PATRIOTS
FOR EUROPE FOUNDATION

The rule of law in conflicts between Brussels and the Polish-Hungarian bloc

A study commissioned by the Patriots for Europe Foundation

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

(Article 2 of the Treaty on European Union)

" *We have a duty to always be vigilant to care and nurture for the rule of law. Breaches of the rule of law cannot be tolerated. I will continue to defend it and the integrity of our European institutions. Be it about the primacy of European law, the freedom of the press, the independence of the judiciary or the sale of 'golden passports'. European values are not for sale. (...) I will not rest when it comes to building a Union of equality. A Union where you can be who you are and love who you want – without fear of recrimination or discrimination. (...) to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights. As part of this, I will also push for mutual recognition of family relations in the EU. If you are a parent in one country, you are a parent in every country*"

(Ursula von der Leyen, President of the European Commission, in her State of the Union address on 16 September 2020)

*"*The *European Parliament (...) calls on the Council and the Commission to refrain from narrowly interpreting the principle of the rule of law, and to use the procedure under Article 7(1) TEU to its full potential by addressing the implications of the Polish government's action for all the principles enshrined in Article 2 TEU, including democracy and fundamental rights as highlighted in this report*"

(Extract from the European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law).

"*...the definition of family in the Hungarian constitution as "marriage and partner-child relationships" is outdated and based on conservative beliefs;*"

(European Parliament report of 4 July 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded).

" *...the rights granted to the Union were causes of war rather than of power, since these rights multiplied its demands without augmenting its means of enforcing obedience. Consequently, the real weakness of federal governments has almost always been seen to grow in direct proportion to their nominal power*"

(Alexis de Tocqueville in volume I of *Democracy in America*, published in 1835)

Introduction

The rule of law and European values

There has never been so much talk of the rule of law and 'European values' in Europe as since voters brought conservative governments to power in Hungary and Poland. The accession of the Fidesz / Christian Democrat KDNP coalition in 2010 in Hungary, and then of the "United Right", a coalition led by the Law and Justice party (PiS), in 2015 in Poland, marked the beginning of an increasing number of conflicts between Brussels and the two capitals. Another coalition led by the PiS in 2005-2007 in Warsaw had already given a foretaste of the reactions that could be provoked within the European Union by the arrival in power of a conservative government in one of the former Eastern European countries that joined the bloc in 2004.

While the criticisms levelled at the two countries of former Eastern Europe, whose resistance contributed most to the fall of communism and the break-up of the Soviet empire, are not identical, they do share many similarities. Like Poland, Hungary has been criticised for reforms to its Constitutional Court and judicial system. However, more than the Polish governments of Beata Szydło in 2015-2017, and then Mateusz Morawiecki from December 2017, Viktor Orbán's government chose, in the early 2010s, to back down on certain points to avoid a head-on confrontation. Nevertheless, its justice reforms have still been criticised in Brussels, as can be seen in the European Parliament's resolution of September 2018, which activated the sanction procedure against Hungary under Article 7 of the Treaty on European Union, and also in the Commission's annual reports, published since 2020, on the rule of law in the EU.

With Poland, however, the dispute with Brussels has gone further and now seems to be making a head-on confrontation difficult to avoid, with two verdicts from the Warsaw Constitutional Court delivered in 2021, which set out the limits of the jurisdiction of the Court of Justice of the European Union on Polish territory by noting that the organisation of the judiciary is not one of the competences transferred to the EU under the European Treaties, and by reaffirming the primacy of the Polish Constitution over CJEU rulings in areas where sovereignty has not been transferred.

In connection with these verdicts, on 19 October 2021, in her speech to the plenary of the European Parliament on the crisis in the rule of law in Poland and the primacy of EU law, the President of the European Commission Ursula von der Leyen said: "*The Polish government has to explain to us how it intends to protect European money, given this ruling of their Constitutional Court. Because in the coming years, we will be investing €2.1 billion with the Multiannual Budget and the NextGenerationEU recovery programme. This is European taxpayers' money. And if our Union is investing more than ever to advance our collective recovery, we must protect the Union's budget against breaches of the rule of law.*"

The main stumbling block is the disciplinary chamber of the Polish Supreme Court, which is a court of cassation and whose suspension was ordered by the CJEU. The Polish Constitutional Court considers that the CJEU has exceeded the powers conferred on the EU by the Treaties and is therefore in breach of the Polish Constitution which does not allow European institutions to interfere in the organisation of the national judicial system or to order the suspension of national courts.

At a press conference on 28 October 2021, Ms Von der Leyen therefore presented a "compromise" proposal for Poland, explaining that the Commission had a "*long-standing specific recommendation for Poland, namely the independence of the judiciary* ". So, in order to obtain the funds from the recovery plan, Poland had to commit to "*dismantling the disciplinary chamber, ending or reforming the disciplinary system and launching a process to reinstate judges*", warned the President of the European Commission.

In the case of Hungary, the reason for withholding funds from the recovery plan is in principle different: it is officially a question of unresolved corruption risks against the backdrop of reforms to the judicial system which, in the Commission's opinion, would not guarantee an effective fight against corruption. However, several statements from Brussels have suggested that another reason for the withholding of funds is the amendments to the Child Protection Act adopted by the Hungarian Parliament in 2021, due to the Act's ban on the promotion of homosexuality and sex or gender reassignment practices in schools and among minors in general, which the Commission sees as a form of discrimination against LGBTQI people. The President of the European Commission, Ursula von der Leyen, declared in June 2021 that "*this proposed law is a disgrace*" and, following its adoption, the Commission launched an infringement procedure under Community law in respect of this law. On 8 July 2021, the European Parliament, in its resolution "Breaches of EU law and of the rights of LGBTIQ citizens in Hungary as a result of the legal changes adopted by the Hungarian Parliament", *"calls on the Commission and the Council to carefully analyse every measure outlined in the draft Hungarian Recovery and Resilience Plan and to only approve the plan if it is established that it would not contribute to implementing the Law [on protection of children], and subsequently lead to the EU budget actively contributing to breaches of fundamental rights in Hungary*".

Questioned on 17 November at a meeting of the European Parliament's working group on the Recovery and Resilience Fund, Céline Gauer, Director General of the European Commission's Task Force for Recovery and Resilience, acknowledged that in the case of Poland, unlike other countries, the Commission had not issued recommendations for the fight against corruption. For Hungary, on the other hand, Céline Gauer said at a meeting organised by the Politico media outlet in November : "*There are a number of aspects (...) that are very relevant to the issue, such as the need to tackle corruption, the need for greater transparency in the decision-making process, and to have [an] effective judicial system"* She added: " *We are checking these elements because we are doing so on the basis of the law. (...) But it really is a rigorous and legal process, because I think we have to respect the rule of law and practice what we preach*", adding that countries "*are not required to deal with all country-specific*

recommendations, but with a significant subset [of those recommendations]".

Nevertheless, it has to be said that the European Commission takes a very broad view of the legal basis enabling it to hold back European funds, it as it did in autumn 2021, and in particular the recovery plan funds, the allocation of which depends on a positive assessment by the Commission of the national recovery plans, which must then be approved by the EU Council. This vision had already been laid out in June 2020 by Justice Commissioner Didier Reynders in a webinar[1]: " *The aim is not to punish Member States, but to protect the EU budget against corruption and fraud. To achieve this, a Member State must have independent judicial systems, effective investigation and prosecution services, and properly functioning public authorities allocating European funds. When this is not the case, when we find widespread deficiencies in the rule of law in a Member State, we have proposed to give the Union the possibility of suspending, reducing or restricting, in a proportionate manner, access to EU funding.* "

In the same way as for the organisation and operation of the justice system, the Commission seems ready to use all the instruments at its disposal, so including financial blackmail by means of a very broad interpretation of the criteria for allocating European funds, including those of the Next Generation EU recovery plan, since, as mentioned above, in June 2021, the President of the Commission herself declared in response to the Hungarian law on the protection of children, which prohibits the promotion of homosexuality and sex or 'gender' reassignment practices among minors:

"*This Hungarian bill is a shame. I have asked my responsible Commissioners to write a letter to the Hungarian authorities outlining our legal concerns before the bill comes into force. It discriminates people on the basis of their sexual orientation & goes against the EU's fundamental values. It's about human dignity, equality and fundamental rights. We will not compromise on these principles, and I have said it before and I want to say it again: I firmly believe in a European Union where you are who you want to be. And I firmly believe in a European Union where you are free to love whoever you want. And I believe in a European Union that embraces diversity. It's the foundation of our values. I will use all the legal powers of the Commission to ensure that the rights of all EU citizens are guaranteed. whoever you are and wherever you live*[2]. "

For Poland too, the issue of LGBT rights may play a role in the attitude of the European Commission under the guise of respect for the general principles set out in Article 2 of the Treaty on European Union. In July 2020, the European Commissioner for Equality, Helena Dalli, wrote on her Twitter account: "*European values and fundamental rights must be respected by Member States and state authorities. This is why 6 town twinning*

[1]Keynote speech by Commissioner Reynders at the webinar with the Institute of International and European Affairs, Dublin, 17 juin 2020 (https://ec.europa.eu/commission/commissioners/2019-2024/reynders/announcements/keynote- speech-commissioner-reynders-webinar-institute-international-and-european-affairs-dublin_en)
[2]Press conference by the President of the European Commission on 23 June 2021 (source : https://twitter.com/vonderleyen/status/1407633592746971141)

applications involving Polish authorities that adopted 'LGBTI free zones' or 'family rights' resolutions were rejected." What is striking is the arbitrariness of the decision, which is not based on a court ruling, and which also displays media manipulation, since what Commissioner Dalli called "LGBTI-free zones" (as the President of the European Commission herself has done on several occasions) are in fact Polish local authorities that have adopted resolutions in which they undertake not to promote what they describe as LGBT ideology within the scope of their powers. These resolutions, which have no legal effect as they are merely declarations of intent, do not, however, provide for any discrimination on the grounds of sexual orientation or even any prohibition on LGBT associations operating within the territory of these authorities.

In September 2020, the European Commission published its first annual report on the state of the rule of law in the 27 Member States of the European Union, as part of a new "European mechanism for the protection of the rule of law" sought by the Commission and the European Parliament for the 27 Member States. In this first report, the Commission explained that " *The rule of law mechanism is one element of a broader endeavour at EU level to strengthen the values of democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. It will be complemented by a set of upcoming initiatives including the European Democracy Action Plan, the renewed Strategy for the Implementation of the Charter of Fundamental Rights, and targeted strategies to address the needs of the most vulnerable in our societies to promote a society in which pluralism, non-discrimination, justice, solidarity and equality prevail.*"

Under these conditions, are Poland and Hungary not right to fear that the conditionality mechanism adopted by the European Council in December 2020, which is intended to make the payment of European funds conditional on respect for the rule of law and the values listed in Article 2 of the Treaty on European Union - in principle only insofar as failure to respect them would have implications for the proper use of European funds - not in fact being used as blackmail to impose surrenders of sovereignty not provided for in the Treaties or societal changes not desired by a majority of voters in these two countries?

The European Commission's definition of the rule of law, as set out in Commission Recommendation (EU) 2018/103 on the rule of law in Poland:

Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ('Venice Commission') provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

(...)

Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

The proper functioning of the rule of law is also essential in particular for the seamless operation of the Internal Market because economic operators must know that they will be treated equally under the law. This cannot be assured without an independent judiciary in each Member State

In the declarations and documents of the European institutions, the idea of the limits of the rule of law is not well defined and is often confused with the even vaguer notion of "European values", and the whole concept, which is supposed to be described in Article 2 of the Treaty on European Union, is understood in different ways. We should also note that the European Parliament resolution of 17 September 2020 on the proposal for an EU Council decision on the determination of a clear risk of serious breach of the rule of law by the Republic of Poland "*Calls on the Council and the Commission to refrain from narrowly interpreting the principle of the rule of law, and to use the procedure under Article 7(1) TEU to its full potential by addressing the implications of the Polish government's action for all the principles enshrined in Article 2 TEU, including democracy and fundamental rights;*". The adoption of this resolution was an obligatory step in the procedure launched in December 2017 by the European Commission under Article 7 of the Treaty on European Union, and the report on which this resolution is based is a perfect illustration of the fluctuating and largely ideological nature of the values of Article 2 of the TEU, since the European Parliament includes in its list of fundamental rights, among other things, "*sexual and reproductive health care and related rights*". This would include the right to abortion, which is not however recognised under international law and does not fall within the remit of the European Union. This notion of the right to abortion, which Hungary was accused of not fully guaranteeing (even though abortion is authorised and accessible up to the 12th week of pregnancy), was also found in the report on a proposal inviting the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, also known as the 'Sargentini' report (named after the rapporteur), which led to the European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, of the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. Worse still, this report by the

European Parliament's Committee on Civil Liberties, Justice and Home Affairs (the LIBE Committee) criticised Hungary for its new constitution of 2011, which "*gives a definition of the family that revolves around marriage and partner-child relationships, a definition that is obsolete and based on conservative beliefs*", " *while marriage between same-sex couples is prohibited*". This is just one of many examples of the constant confusion, in Brussels' conflicts with Hungary and Poland, between the rule of law, "European values" and the political and ideological views of the people involved in these conflicts.

Abortion as a European value

In 2011, as part of its pro-birth policy, Hungary launched a campaign to encourage parents who did not wish to keep their child to give it up for adoption. Posters with a photo of a human foetus read: "*I can understand that you're not ready for me right now, but please think about it and allow me to be adopted. Let me live!"* The European Commission has demanded the reimbursement of European funds from the Progress programme allocated to this anti-abortion campaign after French Socialist MEP Sylvie Guillaume questioned the European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding on the grounds that using European funds to finance an anti-abortion campaign was contrary to EU values. European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding on the grounds that using European funds to finance an anti-abortion campaign was contrary to EU values.

In its resolution of 24 June 2021 on the situation concerning sexual and reproductive health and rights in the European Union, the European Parliament now refers to "abortion care" to which every woman should be entitled as part of her fundamental right to healthcare. Poland is once again singled out in this resolution, which follows on from several other European Parliament resolutions condemning the October 2020 ruling by the Polish Constitutional Court declaring abortion on the grounds of a diagnosis of a congenital anomaly or serious and incurable disease of the unborn child to be contrary to the 1997 Constitution.

These societal accusations could be contrasted with the response given to the European Parliament by Hungarian Prime Minister Viktor Orbán at the beginning of 2012, when his government was already under heavy fire from the Commission and the European Parliament: "*Our political community must realise that the ideas we represent are unfortunately not supported by a majority, including in this House. There is no doubt that our ideals are Christian. They are based on the responsibility of the individual, positive national feelings are important to us and we see the family as the foundation of the future. Many may have a different view of these issues, but that doesn't change the fact that our position remains European. We may be in a minority with these ideals in Europe, but these opinions are still European and we have the right to defend our beliefs. You may not agree with the phrase I'm going to quote to you now, but personally I agree with Schuman when he said that European democracy will be Christian or it won't exist. And that too is a European point of view*[3]! "

[3]Source: *Napastnik*. *Opowieść o Viktorze Orbánie* (A striker. A story of Viktor Orbán) by Poland's Igor Janke.

