The role of the Venice Commission in strengthening the Rule of Law

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I. Introduction

The Commission for Democracy through Law, popularly known as the Venice Commission (VC) is part of the Council of Europe (CoE) dealing with constitutional and other legal matters of importance for democratic and rule of law development. The present article will deal with the role of the VC in strengthening the rule of law in Europe. I begin with some background on the VC, how it works and how it influences states, before looking briefly at the phenomenon of "rule of law backsliding". I then give a brief overview of relevant VC opinions on Hungary, Poland and Romania, before looking at the ways in which the VC interacts with EU mechanisms for rule of law oversight, and how it might work in the future. I close with a number of concluding remarks.

II. The Venice Commission

11.A Mandate and composition

The Venice Commission was created in 1990 by "partial agreement", meaning that CoE states were free to join or not. It served an immediate purpose for the new democracies in East and Central Europe, which emerged from a period of Soviet control, and which wished to "rejoin" Europe. The CoE was widely perceived as a "waiting room" for EU membership, and extensive changes were necessary in these states' legal systems, systems of public administration and constitutional justice. All 47 CoE states are now members, the last CoE state which joined being Russia in 2003. With effect from 2003 the partial agreement was turned into an "enlarged agreement",[1] which made it possible for non-European states to accede. The 60 member states now include states in North Africa and the Middle-East (e g Morocco, Algeria, Tunisia, Israel), North and South America (e g Brazil, Chile, Mexico Canada and the USA), and Asia (e g Kazakstan, South Korea). Two international organisations, the EU and OSCE (ODHIR) are also parties to the enlarged agreement.

The VC's functions are set out in Article 1 of its Statute: strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the working of democratic institutions and their reinforcement and development and responding to states' requests for advice on draft laws amending constitutions and related legal norms.

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[1] Resolution(2002)3 Revised Statute of the European Commission for Democracy through Law, (adopted by the Committee of Ministers on 21 February 2002).

The VC consists of experts, appointed by state parties, but serving in an individual capacity. Pursuant to the Statute of the VC, these experts are to "have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science".[2] Individual members' backgrounds vary. There are serving and past members of supreme and constitutional courts, former prime ministers and ministers of justice, ombudsmen, and, particularly, professors in constitutional and administrative law. Members are not remunerated. Their travel and accommodation costs when attending the four plenary sessions in Venice are paid by the government that appointed them. When a working group is formed (on which more below), a small per diem allowance is paid by the CoE, as well as any necessary travel and accommodation costs.

The Commission is funded in the same way as other parts of the Council of Europe, i.e. in proportion to the member state's population size and per capita income. As international organisations go, the Venice Commission is ludicrously cheap: it costs about € 4M per year. Most of the cost consist of salaries for the approximately 25 lawyers and administrative staff in the secretariat. The secretariat are recruited through the normal – fairly rigourous - CoE procedures. The secretariat has a Secretary-General, and deputy Secretary-General. The secretariat is governed by the President, assisted by three vice-presidents, and steered by an eight-person Bureau (the President, the vice-presidents and four other members). The incumbents of all of these posts are chosen for four year periods from amongst the members. A larger body, the Enlarged Bureau, consists of the Bureau, and the chairs of the various sub-commissions. The process of election of the President, the vice-presidents, the Bureau and the chairs of the sub-commissions, is prepared by a group of wise-persons, nowadays drawn from the substitute members, who themselves are not eligible to be the President, vice-presidents or chairs.

11.B The work of the Venice Commission

The VC does three main things.[3] Most of its work consists of opinions that are responses to states requesting advice on draft laws amending constitutions and related legal norms. The great majority of these opinions have dealt with the post-socialist countries of East and Central Europe. The request forms the framework for the opinion, although the VC decides itself which issues are necessary to discuss to answer the request. This part of its work is rarely like major projects of constitutional engineering, occasionally engaged in by the UN (for failed states) or as academic exercises, where the goal is the production of a whole constitution.[4] Instead, it resembles more the type of abstract constitutional review of a legislative proposal that is made by a constitutional court. In many jurisdictions where abstract constitutional review exists, it is binding, but this is not the case for opinions of the VC. A state typically asks the Commission to examine the compatibility of its own laws or legal proposals with European rule of law standards. Where an opinion is requested by a state on

[2] Statute, Article 2. See also CDL-AD(2018)018 Venice Commission Rules of procedure, Article 3(1) "Members shall act in a manner that is, and is seen to be, independent, impartial and objective with respect to any issue examined by the Commission."

[3] For another perspective on the work of the VC, see W Hoffmann-Riem, 'The Venice Commission of the Council of Europe — Standards and Impact' (2014) *25 European Journal of International Law*, 579.

[4] I say "rarely" because in the 1990's (and in the 2000s, concerning Armenia and Tunisia), the VC has been asked to assist in producing a totally new constitution.

a matter which concerns another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.[5]

In international law, a state is usually seen as a monolithic entity, acting on the international level only through its government. In the practice of the VC, however, the "state" (Article 5 of the Statute) is interpreted widely: any state institution can request an opinion within its sphere of constitutional competence.[6]

The VC also prepares, on request, amicus curiae briefs for constitutional courts, usually when the court is faced with a novel issue. In such cases, the VC usually tries to provide guidance based on comparative constitutional law and European standards (on which more below). It will usually defer to whatever interpretations a constitutional court has made of national law, it being the expert on the subject.

The second main thing the VC does is respond to requests for opinion from CoE institutions. These can be requests for general constitutional or international law studies in a particular area, but also requests regarding the law of specific CoE member states. Member states must thus tolerate that the VC may be asked to make an independent review of their national legislation or legislative proposals in a particular area. The Committee of Ministers, the Parliamentary Assembly (PACE), the Congress of Local and Regional Authorities of Europe, the Secretary General can all ask for opinions, but most requests for opinions come from PACE, in particular from the Committee on Legal Affairs and Human Rights and the Monitoring Committee. The Political Affairs Committee also sometimes requests opinions. Between 5-15 general studies or opinions (concerning the legislation of a particular country) adopted each year have their origins in requests from the Parliamentary Assembly.

The ECtHR can request an amicus curiae brief, or the Venice Commission can request to submit such a brief. This occurs relatively often, and the ECtHR relatively often refers to VC studies in its judgments.

The EU is able to request an opinion regarding a matter within its competence. The EU Commission has so far done this twice, in 2012 concerning Bosnia-Herzegovina, and in 2015 concerning the Former Yugoslav Republic of Macedonia (now the Republic of North Macedonia). The EU Special Representative for Kosovo requested an opinion in 2014.

The third main thing that the VC does is to undertake, of its own motion, constitutional studies in particular areas. Such studies are to be general, not of specific states, although specific states' legislation can and does form a part of the general study. The general studies of the VC can be in the form of "check-lists" or guidelines in different areas (e g electoral systems, the Rule of Law, financing

[5] Statute, Article 3(2).

[6] For example, the Polish Senate, after the most recent elections, is not controlled by the Law and Justice Party (PiS). The Marshal (speaker) of the Senate requested an opinion on a legislative proposal which involved a further undermining of the independence of the Polish courts, see CDL-PI(2020)002 Poland Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on The Supreme Court, and some other Laws.

of political parties, freedom of assembly) based on its earlier opinions and comparative law. In some such studies the VC has worked together with OSCE-ODIHR.

II.C Working practices and standards applied

The VC is widely considered to be a success.[7] One key to understanding this success is the Commission's flexibility. It has a semi-autonomous status within the Council of Europe, which facilitates the speedy response to political crises. When a report is requested, the secretariat quickly assembles a working group. The composition of the working group depends on a variety of different factors. The individual members have different areas of expertise, they have differing language skills and knowledge of legal cultures and represent different constitutional traditions. The availability of the members in question at short notice is also important: most are still employed in different capacities in their home states.

When it comes to opinions on a particular country, the working group usually visit the country in question, albeit for only a short time (normally two days). While a government department often takes the lead in arranging the practicalities of the visit (often the Foreign Ministry), to have a chance to really change anything in the country's legal order in a positive way it is necessary to communicate with the "factory floor". Thus, the VC working group tries to meet not only senior civil servants involved with the preparation of a legal reform (usually in the Ministries of Justice and the Interior) but also a wide range of groups representing different interests. Who these groups are will depend upon the proposal in question (the political leaders, the political opposition, NGOs, associations of judges and prosecutors etc.). In my experience, even when dealing with governments that are not enthusiastic about a Venice Commission visit, there almost always is a large degree of professionalism in how one is treated. There may be great differences in opinion over the substantive values being discussed, but there is still a common "language" that professionals can speak to each other.

The VC is not a "fact-finding" body: it is largely dependent on the factual information which is made available to it (on which more below). Having said this, over the years, the VC secretariat has built up good contacts with political groups and civil society in the states that are the main "customers" of the VC. Local contacts and locally produced material is often very useful, although the Commission strives not to become a chip in an internal political game.

After the information-gathering phase, the working group compiles a draft opinion. This draft must be distributed to the individual members and the government concerned at least two weeks before the plenary session. The day before the plenary session, which takes place in Venice,[8] the opinion is usually discussed at a preparatory meeting (there are several different thematic sub-commissions). At this meeting, members may make suggestions for additions and amendments, which are often

[7] Measuring "success" in this area is not without difficulties. States and PACE committees, the main consumers, continue to request opinions, which would indicate that, at least, they seem some value in this. In terms of "output", results, I would argue that one would need to evaluate actual impact, short-term, but also long-term which the VC has on constitutional reforms in states specifically concerned by an opinion, VC member states as a whole (e.g. influenced by VC general standard-setting) but also other actors (such as EU institutions). I deal with some of the factors affecting impact below.

