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THE ASSAULT ON POSTCOMMUNIST COURTS

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Less than two decades after the triumphant "return to Europe," the countries of Central and Eastern Europe (CEE) are facing a serious crisis of constitutional democracy. Following the example of Russia's "managed" democracy, a new form of illiberal regime is emerging in postcommunist Europe.[1] In such regimes, political parties seek to capture the state for their own ideological or economic gains by dismantling key rule-of-law institutions. As in Moscow, the governments of these countries maintain the superficial appearance of democracy by holding elections, while seeking to undermine any institutional safeguards that could prevent them from maintaining power in perpetuity. Constitutional courts are central targets in these efforts.

The populist and anti-liberal wave sweeping Central and Eastern Europe has featured assaults on the institutions that mediate between government and the people.[2] Western democracies tend to be more successful at fending off attacks on liberal institutions because Western courts, media, human-rights organizations, and ombudsmen have longer and better-developed traditions of independence and professionalism, and because these institutions mutually reinforce one another. Conversely, where such institutions are weak and underdeveloped, as they are in CEE countries, there is always the potential danger of a drift toward "illiberal democracy," and even authoritarianism.

Today in the Baltic States, Bulgaria, Hungary, Poland, Romania, Slovakia, and Slovenia, populist political movements, political parties, and governments claim to stand for ordinary citizens against corrupt elites. A corollary is the growing governmental disdain for rule of law, which has manifested most forcefully in the form of attacks against constitutional courts. In some countries, such as Hungary and Poland, new populist governments have managed fairly easily to render the courts toothless by packing them with loyalists and curtailing their independence. These governments have also reduced the independence of the mass media and the civil service by replacing journalists and civil servants with mediocre but loyal newcomers.

Governments that distrust and disrespect liberal institutions often also attack the constitutionally granted rights and freedoms of Roma communities, Jews, and other ethnic minorities, as well as homosexuals. These groups fall outside an organic, ethnonationalist, culturally conservative concept of the political community. As a result, hate speech is fast becoming a lingua franca in Central and Eastern Europe, a region with long a long history of a particularly virulent form of xenophobic nationalism.

All this is happening in member states of the European Union—signatories of the Treaty on the European Union (TEU, formerly the Maastricht Treaty), which declares in Article 2 that the EU represents a family of countries founded on the principles of liberty, democracy, rule of law, and respect for human rights and fundamental freedoms. Yet prior to 1989, most CEE countries had little if any tradition of protecting human rights, particularly the rights of minorities.

During the interwar years, dictatorial regimes gradually spread throughout the region—to Albania, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Yugoslavia. In 1920, the regency government of Hungarian dictator Admiral Miklós Horthy became the first in

Europe to enact anti-Jewish legislation. After World War II, communist rule in these same countries further eroded any remnants of the rule of law, substituting instead a "socialist" concept of legality that emphasized subservience of the law to political considerations. Thus when the transition from communism began in 1989, few CEE countries had the necessary conditions for a robust, "polyarchic" democracy: the rule of law, free media, and a vibrant civil society. Since then, of course, there has been massive external investment in fostering democratic institutions such as elections, political parties, and civil society in these countries.

What is particularly troubling about the current moment is that the illiberal turn has been most pronounced in the democracies that were once considered to be the region's most advanced—namely, Hungary and Poland. In a relatively short time, Hungary has regressed from a consolidated democracy to a semi-authoritarian regime, while Poland's democracy has become illiberal with strong authoritarian overtones. What does this say about institutional reform as a way to lock in democracy?

The Rise of the Courts

The primary targets of the new illiberal regimes in Central and Eastern Europe are the constitutional courts. During the first quarter-century after the collapse of communism, constitutional courts became the region's primary defenders of the rule of law. The constitutional courts of Hungary and Poland, as well as those of Bulgaria, Romania, Slovakia, and Slovenia, became extremely influential. Facilitated by help from outside organizations such as the Council of Europe's Venice Commission (the European Commission for Democracy Through Law), these courts came to be important "veto players" in the politics of postcommunist Europe.