The aim of this report will therefore be to attempt to distinguish between ideological disputes and disputes that genuinely concern the need to respect the rule of law and democratic principles, by defining the subject of the conflicts that have developed between the institutions of the European Union and the conservative governments of Budapest and Warsaw, and by examining the causes and consequences of these conflicts.

First part
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Inventory of ongoing conflicts (autumn 2021)

1. The procedure under Article 7 of the Treaty on European Union

A. What is the Article 7 procedure?

Until it was triggered against Poland in December 2017 by the European Commission and then against Hungary in September 2018 by the European Parliament, the Article 7 sanction procedure brought in under the Lisbon Treaty had never been used before. As stated in paragraph 1 of Article 7, " *On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply* "

This is the stage at which the proceedings against the two countries were still pending at the end of 2021: The ball is in the court of the EU Council, which can act by a majority of four-fifths of its members - the approval of the European Parliament having already been obtained, including for Poland in September 2020 - to establish the existence of a clear risk of a serious breach of the values referred to in Article 2[4].

Once this stage has been completed by a four-fifths majority, which had still not been done by the end of 2021, the European Council may, if appropriate, "*declare the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting that Member State to submit any observations on the*

[4]Article 2 of the Treaty on European Union:
" *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"

matter" However, to do so, the European Council must act "*unanimously on a proposal by one third of the Member States or the European Commission and after obtaining the consent of the European Parliament* ". "Unanimity" here means all EU countries except the country covered by the Article 7 procedure.

As the European Union has from the outset inaugurated the use of this procedure against two Member States, unless there is a change of parliamentary majority and government in one of them, it is clear that this unanimity is impossible to obtain since they have promised each other mutual support. However, a number of other countries, notably the former Eastern European countries, which fear they could be the next targets, indicated that they consider this procedure inappropriate at this stage.

For this reason, Article 7 has sometimes been described by critics of Poland and Hungary as excessive, as a "nuclear option" or an inappropriate "legal nuclear bomb". And with good reason, as paragraph 3 of that Article states: "*Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State."* More than the lack of substance in the accusations levelled at the two countries, it is this, according to the critics of the Budapest and Warsaw governments, that explains why the EU Council is reluctant to additionally follow up the procedures initiated by the Commission and Parliament.

This is why these critics wanted the introduction of the conditionality mechanism, or Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget[5], which is a way, if used in the way that Commissioner Helena Dalli did in refusing funds to Polish local authorities that had adopted a family charter that did not meet the demands of the LGBT lobby, to sanction an EU country by circumventing the unanimity rule laid down in the Treaty with lighter and therefore more easily applicable sanctions. These sanctions consist not in depriving the sanctioned country of its voting rights in the Council, but in suspending payments of European funds to that country, as was already the case in autumn 2021 when the European Commission suspended payments to Poland and Hungary under the Next Generation EU recovery plan.

[5]Regulation of the European Parliament and of the Council of 16 December 2020. The text of this regulation is available at the following address https://data.consilium.europa.eu/doc/document/PE-64-2020-INIT/en/pdf

B. The purpose of the Article 7 procedure

1) Poland

As far as Poland is concerned, the Article 7 procedure was initiated by the European Commission on 20 December 2017, following the adoption by the Polish Parliament of three major reforms of the judiciary system: reform of the ordinary courts, reform of the Supreme Court (which is a court of cassation) and reform of the National Judicial Council. The procedure was triggered by a recommendation from the European Commission to the Council. This is Commission Recommendation (EU) 2018/103 of 20 December 2017 on the rule of law in Poland supplementing recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

The Commission's main objections against Poland, as set out in its latest recommendations, which preceded the transmission of the case to the EU Council in accordance with Article 7 paragraph 1 of the TEU that is, recommendations (EU) 2017/1520 of 26 July 2017 and (EU) 2018/103 of 20 December 2017) are as follows:

1) "*Lack of independent and legitimate constitutional review*": the Commission considers that the Polish Constitutional Court, in its current composition, is not legitimate, for three main reasons:
    a. The dispute over the appointments of three out of fifteen judges to the Polish Constitutional Court broke out in 2015, after the previous parliamentary majority changed the law to appoint five judges in advance to replace judges whose terms of office were due to expire in November and December 2015, while parliamentary elections were due to be held in October. The new majority cancelled these five appointments and appointed five new judges in their place, and then refused to take account of the Constitutional Court's ruling recognising the validity of three of the five previous appointments.
    b. The successive laws adopted by the Polish Parliament between December 2015 and the end of 2016 to reform the Constitutional Court, including the one that led to a modified procedure for the appointment of the new President of the Constitutional Court in December 2016 on the expiry of the previous President's term of office, which the Commission considers illegitimate.
    c. The Polish government's failure to publish certain decisions of the Constitutional Court taken in 2016 in breach of the law in force concerning the Constitutional Court, as recently adopted by Parliament.

On this basis, the Commission seems to have considered itself as the body for constitutional monitoring of the laws passed by the Polish Parliament, since it pronounces in its recommendations on the constitutionality of these laws and refuses to recognise the validity of the judgments handed down by the Polish Constitutional Court. As a result, the Commission apparently considers itself empowered to give an opinion on all laws passed by the Polish Parliament, regardless of the competences entrusted to the EU by the signatory states of the Treaty on European Union and the Treaty on the Functioning of the European Union.

Extract from the Commission Recommendation of 26 July 2017

"*The Commission considers that the independence and legitimacy of the Constitutional Tribunal have been seriously compromised and that, as a result, the constitutionality of Polish laws can no longer be effectively guaranteed. This situation is particularly worrying for the respect of the rule of law since, as explained in the previous Recommendations, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament, such as a new Civil Service Act, a law amending the law on the Police and certain other laws and laws on the Public Prosecution Office , a law on the Ombudsman and amending certain other laws, a law on the National Council of Media and an anti-terrorism law. Moreover, the adverse impact on the rule of law of the lack of an independent and legitimate constitutional review in Poland is now seriously aggravated by the fact that the constitutionality of the new laws relating to the Polish judicial system [...] can no longer be verified and guaranteed by an independent constitutional tribunal.* "

2) The use of auxiliary judges to make up for the shortage of judges and the possibility of these judges carrying out the duties of single judge in district courts, under the 2017 Law on the National School of Magistrates and Public Prosecutors, which implemented, with certain modifications, the return of auxiliary judges provided for by a law of July 2015, and therefore adopted by the previous majority: the European Commission considers that the re-establishment of the administration of justice by auxiliary judges appointed by the Minister of Justice and destined to become judges on the recommendation of the National Council for the Judiciary and appointment by the President of the Republic after a period of four years does not guarantee the independence and impartiality of the courts in which they practise.
3) The possibility for the Minister of Justice, under the law on the organisation of the ordinary courts of July 2017 and for a period of six months from the entry into force of the said law, to dismiss and appoint the court presidents of the ordinary courts without the possibility of the National Council of the Judiciary (KRS) blocking his decisions. After this six-month period, the Minister of Justice can appoint the court presidents of the ordinary courts and also dismiss them, but the KRS can block these decisions by a two-thirds majority of its members.
4) The retirement age for judges, set at 65 for men and 60 for women in order to bring it into line with the general retirement age in force in Poland, was deemed discriminatory by the European Commission, and Poland consequently amended its law to raise the retirement age to 65 for all judges, regardless of gender.

5) The possibility, following the lowering of the retirement age for judges from 67 to 65, of continuing to work until the age of 67 with the agreement of the Minister of Justice, which the Commission sees as an instrument of pressure on judges from the government. The law of July 2017 was then amended and it is the National Council of the Judiciary (KRS) that can authorise a judge to continue to sit on the bench after the age of 65.
6) The replacement of Supreme Court (Court of Final Appeal) judges who have reached or exceeded the new retirement age, including the first sitting president when the new law was passed in 2017, with the possibility for judges who have reached the new retirement age to request an extension of their term of office from the President of the Republic. The judges concerned were able to return to the Supreme Court (where they have security of tenure until retirement age) and the first sitting president was able to complete her six-year presidency enshrined in the constitution after the vote on an amendment that took account of the Commission's comments. A ruling by the CJEU in November 2019 finally found in favour of the Commission, but had become irrelevant. At the beginning of December 2021, the Commission terminated its procedure concerning the retirement age of Supreme Court judges.

The return of Communist judges under pressure from the EU

The amendment to the law altering the retirement age of judges, ratified in December 2018 by President Andrzej Duda, reinstated the judges of the Supreme Court (SN) and the High Administrative Court (NSA) who had retired following the reduction in the retirement age from 70 to 65. Two days before the municipal and regional elections in October 2018, the Court of Justice of the European Union had issued a suspensive decree requiring the judges to be reinstated pending a ruling on the merits of the case. A number of former Communist judges were offered the chance to sit on Poland's highest judicial bodies for a few more years, such as Judge Iwulski, Dean of the Supreme Court, who in the 1980s handed down several judgments against dissidents under the state of siege laws..

7) The institution of the Extraordinary Review Chamber introduced by the Supreme Court Act of December 2017, which allows for the review of any final judgment handed down by a Polish court during the previous twenty years, for a period of three years (since extended in view of the flood of applications and the lengthening of processing times due to the Covid-19 pandemic) from the date on which the law came into force. In the opinion of the European Commission, this possibility, which is intended to allow the reversal of particularly shocking judgements handed down in the post-Communist period by a justice system that was often corrupt or incompetent, calls into question "*the principle of legal certainty, which is an essential element of the rule of law*".

Extraordinary Review Chamber

The new institution of extraordinary review, as described by the Commission itself in its recommendations of 20 December 2017:
"The law introduces a new form of judicial review of final and binding judgements and decisions: the extraordinary review. Within three years of the law coming into force, the Supreme Court will be able to annul in whole or in part any final judgment handed down by a Polish court in the last twenty years, including judgments handed down by the Supreme Court, with a few exceptions. The power to lodge a review lies mainly with the public prosecutor and the ombudsman. The grounds of appeal are broad: an extraordinary review may be lodged if it is necessary to guarantee the rule of law and social justice and if the judgment cannot be set aside or amended by other extraordinary remedies, and 1) it violates the principles or the rights and liberties of individuals and citizens provided for in the Constitution; or 2) it constitutes a manifest violation of the law based on misinterpretation or misapplication; or 3) there is a clear contradiction between the court's findings and the evidence gathered."

8) The new disciplinary process for Supreme Court judges and the creation of a Disciplinary Chamber at the Supreme Court, for disciplinary cases concerning Supreme Court judges and as the court of last instance for disciplinary cases concerning judges of the ordinary courts. As the judges of this new disciplinary chamber were appointed by the reformed National Council of the Judiciary (KRS), which, according to the Commission, is politicised, they are considered not to be independent of the political power, even though the judges of this new disciplinary chamber are in fact irremovable until retirement age under the Constitution (unless a new law amending the organisation of the Supreme Court is adopted, which would entail the abolition of certain categories of judges).
9) The creation at the Supreme Court of two new chambers, the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs (for handling the new extraordinary review procedure), comprised for the most part of new judges appointed by the President of the Republic based on the proposals of the reformed National Council of the Judiciary, which, in the opinion of the Commission, leads to political influence of the executive power and the parliamentary majority on the Supreme Court.
10) The reform of the National Council of the Judiciary (KRS) in December 2017: in the opinion of the European Commission, the new method of appointing the fifteen judges who are members of the KRS, now elected by the Sejm rather than by their peers, does not guarantee the independence of the body that oversees the judiciary and does not meet European standards. The KRS has twenty-five members in all: the First President of the Supreme Court, the President of the Superior Administrative Court (NSA), the Minister of Justice, one member appointed by the President of the Republic, four members chosen by the Sejm from among the deputies, two members appointed by the Senate from among the senators, and fifteen members appointed from among the judges of the Supreme Court, the ordinary courts, the administrative courts and the military courts. The Polish Constitution leaves it up to the legislator to decide how these fifteen KRS judges are appointed, and it should be noted that in Spain too, since the 1980s, the magistrates who are members of the General Council of the Judiciary (CGPJ) are chosen by Parliament. But for the Commission, the European standard in this area is the one set out in December 2017 in relation to Poland by the Venice Commission,

which is however only an advisory body to the Council of Europe. The Venice Commission's opinion corresponds to a recommendation of the Committee of Ministers of the Council of Europe dating from 2010 and which the Commission is clearly seeking to make mandatory within the EU since it wrote in its recommendation of 20 December 2017 by which it triggered the Article 7 procedure against Poland: "*Well-established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, provide that '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'. It is up to the Member States to structure their judicial systems, and in particular to decide whether or not to set up a judicial council. However, where such a council has been set up, as is the case for Poland, its independence must be guaranteed in compliance with European standards.*"

11) Still concerning the Polish KRS, the Commission criticises the Polish reform for having shortened the term of office of a certain number of KRS judges in order to comply with a 2017 ruling by the Polish Constitutional Court that the law in force before the PiS reform, which permitted the appointment of KRS judges to individual terms of office, did not comply with the Constitution, as the four-year term of office of KRS members should, according to the Constitutional Court, be handled collectively. The next renewal of the KRS was scheduled for 2022.

After the questioning of the legitimacy of the Polish Constitutional Court following the internal Polish conflict that took place around this institution in 2015-2016, the accusation that the National Council of the Judiciary is subservient to political power is the second cornerstone on which the Commission, the European Parliament and the Court of Justice of the European Union base their arguments to justify their interference in the organisation of the Polish judicial system. The Polish KRS is the constitutional body responsible for overseeing the independence and impartiality of judges and proposing judicial appointments to the President of the Republic. It can also block the dismissal of presidents of ordinary courts by the Minister of Justice and refer a case to the Constitutional Court if a law should call into question the independence and impartiality of the judiciary.

As stated in the Commission's recommendation that the Council initiate the penalty procedure under Article 7 of the Treaty on European Union, " *For the reasons set out above, the Commission considers that the concerns expressed in the Rule of Law Recommendation of 26 July 2017 relating to the laws on the Supreme Court and the National Council for the Judiciary have not been addressed by the two new laws on the Supreme Court and the National Council for the Judiciary.*

Furthermore, the Commission observes that none of the other concerns set out in the Recommendation of 26 July 2017 relating to the Constitutional Court, the law on Ordinary Courts Organisation and the law on the National School of Judiciary have been addressed.

Consequently, the Commission considers that the situation of a systemic threat to the rule of law in Poland as

presented in its Recommendations of 27 July 2016, 21 December 2016, and 26 July 2017 has seriously deteriorated further. The law on the National Council for the Judiciary and the law on the Supreme Court, also in combination with the law on the National School of Judiciary, and the law on the Ordinary Courts Organisation significantly increase the systemic threat to the rule of law as identified in the previous Recommendations ".

This recommendation was therefore accompanied by a reasoned proposal in accordance with Article 7(1) of the Treaty on European Union concerning the rule of law in Poland[6].

2) Hungary

In the case of Hungary, the Article 7 procedure was triggered not by the European Commission but by the European Parliament, which adopted a resolution to this effect in September 2018 on the basis of the Sargentini report. It is therefore in this report that we must look for the argument in favour of the Council's finding that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. As for the Commission's criticisms, which are nonetheless more factual and less ideological than those made by the European Parliament, they can be found in the chapter devoted to Hungary in the Commission's 2021 annual report on the rule of law.