[8] During the Corona-crisis, a written procedure of discussion and adoption has been applied.

adopted. The draft is then presented at the plenary session. The government has usually filed written comments in advance of the plenary session. It has a further opportunity to make oral comments at the plenary session. The VC listens particularly carefully to any criticism from the government that it has failed to understand some element of the state's laws or institutions under consideration. If it finds this criticism justified, it will modify the opinion accordingly. It happens occasionally that governments express considerable dissatisfaction with the views expressed in the opinion, without being able to point to any inaccuracies (simply that the government does not like the result). The VC is not scared to express very critical views, even if these, which is fitting for an international organisation dealing with sovereign states, tend to be expressed in diplomatic terms.

There are four plenary sessions per year, so the above process is not particularly slow. Mainly because of the expertise of the individual members and the secretariat, an opinion can be produced, from beginning to end, in a few months. This is remarkably fast, bearing in mind that the legislative process in a state, particularly in constitutional matters, is supposed to be slow, to allow for a many-sided debate. However, there is also an accelerated VC procedure. There is a Protocol on the Preparation of Urgent Opinions, allowing a preliminary opinion to be issued pending endorsement by the plenary session.[9]

As regards the "law", the standards that it applies, the CoE works in three broad fields: human rights, the rule of law and democracy. The "hard" law of the CoE is easiest to find, namely the provisions of treaties when these bind the state in question. The ICCPR and the ECHR are particularly important, and one of the qualities which it is helpful for individual members to have is a good knowledge of the case law of the European Court of Human Rights (ECtHR). The ECtHR jurisprudence is regarded as a minimum standard. [10] The Venice Commission aims for "best practices" and may accordingly set the criteria higher than the ECtHR. It has done so on several occasions. (e.g. as regards political parties, or democratic control of security agencies). The rule of law can be partly concretized by the ECtHRs case law[11] but also by distilling "best practices" from comparative constitutional law. The third element, democracy, comes in as many variations as there are democratic states, and it has accordingly been more difficult to concretize standards. Electoral systems vary, with greater or lesser weight being put on different values, particularly the balance to be drawn between producing an effective government and producing a legislature which reflects accurately the popular vote. Nonetheless, standards for the fairness of elections have been developed by the VC and other actors, and the VC has produced best practices for other aspects of democracy, particularly for the role of the opposition in a democracy.[12]

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[9] CDL-AD(2018)019. E.g. the opinion requested by the Polish senate, CDL-PI(2020)002, op. cit note 6, was adopted under the accelerated procedure, and subsequently endorsed by the plenary.

[10] Article 53 ECHR.

[11] See, e.g. E Steiner, 'The Rule of Law in the Jurisprudence of the European Court of Human Rights' in W Schroeder (ed.), *Strengthening the Rule of Law in Europe* (London, Bloomsbury, 2016) 135-154.

[12] See, in particular, CDL-AD(2019)015, Parameters on the Relationship Between the Parliamentary Majority and the Opposition in a Democracy: A Checklist.

The VC is not thus simply a “consumer” of soft law, but also a producer of soft law, particularly as regards the rule of law.[13] However, an important qualification should be made here. VC does not try to harmonize its member states’ legislation on constitutional issues (notwithstanding the wording of Article 1 of its Statute). There are such variations in constitutional systems among members of the Council of Europe that it is not possible to talk about a single “European best practice". Instead, the VC almost always suggests several alternative solutions, outlining their advantages and disadvantages, and the factors which should be taken into account for each. [14] This increases the acceptability of its opinions: the sovereign right of the state to choose its own solutions is explicitly recognised. It is also important for practical reasons connected to working methods, as it makes it easier for members of the working group to agree. In my experience, members almost invariably have an open and professional way of approaching the review work and usually agree relatively quickly on what are the technical and other shortcomings of the specific law or bill they are discussing. On the other hand, the discussions would run the risk of being endless if the working group was obliged to propose only one solution in the area in question, a "minimum European standard".

II.D The authority of the Venice Commission

The Commission works through "soft power", rational persuasion. As Kaarlo Tuori, has noted, the prerequisites for the successful functioning of a body of constitutional consulting, such as the Venice Commission, include *expertise*, *experience*, *independence* and *authority*. Authority is a consequence of expertise, experience and independence. No institution can gain authority by the simple fact of its establishment: authority must be earned.[15] The Commission has been working now for 30 years. During this time it has built up considerable experience in constitutional assessment and consulting. This experience is stored, not only in Commission documents, but also in institutional memory, borne by long-time members of both the Commission and its highly qualified secretariat of lawyers which assists working groups in preparing opinions and reports. [16] As already mentioned, members are appointed by the governments of their states, which means that how “independent” they actually are will vary. However, for reasons explained further below, those members who take instructions, or otherwise let themselves be strongly influenced by their governments, have had only a limited influence on the work of the Commission.

As indicated before, the Commission's chances of exerting an influence on a state in a constitutional or legal question are at their greatest when the government genuinely wants input on the issue, and has requested this input well before the proposal is implemented, instead of asking for a "last minute blessing", or even a “blessing after the fact”. A government’s willingness to entertain different solutions can increase the more "technocratic" or “long-term” the issue is perceived as being, and

[13] See in particular CDL-AD(2016)007, the Rule of Law Checklist. These “soft law” standards can become “hard” law, e.g. where the ECtHR adopts, in a concrete case, a solution suggested by the VC.

[14] Although having said this, it has had a tendency to prefer certain types of institutional solution. See below, text at note 28.

[15] K Tuori, ‘From Copenhagen to Venice’, in C Closa, D Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge, CUP, 2016) 225-246.

[16] Tuori, ibid.

decrease the more the issue is perceived as having immediate political significance. One of the ideas behind constitutionalism is a separation of "ordinary" politics from "the rules of the game".[17] However, even if the ambition is that such rules of the game be framed in neutral terms, they can obviously favour a political party or grouping, an obvious example being different rules on electoral representation such as the choice between different methods of proportional representation, or between such methods and a "first past the post" system. It is asking a lot of a political party in power to agree to changes in the rules of the game that will exercise an immediate negative effect on its hold on power. No hard and fast line between "technocratic" and non-technocratic rules can be drawn. It will depend entirely on the context in the state in question. One might think that all states have an interest in a better functioning, neutral system of public administration, and any improvements in this are likely to be welcomed. However, this is unlikely to be the case for a political system with a "spoils system" or a large element of "clientelism". Having said this, in many states there are coalition governments, or power is split between a president and a prime minister, and one element may be in favour of one of the alternative solutions proposed by the Venice Commission. Moreover, minority governments may be more susceptible to take heed of a critical report. There may be a similar situation where there are two chambers of parliament, and the party of government dominates only one chamber. Even in a state with a stable majority government, where the state is relatively democratic, a critical report may strengthen the political opposition's voice in the issue in question, especially if the political opposition is acting in tandem with civil society and the media.

Pressure to take account of the opinion may also come from outside the country. The main responsibility for "follow-up" of reports which a Council of Europe body has requested lies with the body itself, usually the PACE legal affairs and monitoring committees. Pressure can also in some cases come from other influential international players such as foreign governments (especially those helping the state in question with public administration etc. aid projects) and the International Monetary Fund. The most important such actor is the European Union, to which I now turn.

The EU Commission is a significant international actor in aid projects for third states, particularly states in the EU neighbourhood. The CoE and the EU signed a Memorandum of Understanding In 2007 that set out the general basis for cooperation. [18] The Joint Programmes (JPs) framework, started in 1993, consists of capacity-building projects.[19] The EU acts as a donor, providing the vast majority of funding, while the CoE assumes the role of an implementing partner, working on the ground through its offices and missions in countries. The VC fits seamlessly into this system. A VC report can identify a deficiency in a state's system of constitutional justice or public administration and the European Commission can then offer the state in question funding to fix the deficiency.

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[17] For a brief discussion on constitutionalism generally, see, e.g. A Godden, J Morison, 'Constitutionalism', Max Planck Encyclopedia of Comparative Constitutional Law 2017. For the distinction, see e.g. G Brennan, and JM Buchanan, *The reason of rules: Constitutional political economy* (Cambridge, CUP, 1985).

[18] Text in https://rm.coe.int/16804e437b.

[19] For a short discussion, see J Jaraczewski, 'Old friends, new friends? Prospects for EU's cooperation with intergovernmental organisations in promotion of the rule of law', 13 Nov 2019, https://verfassungsblog.de/old-friends-new-friends-prospects-for-eus-cooperation-with-intergovernmental-organisations-in-promotion-of-the-rule-of-law/ accessed 11 March 2020.