As the judgments handed down by constitutional courts began to gain widespread attention in legal and political circles, the courts rose to even greater prominence. Previously, legislatures had enjoyed almost absolute supremacy. The power of the courts to review the constitutionality of statutes, however, challenged that unchecked authority. For example, the Hungarian Constitutional Court, under the strong leadership of liberal former chief justice László Sólyom (1990–98), issued a series of decisions establishing its reputation as a guardian of political and social rights. The constitutional courts of Poland, Slovenia, Slovakia, and Romania likewise robustly defended key constitutional principles and the basic rights enshrined in their respective postcommunist constitutions.

In a landmark 1999 ruling, for example, the Slovenian Constitutional Court overturned legislation that had violated the rights of tens of thousands of people known as the "erased." After declaring independence in 1991, Slovenia required residents with citizenship in other countries either to apply for Slovenian citizenship or to register as foreign residents. The almost twenty-thousand people who failed to do so before the country's first election in 1992 were "erased" from the register of permanent residents. Many of the erased lost their jobs, health insurance, driver's licenses, passports, and even their homes. Some were deported, while others remained in the country but did not legally exist. The 1999 ruling declaring the law unconstitutional was the first step toward rectifying this situation.

This role for the courts is relatively new. Before the 1950s, judicial review was virtually unknown anywhere in Europe. In a famous 1930s legal debate, German political theorist Carl Schmitt, a leading jurist of the Third Reich, argued that the only real safeguard for democracy was a leader (Führer). In Schmitt's version of democracy, there was no place for liberal institutions such as constitutional courts. Hans Kelsen, a top Austrian jurist, criticized Schmitt,

arguing that only an independent constitutional court could protect democracy from its weaknesses.[3] Schmitt's concept prevailed in wartime Europe. Austria and Czechoslovakia were the only countries in Europe to establish constitutional courts before the war. After the Anschluss in 1938, however, the Austrian court was shut down, and Kelsen, who had Jewish ancestry, was forced to emigrate.

After the war, Kelsen's positions found widespread favor. Beginning with Germany, most countries in Europe established constitutional courts, primarily as a response to the collapse of democracies before and during the war. In the early postwar years, exiled German political scientist Karl Loewenstein developed the concept of "militant democracy."[4] In Loewenstein's view, the dark legacy of Nazism and fascism showed democracy's inability to fend off authoritarian movements. To compensate for that weakness, Loewenstein urged democracies to take preemptive legal measures against antidemocratic forces—for example, to ban antidemocratic political parties, to forbid the formation of private paramilitary armies, and to prohib the ostentatious wearing of political uniforms.[5]

These core components of militant democracy were enshrined in Germany's new basic law of 1949, along with the Federal Constitutional Court, which later banned the Communist Party and the Socialist Reich Party (founded in 1949 as a successor to the Nazi Party). Since then, the German court and other West European constitutional courts have become prominent political actors with significant influence over national policy. Their power and prestige, however, have never been challenged as strongly as in postcommunist Europe, where the very survival of such bodies today is under threat by the court-packing plans of proto-authoritarian and populist governments. There, a new generation of autocratic leaders is directly attacking and

dismantling the constitutional courts, often invoking arguments alarmingly similar to those of Schmitt.

Do the constitutional courts of postcommunist Europe have the capacity to protect constitutional democracy, as envisaged by Loewenstein and the framers of the postwar German constitutional order? Before the Nazis came to power in Germany, judges had been celebrated for developing an early form of the Rechtsstaat (legal state). Yet they did not even try to challenge Hitler's supremacy. In a 1936 essay, Lowenstein pointed out that a judge would have to be very reckless to challenge Nazi ordinances on legal grounds, and noted that that he knew of no such judge.[6] On the contrary, the blessing of the German judges, which stabilized the judicial system, was instrumental in legitimizing the Nazi regime.