The European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, sets out the following arguments in support of its proposal:

1) The new Hungarian constitution adopted in 2011 replaces the old constitution of 1949, which dated from the Stalinist communist era and had only been amended since then :According to the European Parliament, which relies on the statements of the Venice Commission, the Council of Europe's advisory body, the problem with the adoption of the new Hungarian constitution, the Fundamental Law, was " *the lack of transparency of the process, the inadequate involvement of civil society, the absence of sincere consultation, the endangerment of the separation of powers and the weakening of the national system of checks and balances* ".
2) The limitation of the powers of the Constitutional Court under the new Constitution, " *including with regard to budgetary matters, the abolition of the* actio popularis*, the possibility for the Court to refer to its case law prior to 1 January 2012 and the limitation on the Court's ability to review the constitutionality of*

[6]Proposal for a Council Decision of 20 December 2017 on the determination of a clear risk of serious breach of the rule of law by the Republic of Poland (https://eur-lex.europa.eu/eli/reco/2018/103/oj/eng?https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52017PC0835&from=EN)

any changes to the Fundamental Law apart from those of a procedural nature only ".

3) The creation, with the constitutional reforms, of the post of President of the National Office for the Judiciary (OBH), appointed by the National Assembly, which is Hungary's unicameral parliament, and taking over some of the powers of the National Judicial Council (OBT, the name of which in Hungarian also translates as National Council of the Judiciary), whose members are judges elected by their peers. As stated in the European Parliament resolution, " *the President of the ONJ [OBH] is, inter alia, able to transfer and assign judges and has a role in judicial discipline. The president of the NJO also makes a recommendation to the President of Hungary to appoint and remove heads of courts, including presidents and vice-presidents of the Courts of Appeal.*" As the chapter on Hungary in the European Commission's 2021 report on the rule of law in the EU states: " *The Fundamental Law tasks the President of the National Office for the Judiciary (OBH), elected by Parliament, with the central administration of the courts. The National Judicial Council is an independent body, which, under the Fundamental Law, supervises the NOJ President and participates in the administration of the courts. Judges are appointed by the President of the Republic following a recommendation of the OBH President based on a ranking of candidates established by the local judicial councils (composed of judges elected by their peers) The OBH President cannot deviate from this ranking without the prior consent of the National Judicial Council.*"

   As mentioned above in relation to the criticism levelled at Poland, the European Commission now considers, even though such a standard has never been met in all EU Member States and is not covered by the Treaties or even EU legislation, that, where a country has a judicial council, "*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*". From Brussels' point of view, the problem is that the powers of the National Judicial Council are exercised by a National Office for the Judiciary whose president is appointed by Parliament by a two-thirds majority for a nine-year term, on a proposal from the President of the Republic. Like Parliament, the Commission, in its report on the rule of law in support of Parliament's arguments in favour of a sanctions procedure under Article 7, refers in this matter to the recommendations and criticisms of the Venice Commission , which is, however, officially only a consultative body of the Council of Europe.

4) In its resolution, the European Parliament notes that Hungary has taken note of the judgment of the Court of Justice of the EU in November 2012 that the lowering of the retirement age for judges to 62 (a measure designed, like the one adopted in Poland in 2017, in particular to rid the country of old judges who had handed down judgments during the Communist dictatorship) should be abolished and that it has modified its law "*to make its retirement legislation compatible with EU law*". However, the European Parliament resolution notes that "*in its October 2015 report, the Human Rights Institute of the International Bar Association reported that a majority of judges dismissed had not returned to their original posts, partly*

because their previous posts had already been filled. It also pointed out that the independence and impartiality of the Hungarian judiciary cannot be guaranteed and that the rule of law remains weakened".

5) The shortening of the term of office of the President of the Supreme Court (Court of Cassation) as a result of the replacement of this court by the Kúria as part of the 2011 constitutional and judicial reforms .
6) The shortening of the Data Protection Commissioner's mandate as a result of their replacement by a national data protection and freedom of information authority from1 January 2012. In April 2014, the CJEU ruled against Hungary, taking the view that the independence of the supervisory authorities necessarily meant that they had to be allowed to exercise their mandate until the end of its term, in accordance with the main principles governing the EU.
7) The Attorney General's lack of independence, in particular because their mandate is renewable.
8) Issues relating to MEPs' conflicts of interest, which, according to the European Parliament's resolution, are not sufficiently regulated and therefore form part of the European Parliament's arguments in favour of a sanctions procedure under Article 7, as do the inadequate fight against corruption, the excessively high number of public contracts awarded without competitive tendering and the "*high percentage of financial recommendations by OLAF with regard to the Structural Funds and agriculture for the period 2013-2017*".
9) Legal safeguards against secret surveillance of citizens for national security purposes deemed insufficient.
10) The rules applicable to the election of members of the Media Council, which should, according to the European Parliament's resolution of 12 September 2018, be " *amended to ensure a fair representation of the main political and other groups in society*", while "*the method of appointing and the position of the president of the Council or the Media Authority should be reviewed in order to ensure the political neutrality of this person and to reduce the concentration of power in their hands*". Need we add that in France, to take just one example from another EU Member State, the members of the Conseil supérieur de l'audiovisuel (CSA) are appointed on a discretionary basis by the President of the National Assembly, the President of the Senate and the President of the Republic, which does absolutely nothing to "*ensure a fair representation of the main political and other groups in society*"?
11) More generally, the European Parliament is critical of the Hungarian government, mainly on the basis of reports by international organisations and recommendations by the Venice Commission, for undermining freedom of expression and the freedom and pluralism of the media.
12) The "unfavourable climate" accompanying the elections in Hungary, even though "the technical administration" is judged to be "professional and transparent" as well as "impartial". Here too, the European Parliament is relying on an opinion issued by the Venice Commission. For the European Parliament, " *the ability of candidates to compete on an equal footing was considerably undermined by the government's excessive spending on public information advertising, which amplified the message of*

the ruling coalition in power ", and the delimitation of constituencies was not carried out "*in a transparent and professional manner within the framework of an impartial and non-partisan process, i.e. avoiding the pursuit of short-term political objectives* ", which, according to the European Parliament, is apparently a Hungarian specificity!

13) The use of national consultations containing " *assertions and allegations that are factually inaccurate or grossly misleading* ", establishing " *parallels between terrorism and migration* ", "*inciting hatred towards migrants*", or targeting "*in particular George Soros personally and the [European] Union* ".
14) The 2017 Higher Education Act requires foreign higher education establishments (from outside the European Economic Area) offering education in Hungary to also have a campus with teaching activities in their own country.
15) The Hungarian government's abolition of masters programmes teaching gender theory because, in Budapest's view, they were unscientific and purely ideological. In its resolution of 12 September 2018, the European Parliament appears to be deliberately confusing the issue of gender theory with issues relating to sexual equality, renamed "gender equality". Using this lexical acrobatics, where the idea of sexes is replaced by the vaguer notion of "genders", Hungary is falsely accused by the European Parliament of having abolished teaching programmes relating to sexual equality.
16) The 2011 law setting out the criteria for recognition by the authorities of churches and other religious communities, whose criteria would infringe freedom of association and religious freedoms.
17) The Hungarian government's rhetoric deemed hostile to NGOs.
18) The 2017 law requiring NGOs receiving funds from abroad to make this information available to the public
19) The 2018 laws, commonly referred to in the media as the "Stop Soros laws", allowing sanctions on NGOs promoting illegal immigration.
20) Discrimination against women stemming from a " *conservative vision of the family, whose protection is guaranteed as essential to national survival* " and from " *new school textbooks [which] still contain sexist stereotypes, portraying women mainly as mothers and wives* ", as well as the absence of any requirement for parity between men and women in elections.
21) The fact that "*the prohibition of discrimination laid down in the Fundamental Law does not explicitly mention sexual orientation and gender identity among the grounds for discrimination*" and "*the fear that the restrictive definition of the family contained in this text could be a source of discrimination insofar as it does not cover certain types of family structures, in particular same-sex couples*".
22) The reference by the United Nations Human Rights Committee, in its observations of April 2018, to concerns about " *the large numbers of persons with mental, intellectual and psychosocial disabilities who are forcibly placed in medical institutions, held in isolation or subjected to forced treatment [...] reported violence and cruel, inhuman and degrading treatment and about allegations of a high number of deaths*

in closed institutions that have not been investigated."

23) " *the deterioration of the situation as regards racism and intolerance in Hungary, with anti-Gypsyism being the most blatant form of intolerance, as illustrated by distinctively harsh manifestations, including violence targeting Roma people and paramilitary marches and patrolling in Roma-populated villages*", a statement taken from the December 2014 report by the Council of Europe's Commissioner for Human Rights, which in fact described a situation that pre-dated Fidesz's return to power and which Fidesz has since put an end to. The European Parliament does, however, note the efforts made by the Hungarian government to combat anti-Semitism and discrimination against the Roma, although it considers these efforts to be insufficient, taking up the Council of Europe's Commissioner for Human Rights' observation of an "*upsurge in xenophobia targeting migrants, including asylum seekers and refugees, and intolerance targeting other social groups such as LGBTI people, the poor and the homeless* ". In passing, the European Parliament's resolution attributes an anti-Semitic character to Prime Minister Viktor Orbán's verbal attacks on the American billionaire of Hungarian Jewish origin, George Soros.

24) Hungary's violation of certain economic and social rights: ban on "street homelessness", excessive restrictions on the right to strike, inadequate social protection for domestic workers and the self-employed, children taken away from their families on the grounds of inadequate social and economic conditions, the proportion of people at risk of poverty and exclusion is falling but is still higher than the EU average.

25) The fundamental rights of migrants, asylum seekers and refugees are being violated by Hungary, as stated by the United Nations High Commissioner for Refugees, the United Nations Working Group on Arbitrary Detention and the Council of Europe Commissioner for Human Rights. These concerns have been reinforced by the 2017 law " *which provides for the compulsory detention of all asylum seekers, including children, for the duration of the asylum procedure*". The European Parliament's resolution of 12 September 2018 also endorses the findings of the Special Representative of the Secretary General of the Council of Europe on "*the violent pushback of migrants and refugees from Hungary to Serbia*", which "*raises concerns under Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR* ", as well as the fact that "*asylum procedures, which are slow in transit zones, do not include sufficient guarantees to protect asylum seekers against pushback to countries where they run the risk of being subjected to treatment contrary to Articles 2 and 3 of the ECHR* ".

It should be noted in passing that Hungary's "muscular" policy to defend its part of the Schengen area's external border against massive attempts by migrants to cross illegally was taken up by Greece in the spring of 2020 and then by Poland, Lithuania and Estonia in the summer of 2021, without the same condemnation from the European institutions, and also that in February 2020 the European Court of Human Rights recognised the legality under the European Convention on Human Rights (ECHR) of the

"hot" pushbacks carried out by Spain at its land border with Morocco in Ceuta and Melilla.

26) "*The automatic return of all asylum seekers to transit zones for the duration of their asylum procedure, with the exception of unaccompanied children recognised as being under the age of 14*" and "*the generalised use of automatic detention of immigrants in detention centres in Hungary"*, as well as " *allegations that restrictions on personal liberty are used as a general deterrent to illegal entry rather than on a case-by-case risk assessment* ".

27) Hungary's refusal to relocate illegal immigrants who have applied for asylum in the EU in accordance with the Council decision of September 2015.

C. European Parliament reports for the Article 7 procedure

(The above comparative analysis of the two reports that served as the basis for the green light given by the European Parliament to initiate the Article 7 sanctions procedure against Poland and Hungary is an updated version of an article by the author of this report published in August 2020 in English on the website of the Institute for Polish-Hungarian Cooperation, Wacław Felczak, under the title "A tale of two very biased reports in the European Parliament: the López Aguilar report on Poland and the Sargentini report on Hungary".)

The Sargentini report on Hungary was adopted by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on 25 June 2018, and subsequently served as the basis for the resolution adopted at the plenary session on 12 September 2018. Hungary challenged the validity of the vote before the Court of Justice of the European Union (CJEU) due to the exclusion of abstentions from the vote count. This exclusion, decided on the day of the vote, was essential to obtain the two-thirds majority required by the European treaties. On 3 June 2021, however, the CJEU rejected Hungary's appeal and declared that the September 2018 vote in the European Parliament was valid [7]. The López Aguilar report on Poland was adopted by the LIBE Committee on 16 July 2020 and served as the basis for the resolution adopted on 17 September 2020 by the European Parliament conveying Parliament's approval for procedure 7 initiated in December 2017 by the European Commission.

These two reports on Poland and Hungary are the first in the history of the European Union to have served as a basis for the Article 7 procedure, and it so happens that they have a great deal in common, especially their highly ideological content - with criticisms covering areas that do not fall within the remit of the European institutions (such as the national dimension of the management of illegal immigration, but also gay marriage and abortion), their tendency to call into question all the major reforms introduced by the conservative governments of the two Central European countries, the very left-wing political profile of their authors, and the way in which public consultations were conducted in both countries, with right-wing, conservative and/or Christian organisations almost entirely excluded from the process. In its detailed critique of the Sargentini report in 2018[8], the Hungarian Centre for Fundamental Rights pointed out that if the Article 7 procedure is not pursued

[7]Judgment of 3 June 2021 in Case C-650/18 Hungary v Parliament
(https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-06/cp210093fr.pdf)

[8]The document can be downloaded from http://alapjogokert.hu/wp- content/uploads/2018/09/sargentini_report.pdf

objectively and impartially, then "*legal instruments will be swept aside and become instruments of political pressure*". The López Aguilar report on Poland and the Sargentini report on Hungary clearly show that this prediction has already become reality in the European Parliament.

What do the reports contain?

Both reports express general criticism of the main reforms enacted since 2015 by the united Right coalition led by PiS in Poland, and since 2010 by the Fidesz-KDNP coalition in Hungary.

The Sargentini report against Hungary

The content of the Sargentini report against Hungary is largely taken up in the European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, the main criticisms of which have already been listed above. Among the reasons why, in the view of the author of the report and a majority of MEPs, " *it is necessary to determine, in accordance with Article 7(1) of the EU Treaty, that there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 of the EU Treaty*" we find, for example, *concerns about the constituent process in Hungary, both as regards the Fundamental Law and the amendments that have been made to it*". This refers to the new Hungarian Constitution, which was adopted by a two-thirds majority of the Fidesz-KDNP Parliament in 2011 and came into force on 1 January 2012. When the Sargentini report was adopted in the form of a resolution by the European Parliament, two general elections had been held - in 2014 and April 2018 - since the new Hungarian constitution came into force. The two elections gave Fidesz-KDNP a new two-thirds majority in the National Assembly (Hungary's unicameral parliament). So a clear majority of Hungarian voters seemed to have a very different opinion of their new Fundamental Law to that of the LIBE Committee and the European Parliament. The same applies to other reforms dating from the early 2010s that are criticised in the Sargentini report, such as the new limits imposed on the competences of the Hungarian Constitutional Court following the constitutional reform, and the massive use of national consultations, which would, according to the Sargentini report, induce "*hatred towards migrants*" and target "*George Soros personally and the Union* ". The Sargentini report criticises the creation in 2011 of a National Office for the Judiciary, whose president is elected by Parliament and which has taken over some of the previous powers of the National Judicial Council, whose members are judges elected by their peers. It also criticises a reform of the public prosecutor's office introduced by a law passed in 2011. The report takes up the objections expressed by the Venice Commission, a consultative body of the Council of Europe, to the Hungarian media laws adopted by Parliament in 2010. It criticises a 2011 law on higher education, in addition to the more recent law passed in 2017 which requires foreign universities operating in Hungary to have a campus in their country of origin, and it continues with the 2011 law on religious freedom and the legal status of churches, and so on. Of course, more recent measures, such as the 2017 law on the transparency of organisations receiving support from abroad and

the 2018 anti-immigration laws known as "stop-Soros", are also criticised in the report and considered as reasons why the European Council should determine, "*in accordance with Article 7(1) of the EU Treaty, that there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 of the Treaty on European Union*". Even the advertising tax introduced by Hungary in 2014 is criticised in the Sargentini report, and can therefore be assumed to be another of the reasons why the European Parliament voted in favour of the Article 7 procedure, although the CJEU subsequently annulled, in June 2019, the Commission's decision finding the Hungarian advertising tax incompatible with EU state aid rules[9].