Where the European Commission has already been giving aid, and the issue is whether the deficiency has been fixed, it may suggest that the state request an opinion from the VC. As the VC, by EU terms, is operating on a shoestring, the EU often gives it special project funding to perform such an analysis. The economic muscle of the European Commission melds very well with the authority of the Venice Commission. This is obviously something that can work particularly well with countries which have, or wish to have, an association agreement with the EU, and particularly, with EU candidate countries, such as Serbia. An overarching goal in the foreign policy of a number of non-EU states in Europe is to become an EU member. For such states, this means a corresponding increase in the influence of the Venice Commission.[20]

This link between the VC and the convergence criteria used by the European Commission applied already for the candidate states from CEE (now members of the EU) in the process of Eastern Enlargement. One can certainly take the view that in the last wave of EU accessions, the European Council let several states with weak rule of law cultures too easily into the EU. As is well known, special monitoring procedures (the cooperation and verification mechanisms, CVM) were put in place for only two of the new EU member states, Bulgaria and Romania, which were admitted as EU members in 2007. [21] The European Commission, for its part, has usually taken rule of law issues relatively seriously in monitoring fulfilment of the convergence criteria, and it refers extensively to Venice Commission reports in this respect.[22] It remains to be seen if the European Commission will continue to place such emphasis on rule of law issues in the future.[23]

The problem, as many have noted, is once a state has become a member of the EU, there is no longer a strong financial/economic incentive to comply with the "soft" values of EU membership. Why have these values not been "self-supporting"? Before dealing with the role the VC has played as regards existing EU members, and the possible roles it can play in the future, something should be

[20] The importance of the link to EU economic muscle cuts both ways. There has been discussion of the potential for the VC to develop into a global actor, see, e.g. M de Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *American Journal of Comparative Law*, 963-1008. Many of the standards the VC develops and applies indeed have universal application, however, I think the conditions for these having an actual impact on non-CoE member-states are less favourable where these states are not strongly linked to the EU in some way (candidate countries, countries with association agreements etc.). Thus, I do not think the VC can serve quite the same purposes on the global level, as it has in the European "neighbourhood".

[21] There are many example of the mutual support between VC and the Commission in the CVM. See e.g. Recommendation no. 1 of the European Commission CVM Report of 15 November 2017 which reiterated the recommendation put forward by the European Commission in previous CVM reports to Romania to "put in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission."

[22] A non-exhaustive list of such references can be found at https://www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN#EU

[23] In the von der Leyens Commission, the new Commissioner in charge of the enlargement process is from Hungary, something which has drawn criticism from commenters, see P Bard, 'The von der Leyen Commission and the Future of the Rule of Law', www.verfassungsblog.de/the-von-der-leyen-commission-and-the-future-of-the-rule-of-law/ accessed 11 March 2020.

said about the "malaise", or to put it another way, why the constitutional situation in certain EU member states has raised such concern that the VC has been asked to look at it.

III. Something on the background to, and reasons for, rule of law backsliding

When I first became a member of the VC in late 2005, the EU Fundamental Rights Agency (FRA) had just been established, and the general opinion in the first plenary session I attended seemed to be that, as far as EU states were concerned, the work of the Venice Commission was more or less over.[24] Romania and Bulgaria continued to have problems, but it was expected, naively it turned out, that these would disappear by themselves, given time.

In 2010 Victor Orban's Fidez party won the elections in Hungary. The "bonus" the Hungarian electoral system gives the winning party meant that it obtained the necessary two-thirds majority to make constitutional reforms. The process of what has since been called "rule of law backsliding" began. A good working definition of this phenomenon is that suggested by Scheppele and Pech, namely "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party". [25] A related term, more common in political science, is "democratic backsliding".[26] The two terms overlap if one has a material definition of democracy, i.e. as requiring not simply periodic elections, but also the enjoyment of certain freedoms (in particular, expression, association, assembly and information).[27] In this, and the following, section, I concentrate upon three states, Poland, Hungary and Romania, because these have been the EU states that the Venice Commission has primarily been asked to look at. However, it should be stressed that these are not the only EU states that have experienced serious rule of law problems in recent years.[28]

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[24] Although, for those who would see, one can say that there were worrying indications at the time, which was during the "war on terror", that certain EU states were prepared to let their territories be used for the purposes of secret detention.

[25] See K L Scheppele, L Pech, 'What is Rule of Law Backsliding?' https://verfassungsblog.de/what-is-rule-of-law-backsliding/, accessed 3 June 2019.

[26] Meaning the state-led debilitation or elimination of the political institutions sustaining an existing democracy. See, e.g. N Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5–19. Landau refers to "abusive constitutionalism": using the tools of constitutional amendment and replacement by would-be autocrats to undermine democracy with relative ease. D Landau, 'Abusive Constitutionalism', (2013) 47 U.C. Davis L. Rev.189. A third term is that of "constitutional capture" see, e.g. J W Müller, 'Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states', 21 March 2014, https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/ accessed 3 June 2019. Although this last term is undoubtedly accurate for the case of Hungary, technically it is less apposite for Poland (see further below).

[27] Cf The first article in the Swedish Instrument of Government, "Swedish democracy is founded on the free formation of opinion".

[28] At least one other state should be mentioned here, namely Malta. In its Opinion CDL-AD(2018)028, the VC considered that the Prime Minister (PM) was at the centre of power while other actors – the President, (part-

In the 2015 Polish elections, Jaroslav Kaczyński's Law and Justice (PiS) won a majority and set about removing what it saw as institutional obstacles blocking its hold on power. The situations in Poland and Hungary display certain similarities. Both Victor Orban's Fidesz party and Jaroslav Kaczyński's Law and Justice (PiS) obtained power democratically and, importantly, their hold on governmental power was confirmed in the next general elections (respectively, in 2014 and 2018 and in 2019). There are also, undoubtedly, similarities in how these two governing parties have gone about concentrating executive power and removing checks and balances that existed before.[29] Common to both states was the fact that the constitutional courts were strong, independent bodies that exercised considerable political power. Both Fidesz and PiS saw the constitutional courts as political actors that stood in the way of their political ambitions, and which therefore had to be "captured" or neutralized. However, while the objects of attack – the judicial system and other institutional checks and balances - were the same, the national contexts are not. For example, the actors' underlying motivations can be different (economic-kleptocratic/political/mixed), and there can be differences in why a significantly large part of the Hungarian, respectively, Polish, electorates have accepted their policies.

The situation in Romania is different again. Before a country can have rule of law backsliding, it needs to have achieved a reasonable level of respect for the rule of law from which it then "backslides". Romania (and for that matter, Bulgaria) have had great difficulties in getting there in the first place. In Romania, the communist dictator Nicolae Ceaușescu was toppled from power in 1989, but, as it later transpired, by a coup rather than a revolution. Since this time, reformist political and legal movements in Romania have had an uphill struggle to establish a (reasonable) standard of compliance with the rule of law. Corruption has been endemic. Politics and political parties have been used as a means to take over and maintain economic power. After the 2016 elections, the socialist (ex-communist) PSD formed a coalition government with a (supposedly) liberal party. The PSD leader, Liviu Dragnea, was unable to become Prime Minister because of ongoing judicial proceedings for electoral fraud and corruption. However, Dragnea steered through three different prime ministers between 2017-2019. The PSD also launched an assault on legal institutions, but opposition - inter alia, from Romania's elected president -has meant that the PSD's success has not been as complete as in Hungary or Poland. From the end of 2019, a fragile, anti-PSD coalition rules in Romania.

The explanations for rule of law backsliding fall into two broad groups, those that stress primarily endogenous (internal) factors, such as longer term historical and cultural considerations, and those that stress primarily exogenous factors, i.e. reactions to "external shocks".

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time) Parliament, Cabinet of Ministers, Judiciary, Ombudsman, etc. were too weak to provide sufficient checks and balances. The VC considered that the Judicial Appointments Committee established in 2016, fell short of ensuring the independence of the judiciary. The Opinion was also critical of the double role of the Attorney General as advisor of the Government and as prosecutor. The PM's wide powers of appointment make this institution too powerful, creating a serious risk for the rule of law, in particular, the PM's influence on judicial appointments resulted in the absence of crucial checks and balances. This problem was reinforced by the weakness of civil society and independent media.

[29] Laurent Pech and Kim Scheppele have argued that PiS has followed closely the "play book" of Victor Orban's Fidesz party, op. cit note 24.

Cultures are complex matters, and difficult for both insiders and outsiders to understand. I am not a historian, political scientist or sociologist and I would not presume to state definitively what endogenous factors are at work in Hungary, Romania and Poland. As regards exogenous factors however, something, albeit brief, should be said. Firstly, because it has been claimed that externally imposed technocratic solutions were the cause (or part of it), of rule of law backsliding in the first place.[30] Secondly, the solutions which are being discussed today at EU level to deal with rule of law backsliding would also be "externally imposed" technocratic solutions. In order to evaluate whether such proposed solutions will in fact help, in any way, it is necessary to know something about the exogenous factors at work.

It is undoubtedly the case that to become CoE, and later, EU members, eastern and central European states generally introduced major reforms of electoral systems, constitutional systems, the courts and the economy. As regards the introduction of a market-based economy, there were groups of the population who lost a lot compared to what they had during the Soviet period: job security, health care, accommodation, social care etc. Universal social benefits became rights, and rights became something for the "wide-awake". The amount of suffering in each state has depended in part on how brutally, and how fast, the transition to a market economy was carried out. A population which has been told that an era of prosperity, at Western European levels, is just around the corner will have, understandably, high expectations. But economic development, when it came, naturally enough followed the logic of the market: certain sectors benefited and others did not. Nor was prosperity equally spread throughout the country. In some states rural areas, or former industrial areas, were often left behind. In all eastern and central European states, even those not dominated by oligarchs, large disparities in wealth among the population emerged, and corruption thrived. So, one simple explanation for rule of law backsliding is that economic liberalism and constitutionalism have become intertwined in the minds of large sections of the public and that disillusionment with the former has tainted the reputation of the latter.[31] One can add political instability to this mix. As Rupik has put it, the opposition to communism, the dissidents, failed in the "next phase of institutionalizing pluralism – the creation of viable political parties."[32] The economic downturn caused by the global financial crisis of 2008 did not help matters either. The ground was undoubtedly well prepared for populist politicians playing nationalist cards.[33] Of course, disillusionment with government and populist responses are global phenomena. What is different, compared to the communist period, is that the population can now vote the government out of office.