The new populist governments in Hungary and Poland quickly identified constitutional courts as "obstacles" to their plans. Gaining the blessing of powerful courts for controversial initiatives required manipulation and intimidation. The developments in Hungary under the government of Viktor Orbán and his Fidesz party have been the most radical and worrisome. Between 2010 and 2015, the Fidesz government drastically revised the Hungarian constitutional and political order by systematically dismantling checks and balances, thereby undermining the rule of law and transforming the country from a postcommunist democratic success story into an illiberal regime. With a series of constitutional amendments that culminated in a new constitution in 2012, the Fidesz government rendered the constitutional court virtually powerless. The government first changed the rules for nominating judges to the Constitutional Court so that Fidesz could use its two-thirds majority to nominate its own candidates. Next, the government restricted the court's jurisdiction over fiscal matters. After that, it increased the number of judges from eight to fifteen, filling the seven new positions with handpicked Fidesz loyalists.

The worst blow to the court, however, was the Fourth Amendment to the 2012 Constitution, which repealed all Constitutional Court decisions made before 1 January 2012, when the new constitution entered into force. As a result, precedent based on earlier decisions can no longer be invoked in new cases. The Fourth Amendment also bans the court from reviewing constitutional amendments for substantive conflicts with constitutional principles; the court is allowed only to review the procedural validity of new amendments. In essence, the Fourth Amendment is the Orbán government's "constitutional revenge" for several of the "losses" that it incurred in earlier court decisions, as well as for the insistence of EU bodies that it modify certain controversial rules. For now, Hungary's once-powerful and highly respected Constitutional Court has effectively disappeared from the political scene, erased as quickly as the Slovenian citizens whose registration was eliminated by their government.

The Case of Poland

In Poland, the government of the far-right populist Law and Justice party (PiS), elected in October 2015, has set off down the path of Hungary. Almost overnight, Prime Minister Beata Szydło's administration packed Poland's Constitutional Tribunal with five handpicked judges and refused to swear in the three judges who had been properly appointed by the previous government. In December 2015, the PiS-controlled parliament passed an amendment to the Constitutional Tribunal Act. Known as the "repair bill," the amendment reorganizes the fifteen-judge tribunal, requiring a two-thirds majority for any decision to be binding and raising the quorum for hearing a case from nine to thirteen. As there are currently only twelve judges on the tribunal, the new rules prevent it from annulling PiS-backed legislation. Moreover, the repair bill seems to be custom-made to paralyze the court. The bill requires cases to remain on the docket

for at least six months before they are decided. The bill also gives the lower house of parliament (the Sejm) the power to terminate a judge's mandate, which impinges upon judicial independence.

The first time the PiS was in power, from 2005 to 2007, the tribunal blocked a number of the government's plans. In May 2007, the tribunal invalidated several key sections of Poland's lustration law, which governs the participation of former communists in government and the civil service. Angered by the ruling, then–prime minister Jarosław Kaczyński threatened to charge the judges for having acted "improperly." Today, as the ruling party's de facto leader, Kaczyński has, in a legal "blitzkrieg," defanged the tribunal, leaving it largely impotent. When the PiS announced its plan to curb the tribunal's powers, Lech Wałęsa, the country's first president, warned that Polish democracy was in peril.

In March 2016, the Polish Constitutional Tribunal unexpectedly struck back, declaring the repair bill to be in violation of the constitution. In a decision that deepens Poland's constitutional crisis, the tribunal ruled that the reorganization called for by the repair bill prevented the tribunal from working "reliably and efficiently." Shortly afterward, Poland's Supreme Court (the country's highest appellate court) passed a resolution stating that the rulings of the Constitutional Tribunal should be respected, despite its stalemate with the government. The government, however, announced that it would ignore the tribunal's repair-bill ruling and refused to publish it in the official Gazette, as required by the constitution. An enraged Kaczyński addressed the Sejm, condemning both high courts for opposing reforms passed by parliament. "[We] will not permit anarchy in Poland," Kaczyński declared, "even if it is promoted by the courts."[7] The tribunal most likely will survive this standoff with the

government, but, as Adam Bodnar of the Helsinki Foundation for Human Rights points out, it remains to be seen whether the court's "function will not be purely decorative."[8]

It seems that a constitutional court alone is relatively weak against a powerful government determined to dismantle basic rule-of-law institutions, as in Hungary and Poland. In such a circumstance, there is little a constitutional court can do to stop the authoritarian drift. In retrospect, we see that the postcommunist reformers who put their faith in the courts were naïve. Constitutional courts and other rule-of-law institutions in Central and Eastern Europe always lacked the necessary support of genuinely liberal political parties and programs, leaving the courts vulnerable to attacks from populists.