The Sargentini report also contains general accusations of a supposed "*deterioration of the situation as regards racism and intolerance in Hungary*", in particular against Roma, Jews and LGBTI people. This is an extraordinary statement at a time when Hungary is one of the safest countries in Europe for Jews, and given that Fidesz-led governments have done more than any previous government to integrate the Roma community into Hungarian society, particularly through support for families and schooling for children

.http://abouthungary.hu/news-in-brief/mep-hungary-has-done-a-lot-for-the-integration-of-the-roma-community/

As for the "*paramilitary marches and patrolling in Roma-populated villages*" denounced in the 2018 Sargentini report, on the basis of a 2014 report by the Council of Europe's Commissioner for Human Rights, such a situation existed before 2010, i.e. before the return to power of Fidesz, and had long been a thing of the past by the time the Sargentini report was adopted!

[9]Judgment of the General Court of the European Union of 27 June 2019 in Case T-20/17

Anti-Semitism in Poland and Hungary

As revealed by a 2018 study by the European Agency for Fundamental Rights[10], involving over 16,000 Jews surveyed in 12 European countries: 77% of Hungarian Jews and 85% of Polish Jews consider anti-Semitism to be a problem in their country. Nevertheless, in Europe, Germany, Sweden and the United Kingdom are experiencing the greatest increase in the number of Jews considering emigrating, which shows that the nature of the anti-Semitism suffered by Jews is much more serious in these countries.

This finding is confirmed by a study published in November 2018 by the American Jewish organisation International Center for Community Development[11]. This was the fourth such questionnaire sent to Jewish community and professional leaders in Europe and Turkey, and responses were received in April-May 2018 from 893 such leaders in 29 countries, with the highest response rate from France, Germany, Hungary, the UK, Poland, Italy, the Netherlands, Greece, Spain, Romania, Turkey and the Czech Republic. The survey shows that only 76% of Jews in Western Europe feel safe, compared with 96% of their counterparts in the former Eastern Europe.

"*Jews feel safer in the conservative east of Europe than in the liberal west*", concluded Evelyn Gordon- https://www.commentarymagazine.com/anti-semitism/jews-anti-semitism-europe-east-west/ in the American Jewish monthly *Commentary.*[11] Adding: "*Other studies have shown that Jews are much more likely to suffer physical violence in Western Europe than in Eastern Europe. In 2017, for example, Hungary's 100,000 Jews reported no physical attacks while Britain's 250,000 Jews did.*"

In the same year in Poland, there were 73 anti-Semitic incidents (compared to 101 in 2016), the vast majority of which involved 'hate speech' on the Internet or anti-Semitic graffiti. Of the total, there were only 12 reported cases of insults or threats against Jews and three physical assaults, two of which caused property damage to the victim, but no physical injury.

A special chapter entitled "*Fundamental rights of migrants, asylum seekers and refugees* " is of course reserved in the Sargentini report for the issue of Hungary's strict policies against illegal immigration. If the opinion of the European Parliament's Committee on Women's Rights and Gender Equality had also been taken into account, the resolution adopted on 12 September would also have condemned Hungary for imposing compulsory counselling and a three-day reflection period on women requesting an abortion (in accordance with the law that already existed prior to 2010), as the majority of MEPs on this committee consider that this "*complicates women's access to these health services and stigmatises them*". The Committee on Women's Rights and Gender Equality also wished to add to the report a reference to the " *definition of the family that revolves around marriage and partner-child relationships, a definition that is obsolete and based on conservative convictions*" and to sanction Hungary for banning same-sex marriage (the nature of marriage being enshrined in its Fundamental Law). While these

[10]Study entitled "Experiences and perceptions of antisemitism. Second survey on discrimination and hate crimes against Jews in the EU", available for download at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-

[11]Jews Feel Safer in Europe's Conservative East Than Its Liberal West, Evelyn Gordon, 26 November 2018, in *Commentary* (https://www.commentary.org/evelyn-gordon/jews-anti-semitism-europe-east-west/)

amendments were not included in the final resolution of the European Parliament that launched the Article 7 procedure against Hungary, the López Aguilar report as adopted two years later (in 2020) against Poland does contain demands for the liberalisation of abortion.

[11]Study published under the title "Fourth European Jewish Community Leaders' Survey (2018)", downloadable from the ICCD website (http://www.jdc-iccd.org/publications/fourth-european-jewish-leaders-survey-2018/)

The López Aguilar report against Poland

In fact, in a special chapter entitled "*Sexual and reproductive health and rights*" (which, under the European Treaties, do not fall within the scope of the European institutions), the López Aguilar report criticises a citizens' initiative behind a "*legislative proposal that would ban abortion in cases of serious or fatal foetal malformation*". In the same way that the Sargentini report criticises Hungary for not having ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), the López Aguilar report expresses deep concern that there have been calls within the Polish government for Poland to withdraw from the Istanbul Convention. Thus, the possibility of withdrawal from the Istanbul Convention, which is totally independent of EU law and treaties, is presented in the López Aguilar report, as it was in the Sargentini report on Hungary, as a further reason to call on the Commission to "*use to the full the tools available to address a clear risk of a serious breach by Poland of the values on which the Union is founded, in particular accelerated infringement procedures and requests for interim measures before the Court of Justice, as well as budgetary tools*". And while Hungary was singled out in the Sargentini report for its immigration policy, Poland is heavily criticised in the López Aguilar report for "*declaring areas in Poland to be free of so-called 'LGBT ideology' and adopting 'regional charters of family rights'* ".The report goes on to state that "*the rapporteur deeply regrets that certain regions of the European Union have declared themselves free of ideologies that do not even exist* ". The areas referred to in the López Aguilar report, i.e. Polish territories where local authorities have adopted declarations stating that they do not adhere to LGBT ideology and will not impose it on their constituents within the scope of their powers (which includes the management of schools), or have simply adopted a charter of family rights that does not mention partnerships between people of the same sex (which are not recognised in Poland, where the nature of marriage is enshrined in the constitution as it is in Hungary), are also referred to in the report as "LGTBI-free zones", as if these declarations or this charter included measures to exclude or discriminate against

people on the grounds of their sexual orientation, which is not the case[12]. These declarations or resolutions and this charter are only declaratory and have no legal force. An ideological conflict is underway in Poland, as in other European countries, and the European Parliament is using the Article 7 procedure to take sides in this conflict.

Like the Sargentini report on Hungary, the López Aguilar report on Poland also criticises the most important reforms introduced since the first elections won by the conservative right in 2015, whether or not they fall within the remit of the European institutions. **The reasoning behind this approach is clearly explained in the report itself, where it is stated that "*the scope of Article 7 of the Treaty on European Union is not limited to the areas covered by Union law*", and that "*the Union may therefore assess the existence of a clear risk of a serious breach of the common values referred to in Article 2 of the Treaty on European Union not only in the event of a breach in that specific area but also in the event of a breach in an area in which the member states act independently*".** According to the report, it is in fact "*the facts and trends mentioned in this resolution [that] taken together represent a systemic threat to the values set out in Article 2 of the Treaty on European Union (TEU) and constitute a clear risk of a serious breach of those values*". In other words, as in the Sargentini report, there is no specific action taken by Polish governments and parliamentary majorities since 2015 that could in itself justify activating the sanction procedure provided for in Article 7.sanction procedure provided for in Article 7 and it is only by making a subjective assessment of the whole that one could consider that Poland is violating the values of Article 2. At the same time, it is admitted as a fact in the López Aguilar report that the Council, which is the only body competent to pursue the Article 7 procedure, appears to have a different view on the matter, since it has consistently refused to act on the Commission's "*reasoned proposal of 20 December 2017 submitted pursuant to Article 7(1) of the EU Treaty on the rule of law in Poland*". This is why the López Aguilar report urges the Commission and the Council to "*widen the scope of the Article 7(1) TEU procedure to include clear risks of serious breaches of democracy and fundamental rights, including the rights of persons belonging to minorities* ". Thus, since the Sargentini report, the LIBE Committee's approach to Article 7 procedures has become even more overtly ideological, going so far as to say that "*the latest elements of the ongoing hearings under Article 7(1) of the EU Treaty underline once again the imminent need for a complementary and preventive mechanism of the Union for democracy, the rule of law and fundamental rights*", reaffirming "*its position on the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union budget in the event of widespread failure of the rule of law in a Member State* ".

With regard to the reforms of the Polish judicial system, the López Aguilar report reiterates the position of the European Commission set out above in the section concerning the purpose of the Article 7 procedure in the case of Poland. It also sees fit to wade into the Polish political debate about the date of the last presidential election in

[12]On the subject of these "LGBT ideology-free zones", see the article "Poland: ideological blackmail by the European Commission" published in 2020 on the website of the European Centre for Law and Justice - ECLJ. https://eclj.org/family/eu/pologne--le-chantage-ideologique-de-la-commission-europeenne?lng=fr

the context of the Covid-19 pandemic, criticising the proposal to hold a postal vote on 10 May 2020, when by the time the report was approved by the LIBE Committee such a vote did not take place and the election had been called in the traditional way for a later date, and its results had been recognised by all political parties and candidates involved. While the López Aguilar report accuses PiS-led governments and parliamentary majorities of violating the Polish constitution, as if the European Parliament could act in the place of the Polish Constitutional Court to assess these violations, it also criticises the Polish Sejm (the lower house of the parliament) for having discussed citizens' initiatives in the form of a "*legislative proposal that would ban abortion in the case of serious foetal malformation or birth defects*", even though the Sejm was obliged to do so under the same Polish constitution. Finally, like the Sargentini report against Hungary, the López Aguilar report against Poland makes general statements about problems presented as specific to Poland, in a section entitled "*Hate speech, public discrimination, violence against women, domestic violence and intolerant behaviour towards minorities and other vulnerable groups, including LGBTI people*".

Behind the scenes of the preparation of the reports

For the Sargentini report, there was no official visit by a LIBE delegation, and the rapporteur admits that " *it is difficult to explain to the authorities and citizens of the Member State concerned that Parliament considers that a situation represents a clear risk of a serious breach of the European values enshrined in the Treaties without having taken the trouble to visit the site*". Nevertheless, a majority of MEPs judged that the situation in Hungary presented "*a clear risk of serious violation by Hungary of the values on which the Union is founded*" on the basis of a report mainly based on previous reports by various international and European organisations, including the European Parliament itself, and NGOs, as well as hearings held in Strasbourg, including in the presence of representatives of the Hungarian government. However, as explained by the Hungarian Centre for Fundamental Rights in its critique of the Sargentini report[13], "*the non-governmental organisations listed in the annex to the draft report, which informed Sargentini and LIBE about the 'Hungarian situation' are, with the exception of the Centre for Fundamental Rights, explicitly based on a liberal and fundamentalist human rights ideology or are directly linked to the Open Society network*".

This is very similar to the way the Polish report was prepared, first by British Labour MEP Claude Moraes, and then, after the May 2019 elections to the European Parliament, by Spanish Socialist MEP Juan Fernando López Aguilar, who took over as head of the LIBE committee and as rapporteur under the Article 7 procedure against Poland. For the preparation of the report on Poland, a visit was made to Warsaw in September 2018 by a delegation from the LIBE committee. However, apart from lawyers from the Institute for the Culture of Law Ordo Iuris, a conservative and pro-life organisation, all the other organisations invited to contribute to Claude Moraes'

[13]« Refutation of the top 10+1 erroneous statements of the Sargentini Report », Center for Fundamental Rights (http://alapjogokert.hu/wp-content/uploads/2018/09/sargentini_report.pdf)

report were left-wing, far-left or liberal opposition organisations, including pro-abortion organisations such as *Czarny Protest* (Black Protest) and *Federacja na rzecz- Kobiet i Planowania* (Federation for Women and Family Planning). Furthermore, according to Nicolas Bay MEP of the French Rassemblement National (RN), who was part of the delegation, and according to the subject himself, *Ordo Iuris* lawyer Tymoteusz Zych was constantly interrupted by Dutch Green MEP Judith Sargentini (the author of the 2018 report against Hungary), Italian Communist MEP Barbara Spinelli and British Labour MEP Claude Moraes, who until the May 2019 European elections was the rapporteur for the Article 7 procedure against Poland. These three Members of the European Parliament constantly sought to derail the discussion on the rule of law towards the issue of abortion, even though the regulation of abortion does not fall within the remit of the European Union and therefore has no place in a report whose objective is to vote on whether the European Parliament sees "*a clear risk of a serious breach by a Member State of the values referred to in Article 2*". It should also be noted that the conservative pro-life Polish MEP Marek Jurek was excluded from the delegation at the request of Claude Moraes, by a majority vote in the LIBE Committee. In this particular case, the committee issued an ad hoc rule stipulating that, in order to ensure the impartiality of the procedure, the delegation visiting the country in question should not include a member of parliament from that country. However, this rule ceased to apply when, at the end of September 2021, for the first time in ten years, a delegation from the LIBE Committee visited Budapest to compensate a posteriori for the absence of a visit during the preparation of the Sargentini report under the Article 7 procedure, even though officially the ball was now in the Council's court. The delegation of seven Members of the European Parliament led by Gwendoline Delbos-Corfield, Vice-President of the Greens/EFA Group, included Hungarian MEP Anna Donáth from the Renew Europe Group.

As regards the visit to Warsaw in September 2018, with regard to the 'pluralism and freedom of the media' section, only four journalists, all from left-wing or liberal opposition media, including two from the same media group, Agora, which is fiercely anti-PiS and progressive (it owns the daily *Gazeta Wyborcza* and the radio station *Tok FM* and counts a George Soros fund among its shareholders), were invited to enlighten the LIBE delegation on press freedom in Poland. At the insistence of MEP Nicolas Bay of the Europe of Nations and Freedoms Group, Mr Moraes finally agreed to invite an additional journalist from a conservative media outlet. The choice fell on a journalist from the Catholic daily *Nasz Dziennik*, who was invited to meet the LIBE committee delegation, but only after the meeting with the other media representatives on the afternoon of the last day of the hearings in Warsaw, when half of the delegation - including Moraes himself - had already left for the airport, which was confirmed in person to the author of this report both by MEP Nicolas Bay and by journalist Piotr Falkowski of *Nasz Dziennik*, who was the guest journalist.