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[30] For example, Kosař et al describe the rule of law backsliding in Hungary and Poland as "overreactions to overreactions", D Kosař, J Baroš and P Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 15 European Constitutional Law Review, 427.

[31] On these lines, but more nuanced and elegant, see J Rupnik, 'Explaining Eastern Europe: The Crisis of Liberalism' (2018) 29 *Journal of Democracy*, 24–38.

[32] Ibid, at 32.

[33] I use Mudde's definition of populism: an ideology that considers society to be ultimately separated into two homogenous and antagonistic groups: "the pure people" and "the corrupt elite," and which argues that politics should be an expression of the general will of the people. C Mudde and C R Kaltwasser, *Populism: A Very Short Introduction* (Oxford, OUP, 2017).

Even if the above remarks primarily concern the central and eastern European states which became EU members I should stress that I do not see a clear "East-West" divide when it comes to "rule of law backsliding". It is definitely not a purely "Eastern" phenomenon. And I do not think it is a uniform phenomenon, even if there are similarities in the developments between Poland and Hungary. Nor do I think that all future threats to the rule of law are likely to follow the same trajectory.[34]

I will now turn to the question of whether the CoE caused, or contributed to causing, the backsliding problem. As already mentioned, the three areas of activity of the CoE are democracy, the rule of law and human rights. As regards democracy, the CoE, OSCE and the EU Commission, in its convergence criteria, encouraged different measures such as the creation of independent electoral commissions and the transparent regulation of political parties. The actual choice of electoral system, and how this balances effective government with the degree of representativeness is a sensitive question and there is less common ground between states in such issues. However, as regards human rights, there is a large measure of agreement in CoE (and EU) states that civil and political rights should be justiciable at national level, with a "back-up" system in the ECtHR. As regards the rule of law, central and eastern European states were encouraged to build up checks and balances, in particular, legal institutions such as independent courts (appointment and disciplinary procedures being safeguarded by the involvement of judicial councils, dominated by the judiciary),[35] constitutional courts and constitutional review, ombudsmen, autonomous or quasi-autonomous prosecutors, parliamentary controls over executive powers and statutory or constitutional limitations on executive control over the civil service and the state-owned media. The Venice Commission, as an element of the CoE, has played its part in this process, it must be admitted. The CoE and OSCE-ODIHR also supported the growth of civil society and free media.

However, while such measures were encouraged as part of the process of joining the CoE, and later the EU, it is wrong to say that these measures were imposed. Nor were these measures uniform or unitary solutions ("one size fits all"), although it must be conceded that the VC has tended to prefer strong constitutional courts and judiciary-dominated judicial councils. Still, even the most superficial examination of the constitutions and relevant laws of the central and eastern states, shows that there are considerable national variations in constitutional courts (standing, type of review etc.) and how judicial councils are composed, their functions etc. Nonetheless, it is correct that all of the measures which the CoE in general, and the VC in particular, encouraged fall under the broad title of "constitutionalism" and were aimed at the diffusion of power, particularly executive power.

If it was not a tautology, it would be better to call this model "legal constitutionalism", because there is another broad European model of control of executive power, namely "political

[34] See, e.g. S Hanley and M A Vachudova, 'Understanding the illiberal turn: democratic backsliding in the Czech Republic', (2018) 34 *East European Politics*, 276-296.

[35] See, e.g. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 27 "Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."

constitutionalism".[36] This latter model, simply expressed, means putting a large part of your faith in the restraint and good sense of parliamentarians. This model has, generally speaking, worked well in states with mature political systems, such as the UK, the Netherlands and the Nordic states. All of these states have coped fine without a constitutional court or judiciary-dominated judicial councils with disciplinary etc. functions. However, and this must be stressed, in these states, the ordinary courts may have a less upfront constitutional role than in states with a constitutional court, but they still have a constitutional role, and they are *independent*. Assuming there is a real consensus in society,[37] it is legitimate to move from a system of "legal" to "political" constitutionalism. However, if in so doing you undermine the independence of the courts you are throwing the baby out with the bathwater. Similar points can be made regarding capturing the civil service and the publicly owned media, as well as attacking civil society and undermining academic freedom. A "winner takes it all" mentality is not political constitutionalism.

Eastern and central European states had constitutions during the Soviet period, but these had meant little in practice to the citizen. The new idea was that the constitution should henceforth matter in practice, and this meant rights that could be invoked by individuals and enforced in courts. Moreover, the constitution was to contain the struggle for political power in states that either had not had a pluralistic (democratic) system for 40 years, or had never had such a system. As already mentioned, one of the ideas behind constitutionalism, either "legal" or "political", is that there should be a difference between the "rules of the game" (the constitution and institutions of the state) and day to day political struggles over power. The rules of the game should be respected, even if the struggles over political power may be bitter. Such an insight can grow over time among the political élites of a state. For example, in both England and Sweden during the middle of the seventeenth century, the conditions for the adherence to the rule of law were strong, in that it became obvious that no single grouping (the Crown, the nobles, the yeomanry, burghers, merchants and clergy) could be certain that it could retain absolute power for long. It therefore made sense to accept distribution of, and limits on, power. All of the mechanisms and institutions for diffusing political power make sense if you accept that there are dangers in concentration of power, and that even if you win political power in an election, there is no guarantee that you can keep this power very long. For example, one explanation for politicians accepting strong courts exercising, inter alia a power of constitutional review, is that this can serve as a political "insurance policy", limiting your political opponent, when s/he achieves political power, of "rolling back" all the changes you made while in office.[38] Similar arguments apply to other mechanisms for dispersing political power. However, if you think that you can get *all* the power, and you think you can hang on to it for ever (or at least, a very long time) then you do not need the insurance policy. This, of course, means taking steps to concentrate state power, and ensure the continuation of your grip on that power.

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[36] See, e.g. R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, CUP, 2009).

[37] Something which I consider is lacking in Hungary and Poland, despite the electoral victories of Fidesz and PiS.

[38] See, e.g., T Ginsburg**,** 'Economic Analysis and the Design of Constitutional Courts' (2002) 3 *Theoretical Inquiries in Law* 20.

IV. Briefly on the Venice Commission opinions so far on Hungary, Romania and Poland

In 2010, there was no EU mechanism for monitoring rule of law backsliding. There was accordingly a sudden need for some authoritative body with competence in the area, and the Venice Commission stepped up, or rather was invited to step up. [39]

The sweeping changes made by Orban's Fidesz party are well-known and need not be summarized here.[40] Basically, a new constitution and cardinal laws (which enjoy special constitutional status) were adopted which, inter alia, curbed the powers of the – previously very powerful - Hungarian Constitutional Court. The number of justices was increased, and the appointment procedure changed, allowing the government to pack the court. The ordinary courts were emasculated quickly, by reducing the compulsory retirement age, forcing the retirement of many of the most senior judges, reducing the powers of the judicial council and transferring control over judicial appointments and disciplinary matters to a newly created body staffed by Fidesz loyalists. The power of appointment meant that control was taken over various other state bodies, designed to have a degree of independence, such as the State Audit Office, the National Media and Telecommunications Authority and the National Electoral Commission.

Between 2011 and 2019, 17 opinions were delivered by the Venice Commission concerning Hungarian laws and draft laws. Most of these opinions were requested by CoE bodies. A number of these opinions found that the changes made, or being proposed, were not contrary to European standards. Below I only take up a few of the more critical opinions.

The first VC opinion on the (then) draft constitution, adopted in March 2011, was requested by the Hungarian government.[41] It was limited to three issues; whether to incorporate the EU Charter on Fundamental Freedoms, whether it was compatible with good European practice standards to limit the actio popularis before the Constitutional Court and to restrict this court's ex ante constitutional review of statutes. The Venice Commission advised against the first, because this would have the effect of concentrating rights review to the constitutional court, in potential violation of EU law, but it did not criticize either the second or third measures, considering these not as being contrary to good European practice. However, the VC did criticize the procedure of drafting, deliberating and adopting the new Constitution for its tight time-limits and the limited possibilities of debate of the draft by political parties and within the media and civil society. The second VC opinion[42] was requested by the PACE monitoring committee. This was wider in scope. Again, the VC was balanced in its criticism. It expressed concern– it turned out later, with good cause - about the lack of detail in the constitution about judicial independence, which was instead left to cardinal and other laws to elaborate upon. It warned against passing cardinal laws not expressing consensual political and moral

[39] For a useful brief overview, see R Clayton, 'The Venice Commission and the rule of law crisis' (2019) *Public Law* 450.

[40] See, e.g. J Kornai, 'Hungary's U-Turn' (2015) 10 *Capitalism and Society*. Good short summaries of the steps taken in Hungary and Poland can be found in Kosař et al, op. cit note 29.

[41] CDL-AD(2011)001.

[42] CDL-AD(2011)016.

values, as these would "lock" discussion of these issues, making future changes of these dependent on a two-thirds majority in the parliament.