During the early postcommunist period, a court-centered, rights-based, and depoliticized concept of constitutional democracy prevailed. Accordingly, constitutional courts and other nonpolitical bodies—such as independent agencies, central banks, and the like—emerged as the key agents of the constitutional transformation in Central and Eastern Europe. Paul Blokker observes that "participatory dimensions, popular democracy, and civil society promotion, even if certainly not wholly absent from constitutions in the region, seem then to ultimately have an only secondary priority in constitutional hierarchies."[9] Thus legal constitutionalism, as practiced in Central and Eastern Europe, has a built-in paradox: While it tried to build the rule-of-law institutions needed to curb the excesses of the majority will, it simultaneously weakened such institutions by neglecting to elicit broader political support for their actions.

Today, three of the four Visegrád countries are ruled by populist parties that openly flout the rule of law and liberal democratic values. In Slovakia, populist prime minister Robert Fico, leader of Direction–Social Democracy (Smer-SD), was reelected in March 2016 after campaigning on an anti-migrant platform. In order to form a majority government, he needed

coalition partners. Two of them, the Slovak National Party (SNP) and the Siet Party, are from the far right, and a third, the Most-Híd party, represents the Hungarian minority. In a surprising development, the neo-Nazi People's Party–Our Slovakia won parliamentary seats for the first time. Party leader Marian Kotleba previously headed the Slovak Togetherness–National Party, a neo-Nazi formation that, prior to its forced dissolution by the Constitutional Court, organized anti-Roma rallies and expressed sympathy for Slovakia's wartime Nazi-puppet state. Given the nature of Smer's coalition partners and the improving electoral fortunes of right-wing fringe groups, it will come as little surprise if Fico's new government follows in the footsteps of Hungary and Poland, extending "illiberal democracy" further into postcommunist Europe.

The EU to the Rescue?

Some observers argue that the existence of international organizations such as the European Union makes the court-packing currently underway in EU member states quite different from the "constitutional coups" of earlier eras.[10] One of the most crucial political questions facing Europe today is how well the EU is equipped, legally and politically, to defend democracy and the rule of law in its member states. It is therefore necessary to examine how the EU is managing its first real attempts at safeguarding democracy within member states.

A political club of democratic regimes established primarily to promote peace and prosperity in postwar Europe, the EU must now confront member states that are turning away from liberal democracy. The European Commission, the executive body responsible for upholding the legal order of the EU, began infringement proceedings against Hungary in 2012, claiming that the new Hungarian constitutional order contradicted the "fundamental values" (democracy, the rule of law, and respect for human rights) laid out in Article 2 of the Treaty of

the European Union. And in January 2016, the European Commission launched an official inquiry into Poland's possible violations of EU standards, using the newly adopted Rule of Law Framework, a three-stage process designed to address potential systemic threats to the rule of law within member states.

EU law currently offers three legal options for dealing with cases such as those of Hungary and Poland. The first is to invoke Article 7 of the TEU, the so-called nuclear option, which lays out a procedure for determining whether a member state has violated the values stated in Article 2 and, if so, allows for the suspension of certain rights. This provision was first introduced in the 1997 Treaty of Amsterdam (amending the 1992 Maastricht Treaty), which states that in cases where there has been a "serious and persistent breach" of the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," the Council of the European Union can "suspend certain . . . rights . . . including the voting rights of the representative of the government of that Member State in the Council."