The same pattern of operation was repeated in May 2020 by López Aguilar, Moraes' successor as chair of the LIBE Committee and the European Parliament's rapporteur for the Article 7 procedure against Poland, when almost all

the contributors invited to share their views at the special hearings organised to present what became the López Aguilar report were from left-wing or far-left organisations The most striking example is that of a far-left activist who was presented just as a lawyer when she appeared before the LIBE Committee, but who is in fact a member of the "Abortion Dream Team", an organisation that has shocked Poland on several occasions in recent years by running campaigns to convince people that abortion is something "cool", and by illegally helping women to obtain abortion pills by mail or to have abortions abroad. Together with the representative of the Helsinki Foundation for Human Rights, the Abortion Dream Team activist tried to convince the members of the LIBE Committee that the mere fact that contraception is not free in Poland is in itself a violation of civil rights and should lead to sanctions against Poland.

Thus, while Hungary's anti-immigration policy had seemed to be a major motivation behind the criticisms contained in the Sargentini report, Poland's restrictive law on abortion (which dated back to 1993!) also appeared to violate "European values" in the eyes of a majority of MEPs on the LIBE Committee.

The political profile of the rapporteurs

Finally, it is worth saying a few words about the political profile of the rapporteurs, as this helps to explain why the first two reports prepared in the European Parliament with the aim of launching proceedings against two Member States under Article 7 are so clearly motivated by ideological considerations.

Like her Dutch compatriot Sophie in 't Veld of the liberal Renew Europe group, who has chaired the Rule of Law Monitoring Group (ROLMG) within the LIBE Committee since 2018, admitted in 2016 [15] that the choice of target for the Article 7 procedure was highly arbitrary ("*The way things are going, this process is very arbitrary. Why Poland and not Hungary? Why not France, which is in a quasi-permanent state of emergency? Why not Lithuania, which is about to pass an anti-gay law?* ") the Green/EFA MEP Judith Sargentini stated in September 2018 during the LIBE Committee's visit to Warsaw, that if the proceedings against Hungary and Poland are successful, it will then be Slovakia and Romania's turn, according to Polish MEP Marek Jurek, who quoted these words to the author of this report.

Sargentini is on the Open Society Foundations' list of "trusted allies in the European Parliament (2014 - 2019)"[14]

[14] See the document published under the title "Reliable allies in the European Parliament (2014 - 2019)" by Kumquat Consult for the Open Society European Policy Institute.

The 2013 Tavares report

Among its many resolutions criticising the policies of Viktor Orbán's successive governments, the European Parliament had already adopted the "Tavares Report "[19] in early summer 2013. For the Hungarian Minister of Foreign Affairs at the time,

in a number of areas of interest to the George Soros network, including immigration and asylum and minorities. As a Member of the European Parliament, she spoke out very openly in favour of the relocation of illegal immigrants, which Hungary so strongly opposed, even before she was asked to prepare a report on the country at the end of 2017. During the migration crisis in the summer of 2015, Judith Sargentini supported the idea of letting in more immigrants as the key to combating illegal immigration, but also of transferring responsibility for managing migration from the Member States to the EU. Since then, Viktor Orbán's Hungary has been one of the main opponents of such proposals. Parliament did not choose an impartial observer when it entrusted Judith Sargentini with the task of preparing a report on possible violations of the rule of law by the Hungarian government.

As a British Labour MEP and the OSF's "reliable ally" on asylum and immigration, as well as minority and LGBTI rights, Claude Moraes could be expected to be no less prejudiced towards the successive PiS-led Conservative governments in Poland after 2015. And things could only get worse with the Spanish socialist Juan Fernando López Aguilar, also a "reliable ally" in the eyes of George Soros' OSF. As Minister of Justice in José Luis Rodríguez Zapatero's Spain, López Aguilar was one of the main promoters of same-sex marriage in his country, while Poland, like Hungary, enshrined gay marriage in its 1997 constitution.

[15] Statement quoted in the article "EU still shy of 'nuclear option' on values" published on1 June 2016 by the EU Observer website .(https://euobserver.com/institutional/133649) and repeated on 3 June 2016 on the Facebook profile of Sophie in 't Veld (https://m.facebook.com/sophieintveld/posts/10153869599802732?_rdr) the nature of marriage as the union of a man and a woman. In July 2016, three years before he was given the task of completing the European Parliament report on Poland begun by Claude Moraes, López Aguilar published an article in which he attributed a supposed erosion of democracy and a rise in nationalism, far-right tendencies and hate speech across the EU to its enlargement to the countries of the former Eastern bloc, arguing that Poland and Hungary were already the worst examples of this anti-democratic development[15]. A Spanish law professor quoted anonymously (at his express request , for fear of reprisals in Spain) by Polish journalist Małgorzata Wołczyk[16], [17] attributes to Justice Minister López Aguilar a statement made at a dinner with lawyers in Barcelona in 2004 to the effect that Zapatero and the PSOE Socialists "*were not in government to improve things but to carry out a revolution*", that they would "*carry out the revolution through laws that create irreversible fait accomplis* ", and that they were aware that "*governments come and go, but revolutionary social transformation will remain* ". So why has the report on respect for European values and the rule of law in conservative, Catholic Poland been entrusted to this Spanish Freemason who dreams of a new kind of socialist revolution? The answer seems all too obvious, and it's the same as for the decision to entrust the report on conservative, anti-immigration Hungary to a radical female pro-immigration

[15]"El caso de Polonia en la UE: retrocesos democráticos y delestado de derecho y "dilema de Copenague", available at: https://www.researchgate.net/publication/326267697_El_caso_de_Polonia_en_la_UE_retrocesos_democraticos_y_del_estado_de_derecho_y_dilema_de_Copenague

[16]Remarks quoted in the article "Ten, który popsuł Hiszpanię" published in the Polish weekly *Do Rzeczy* in June 2020 and confirmed by the journalist to the author of this report.

[17]European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)

Dutch politician: to leave no doubt as to the outcome of their work, whatever the real situation in Poland and Hungary. During a session of the European Parliament in January 2020, Mr. López Aguilar famously asked Polish opposition MEPs https://dorzeczy.pl/kraj/128081/powinniscie-pomyslec-o-zmianie-lagodnego-podejscia-sikorski-i-sadurski-doradzaja-jak-uderzyc-w-polski-rzad.html a question while being filmed by Polish public television (which the Polish opposition MEPs promptly reminded him of) "*What else can the European Parliament do? What else can you expect from it? Because we've done everything we could.*"

János Martonyi, it was the European left, in particular the French and German left, that was behind the criticism levelled by Brussels. Even then, according to the minister quoted by the Hungarian press agency MTI, political considerations seemed to have taken precedence over legal ones in the approach to the European institutions.

Unsurprisingly, the Parliament's rapporteur, Portuguese MEP Rui Tavares, was a member of the Greens/EFA Group led by former far-left activist Daniel Cohn-Bendit, whose diatribes against Viktor Orbán remain etched in Hungarian memory. He was previously a member of the Confederal Group of the European United Left/Nordic Green Left, which brings together parties of the anti-capitalist, social ecologist and European communist left. On the other side of the argument, Hungarian Prime Minister Viktor Orbán was a dissident before the fall of the Berlin Wall, and since the1990s he has been critical of Hungary's incomplete transition from communist dictatorship to democracy and a market economy, a transition that Fidesz has sought to make more complete and definitive.

D. The new "rule of law" mechanism

On 11 March 2021, the Court of Justice of the EU (CJEU) announced that Poland and Hungary had referred to it the question of the new conditionality regime for the protection of the EU budget in the event of a breach of the principles of the rule of law, often referred to in the media as the "rule of law mechanism" or the "conditionality mechanism". The new mechanism makes the payment of European funds conditional on respect for the rule of law and European values. On 2 December 2021, Advocate General Campos Sánchez-Bordona published his opinion that "*the actions brought by Hungary and Poland should be dismissed* ". Although the CJEU is not obliged to follow the Advocate General's opinion, it usually does, and this opinion therefore gave reason to believe, as early as December 2021, that the new regime would be validated by the Court of Justice of the EU. It is astonishing that the decision to place in the hands of the European Commission an instrument of pressure and blackmail as powerful as this new mechanism of the rule of law should be entrusted to the discretion of unelected judges, known for their propensity to extend the powers of the European Union at the expense of the Member States. If only out of respect for democratic principles, the potential transfer of sovereignty brought about by this new mechanism would undoubtedly have merited a new treaty, as called for by Warsaw and Budapest.

Threat of veto - The Pyrrhic victory of Warsaw and Budapest

Although the Polish and Hungarian leaders claimed victory after the European Council on 10 December, the reality is that for the 2021-27 multiannual financial framework and the Next Generation EU recovery plan, they had finally accepted the new 'rule of law' mechanism that the European Parliament and the European Commission had been wanting for more than two years. Its application will certainly be more limited than the two institutions wanted, but more extensive than what was decided at the July European Council. Under pressure from their peers, lured by the promise of billions of euros in budget subsidies and the recovery plan, Polish Prime Minister Mateusz Morawiecki and his Hungarian counterpart Viktor Orbán signed a text in which the leaders of the 27 countries unanimously accepted the principle of the rule of law mechanism for the first time[20].

[20] This principle is introduced by points 22 and 23 of the Conclusions of the European Council of 17 to 21 July 2020, which read as follows:
« *22. The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU.*

The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law.

23. Based on this background, a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority.

The European Council will revert rapidly to the matter. "

This mechanism is a new instrument that will enable the European Commission to suspend payments to a country that it considers does not respect the rule of law and that this poses a risk to the proper use of European funds, and therefore to the EU's financial interests. In July 2020, Morawiecki and Orbán claimed victory by assuring their

voters that this mechanism could not be applied without a unanimous vote in the European Council. This is also the case for the sanctions procedure under Article 7 of the EU Treaty, which has already been activated by the Commission and Parliament against Poland and Hungary. Their interpretation was not the same as that of the German Presidency of the EU Council in the second half of 2020, nor of the European Parliament.

On 5 November 2020, after several months of negotiation and blocking of the budget and the recovery plan by the European Parliament, the German Presidency finally agreed with the European Parliament on a wording for this mechanism that was halfway between what the Parliament and the Commission wanted and what had been accepted by Poland and Hungary in the European Council in July. Warsaw and Budapest saw this as an instrument of political and ideological blackmail in the hands of the European Commission, and threatened to veto the budget and the recovery plan when the agreement between the German presidency and the Parliament was approved by a qualified majority of Member States at a meeting of ambassadors on 16 November. The veto was finally withdrawn at the European Council on 10 December on the basis of a declaration specifying the application of the new rule of law mechanism. A declaration which forms part of the Conclusions of the European Council of 10 and 11 December 2020[21].

The "guarantees" given by the European Council to Poland and Hungary

The European Council thus specified that the Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union's budget "*must be applied in full compliance with Article 4(2) of the TEU*[21]*, in particular the national identity of the Member States, inherent in their fundamental political and constitutional structures, the principle of conferral of powers, and the principle of proportionality, non-discrimination and equal treatment of Member States*".

Generally speaking, the conclusions of the European Council ensure that the Regulation establishing the 'rule of law' mechanism cannot be implemented until the CJEU has ruled on its legality, if its legality is challenged before the CJEU by a Member State (which Poland and Hungary had promised to do, putting their promise into effect on 11 March). The European Council has made it clear that this mechanism serves only to protect the Union's budget while respecting the law and the principle of equal treatment of Member States.

[21]Conclusions can be downloaded from https://www.consilium.europa.eu/media/47328/1011-12-20-euco-conclusions-en.pdf
It also specified that, in the event of breaches of the rule of law, " *the causal link between these breaches and the negative consequences for the financial interests of the Union must be sufficiently direct and duly established*" and that "*the Regulation does not concern generalised failures*"

In theory, therefore, the demands of the Polish and Hungarian governments have been met, including that of

[21]Article 4(2) of the Treaty on European Union : " *The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*"

being able to submit the legality of the new mechanism to the CJEU.

Nevertheless, as both supporters and critics of this famous mechanism have noted, the conclusions of the European Council of 10 and 11 December, unlike the Regulation of the European Parliament and of the Council of the EU of 16 December 2020, are not a text of European law[22]. Once the moment of promise making is over, the Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union's budget will apply, unless the CJEU effectively challenges its legality in the light of the Treaties despite the opinion of the Advocate General in favour of the new system.

A powerful tool in the hands of the Commission

The definition of the rule of law in the regulation in question is very broad and covers all the principles and values enumerated in general terms in Article 2 of the Treaty on European Union, which reads as follows:

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

It will now officially be up to the Commission to assess compliance in detail, as it claimed when it activated the Article 7 procedure against Poland and supported the same procedure activated by the European Parliament against Hungary.

The new regulations also specify that:

" *The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected*"

The Regulation goes on to state that " *whenever Member States implement the Union* budget [...] *respect for the rule of law is an essential precondition for compliance with the principles of sound financial management*". And continues that the sound financial management of EU funds (from the budget and the recovery plan) requires an independent judiciary, which means that the European Commission has the right to scrutinise the judicial organisation of the Member States, in violation of Article 4 of the EU Treaty, which states that " *competences not conferred upon the Union in the Treaties remain with the Member States* ". The regulation goes even further by

[22]See Article 15(1) of the Treaty on European Union: " *The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.* ***It shall not exercise legislative functions.*** "

detailing the conditions under which the judiciary can truly be said to be independent.

Using the concept of the 'rule of law' for political and ideological ends

This "rule of law" mechanism also appeared at a time when the European Commission had just announced for the first time a "strategy to promote equality for LGBTIQ people in the EU". For example, the premises of this strategy include EU-wide recognition of parenthood with "two fathers" or "two mothers", as decreed in some EU countries that have introduced same-sex marriage. Let's imagine for a moment that a country refuses to recognise birth certificates showing two fathers or two mothers, and that the European Commission, supported by a qualified majority of the Council, considers this to be discrimination, and therefore a flagrant violation of one of the principles of Article 2 of the Treaty on European Union. Let's further imagine that the European Commission and a sufficient majority of the governments represented on the Council then consider that the funds allocated to this country are likely, as a result, to finance policies that discriminate against so-called "homoparental" families. Could this not fall within the scope of "*seriously risk[ing] affecting the sound financial management of the Union budget or the protection of the financial interests of the Union*" due to "*other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union*" referred to in Article 4 of the new Regulation?

Even before the final adoption of the Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, the European Parliament was calling on the Commission to activate the new mechanism against Poland on a variety of grounds, including, for example, Polish legislation on abortion, which was too restrictive in the eyes of a majority of MEPs[23]. As mentioned above, within the EU, the regulation of abortion is an exclusive competence of the Member States. But why not consider, for the purposes of the new mechanism, that the Polish law undermines the equality between women and men referred to in Article 2? Under Article 7 of the EU Treaty, the requirement for all other countries to unanimously sanction a Member State for non-compliance with the rule of law provides effective protection against this type of abusive politically or ideologically motivated interpretation. This protection no longer exists under the new "rule of law" mechanism, since the financial penalty applied by the Commission will only require a qualified majority vote in the EU Council.

A new mechanism that tramples on democracy and the rule of law

It is precisely because it will make it possible to penalise a Member State by circumventing the conditions laid down in Article 7 of the Treaty on European Union that the Council's legal services themselves pointed out, in an[24] opinion issued in 2018 and kept confidential until November 2020, that the new "rule of law" mechanism does not comply with the European Treaties.