In the opinion on the court reform laws, requested by the Secretary General of the CoE, in 2012, the VC was very detailed, and very critical.[43] Basically, the reforms in question handed over control of all significant issues concerning the appointment, transfer and disciplining of judges to a single person, the President of the National Judicial Office (PNJO), appointed by the government. The Hungarian arguments for the necessity of doing this, and of compulsorily retiring judges over 62, were analysed. These arguments were dismissed as totally inadequate.[44] The Commission concluded that the reforms "not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR".[45]

In March 2013 the Hungarian Parliament enacted the Fourth Amendment to its Fundamental Law and the Secretary General of the Council of Europe requested an opinion from the Commission.[46] The Commission was again very critical both of provisions in it, but also of how the new constitution had come into being. The constitution confirms the position and powers of the PNJO, which in effect removes any judicial independence. Why this was done was "unclear", all the more so because there was no "indication of the necessary limitations and the checks and balances to which it must be subject".[47] Several new provisions of the constitution have "no constitutional character and should not be part of the Constitution (e.g. homelessness, criminal provisions on the communist past, financial support to students, financial control of universities). In addition to shielding these provisions from control by the Constitutional Court, this ensures that future governmental majorities in Parliament without a two-thirds majority cannot change these policies".[48] The

[43] CDL-AD(2012)001

[44] It is useful to quote this part of the opinion in extenso, "104. The Venice Commission examines this issue not from the special angle of age discrimination, but from its effect on judicial independence. From this point of view, the retroactive effect of the new regulation raises concern. A whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and expected – to continue to work as judges, have to retire. The Commission does not see a material justification for the forced retirement of judges (including many holders of senior court positions). The lack of convincing justifications may be one of the reasons for which questions related to the motives behind the new regulation were raised in public. 105. The sudden change of the upper-age limit creates the problem that a significant part of nearly 10% of the Hungarian judges will retire within a short period of time (between 225 and 270 out of 2900 judges in Hungary). The argument, which has been made, that a higher number of younger judges with 'up-to-date qualifications' will increase the performance of the judiciary, since they are expected to be 'more suitable to carry a higher workload' as well as 'more ambitious and more flexible', must be dismissed as not being sufficiently proven."

[45] At para. 120.

[46] CDL-AD(2013)012.

[47] Ibid, at para. 70.

[48] Ibid, at para. 136.

Commission criticized the instrumental and partisan use of constitutional amendments, noting that before the entry into force of the new Constitution, the previous Constitution had been amended 12 times after the elections of 2010. The amendments which casually nullified Constitutional Court rulings undermined the whole idea behind constitutional control. A constitution should be "a stable act, not subject to easy change at the whim of the majority of the day. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. …a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought."[49]

Another critical opinion was on the law introducing restrictions on foreign funded NGOs.[50] The opinion analyses the government arguments for introducing wide-reaching restrictions and reporting requirements and finds these to be unjustified. Similar criticisms are made on the so called "Stop Soros" Draft Legislative Package.[51] This package was aimed particularly at NGOs working in the fields of human rights and asylum. The VC noted that Draft Article 353A criminalises organisational activities not directly related to illegal migration, such as "preparing or distributing informational materials"; something restricting disproportionally the rights guaranteed under Article 11 ECHR. Moreover, the VC noted it criminalises advocacy and campaigning activities, something which is an illegitimate interference with Article 10 ECHR. People and organisations acting in good faith to fulfil the provisions of the international law on asylum would risk prosecution. The VC also stated that draft Article 353A lacked the required clarity to qualify as a "legal basis" within the meaning of Article 11 ECHR. [52]

A number of interesting points can be made regarding the VC opinions on Hungary. The first is that the VC was not, and has never been, asked to give an overall assessment of all the Fidesz legal measures. With the benefit of hindsight, one can argue that Fidesz's intentions should have been obvious from the beginning. However, the VC is not in the business of identifying underlying "intentions". It is asked to look at specific proposals, albeit within a wider constitutional context. It can criticize the procedure (haste, lack of inclusiveness etc.) for making important changes in a legal system, but it has to begin its consideration of the substantive aspects of draft laws of a sovereign state from an objective perspective: are adequate reasons advanced by the government for the need to make the reforms, and for constructing the reforms in the way they have? Are the reforms internally consistent? Are they likely to achieve their stated objectives? Is there a degree of proportion between the ends sought and the means used? Moreover, if one wishes to argue that a given legal measure is not only not in accordance with "*best* European practice" but violates some *minimum* European standard then there obviously has to *be* such a minimum standard. Here, a

[49] Ibid, at para. 137

[50] CDL-AD(2017)015. See the subsequent judgment of the CJEU in Case C-78/18, Commission v Hungary (Transparence associative) ECLI:EU:C:2020:476.

[51] CDL-AD(2018)013. See Case C-821/19, pending before the CJEU. I can also mention here that the VC issued an opinion on the Hungarian government's targeting of the Central European University, CDL-AD(2017)022, a matter which was subsequently brought before the CJEU by the European Commission, Case C-66/18.

[52] Ibid. paras 101-103.

difficulty emerges because of the rich variation in how European states construct their systems of constitutional control. The Hungarian government advanced arguments that this or that measure could be found in X or Y's laws, and so it could hardly be described as in violation of a minimum European standard.

The VC opinion on the Fourth Amendment to the constitution is a good example of both analyzing specific reforms from a wider perspective, and of dealing with the (mis)use of comparative constitutional law. The VC stated that "In constitutional law, perhaps even more than in other legal fields, it is necessary to take into account not only the face value of a provision, but also to examine its constitutional context. The mere fact that a provision also exists in the constitution of another country does not mean that it also 'fits' into any other constitution. Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the constitution of one's own country. Each constitution is a complex array of checks and balances and each provision needs to be examined in view of its merits for the balance of powers as a whole".[53] Another example of the VC's ability to look at a reform in a wider context is the previously mentioned opinion on the court reform laws.[54] By contrast with the case brought before the CJEU by the Commission, which reduced the whole question to one of age discrimination, the VC was able to focus on the heart of the issue: the effect of such measures on judicial independence.

A second interesting point regards what can be called the "good faith" problem. It is difficult to show lack of good faith, something illustrated by high standards of proof set by the ECtHR case law on Article 18 ECHR.[55] If a draft law, on its face, provides for certain powers, backed by certain safeguards, some form of proof is needed before one can say that the powers will be used wrongly or that the safeguards will not work in practice. There is a link here to the first point, in that in many well established *Rechtsstaaten* safeguards may have been internalized in legal culture. However, this leaves it open for authoritarian state A to argue that democratic Rechtsstaat B has a similar institution, or a similarly worded legal power. The difference between the two cases is that the institution (X) or the legal power (Y) in state B is not used or is used with great restraint.

The VC does take account of legal cultural safeguards.[56] However, it is more difficult to criticize a law or legal institution which resembles, on its face, a law or legal institutions in a well-functioning

[53] CDL-AD(2013)012, op. cit. at para. 139.

[54] Case C-286/12, Commission v. Hungary, ECLI:EU:C:2012:687

[55] Merabishvili v. Georgia, [GC], No. 72508/13, 28 November 2017.

[56] See, e.g. CDL-AD(2012)01, "When analysing a piece of legislation, the Venice Commission takes into account the manner of its implementation and factors, which determine this implementation and which depend on the context of the respective country, namely its legal and political culture. Every context requires provisions adapted to its specificities and demands. It is due to the decisive role of the concrete contexts, that an allegedly deficient regulation may result in a non-deficient outcome. Nevertheless, the aim

democratic Rechsstaat. Mere allegations by NGO's and in newspaper reports that safeguards are not working, or that power is being abused, may not, in themselves, be sufficient proof. However, where government actions, or statements, themselves indicate how the law will be used in practice, there is more scope for criticism. The VC confronted this issue in its opinion on the law introducing restrictions on foreign funded NGOs.[57] The VC noted that "while on paper certain provisions requiring transparency of foreign funding may appear to be in line with the [international] standards, the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic".

I will turn now to the opinions regarding Poland,[58] As the PiS did not achieve a constitutional majority in the 2015 parliamentary elections, PiS used ordinary laws to first, emasculate the Polish Constitutional Tribunal and then capture it, by securing the presidency for a PiS appointee, who then brought in three (unlawfully) appointed PiS appointees, thus ensuring a majority for PiS appointed judges. This was an extended process. It resembled, in a way, repeated hacking into a computer system. Points of vulnerability were identified, and then exploited. The procedure for selection of the National Council for the Judiciary (NCJ) was changed, and the parliamentary majority (i.e. PiS) then appointed 21 of 25 members. The NCJ has significant power over the assessment, promotion and disciplining of judges, the appointment of new judges and the selection of court presidents. Many lower court presidents and vice-presidents were replaced. Thereafter the Polish Supreme Court was targeted. The compulsory retirement age for judges was reduced from 70 to 65 years, which applied to more than one third of the Supreme Court judges, including the President. At the same time, the number of judges on the Supreme Court was increased from 81 to 120. Then the EU Commission brought an action, and the CJEU intervened issuing interim measures.[59] This had the effect of blocking the "packing" of the Supreme Court. The government thereafter responded by creating two special chambers in the Court, the composition of which it controlled, and granting one of these special disciplinary powers.

Between 2016-2020, the VC delivered six opinions on legal reforms in Poland; two on the constitutional tribunal, two on the reorganization of the courts system, one on police powers and one on the prosecutor. Five of these opinions were requested by CoE institutions (PACE or the Secretary General), the sixth and final by the Polish Senate. I will limit myself to taking up a few points in some of these opinions.

The Commission's first and second opinions on the Constitutional Tribunal were delivered during the period when PiS had not yet secured control over it. The VC was highly critical of the government's undermining of the work of the Tribunal, inter alia by refusing to publish its judgments. It noted in

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of legal reform should be to provide an institutional and regulatory environment that is least likely to be misused" (at para. 8).

[57] CDL-AD(2017)015.