Although Hungary has clearly violated Article 2, the institutions of the EU such as the European Parliament, the European Commission, and the Council of the European Union have yet to use Article 7 to sanction Hungary. The European Parliament contemplated doing so in July 2013, when it adopted the Tavares Report (named for its rapporteur, Portuguese MEP Rui Tavares), which harshly criticized the state of fundamental rights in Hungary and recommended setting up an independent mechanism to monitor rights-related developments. This met with stiff resistance from the European People's Party (EPP), a coalition of center-right European political parties that constitutes the largest bloc in the European Parliament. Fidesz belongs to the EPP, and Orbán has many friends among its members. Consequently, it is doubtful that either the Parliament or the Council would be willing to resort to imposing sanctions.

The only time that EU political leaders have verged on taking such a drastic measure was in 2000, after Jörg Haider's right-wing Freedom Party of Austria (FPÖ), considered to be a xenophobic and racist organization, joined Austria's coalition government. Ultimately, EU heads of state, led by France's President Jacques Chirac, chose not to invoke Article 7 and opted instead to coordinate bilateral sanctions—suspending contact with the Austrian government, denying support to Austrian applicants for positions in international organizations, and reducing contact with Austrian ambassadors. Such a move was unprecedented, and the sanctions regime lasted for seven months.

Yet Austria's coalition government had not explicitly violated any EU rules. Without the appropriate legal basis and without the support of the European Commission and the Council of the European Union, the two key EU institutions, the sanctions were doomed to fail. Given that the coalition government technically had done nothing wrong, it would seem that the sanctions were provoked primarily by Haider's incendiary rhetoric and FPÖ positions minimizing or even glorifying certain features of Austria's Nazi past. Today, it is widely believed that imposing sanctions on Austria in 2000 was highly questionable, both legally and politically.

The EU's second legal option for dealing with countries veering off the democratic path is detailed in Article 258 of the Treaty on the Functioning of the European Union (TFEU). Article 258 states that if the European Commission finds that a member state has "failed to fulfil an obligation under the Treaties" and that state then fails to rectify the matter, the Commission "may bring the matter before the Court of Justice of the European Union [CJEU]." This is what happened in the case of Hungary.

Using Article 258, the Commission initiated several separate suits against Hungary on more narrow legal grounds. The most interesting case involved a provision in Hungary's

Transitional Act on the implementation of the 2012 Constitution, which lowered the retirement age of judges from 70 to 62. This provision would have forced 274 judges and public prosecutors into retirement in a short period of time. The Commission considered the rule to be a violation of the independence of the judiciary.

The most problematic aspect of this new provision was that the judges forced to retire included most of the country's court presidents, who assign cases. Although the 2012 Constitution includes other provisions that are even more troubling in terms of judicial independence, the Commission decided to utilize very narrow legal grounds to deal with the case: It relied exclusively on Council Directive 2000/78/EC on equal treatment in employment, which prohibits discrimination on grounds of age. In November 2012, the European Court of Justice (ECJ) ruled that the radical lowering of the retirement age for Hungarian judges constituted age discrimination and violated Council Directive 2000/78/EC.[11]

Despite this legal victory, the retired judges were never comprehensively reinstated, and Fidesz loyalists basically stayed in place. As Jan-Werner Müller argues, in the end "Europe appeared impotent in getting at the real issue, which was political and had nothing to do with the discrimination [against] individuals."[12] Separate legal proceedings such as this discrimination suit may yield important legal victories, but they ultimately fail to address the broader institutional issues that threaten the foundations of the rule of law and liberal democracy in Hungary.

The final option in the EU's legal arsenal is the aforementioned Rule of Law Framework. The framework was adopted in 2014, mainly in response to the inability of the key EU actors to agree on invoking Article 7. Often called the "pre–Article 7 procedure," the Rule of Law Framework complements Article 7 by establishing a structured "preparatory" phase for taking

Article 7 actions. The Commission first assesses whether there is a systemic threat to the rule of law in a specific country. It then sends a "rule-of-law opinion" to the member state in question as a basis for dialogue to resolve the issue. If that member state ignores the opinion, the Commission then issues a "rule-of-law recommendation" and monitors the country's follow-up. If ultimately unsatisfied with the country's response, the Commission may decide to activate Article 7.