Because it carries with it a strong potential for the transfer of sovereignty linked to the power granted to the European Commission to use European funds for blackmail while dispensing with a new treaty ratified according to the democratic procedure of the Member States, it is not absurd to consider that the new "rule of law" mechanism violates democratic rules. Nor is it absurd to consider, as do the Council's legal services, that by

[23]See the European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland.
[24]Legal Service Opinion of 25 October 2018, document 13593/18, Interinstitutional File: 2018/0136(COD)

bypassing the procedures laid down in the Treaties by means of a simple regulation adopted by Parliament and the Council, the "rule of law" mechanism in fact tramples on the rule of law.

However, in his opinion of 2 December 2021, Advocate General Campos Sánchez-Bordona takes the view that "*the regime was adopted on an adequate legal basis, is compatible with Article 7 TEU and complies with the principle of legal certainty*". Ignoring the concerns raised by the drafting of the new regulation in the context of the past and present practices of the European institutions, the Advocate General asserts that " *the purpose of the regulation is to put in place a specific mechanism to ensure the proper implementation of the Union budget where a Member State breaches the principles of the rule of law which jeopardise the proper management of Union funds* ", and that consequently " *the Regulation is not intended to protect the rule of law by means of a repressive mechanism analogous to that of Article 7 TEU, but to establish an instrument of financial conditionality with a view to preserving this value of the Union* ". In response to the criticisms levelled by Poland and Hungary, the Advocate General also considers that " *the Regulation requires a sufficiently direct link between the breach of the rule of law and the implementation of the budget, so that it does not apply to all breaches of the rule of law, but only to those which have a direct link with the implementation of the budget*" and that it therefore constitutes "*financial rules within the meaning of Article 322 TFEU(1)(a)*". The Advocate General also states in his opinion that " *would not authorise the EU legislature to introduce, by means of secondary law, another similar mechanism, [...], which had the same objective of protecting the rule of law and which applied similar sanctions*" but that "*There is nothing to prevent the use of instruments other than that in Article 7 TEU to provide such protection, provided that their essential characteristics differ from those of the instrument in Article 7 TEU*".

The implementation of the new conditionality regime by the Commission and the Council will therefore need to be closely monitored, and in particular the existence of a direct link between the Union's budgetary interests and the situation motivating a suspension of payment of funds by the European Commission. The way in which the Commission used the funds from the Next Generation EU recovery plan from autumn 2021, even before the conditionality regime officially came into force, firstly to put pressure on the Polish Constitutional Court not to uphold the primacy of the Polish constitution over the interpretation’s of the European treaties by the CJEU conferring new powers on the EU in terms of the organisation of justice, and secondly to demand that Poland ignore the ruling of its Constitutional Court of 7 October 2021 affirming this primacy of the constitution and go back on its reforms of the justice system, lead us to fear the worst for the future. The Commission did not in fact establish a direct link between this legal situation and the correct use of European funds by Poland, but only an indirect, general causal link, according to which in the absence of primacy of the judgments of the CJEU over the Polish constitution and in the supposed absence of an impartial and independent judiciary, as conceived by the European Commission, the correct use of European funds cannot be guaranteed.

11. List of proceedings pending before the CJEU

In addition to the procedures launched under Article 7 TEU, the continuation of which still depended at the end of 2021 on a four-fifths vote in the Council which had still not happened after several hearings from Poland and Hungary, among other reasons because a number of countries, notably in the former Eastern Europe, believe that these procedures are in reality part of a political and ideological conflict which could come for them next, the Commission turned to the Court of Justice of the European Union to exert further pressure on Warsaw and Budapest in the areas covered by the Article 7 procedure.

The list below only includes cases in progress in autumn 2021 in these areas.

A. Hungary

Cases still pending in autumn 2021, in the chronological order in which they were launched by the European Commission:

- Formal notice served on Hungary for failure to notify measures transposing Directive 2013/32 on asylum procedures. The Commission launched proceedings in this case back in September 2015, at the height of the 2015 migration crisis.

- Formal notice to Hungary for failure to comply with the judgment of the CJEU of 17 December 2020 on international protection and return procedures. In the judgment in question, the CJEU, at the request of the Commission, ruled that it was contrary to EU law to keep asylum seekers in transit zones at the border with Serbia, where they were not allowed to leave unless they returned to Serbia, as was pushback to the other side of the border of people who had been caught after illegally entering Hungarian territory. The infringement procedure against Hungary was launched in December 2015, in response to the laws adopted by the Hungarian Parliament in July and September 2015 to tackle the wave of illegal immigration and defend the Hungarian part of the Schengen area's external border.

- Infringement proceedings concerning Hungarian legislation on equal treatment and education, namely concerning discrimination, from the Commission's point of view, against Roma children in the field of education. Hungary's formal notice dates back to May 2016.

- Infringement proceedings concerning the Higher Education Act as amended in April 2017, which introduced

new requirements for foreign higher education institutions whose country of origin is not a member of the European Economic Area (EEA), namely the requirement for a bilateral agreement between Hungary and the institution's country of origin and the requirement for the institution to deliver higher education services in its home country. One of the institutions affected by the legislative changes was the *Central European University* (CEU), founded and funded by Hungarian-born American billionaire George Soros. The Commission's formal notice dates back to April 2017.

- Infringement proceedings concerning the law on NGOs benefiting from foreign capital, adopted by Hungary in June 2017. Under this law, NGOs funded from abroad must, above a certain funding threshold (7.2 million forints, or around €24,000 at the time the law was passed), make said funding clear on all the books and brochures they publish, as well as on their website, and must inform the authorities, about the funding received. The Commission's letter of formal notice against Hungary dates back to July 2017.

- Infringement proceedings concerning the law allowing the sanctioning of NGOs facilitating illegal immigration, through their activities in support of asylum and residence applications in favour of immigrants who clearly do not have the right to asylum. This law was adopted as part of what was presented in the media as the "Stop Soros" package of laws, due to the large proportion of pro-immigration NGOs funded by the Open Society Foundations (OSF) of the American speculator of Hungarian origin. The Commission's first warning to Hungary in this regard dates back to July 2018.

- Infringement proceedings concerning the detention of asylum seekers in border transit zones for the duration of the processing of their asylum application, with a first formal notice in July 2019.

- Infringement proceedings concerning new asylum procedures during the Covid-19 pandemic, with first formal notice in October 2019. Under the new procedures, which were subsequently made permanent in response, according to statements by Hungarian leaders, to the CJEU's order to close transit zones at the border (see above), an asylum seeker must apply to a Hungarian embassy outside the EU, which prevents people on Hungarian territory or at the Hungarian border from applying for asylum.

- Infringement proceedings concerning the Child Protection Act adopted in June 2021, which restricts the possibility of giving people under the age of 18 access to content promoting homosexuality or sex or 'gender' reassignment practices and imposes an obligation to include a warning on children's books dealing with LGBT themes. While in its statements to the media the Commission has claimed that LGBT people are discriminated against in violation of the values listed in Article 2 of the Treaty on European Union, in practice, no doubt realising that this accusation of discrimination against people who identify as LGBT is not based on solid grounds, the Commission, as it explained in its press release of 15 July 2021, based the infringement procedure on "*the*

Audiovisual Media Services Directive as regards the standards for audiovisual content and the freedom to provide audiovisual media services, insofar as Hungary has put in place unjustified restrictions that discriminate against persons on grounds of their sexual orientation and which are otherwise disproportionate ", as well as " *the Directive on electronic commerce(in particular the country of origin principle). The law prohibits the provision of services displaying content of different sexual orientations to minors, even if these services originate in other Member States*". As for the obligation to place a warning on books for minors with LGBT content, the Commission claims that it " *infringes the Unfair Commercial Practices Directive* " and that it " *restricts the freedom of expression of authors and publishers of books and discriminates unjustifiably on the basis of sexual orientation*", since, again according to the Commission, " *Hungary has not justified the restriction of these fundamental rights and has not explained how the exposure of children to LGBTIQ content would be detrimental to their well-being or not in their best interests*".

B. Poland

Cases still pending in autumn 2021 in the chronological order in which the European Commission launched the procedures:

- Infringement proceedings concerning the Ordinary Courts Reform Act 2017. The law in question was published in the Official Journal of the Republic of Poland on 28 July 2017 and the European Commission sent a letter of formal notice the following day. " *The main point of this law that concerns the Commission is the discrimination based on gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years)* ", wrote the Commission at the time . Poland reversed this provision in autumn 2017 in order to address this concern of the Commission, which saw it as discriminatory, even though this rule continues to apply to the general pension scheme. But the Commission was also concerned about the power given to the Minister of Justice, who is also the Attorney General, to dismiss the presidents of the courts (a discretionary power granted for a period of six months, after which the National Judicial Council acquired the power to block these decisions).

- Infringement proceedings concerning the Supreme Court Act 2017. As with the ordinary courts, there is also the issue of retirement age, with the lowering of the retirement age from 70 to 65 forcing 27 of the 72 Supreme Court judges to step down and shortening the six-year term of office of the first President of the Supreme Court. On this point too, the Polish Parliament amended the law to satisfy the Commission, exempting from the application of the law judges who had already reached the age of 65 at the time the law was published and allowing the first president to complete her term of office at the head of the Supreme Court. However, the Commission continued with the procedure and in December 2021 the CJEU ruled in favour of the Commission in this case, which had become moot. The Commission's first letter of formal notice against Poland was issued in July 2018.

- Infringement proceedings concerning the new disciplinary regime for judges. In the Commission's view, "*Polish law allows ordinary court judges to be subject to disciplinary investigations, proceedings and ultimately sanctions, on the basis of the content of their judicial decisions. In addition, the new disciplinary system does not guarantee the independence and impartiality of the Supreme Court's disciplinary chamber which reviews decisions taken in disciplinary proceedings against judges. The disciplinary chamber is composed solely of new judges selected by the National Judicial Council, whose member judges are now appointed by the lower house of the Polish Parliament.*"

Among the other criticisms levelled at Poland in the context of this procedure launched in April 2019, with referral to the CJEU in October 2019, " *the new disciplinary regime makes it possible to subject judges to disciplinary*

proceedings on account of the content of their judicial decisions, and in particular decisions to refer a question to the Court of Justice for a preliminary ruling. Given that judges are not immune from disciplinary sanctions when they exercise this right enshrined in Article 267 TFEU, the new regime creates a dissuasive effect as regards recourse to this mechanism". On 14 July 2021, the CJEU issued a second interim order requesting the suspension of the operation of the Supreme Court's Disciplinary Chamber. On the same day, the Polish Constitutional Court pointed out [26] that the CJEU's precautionary measures concerning the organisation and operation of Polish courts are incompatible with the Polish Constitution insofar as Poland has never transferred its powers in this area to the EU, and that the CJEU is not, in the light of the Polish Constitution, one of the institutions empowered to suspend the operation of Polish courts. The matter had been referred to it by the Supreme Court's Disciplinary Chamber following an initial interim order issued on 8 April 2020[26] which, in accordance with the European Commission's request, had already called for the suspension of the operation of the aforementioned Disciplinary Chamber. On 15 July 2021, the day after the judgment of the Polish Constitutional Court, the CJEU handed down its judgment on the merits and found in favour of the Commission, ruling that the disciplinary regime for judges in Poland does not comply with EU law. Considering that the operation of the Disciplinary Chamber of the Polish Supreme Court had not been fully suspended, on 7 September 2021 the Commission asked the CJEU to impose a daily penalty on Poland. On 27 October, the CJEU granted the Commission's request and imposed a daily penalty payment of €1 million, applicable until the Disciplinary Chamber of the Supreme Court is fully suspended. In autumn 2021, the Polish government, relying on the ruling of its Constitutional Court, refused to pay this daily fine, arguing that the CJEU had exceeded its powers under the Treaties and had therefore acted *ultra vires*, which, in the opinion of the Polish authorities, violates the principles of the rule of law.

[26]Judgment of the Polish Constitutional Court of 14 July 2021, case P 7/20 (judgment available at https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11589-obowiazek-panstwa-czlonkowskiego-ue- polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania- konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa)

Jerzy Kwaśniewski's explanation

Jerzy Kwaśniewski, a Polish lawyer and President of the Ordo Iuris Institute for Legal Culture, explains the significance of the Polish Constitutional Court's ruling of 14 July 2021 as follows: " *The problem lies in the evolutionary change in Community law. Poland has ratified the accession treaties and, in particular, the Lisbon Treaty. However, the EU institutions, in particular the Commission and the Court of Justice, have extended the scope of their powers and acquired additional powers over time, to the detriment of the Member States. And it is the compatibility with the Polish Constitution of these powers of the Union,*

[26]Order of the Court of Justice in Case C-791/19 R Commission v Poland

systematically extended without the consent of the Member States, that is the subject of the proceedings before the Constitutional Court. "

- Infringement proceedings concerning the new law on the judicial system adopted by the Polish parliament in December 2019, in reaction to the rebellion and militant commitment of certain judges who, relying on a CJEU ruling of November 2019 following preliminary questions put by a group of judges of the Polish Supreme Court - unrelated to the case being judged -, had decided not to recognise judgments issued by judges appointed after the 2017 reform of the National Council of the Judiciary (KRS). *"The new law prevents Polish courts from directly applying certain provisions of Union law protecting the independence of the judiciary and from making requests to the Court of Justice for preliminary rulings concerning those provisions* ", complained the Commission in its press release informing of the launch of this new procedure on 29 April 2020. In the Commission's view, the fact that the law " *prevents the Polish courts from assessing, in the context of cases pending before them, the right of other judges to rule on cases* " - a right they do not have under the Polish Constitution and legal system - "*undermines the effective application of Union law and is incompatible with the principle of the primacy of Union law*"

- Infringement proceedings opened in July 2020 concerning new legal provisions that led to the shortening of the term of office of the President of the Office of Electronic Communications.

- Infringement proceedings opened in July 2021 in relation to resolutions and declarations adopted by certain Polish local authorities, by which the said authorities commit to their citizens not to impose LGBT ideology on them within the scope of their powers (including the management of schools). As explained in the Commission's press release informing of the opening of infringement proceedings on 15 July 2020, " *the Commission is concerned that these statements may breach EU law on non-discrimination on grounds of sexual orientation*". However, according to the Commission, Poland, which here also considers that the Commission is going beyond the scope of the competences conferred on the EU by the Treaties, since these are societal and family issues, is not cooperating sufficiently in providing explanations. It is therefore for its lack of cooperation that Poland is subject to an infringement procedure, which, as in the case of the Hungarian child protection law referred to above, shows that the accusations of discrimination contrary to Article 2 TEU made by representatives of the Commission, including President Ursula von der Leyen, are based on foundations too flimsy to justify an infringement procedure.