[58] A much more detailed analysis can be found in W Sadurski, *Poland's Constitutional Breakdown* (Oxford, OUP, 2019).

[59] Case C-619/18R, Commission v Poland, ECLI:EU:C:2018:1021.

the first opinion, inter alia, that "Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground".[60]

In its opinion on the public prosecutor, the Commission noted that the merger of the office of Minister of Justice and Prosecutor General "falls short of international standards as to the appointment of the Prosecutor General and to his/her qualifications. Furthermore, the main problem concerns the attribution of extensive powers to the Prosecutor General-Minister of Justice by the 2016 Act, notably with regard to direct intervention in individual cases. This, in addition to the very broadly formulated power of the Public Prosecutor General of 'maintaining law and order' which appears as a sort of general supervisory power commonly found in 'prokuratura' type systems, creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law. The problems related to the merger of the positions of the Public Prosecutor General and of the Minister of Justice are exacerbated by the entry into force of the Act on the Organisation of Common Courts, which gives strong powers to the Minister of Justice in particular the right to dismiss and replace the court presidents".[61]

The Venice Commission's first opinion on the reorganization of the courts is another detailed and very critical analysis of the government's arguments for reform, and the different measures taken. The VC noted in conclusion that the stated goal of the 2017 reform was to enhance the democratic accountability of the Polish judiciary. However, the VC concluded that, instead, this reform jeopardised judicial independence and "enabled the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice."[62]

I will turn now to Romania. The VC has delivered seven opinions concerning Romania between 2012-2019. I will content myself with quoting from three of them. The first of these concerned a constitutional crisis in 2012 between then President Traian Băsescu and Prime Minister Victor Ponta. The Constitutional Court, among other institutions can be described as getting caught in the cross-fire. The opinion is interesting for several reasons, inter alia because it explicitly notes the limitations of the law in general, and the constitution in particular, when the main problem is the lack of a mature political culture, where state office-holders pursue their own, or their parties' interests, rather than the interests of the state as a whole. This, of course, is hardly a problem exclusive to

[60] CDL-AD (2016)001 Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, at para. 138.

[61] CDL-AD (2017)028 Opinion on the Act on the Public Prosecutor's office, as amended, at para. 111.

[62] CDL-AD(2017)031, Opinion on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts at para. 129.

Romania, but it is particularly severe there. The VC emphasised the need for office-holders to comply with the principle of loyal cooperation between institutions.[63]

The second opinion was requested by the President of Romania in 2017, and concerns the then government's attempts to exert increased political control over the prosecutors and the courts. The background to the issue was allegations that some prosecutors had been using elements in the intelligence services to obtain evidence of corruption. As before, in its opinion on the 2012 political crisis, the VC gives a detailed and objective analysis of the proposals made, and the reasons given for them, trying to steer a path between different problematic alternatives.[64] The third opinion concerned an attempt from the then government to undermine ongoing and future investigations and prosecutions into corruption under cover of the need to make reforms of the criminal code and criminal procedure code.[65] Substantive criminal offences were modified to make it much more difficult to prove corruption. Procedural changes were made to put obstacles in the way of investigating alleged corruption. The VC makes a careful analysis of each of the reforms proposed. It concludes, with what I consider is admirable self-restraint, that "Some of the proposed amendments are in conflict with the international obligations of the country, especially regarding the fight against corruption, or go far beyond the requirements resulting from the case law of the Constitutional Court or the country's international obligations. The Commission is concerned that, taken separately, but especially in view of their cumulative effect, many amendments will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences, violent crimes and organised criminality."[66]

More examples can be given, but these will suffice. The VC opinions have been objective and balanced analyses, produced after a fair procedure, in which the government has had every opportunity to explain and justify its actions. The VC is not imposing a particular "European" constitutional model without reference to national traditions but has instead examined the measures taken, and the justifications given for these, on their own merits.

V. The Venice Commission's role in strengthening the Rule of Law in the EU

The above discussion of developments in Hungary, Poland and Romania makes it abundantly clear that all is not well in a number of EU member states. I will not go into the question of *whether* a

[63] CDL-AD(2012)026, see particularly paras 72-74.

[64] CDL-AD(2018)017-e, Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy. There is a reference for a preliminary ruling pending before the CJEU concerning a number of issues relating to the appointment etc. of the Romanian prosecutors, Joined cases C-83/19, C-127/19, C-195/19, Asociația Forumul Judecătorilor din România și alții.

[65] CDL-AD(2018)021-e, Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code. The measures of the then government included the dismissal of the head of the specialist anti-corruption prosecution body, a step later found by the ECtHR to be in violation of Articles 6 and 10 ECHR, Kövesi v Romania, No. 3594/19, 5 May 2020.

[66] Ibid, at para. 184.

reaction is called for by EU institutions, and other EU member states.[67] Of course one can argue that, with a free trade organisation, you do not need to like your neighbours, or have any values in common with them. So, if the EU retreated back to being only a free trade organisation, it might be justified to leave democracy, the rule of law and human rights to the European organization which was the first to declare and commit to these values , namely the CoE.

However, the EU is a lot more than a free trade organisation today. It is also more than an internal market. Even in an internal market, soft values (human rights, rule of law, democracy) tend to creep in whether one wants them there or not. To take an extreme example, if my neighbouring state has enslaved its population, it can sell its goods cheaper to me. This will undermine the profitability of my production of the same goods. Moreover, its population will not have the money to buy any of the consumer goods I produce (although its government might want to buy weapons). Thus, my neighbour's respect for basic human rights becomes my concern. To take a less extreme example, if there is an internal market, with freedom of movement, I can expect an exodus of people from states where there is a lack of respect for basic human rights. This is happening already in the EU. The principle of mutual recognition is central in an internal market. The independence of the courts in my neighbour is thus of utmost concern to me because behind the principle of mutual recognition is an independent court. Why should I otherwise accept that the certification made by the Food Standards authority in my neighbour's state?

Thus, even on the crass economic level, it is clear to me that it is not only legitimate but absolutely necessary for EU institutions, and EU member-states, to be concerned with Rule of Law backsliding. But it goes beyond economic factors. As Scharpe, amongst others, has pointed out, the EU largely receives its democratic legitimacy through a two-stage mechanism; i.e. through member states' democratic procedures.[68] As a number of commentators have noted, this reason alone means that the EU institutions, or other Member States, cannot remain indifferent in the face of developments threatening democracy and the rule of law in individual Member States. At stake is not merely democratic legitimacy in the country concerned but also in the EU as a whole.[69]

There has been criticism of the unwillingness and/or inability of member states governments to activate the mechanism in the treaties supposedly designed for dealing with this problem, namely the "nuclear option" in Article 7(2) TEU.[70] This is hardly a surprise. The procedural requirements, unanimity minus one, are most unlikely to be fulfilled, even if simultaneous proceedings are brought against both Poland and Hungary. The governments of some states, e.g. Finland, Sweden and the

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[67] See, amongst many good inputs on this issue, C Closa, 'Reinforcing EU Monitoring of the Rule of Law', in Closa/Kochenov, op. cit note 15 and J W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal*, 141–160.

[68] See, e.g., FW Scharpf, *Reflections on Multilevel Legitimacy* (Cologne, Max Planck Institute for the Study of Societies, 2007), http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp07-3.pdf, accessed 12 May 2020.

[69] Cf. Tuori, op. cit, note 15.

[70] Article 7(1) TEU provides for a preventive mechanism that can be activated in case of a "clear risk of a serious breach" of the values set out in Article 2 TEU and Article 7(2) TEU provides for a sanctioning mechanism only in case of a "serious and persistent breach by a Member State" of these values.

Netherlands, may be prepared to grasp the nettle, but others are not. In the endless series of negotiation which is the EU, governments are understandably reluctant to burn their bridges with another government which they will probably need on their side tomorrow. Moreover, there are plenty of other crises to take up time and energy, and that argue against rocking the boat too much, e.g. the Covid 19 emergency and its financial aftermath, climate change and filling the hole in the budget caused by Brexit. EU states have traditionally been content to provide the EU Commission with the evidence, and let it start infringement proceedings, rather than bring actions before the CJEU themselves. Thus, it is to the EU Parliament, the EU Commission, and the CJEU to which we must look.

The VC has helped take away the Polish, Hungarian and Romanian governments' attempts to maintain a veneer of respectability, a facade of constitutionality, when they have deliberately undermined the rule of law.[71] The VC opinions sketched out above have had direct and indirect inputs to the efforts of these EU institutions to raise rule of law issues. In its activation of the Article 7(1) procedure as regards Hungary, and its resolutions on Hungary and Poland, the European Parliament has referred directly and indirectly to the VC opinions.[72] The European Commission referred repeatedly to the VC opinions in its reasoned proposal on Poland[73] and the infringement proceedings it has subsequently brought before the CJEU.[74] The Advocates General have referred to the VC in their opinions to these Commission cases.[75] Specific VC opinions can provide an objective background for the Commission, for example, that a particular measure is problematic, or that a government justification for introducing the measure is inadequate. However, the VC can also concretize the general standards in question, providing substance to the "rule of law" obligations undertaken by EU member states under Article 2, TEU.[76]

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[71] Tuori refers to "parasitical legitimacy", K Tuori, *European constitutionalism* (Cambridge, CUP, 2015) p. 36.

[72] See https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act, OJ C 433, 23.12.2019, p. 66, EP resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP) which "notes with concern that the reports and statements by the Commission and international bodies, such as the UN, OSCE and the Council of Europe, indicate that the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) of the TEU", https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.pdf.