The Framework's greatest shortcoming is that it offers little in the way of viable sanctions that can be used before the activation of Article 7. When Poland was investigated under the Framework in 2016, Prime Minister Szydło made it clear that her government was not worried about the inquiry. Moreover, she did not shy away from expressing strong contempt toward Brussels' action, calling the investigation an "ideological threat" to Poland's national sovereignty.[13]

In April, the European Parliament passed a resolution urging Poland's government to respect the decisions of the country's Constitutional Tribunal. If Poland's government refuses to comply with the resolution's recommendations, the European Commission can move on to the next step of the Framework, which is to recommend "that the Member State solves [sic] the problems identified within a fixed time limit." Not surprisingly, two PiS members of the European Parliament immediately announced that the Polish government would not follow the resolution's recommendations.

For now, it seems as though little can be expected from EU legal actions aimed at protecting the rule of law in member states. Writing about "subnational authoritarianism," Daniel Kelemen argues that "legal levers alone are unlikely to safeguard democracy. . . . So long as political leaders are willing to put partisan interests above democratic values, they may allow . . .

autocracy to persist for decades within otherwise democratic political systems."[14] This holds true at the supranational (EU) and national (member states) levels as well. It will take bold political action on the part of other EU member states to defend core EU values more effectively.

From Courts to Politics?

One of the problems with Framework on the Rule of Law and Article 7 TEU is that they allow the EU only to issue recommendations and to suspend voting rights in the Council, with no steps in between. Suspending voting rights can be a risky move. In the case of Hungary, doing so could easily alienate the Orbán government from the EU, pushing it further into Russia's sphere of influence. At the same time, while a voting-rights suspension sends a powerful message, it is a mostly symbolic measure, particularly for smaller, less influential EU members such as Hungary.

Article 7 would likely be far more effective if it included the possibility of economic sanctions, which would weigh heavily on a country such as Hungary that is heavily dependent on EU structural funds. In 2012, Orbán declared that Hungary "will not be a colony" of the EU. But he had no qualms about signing a a six-year budget agreement with the EU that will provide nearly US$40 billion in aid for Hungary (whose annual GDP is $125 billion), between 2014 and 2020. Poland also benefits substantially from EU aid. On 5 October 2014, the New York Times reported that Poland (whose 2013 GDP was $518 billion), would receive a total of $318 billion in EU aid between 2008 and 2020. This is more than two times the present-day value of the Marshall Plan. The annual average accorded to each Marshall Plan recipient for four years was $2.5 billion. By 2020, Poland will be receiving $26.5 billion per year.

These aid deals should be a great source of leverage for the EU. Yet studies suggest that economic sanctions seldom work. In the case of the EU, a big reason why "economic sanctions

have fallen short in the past is that not all countries have complied. Indeed, significant differences of domestic opinion in the imposing country often undermine sanctions as well."[15] Therefore, future attempts at imposing economic sanctions should be backed by a strong regional consensus. In light of current events, however, achieving consensus is no small task. Even the EU institutions themselves have not agreed on a common language to describe the Hungarian and Polish cases. The EU's flawed approach to Hungary has already damaged the Union's political legitimacy, while the Eurozone crisis, the migration crisis, the threat of "Brexit," and Russia's occupation of Crimea and other parts of Ukraine have left the EU more politically divided than ever before. Needless to say, in such a fragile union, consensus on sanctions may remain elusive.

Like other international organizations, the EU is more likely to exert pressure on a member state when foreign interests are at stake; it is less likely to intervene over matters of domestic policy and "the internal functioning of democracy, such as curtailment of press freedoms, corruption in public administration, and the centralization of power in the hands of the ruling party,"[16] in part because it is in the EU's interest to maintain stability and also because the issue of national sovereignty is delicate. While the EU has made massive encroachments on the fiscal sovereignty of member states (with the Fiscal Compact, the European Stability Mechanism, and the "six pack" of five regulations and one directive), it is more reluctant to impinge on national sovereignty when it comes to more sensitive social or political matters.