The State of the Union address by the President of the Commission

On 16 September 2020, in her State of the Union address to the European Parliament, European Commission President Ursula von der Leyen said, with reference to these Polish declarations and to the traditional concept of marriage and parenthood enshrined in the Polish and Hungarian constitutions:

"*I will not rest when it comes to building a Union of equality. A Union where you can be who you are and love who you want – without fear of recrimination or discrimination. Because being yourself is not your ideology. It's your identity. And no one can ever take it away. So I want to be crystal clear – LGBTQI-free zones are humanity free zones. And they have no place in our Union And to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights. As part of this, I will also push for mutual recognition of family relations in the EU. If you are a parent in one country, you are a parent in every country*"

III. Preliminary questions against justice reforms

A section of Polish judges particularly angry about the reforms carried out by the parliamentary majority in power since the October 2015 elections did not wait for the European Commission to involve the Court of Justice of the European Union in what should have remained an internal conflict in Poland, despite the stated intention of the liberal and left-wing opposition to use "the street and abroad" to fight against the PiS governments elected in 2015 and 2019.

The "street and abroad" strategy

In a way, after the lost elections of 2015, the Polish opposition drew inspiration from the strategy of the Hungarian opposition after 2010 by organising street demonstrations and seeking support in Brussels. At a meeting of his party's governing bodies in February 2016, Civic Platform (PO) leader Grzegorz Schetyna said: " *We will be total opposition, the toughest opposition possible. We are going to fight total power with total determination".* This statement has since earned the hardest line of the Polish liberal opposition the label of "total opposition", which is applied to it by the right-wing media, whether close to PiS or not. At the beginning of January 2016, the weekly magazine *Newsweek*, whose editor-in-chief is very much on the side of this "total opposition", disclosed the recording of a meeting between Schetyna and the Warsaw authorities of his party, at which the leader of the PO promised to get "a million people" out onto the streets. This strategy, combined with the pleas and votes by MEPs from the PO and its allies in the European Parliament in favour of resolutions condemning Poland, and even in favour of sanctions against Poland, have enabled the Conservative camp to call this strategy a "street and abroad" strategy. Thus, for the PiS and its supporters, the increased pressure from the European Commission from 2018 onwards is the consequence of the failure of the first part of this strategy and of the PiS maintaining its high levels in the polls.

From June 2018, the news website *wPolityce.pl* denounced the organisation by the Warsaw Bar Council (ORA), the judges' association Iustitia (very politically committed against PiS) and the Helsinki Foundation for Human Rights (financed by George Soros' OSF, among others) of training courses to explain to judges how they could block new laws passed by Parliament by sending floods of preliminary questions to the Court of Justice of the European Union[28].

At the beginning of August of the same year, seven judges of the Polish Supreme Court sent a preliminary question to the Court of Justice of the EU (CJEU)[28] [29] with five questions about the reform affecting them

[28]" Kasta sparaliżuje sądy na podstawie Karty Praw Podstawowych? Osobliwe szkolenie dla adwokatów i sędziów. Szykuje się powtórka z Irlandii", *wPolityce.pl*, 11 June 2018 (https://wpolityce.pl/polityka/398991-kasta-sparalizuje-sady-na- podstawie-karty-praw-podstawowych-osobliwe-szkolenie-dla-adwokatow-i-sedziow-szykuje-sie-powtorka-z-irlandii) which had been passed by Parliament. At issue was the lowering of the retirement age for judges from 70 to 65. The case to which these preliminary questions referred concerned the obligation to pay social security contributions when a Pole

[28]Decision of 2 August 2018 (http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/EditForm/III-UZP-0004-18_pytanie_prejudycjalne.pdf)

has a company in the Czech Republic and Slovakia. To justify their reference for a preliminary ruling, the judges of the Labour and Social Insurance Chamber of the Supreme Court considered that they needed an interpretation of the CJEU in the light of European law in order to judge the situation with regard to the coordination of the EU's social insurance systems of two judges who had just reached the age of 65 and who were called upon to rule on this case on the basis of whether or not the lowering of the retirement age for Supreme Court judges was valid in the light of European law. To put it plainly, the judges of the Labour and Social Insurance Chamber of the Polish Supreme Court which is, it should be remembered, a court of cassation, asked the CJEU to rule on a matter that did not directly concern the case under review, but only the question of whether or not the two judges of the Chamber called upon to rule should continue to be members of the Polish Supreme Court in the light of European law, even though they were not in the light of Polish law.

The same chamber sent further preliminary questions on 30 August[30]and 19 September 2018[30] with the aim of submitting the Polish reforms to the jurisdiction of the CJEU. These preliminary questions, also unrelated to the cases under consideration, concerned the legitimacy of the National Council of the Judiciary (KRS) following the reform adopted in 2017 and the replacement of its 15 judges appointed by their peers (out of a total of 25 members) by 15 judges appointed by the Sejm, and hence the independence of the judges appointed by the President of the Republic on the proposal of the reformed KRS.

At the same time, other judges in different courts began to refer to the CJEU for preliminary questions with the same objective. This was the case with judge Igor Tuleya of the Warsaw court, who is very well known in Poland for his commitment to opposing the PiS reforms, due to his many media appearances and his high-profile presence at opposition demonstrations. In a criminal case involving gangsters on trial for organised crime, this judge also turned to the CJEU at the beginning of September 2018 (which had the effect of suspending the gangsters' trial) to ask it whether EU law, which requires Member States to give every citizen a right of appeal

[30] Supreme Court press release, 12 September 2018 (http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=236-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach)

against judicial decisions is not incompatible with the new legal provisions which, in his view, had removed the guarantees of independent disciplinary proceedings against judges in Poland (particularly because of the appointment of judges to the Disciplinary Chamber of the Supreme Court - the final instance for disciplinary proceedings against judges - with the participation of the reformed National Council of the Judiciary).

In the case of Judge Tuleya, the CJEU refused the reference for a preliminary ruling, which was irrelevant to the case being heard, but with regard to the preliminary questions from the Labour and Social Affairs Chamber of the

[30]Supreme Court press release of 19 September 2019 (http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=238-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach)

Polish Supreme Court, the CJEU delivered a landmark ruling on 19 November 2019 [31]. In this judgment, the CJEU ruled that the Polish Supreme Court could itself decide whether its Disciplinary Chamber, created by the PiS reforms, and the National Council of the Judiciary (KRS), also reformed by the PiS majority, were legitimate bodies of the judiciary in the light of European law. Reacting to this ruling by the CJEU, which confers on the Supreme Court a power that it does not have, in the light of the Polish constitution and laws, the first President of the Polish Supreme Court, Malgorzata Gesdorf, whose term of office was due to end in the spring and who had been in open revolt against the PiS reforms from the outset, convened three of the five chambers of the Supreme Court for 23 January 2020, excluding judges appointed after the PiS reforms, in order to rule on the invalidity of judicial appointments made since 2018.

The President of the Sejm then turned to the Constitutional Court to ask it to rule on the respective powers of Parliament and the Supreme Court. The Polish Constitutional Court then temporarily suspended the application of the Supreme Court's resolution of 23 January pending a ruling on this conflict, and on 20 April 2020 issued a ruling that the Supreme Court had exceeded its jurisdiction by purporting to rule on the validity of judicial appointments made from 2018 on the basis of a law passed by Parliament.

However, some judges in various courts took advantage of the opportunity offered to them by the CJEU and, in flagrant violation of the Polish Constitution and Polish law, refused to recognise judgments handed down by judges appointed from 2018 or to sit with such judges. In December 2019, the Polish Parliament therefore passed a law, which came into force in mid-February 2020, to extend the grounds for disciplinary proceedings against judges to include cases of questioning the legitimacy of other judges, courts or constitutional bodies of the State, and in particular the validity of the process of appointing another judge, as well as cases of flagrant violations of the law in their judgments and actions or lack of actions that may significantly impede the functioning of the judicial system (which can be interpreted as a reference to abusive preliminary questions to the CJEU). Indeed, the CJEU ruling, combined with the revolt and the political and public commitment of certain judges, in violation of the constitution which forbids them from making such a commitment, risked generating a great deal of legal uncertainty in Poland, not to say total judicial anarchy.

Preamble to the law of 20 December 2019 amending the law
on the organisation of the ordinary courts, the law on the Supreme Court and certain other laws :

In a sense of responsibility for the administration of justice in the Republic of Poland, emphasizing the fact that the Republic of Poland is the common good of all citizens, and that supreme power belongs to the Nation;
Recognizing the need to respect the division into three powers and the balance of powers resulting from Article 10 of the Constitution of the Republic of Poland;

[31]Judgment of the Court (Grand Chamber) of 19 November 2019 in Cases C 585/18, C 624/18 and C 625/18 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=804054)

While respecting the values of a democratic state governed by the rule of law and the independence and non-political nature of the courts;

Implementing the right of citizens to a fair and public hearing without undue delay by a competent, independent and impartial tribunal.

Respecting the need for the Republic of Poland to guarantee the freedoms and rights of man and citizen guaranteed by the Constitution and other normative acts, as well as the importance of the prohibition, deriving directly from the Constitution, for judges to engage in public activities incompatible with the principles of judicial independence and impartiality of judges;

Recognising the importance of the principle of legal certainty for citizens, in particular the principle of citizens' trust in the State and in the laws it enacts, and the need to ensure certainty in the appointment by the President of the Republic of Poland of judges to decide their cases;

Respecting the desire to ensure the uniformity of jurisprudence in Poland and to raise the level of the law, both established and applied;

Stressing the systemic role of the Constitutional Court as the body appointed to judge the conformity of laws and international agreements with the Constitution;

Recognising that every judge appointed by the President of the Republic of Poland must enjoy the conditions necessary for the dignified exercise of his or her profession and, in particular, that effective procedures must be guaranteed to prevent any executive, legislative or judicial authority, as well as any person or institution, including other judges, from prejudicing the status of a judge without legal justification, thus endeavouring to provide citizens with a sense of security and stability in the judgments handed down by the courts;

This law is hereby promulgated.

As mentioned above, the European Commission has opened infringement proceedings against Poland in respect of this law, which was made necessary by the CJEU judgment of 19 November 2019 to counter the effects and not allow Poland to develop a regime of total legal uncertainty, where any judgement handed down by a judge appointed from 2018 onwards could be challenged on the grounds of the judge's date of appointment. Among the Commission's demands made in autumn 2021 to release the Next Generation EU recovery plan funds allocated to Poland was the lifting of sanctions against rebel judges who had challenged the legitimacy of other judges appointed from 2018 onwards in their rulings.

Another case of preliminary questions seeking to call into question, by means of an interpretation by the CJEU of European law, the legitimacy of judges appointed on the proposal of the reformed National Council of the Judiciary (KRS), is a reference for a preliminary ruling submitted by the Superior Administrative Court (NSA). The matter had been referred to it by five applicants for Supreme Court judgeships who had not been recommended to the President of the Republic by the reformed National Council of the Judiciary (KRS). In its judgment of 2 March 2021[33], the CJEU again purported to grant the referring court - this time not the Supreme Court but the NSA - the right to decide whether the appointments made by the reformed KRS were valid in the light of European law, and in particular of Article 19(1) of the Treaty on European Union, which states: " *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*." It is from this sentence that the Commission and the CJEU believe they can derive their powers to interfere in the organisation and operation of the judiciary in the Member States, on the basis that any court may, at one time or another, have to rule on matters covered by EU law. It was this reference for a preliminary ruling from the Polish NSA and the subsequent judgment by the CJEU that led to the much-publicised judgment of 7 October 2021 by the

Constitutional Court, which will be discussed below.

In a recent case concerning Hungary, the CJEU delivered a judgment on 23 November 2021 in the case of a reference for a preliminary ruling submitted in 2019 by a district court criminal judge to the CJEU[32]. This judge had included in his reference for a preliminary ruling questions which had no direct connection with the case he had to decide, since they were questions of a general nature concerning compliance with the requirement of independence and impartiality of judges in a situation where the President of the National Office for the Judiciary, appointed by Parliament, had made temporary appointments of court presidents, and therefore outside the control of the National Judicial Council, whose members are judges appointed by their peers. Judge Csaba Vasvári, who initiated the reference for a preliminary ruling, also included a question on the impact of the remuneration system for Hungarian judges, with a significant proportion of remuneration in the form of bonuses, asking whether this is not contrary to the principle of the independence and impartiality of the judiciary mentioned in European texts regarding the implementation of European law. Judge Csaba Vasvári's reference for a preliminary ruling was then brought before the Kúria, the Hungarian Supreme Court (Court of Cassation), which declared that the questions put to the CJEU were outside the legal framework as they had no bearing on the case to be decided. The President of the Metropolitan Court of

[33]Judgment of the Court (Grand Chamber) of 2 March 2021 in Case C-824/18 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0824)

Budapest, himself appointed on a temporary basis (for one year) by the President of the National Office of Justice, then launched disciplinary proceedings against the judge who had made the improper reference for a preliminary ruling.

In this particular case, the CJEU held that the Hungarian Supreme Court's ruling on the unlawfulness of preliminary questions concerning not the resolution of a case but, more generally, the Hungarian constitutional and legal order, was contrary to the principle of primacy of European law and the possibility of submitting preliminary questions provided for in Article 267 of the Treaty on European Union. The CJEU therefore stated in its judgment that the courts must disregard the Supreme Court's decision on this issue and confirmed its recent case law which tends to remove the mandatory direct link between preliminary questions and the case being judged, allowing it to interfere, at the request of the courts of the Member States, in areas that do not necessarily fall within its jurisdiction - or at least not directly - under the Treaties.

[32]Judgment of the Court (Grand Chamber) of 23 November 2021 in Case C-564/19

IV. Polish Constitutional Court v CJEU

The judgment of 2 March 2021 referred to above [35], in which the CJEU purported to empower the Polish Supreme Administrative Court (NSA) to assess the legitimacy and legality of appointments to the Supreme Court (Court of Cassation), clearly contradicted the Polish Constitution, which does not grant the NSA such power. It was in response to this ruling that Mateusz Morawiecki's government referred the question of the primacy of the Polish constitution over the CJEU's interpretations of European law in areas where sovereignty had not been transferred under the Treaties, to the Polish Constitutional Court.

In its judgment of 7 October 2021[35], the Polish Constitutional Court, sitting in plenary session, found in favour of the Polish Government, reaffirming, as it had done previously and as the constitutional courts of several other Member States (Germany, France, Spain, Romania, etc.) had done for their respective constitutions, the primacy of the national constitution over European law, and in this case over the interpretation of European law by the CJEU. The reactions to this ruling in Brussels and in several European capitals were very strong, above all because the Polish Constitutional Court did not affirm the primacy of the national constitution and the inapplicability of a CJEU ruling in a specific case, but set out a general principle on the incompatibility with the Polish constitution of certain articles of the treaties as interpreted by the CJEU.

The ruling was applauded by Viktor Orbán's government, whose ministers joined their Polish colleagues in denouncing the false claims that accompanied the ruling, according to which Poland had declared the clauses of the treaties it had signed and ratified to be contrary to its constitution. If the general scope of this judgement is a first, it is also because the powers that the CJEU sought to give to the Polish courts are also new in the history of the EU.