[73] See Commission Reasoned Proposal in Accordance with Article 7(1) of the TEU Regarding the Rule of Law in Poland, Brussels, 20.12.2017, COM(2017) 835 final.

[74] See in particular Case C-619/18 Commission v Poland, ECLI:EU:C:2019:531, Case C-791/19, Commission v Poland, Order of 8 April 2020, ECLI:EU:C:2020:277 (interim measures).

[75] See, e.g. Opinion of Advocate General Tanchev in Case C-619/18 Commission v Poland, ECLI: EU:C:2019:325, and Opinion of Advocate General Campos Sánchez-Bordona in Case C-78/18, Commission v. Hungary, ECLI:EU:C:2020:1

[76] The VC Rule of Law checklist, op. cit., is particularly valuable in this respect.

Moreover, the VC opinions can be, and have been, used by national courts utilizing the preliminary reference procedure. As is well known, the CJEU provided in Case C-216/18 PPU,[77] for a two-stage procedure when a national court may suspend the application of the principle of mutual recognition (in this case, refuse to implement a European arrest warrant issued in another state). The first stage is to make a determination on the basis of objective information, that there are general or systemic failures in the justice system of the other EU state.[78] In PPU, the CJEU stopped short stating that VC opinions are themselves sufficient basis for reaching such a determination. It expressed a preference for the European Commission performing a gate-keeper function, deciding in a reasoned opinion when and if the "systemic" or "generalized" threshold had been reached. Still, the CJEU did not rule out a national court reaching its determination on the basis of other information, so long as this was objective, as the VC opinions are. Nor does the national court requesting a preliminary ruling from the CJEU have to be in another member state. One of the referring Polish courts in case C-585/18, C-624/18 and C-625/18 A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy,[79] referred to the VC opinion on the Polish courts in its preliminary reference to the CJEU. The case concerned the alleged lack of independence of the newly-established Supreme Court disciplinary chamber.[80] The CJEU criteria of independence in this case track the concerns expressed earlier by the VC, even if the CJEU did not refer to the VC opinion directly.[81]

Before taking up a possible enhanced role for the VC in the future, this is a suitable place to discuss reservations against this. There are three reservations as I see it. The first concerns institutional

[77] ECLI:EU:C:2018:586.

[78]Ibid. at para 61 "The executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State …whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is *particularly relevant* for the purposes of that assessment." My emphasis. See also the earlier Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, ECLI:EU:C:2018:117.

[79] ECLI:EU:C:2019:982.

[80] "Where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law." Ibid at para. 171.

[81] In CDL-AD(2017)031, op cit, the VC sketches out a number of the structural problems involved in creating a chamber within the Supreme Court which has disciplinary powers over the rest of the court before noting in para 43 "it is of particular concern that the Draft Act seems to enable the President of the Republic to determine almost completely the composition of these two chambers and to ensure that they are wholly or mainly composed of newly appointed judges. This would mean that judges appointed by a NCJ dominated by the current political majority would decide on issues of particular importance …".

dependency. The second, related, reservation concerns the standards to be applied. The third concerns the vulnerability of the VC itself to "capture".

Firstly, is it not better for the EU, a sui generis organisation, to be self-sufficient? If the EU has been shown to need an organization like the VC, should it not have its own? Jan Werner-Müller proposed the creation of an EU "Copenhagen Commission" on the lines of the VC.[82] One of his reasons for doing so is the fact that the CoE contains states with a poor record on the rule of law, democracy and human rights. Another is that the VC cannot be proactive, whereas a Copenhagen Commission could routinely monitor situations in member states, and have resources to make deeper analyses.

It is true that the VC cannot be proactive, other than producing general (i.e. non-country specific) studies. However, that has not been a problem so far, as when cause for concern has emerged, one or other CoE institution has determined, rather quickly, to refer the issue to the VC. The VC itself, has shown itself able to produce detailed analyses in a very timely fashion.[83] Although I am not impartial in this matter, I find it difficult to see how a new body, starting from scratch, can match let alone surpass the expertise of the VC. As I have already noted, the institutional memory of the VC is deep, and it has, through its experienced membership and secretariat, a unique competence in comparative constitutional law. It may not have the resources to do extended field studies, but it has so far not needed to do so. Law is a practical science and the VC does not need to understand every aspect of the historical or sociological background behind a legal proposal. It analyses the proposal as such, and the justifications advanced for it. Moreover, as the excerpts from the Hungarian opinions above show, it is able to take a holistic approach to an issue, setting the legal reform in its proper context.

As regards the issue of its "dubious" membership, it must be admitted that the membership of the VC includes authoritarian states and even one state which cannot, by any stretch of the imagination, be called a democracy, namely Azerbijan. However, this membership problem also exists for the other "jewel in the CoE crown", the ECtHR. The EU institutions, especially the CJEU, have, however, been happy to refer to, and be influenced by, the case law of the CJEU, even if the CJEU is careful to regard it as a minimum standard.[84] This brings me to the second reservation, the standards to be applied.

Are the CoE standards too low? As is well known, the standards in the ECHR are a minimum standard. The CJEU has made it very clear that, in human rights, the EU can aim higher than the ECHR. However, as pointed out earlier, the VC itself uses "best practices". It too can go beyond ECtHR case law. Moreover, bearing in mind the rich variety of solutions European states have in the areas of

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[82] See, e.g., J W Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order', *Transatlantic Academy*, 2012-2013 paper series, No. 3.

[83] Indeed, bearing in mind the accelerated procedure, very quickly. As Tuori (op. cit note 15) has put it, the Commission has come to play the role of a constitutional fire-brigade.

[84] This is in accordance with Article 53 EUCFR. The CJEU signaled clearly in the – heavily criticized - ECHR accession opinion that it would not be compatible with EU law for it to be bound by ECtHR judgments, Opinion 2/13, ECHR, EU:C:2014:2454. See also the – again heavily criticized – judgment in Case C-399/11, Melloni, EU:C:2013:107

democracy and the rule of law, all of them within a "spectrum" of acceptability, it is difficult to see how a "Copenhagen" commission could apply different standards to those used, and elaborated by, the VC.[85]

The third reservation relates to the potential for the VC itself to be "captured": if this is a real risk, then it obviously makes sense for the EU not to put its eggs into this particular basket. This opinion has been expressed by two of the commentators who have been most active in taking up the rule of law problems in Hungary and Poland, Pech and Kochenov.[86] However, I think this is based on a misunderstanding on how the VC actually works. The individual members are appointed by their government. The VC has no power to object to a member proposed by a government, or make appointment subject to the approval of some sort of independent commission. There is, indeed, an argument that such a procedure should be introduced. The requirement that an individual member be "independent" has not always been respected. For example, some governments have appointed political figures who are still active politically – something which I think is not appropriate. The existing rules of procedure provide for removal of a serving individual member only in extreme cases, which has so far been interpreted only to cover personal wrong-doing (criminal offences etc.).[87] I think that some form of independent group's report on proposed appointees, and/or increased grounds for removal should be discussed for the future– even if formulating the latter will be tricky.[88] However, the absence of such a procedure at the present time does not undermine the integrity of the VC as a whole. As described earlier, the main work of the VC is done by the working groups. Unlike the situation for cases before chambers of the ECtHR, a VC member from the state which is the subject of an opinion has no right to sit in the working group considering the law of that state. Indeed, no member can insist on being on any working group. The membership of working groups is determined by the President, on proposal by the secretariat, and backed up by the Bureau. Nor may a member vote after the plenary debate discussing the adoption of an opinion concerning his or her state. The same applies to anyone whom the president determines has a conflict of interest in the case.[89] Opinions are usually adopted by consensus, but any member is free to call for a vote, and

[85] Cf Tuori, op. cit note 15.

[86] L Pech and D Kochenov, 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid' (June 13, 2019). RECONNECT Policy Brief No. 1, 2019 (Leuven); University of Groningen Faculty of Law Research Paper No. 28/2019, at p. 12 "The Venice Commission could be routinely asked to produce a report on relevant matters as soon as for instance, the Rule of Law Framework is activated – but this more systematic involvement should not be sought until the Venice Commission itself strictly enforces its current eligibility requirements so as to prevent the appointment of manifestly unsuitable members."

[87] Art. 1.3.c of the Rules of Procedure provides that an individual members mandate can be terminated "the day the Commission notes, on the proposal of the Bureau, by a majority of two-thirds of its members that the member concerned is no longer able or qualified to exercise his or her functions".

[88] A substantive ground such as "repeatedly acting contrary to the values of the CoE" might be considered, but this leaves a very wide area of discretion, even if accompanied by procedural safeguards (e.g. a proposal by the Bureau, and a 2/3 majority vote in the plenary).

[89] CDL-AD(2018)018 Venice Commission Rules of procedure, Article 3(4). Members are under a prior obligation to reveal any conflict of interest.

orally signal his or her lack of agreement with the opinion or parts of it. However, the VC is not a court, and there is no right to append written "dissenting" views to opinions adopted.

The situation can admittedly arise where a member from authoritarian state A makes an objection on behalf of another member from authoritarian state B. However, in my experience, on those relatively rare occasions when an obviously political statement is made by a member, without objective merit, the atmosphere in the plenary can be described as embarrassment. Members know that they are appointed as independent experts, and a certain peer-group pressure to maintain this independence definitely applies. Thus, even in the event that a "manifestly unsuitable" person is appointed by a state, this person will usually only have an indirect influence at best on the actual work of the VC.