This contrast between fiscal and sociopolitical measures reflects the limits of EU integration toward a stronger political union. The EU institutions and elites seem to lack the enthusiasm and political will for protecting fundamental values such as democracy and the rule of law that they displayed when dealing with the Eurozone crisis. Otherwise, Article 7 already

would have been used in the Hungarian case. Yet, with trust in the EU at an all-time low and EU political elites unwilling to acknowledge the gravity of the Hungarian and Polish problems, it seems unlikely in any case that sanctions would have achieved the desired results.

Nevertheless, the EU is not completely powerless when it comes to defending the rule of law in its member states. Despite its failure to prevent the drift toward authoritarianism in Hungary, the European Union has shown elsewhere that it can protect democracy and the rule of law in member states. During Romania's 2012 constitutional crisis, for example, the EU quickly threatened the country with serious penalties, including blocking its accession to the Schengen free-movement zone. This pressure from the EU succeeded in getting Romania's Prime Minister Victor Ponta to back down from his attacks on the Romanian Constitutional Court and from his campaign to impeach his rival, President Traian Băsescu.[17]

The European Union should act just as quickly and forcefully against Poland's current government—before the PiS consolidates its grip on power as Fidesz has already done in Hungary. The Romanian example also shows that, in certain political situations, constitutional courts can help to check the authoritarian aspirations of powerful populist leaders—as when Romania's Constitutional Court invalidated the Băsescu-impeachment referendum for failing to reach the vote threshold. Of course, Ponta's government was much less hegemonic than Orbán's or Szydło's, and the EU had more powerful sanctions available for dealing with Romania, as membership conditionalities make for better bargaining chips than political penalties. Timing seems to be critical too. If the EU acts early, before an illiberal government consolidates power, the chances of preventing a slide into autocracy are much greater.

This argues for immediate and forceful action in support of Poland's Constitutional Tribunal. It is worth noting that U.S. secretary of state John Kerry and three U.S. senators told

their Polish counterparts that the legal changes brought by the new government "undermine Poland's role as a democratic model."[18] It is also important that external sanctions find strong domestic support within Poland from opposition political parties and civil society groups. On 19 December 2015, roughly twenty-thousand people rallied in Warsaw to protest the new government's antidemocratic actions; a week earlier, fifty thousand had marched through the city to protest the PiS government. These demonstrations offer a glimmer of hope for Polish democracy. The protesters, led by the Committee for the Defence of Democracy, demanded the protection of freedom and democracy. The group's actions were supported by several famous Polish artists and intellectuals, including Agnieszka Holland and Andrzej Wajda.

In 1957, just three years after the U.S. Supreme Court's landmark Brown v. Board of Education decision, U.S. political scientist Robert Dahl wrote that the court alone "is almost powerless to affect the course of national policy."[19] Dahl's observation remains widely accepted in the United States today. Some political scientists argue that despite the enormous power of high-court justices, "their decisions can enjoy long-term and sometimes even short-term efficacy only insofar as those decisions remain politically tolerable to Congress and the [president]."[20]

In contrast, expectations about the power of constitutional courts in Europe have been much higher, especially since the fall of the Soviet Union. In many CEE countries, the courts have played a major role in building constitutional democracy and have served as symbols of the rule of law. Yet the last few years have exposed the institutional fragility of constitutional courts when they are targeted by illiberal forces. Without quick and sustained pressure from the EU, the dismantling of the hard-fought freedoms associated with the rule of law will continue, and Central and Eastern Europe may again grow to resemble Russia more than the West. More

broadly, we may be forced to question the capacity of the courts to protect democracy from illiberal majorities.

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[11] Court of Justice of the European Union, Case C-286/12 Commission v. Hungary, Judgment of the Court (First Chamber), 6 November 2012.

[12] Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law Inside Member States," European Law Journal 21 (March 2015): 148.

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[17] R. Daniel Kelemen and Mitchell A. Orenstein, "Europe's Autocracy Problem: Polish Democracy Final Days?" Foreign Affairs online, 7 January 2016. It is worth mentioning that Ponta remained a controversial figure with little regard for the rule of law. He was indicted for corruption in September 2015 and resigned two months later in response to massive popular protests over a deadly nightclub fire in Bucharest.

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