I will devote the remainder of this section to discussing briefly what role the VC can have in a future EU rule of law mechanism. The Commission recently proposed deepening its existing monitoring of compliance with the rule of law by Member States by means of a Rule of Law Review Cycle.[90] The cycle would cover all Member States and end up with the adoption of an Annual Rule of Law Report that would summarise the situation in Member States as regards the rule of law. It also proposed bringing more rule of law related cases to the Court, improving the procedure used to decide on the existence of a breach of EU values under Article 7 TEU and modifying the 2014 Rule of Law Framework to involve other EU institutions in the process. As part of its "improved toolbox" it announced that it plans to strengthen cooperation with the Council of Europe, mentioning specifically the Venice Commission and the anti-corruption body GRECO.[91]

It is not clear yet what form such "strengthened cooperation" can or will take. The Commission cannot, within the confines of EU law "outsource" to the VC the job of determining whether a systemic, or generalised, deficiency exists in an EU member state. Nor can the VC, within the wording of its Statute, take such a competence upon itself. Nor is it likely that it would want to do so, even if its Statute was changed by the CoE Committee of Ministers (which has the competence to do this). One interpretation is that "strengthened cooperation" does not mean much more than the existing, already strong, cooperation. It is undoubtedly a strength for the Commission to be able to show that there is independent support for its view that the situation in X-land has got so bad as to be "systemically deficient", in other words, that other international judicial, and legal bodies, the VC, Greco, the ECtHR, the UN Human Rights Committee etc. share its concerns.[92] As the VC is reactive, if

[90] The Commission already produces an annual "Justice Scoreboard" which builds, inter alia, on the work of another CoE body, the Commission for the Evaluation of the Efficiency of Justice (CEPEJ). This is at present more focused on issues of efficiency of courts etc, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

[91] EU Commission, Further strengthening the Rule of Law in the Union, 3. 4. 2019, COM (2019)163.

[92] Cf von Bogdandy "a situation or measure is more likely to qualify as systemically deficient the more institutions of the various legal orders share this assessment" A von Bogdandy, 'Principles and Challenges of a European Doctrine of Systemic Deficiencies' Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-14. Contra, R Kelemen, et al, *The Perils of Passivity in the Rule of Law Crisis: A Response to von Bogdandy, VerfBlog,* 2019/11/26, https://verfassungsblog.de/the-perils-of-passivity-in-the-rule-of-law-crisis-a-response-to-von-bogdandy/.

the Commission does not want to wait too long, it will need CoE bodies to continue referring issues of concern to the VC in a speedy fashion.

One difficulty relates to the EU acquis. While we now know that this includes independent courts, and independent data inspectorates, there is a host of other areas where Fidesz and PiS have taken control over, or undermined checks and balances and where no acquis exists. How do you bring an infringement action to reverse the politicization of the civil service, or the capture of the public media? The EU anti-competition law rules on concentration of the media will not necessarily help here. What acquis is there in areas where states have widely differing approaches to central government control, e.g, when "should" central government respect local government autonomy, or when should it act with restraint and avoid dictating to public universities exactly what to teach and publicly-funded research institutes exactly what to research?

Infringement actions would presumably be backed by (palpable?) economic sanctions. Other economic pressurizing mechanisms include conditionality of, or even denial of, EU funds (e.g. structural funds) or suspension of the principle of mutual recognition. Bearing in mind the fact that Poland and Hungary are net recipients of EU funding, such proposals have a certain attraction, especially for people from states which are net contributors to the EU. There is something particularly galling in having to pay for people who are rude to you. I will not go into the legality, or advisability of these options, beyond noting two problems well known from the area of international sanctions. The first is how to tailor sanctions so as to strike at the ruling élites, and avoid the general population being too disadvantaged. The second is how to avoid the "rally around the flag" effect. An authoritarian government with a monopoly over, or substantial control over, the broadcast media can easily put a spin on sanctions as "foreign interference" directed against the nation as such.

Whatever approach one takes to economic pressurizing measures, it is not wrong to hold the view that the European Commission should show caution in bringing infringement procedures in such sensitive areas as democracy, the rule of law and human rights, and it is good to have "strength in numbers". However, the sensitivity of rule of law issues can be overplayed. I would also object if it was about imposing a uniform EU solution in an important institutional issue (e.g. "every state has to have a constitutional court") or a uniform conception of judicial independence ("every state must apply the principle of the lawful judge").[93] But it is not about this. The goal of European Commission infringement proceedings on judicial independence has been much more modest: it is about establishing that a given system, in given circumstances, is not satisfactory, not about designing and imposing a harmonized, or "perfect", standard.

As regards the idea of an annual rule of law review cycle, monitoring all EU states' performance in rule of law issues might seem outwardly appealing to some. It may be easier for the European Commission to defend bringing infringement proceedings against specific states, if it also can say it has a general "even-handed" monitoring system. No state is being singled out. All states have

[93] Meaning a system where cases are allocated to judges in strict rotation, with no discretionary powers for court presidents to take into account other factors. I feel the same way about CJEU case law which leaves insufficient room for national legislatures or courts to balance different rights against each other (employees wearing headscarves), or ruling out an investigatory measure (general retention of metadata for a limited period), however strong the safeguards on it which are provided, and applied, in national law.

something to learn. However, it can end up being a bureaucratic exercise, expensive, time-consuming, and of little added value. There is already a mechanism for identifying which states have particular rule of law problems, namely the possibility for CoE bodies to refer to the VC concerns related to specific issues concerning draft laws, laws and legal institutions. I think it naïve to believe that the governments of Hungary and Poland will be more receptive to criticism that has emerged out of a more general monitoring procedure.

VI. Concluding remarks

I will not try to summarize the arguments I have made already. I will content myself with making a number of concluding remarks. I began writing this article in November 2019, and finished it in May 2020. In the meantime, the Covid-19 pandemic has come. It remains to be seen what long-term effects this, and the financial crisis it has triggered, will have on the EU. East and West, North and South have even more reasons for drifting apart from each other. However, the idea of the EU is still strong. Indeed, one can argue that the pandemic should ultimately strengthen the feeling of mutual dependence, and that only together are the 27 EU states strong enough to protect and promote their interests in a more uncertain world. The question however, is how strong is the EU's commitment to one of these interests, the rule of law, when the majority of the electorate in a state has shown itself more interested in other things.

The experiences of Hungary and Poland show that it is not possible for courts in a state to defend themselves against a sustained attack from their own government. It is understandable that lawyers are particularly offended by assaults on legal institutions, but my point here is that you cannot compensate for what is, in essence, a failure of political culture, by strengthening legal institutions. It is not for nothing that Alexander Hamilton called the courts the "least dangerous branch" of government, in that they tended to operate only as a veto over the other branches of government, and lacked power over both the military and economic resources of the state.[94] The Hungarian Fidesz party has a supermajority and could change its constitutional court as it chose, but even when such a majority is lacking, and a government has to work through ordinances and normal laws, a constitutional court has too many vulnerabilities to allow it to hold out any length of time. As regards Poland, it was evident to the VC that, sooner or later, PiS would secure control over the Polish constitutional tribunal. The ordinary court system is bigger, and so more difficult to take clear control over. However, given enough time the ordinary judges will be sufficiently "chilled" to say that judicial independence no longer exists. Courts and judicial councils cannot be entrenched so deep to be protected against any attack, at least if one wants to maintain the main principle of governance for an EU state, namely democracy.

While the CJEU can, and should, come to the assistance of the beleaguered Polish judiciary (it is probably too late for the Hungarian judiciary),[95] the CJEU cannot govern Poland by judgments. There

[94] See further A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics, (*Yale, Yale UP, 1986).

[95] Although some Hungarian judges, at least, are still sufficiently independent to ask the CJEU about controversial issues. See Joined CasesC-924/19 PPU and C-925/19PPUFMS and Others v Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság, ECLI:EU:C:2020:367.

are many ways in which CJEU judgments can be undermined and, as noted previously, the EU acquis does not cover everything that needs to be protected.

Lawyers are practical creatures, and the interesting question for them is what the EU institutions can, and should do while we wait for the majority of the electorates in these states to see the long-term advantages in having a state with the separation of powers, the rule of law, independent courts, objective public media etc. The former British diplomat, Robert Cooper, put it very succinctly when he stated that there were only three ways of influencing foreign countries: by military force, by money and by talking to them and getting them, over time, to change their views.[96] As regards military force, Europe has been there, done that, and everybody knows this is a very bad idea. No one is wanting to invade Hungary or Poland. The problem with money is that, once given, you cannot get it back. You can, however, withhold it. But this is not a basis for a long-term relationship based on mutual trust: the recipient will be inclined to try to trick you whenever s/he can. Long-term, it is only the third method which works.

This is not to preach defeatism. As I noted before, the EU can and must do what it can to defend its own democratic legitimacy, and this includes exploring all avenues for combining dialogue with economic pressures. The fact that Fidesz and PiS have been democratically elected does not mean that their actions are legitimate, or acceptable in the European constitutional tradition. As I have argued above, the "winner takes it all" approach shown by the governing parties in Hungary and Poland is not another variant of political constitutionalism. It is the opposite of it. Still, we should not lose sight of the fact that, ultimately, the remedy for rule of law backsliding lies with the electorates in these two states. As the VC has put it, "The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture".[97] In the meantime, we are obliged to keep talking, and the VC is an important part of that dialogue.

[96] R Cooper, The Breaking of Nations: Order and Chaos in the Twenty-first Century (London, Atlantic Books, 2003).

[97] CDL-AD(2016)007, op. cit, at para 43.