[35]Judgment of the Court (Grand Chamber) of 2 March 2021 in Case C-824/18 (https://curia.europa.eu/juris/document/document.jsf;jsessionid=6835B28322D217853E7E8C2D606F4005?text=&docid=238382&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=7169789)

Statement of the judgment handed down on 7 October 2021 by the Polish Constitutional Court
1. *Article1(1) and (2) read in conjunction with Article 4(3), of the Treaty on European Union, insofar as the European Union,*

[35]Judgment of 7 October 2021 of the Constitutional Court, Case K 3/21 (https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej)

made up of equal and sovereign States and forming an "ever closer union among the peoples of Europe", whose integration - achieved on the basis of European Union law and through its interpretation by the Court of Justice of the European Union - has reached a "new stage", in which:

(a) the bodies of the European Union are acting beyond the limits of the powers delegated by the Republic of Poland in the Treaties,

(b) the Constitution is not the supreme law of the Republic of Poland, which prevails over its validity and application,

(c) the Republic of Poland cannot function as a sovereign and democratic state

- is incompatible with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland.

2. Article 19(1)(2) of the Treaty on European Union, insofar as, in order to ensure effective judicial protection in areas governed by Union law, it confers on the national courts (ordinary courts, administrative tribunals, military tribunals and the Supreme Court) jurisdiction to:

(a) disregard the provisions of the Constitution in their trial proceedings, is incompatible with Articles 2, 7, 8(1), 90(1) and 178(1) of the Constitution,

(b) to pass judgments on the basis of legal provisions which are no longer in force, have been repealed by the Sejm or have been declared unconstitutional by the Constitutional Court, is incompatible with Article 2, Article 7 and Article 8(1), Article 90(1), Article 178(1) and Article 190(1) of the Constitution.

3. Article 19(1)(2) and Article 2 of the Treaty on European Union, in so far as, in order to ensure effective judicial protection in areas covered by Union law and to guarantee the independence of judges, they confer on national courts (ordinary courts, administrative courts, military courts and the Supreme Court) jurisdiction to:

(a) review the lawfulness of the procedure for the appointment of a judge, including the lawfulness of the act of appointment of a judge by the President of the Republic of Poland, are incompatible with Article 2, Article 8(1), Article 90(1) and Article 179 in conjunction with Article 144(3)(17) of the Constitution,

(b) review the legality of a resolution of the National Council of the Judiciary containing a request to the President to appoint a judge, are incompatible with Article 2, Article 8(1), Article 90(1) and Article 186(1) of the Constitution,

(c) observing a national court's finding that the process of appointing a judge is flawed and, consequently, refusing to recognise as a judge a person appointed to a judicial office under Article 179 of the Constitution is incompatible with Article 2, Article 8(1), Article 90(1) and Article 179, read in conjunction with Article 144(3)(17), of the Constitution.

Among the very many reactions to this judgment, we shall mention two that perfectly illustrate the respective positions of the two camps and which are taken from the European Parliament plenary session of 19 October 2021 "On the crisis of the rule of law in Poland and the primacy of Union law":

Extract from the speech by Ursula von der Leyen, President of the European Commission:

"*This ruling calls into question the foundations of the European Union. It is a direct challenge to the unity of the European legal order. Only a common legal order provides equal rights, legal certainty, mutual trust between Member States and therefore common policies. This is the first time ever that a court of a Member State finds that the EU Treaties are incompatible with the national constitution* "

Extract from the speech by Polish Prime Minister Mateusz Morawiecki:

"*Important decisions should not be taken by changing the interpretation of the law. The success of European integration lay in this - that law was derived from the mechanisms linking our states in other areas. The attempt to reverse this model by 180 degrees - and impose integration through legal mechanisms - is a departure from the assumptions that were at the root of the European Communities' success. The phenomenon of democratic deficit*

has been discussed for years. And this deficit has been getting worse Never before, however, has it been so visible as in the last few years. Increasingly, through judicial activism, decisions are made behind closed doors and there is a threat to member countries. And more and more often - it is done without a clear basis in the treaties, but through their creative reinterpretation. And - without any real control. And this phenomenon has been growing for years. Today, this process has reached such a stage that we have to say: "stop". The European Union's competences have their limits. We must no longer remain silent when they are exceeded. "

The Hungarian Constitutional Court ruling on national sovereignty in immigration matters

In February 2021, the Hungarian government reacted to the CJEU judgment of 17 December 2020 by also referring the matter to its Constitutional Court.[37] This was the judgment in which the European Court ruled that it was contrary to EU law to keep asylum seekers in transit zones at the border with Serbia, where they were not allowed to leave unless they returned to Serbia, and the pushback to the other side of the border of people intercepted after illegally entering Hungarian territory. On 10 December 2021, the Hungarian Constitutional Court handed down its judgement[37] in which it recognised that a person's traditional social environment is part of his or her identity, and that the State has a duty to ensure that changes in this social environment do not constitute a violation of the constituent elements of his or her identity. In this respect, " *the joint exercise of the competences through the institutions of the European Union may not lead to a lower level of protection of fundamental rights than that required by the Fundamental Law. In the same vein, the fact that an EU legal norm binding on the Member States meets the requirements of the Constitution but is not properly implemented, that is, the result of the binding norm is not or only partially enforced, cannot lead to a lower level of protection of fundamental rights than required by the Constitution.* ". In this context, the Constitutional Court ruled that, *"where the exercise of joint competences with the Union is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.* ". Elsewhere in the judgment, we read that " *the Constitutional Court has also ruled that, where the incomplete effectiveness of the joint exercise of competences results in consequences that raise the issue of the violation of the right to identity of persons living in the territory of Hungary, the Hungarian State shall be obliged to ensure the protection of this right in the context of its obligation of institutional protection. Finally, the Constitutional Court held that the protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure shall be part of its constitutional identity*".

On the other hand, while the Hungarian Government had asked the Constitutional Court, in its application submitted by the Minister of Justice Judit Varga, to rule on the execution of the judgment of the Court of Justice of the European Union in Case C-808/18 by raising the specific constitutional question of whether Hungary can apply an EU legal obligation that may result in a foreign national residing illegally in Hungary to remain in the territory of a Member State for an indefinite period of time and thus effectively become part of the population of that Member State, the Hungarian Constitutional Court emphasised that "*an abstract constitutional interpretation cannot take a position on the question of whether the applicant's argument that, as a result of the CJEU's judgment, a foreign population could effectively become part of the Hungarian population is correct* ". In its view, " *it is up to the legislator or the authorities responsible for applying the law, and not the Constitutional Court, to assess this*". At the same time, the Constitutional Court emphasised that "*abstract constitutional interpretation cannot be directed towards the review of the CJEU judgment, and that the procedure of the Constitutional Court in the present case - given its nature - does not extend to the examination of the primacy of EU law*"

But it is true that we are dealing here with a shared competence - immigration policies - and not, as in the Polish case, with an exclusive competence of the States: the organisation and operation of the national judicial system.

[37]Judgment of the Court (Grand Chamber) of 17 December 2020 in Case C-808/18 (https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0808)

[37]Judgment of 10 December 2021 of the Hungarian Constitutional Court in case X/477/2021 (https://alkotmanybirosag.hu/dontes/ab-hatarozat-alaptorvenyi-cikkek-ertelmezeserol)

Part Two
-
The sources of the conflict

I. Rule of law or government by judges?

Accusations of breaches of the rule of law are now flying in both directions, with the parties in power in Poland and Hungary accusing the European institutions of trampling on the rule of law and democratic principles by seeking to extend their powers beyond those enshrined in the European treaties as signed and ratified by the democratically elected representatives of the people. The European Parliament and the Commission are also accused of seeking to impose their progressive ideology, particularly on abortion and the demands of the LGBT lobby, under the guise of implementing the general principle of non-discrimination enshrined in Article 2 of the Treaty on European Union, even though the regulation of societal issues and family policies are supposed to be the exclusive remit of the Member States. The Commission and the CJEU in particular, when they attempt to interfere in the organisation and functioning of the judiciary in Member States, are accused of disregarding Article 4 of the Treaty on European Union which states that "*competences not conferred upon the Union in the Treaties remain with the Member State*" and that "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional*" More generally, the EU institutions are suspected of exploiting differences of opinion with Hungary and Poland - two countries that are net beneficiaries of the EU budget, and therefore easier to bring to heel than major European countries such as France or Germany - to bring about the emergence of a kind of United States of Europe through the method of case law and faits accomplis, thus avoiding the need for a new treaty.

The response of the European institutions and the proponents of Brussels interventionism is to argue that, since the Commission is the guardian of the Treaties, it has a duty to ensure respect for the values set out in Article 2 of the Treaty on European Union, the content of which it is worth recalling once again:

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

With regard to the EU's interference in the Hungarian and Polish judicial reforms, the arguments of the European institutions, including the CJEU, are also based on Article 19.1 of the Treaty on European Union (TEU), Article 267

of the Treaty on the Functioning of the European Union (TFEU) and Article 47 of the Charter of Fundamental Rights, namely:

Article 19.1 TEU:

"*The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law "

Arguing that any court may at one time or another have to rule on matters covered by Union law, the Commission and the CJEU thus consider themselves empowered to monitor whether the judicial system of the Member States (or only certain Member States) guarantees the existence of the remedies sufficient to ensure effective legal protection.

Article 267 TFEU:

"*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties;*
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. "

The recent practice of the CJEU, particularly in relation to Poland, has been to accept references for a preliminary ruling containing questions relating to the general principles of judicial reform and not directly related to the case under consideration by the referring court, which has been another way for the CJEU to extend its jurisdiction to the operation and organisation of a Member State's judicial system, even going so far as to call into question the legitimacy of its Constitutional Court and claiming to attribute to national courts powers that they do not have under the constitution and laws of their country.

Article 47 of the Charter of Fundamental Rights : "*Right to an effective remedy and to a fair trial.*
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. "

Here again, the Commission and the CJEU claim to derive from this article a power to supervise the organisation and operation of justice in certain Member States on the pretext that any court may have to apply European law. The Charter of Fundamental Rights applies in principle only to the functioning of the institutions and bodies of the Union or to the Member States, but only when they are applying Union law, as provided for in Article 51 of the Charter:

"*Field of application*

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers

2. ***The Charter does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties****.* "

In this case, 51(2) does not appear to be taken into account by the European institutions, which base their powers to supervise the judicial systems of Member States on the Charter of Fundamental Rights.

What about the Anglo-Polish Protocol?

In the Commission's press release announcing the referral of Poland to the CJEU on 24 September 2018 regarding the lowering of the retirement age for judges, it was stated that "*the European Commission maintains that the Polish Supreme Court Act is incompatible with Union law, as it undermines the principle of the independence of the judiciary, including the security of tenure of judges, and that Poland is therefore failing to fulfil its obligations under Article 19(1) of the Treaty on European Union in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union* ". Similarly, in its suspensive order upheld on 17 December 2018 (Case C-619/18 R Commission v Poland), the CJEU refers to the Commission's accusation that Poland had infringed Article 47 of the Charter of Fundamental Rights of the European Union. Similarly, in its suspensive order confirmed on 17 December 2018 (Case C- 619/18 R Commission v Poland), the CJEU supports the Commission's argument accusing Poland of breaching Article 47 of the Charter of Fundamental Rights of the European Union. In the grounds of a further infringement procedure launched on 3 April 2019, the Commission took the view that "*Poland has failed to fulfil its obligations under the combined provisions of Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union, which enshrine the right to an effective remedy before an independent and impartial tribunal.*" This charter is regularly invoked in cases against Poland.
However, when the Lisbon Treaty was signed, Poland, like the United Kingdom, obtained the addition of a protocol limiting the application of the EU Charter of Fundamental Rights to Poland. Protocol 30, which accompanies the Charter, clearly states that "*The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirm*".

Under this Protocol, what applied to the UK until it left the EU should apply in the same way to Poland. However, this is clearly not the case in the eyes of the European Commission and the CJEU, as shown, for example, by the statement in the CJEU's judgment of 19 November 2019 in its part concerning Protocol 30 and the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland: " *Nor does it call into question the applicability of the Charter in Poland or purport to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter [judgment of 24 June 2019 in Commission v Poland (Independence of the Supreme Court), C 619/18, EU:C:2019:531, paragraph 53 and the case-law cited].*"

Does the principle of the rule of law authorise the Commission and the Court of Justice to pretend that this protocol does not exist?

Thus, if the democratic rule of law is to be understood, as is the common understanding of this concept in Europe, as designating the submission of public authorities to the laws and rules that have been adopted by the elected representatives of the people under the conditions laid down by the constitution and by the law, it would seem that the European institutions are taking certain liberties with the rule of law and democratic principles, not least through a very free interpretation of the letter and the spirit of the Treaties. The last word goes to the Court of Justice of the EU, and it is the judges of the CJEU, rather than the officials of the European Commission, who are extending their jurisdiction without the people having any real power of control. We are thus witnessing the emergence of a new conception of democracy, characterised by the increasing legalisation of society and by the development of the role of the judge, experts and independent regulatory bodies, as highlighted by law professor Jacques Chevallier in his work entitled L'État de droit *(The rule of law)*[39].

Koen Lenaerts in 2010 on the extension of the jurisdiction of the CJEU

In an article published in 2010[40] and co-authored by the Belgian law professor Koen Lenaerts, President of the CJEU since 2015 after having been Vice-President of this institution from 2012 to 2015 (he had been at the Court of Justice since 1989), we read, with regard to the application of the general principles of European law (such as those mentioned in the articles of the Treaty on European Union to which the judgments of the institution, now presided over by Lenaerts, against Poland and Hungary, refer) " *It should be emphasised, however, that the horizontal application of general principles can only work where it is undisputed that the national law in conflict [with those general principles] falls within the scope of Community law. Otherwise, the borders of the Community legal order would be continually extended to the detriment of national sovereignty.*"

Moreover, as Professor of Public Law Anne-Marie Le Pourhiet, Vice-President of the French Association of Constitutional Law , pointed out in an article published on 28 December 2020[40], " *What the Union refers to as the 'rule of law' is the progressive and multiculturalist Anglo-Saxon ideology imported from American campuses, concerning in particular ethnic, religious and sexual minorities, immigration, NGOs and the collection of rights known as 'sexual and reproductive rights'. This entire ideological corpus will now be compulsory for all twenty-seven Member States, on pain of legal and financial sanctions*". Anne-Marie Le Pourhiet also points out, since we are talking about respect for the rule of law, that " *the European institutions are also taking the liberty of ignoring Protocol 30 to the Treaty of Lisbon on the application of the Charter of Fundamental Rights to Poland and the United Kingdom*" (see box on previous page). The vice-president of the Association française de droit constitutionnel (the French Constitutional Law Association) also makes a few comparisons that reveal the falsity of the case against Poland: " *As far as the independence of judges is concerned,*

[39]Jacques CHEVALLIER, Professor at the University of Paris II Panthéon-Assas, Director of the Centre d'études et de recherches de science administrative - CNRS. Published by MONTCHRESTIEN, coll:*Clefs*, 160 p., Editions 1st 1992; 2nd 1994;3rd 1999;4th. 2003,5th ed 2010

[40]"The constitutional allocation of powers and general principles of EU law", by Koen Lenaerts and José A. Gutiérrez-Fons, in *Common Market Law Review* (article available at http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2013/11/The-contitutional-allocation-of-powers-and-general-principles-of-EU-law-K.-Lenaerts-J.-Gutierrez-Fons-CMLR-2010.pdf)

the double standards are still blatantly obvious. Poland has been criticised for bringing forward the retirement age for its judges to 65. Big deal! Strangely enough, no one has thought to criticise the undoubtedly exemplary way in which the French Council of State or Constitutional Council are appointed. And when, in the United States, the Democrats plan to increase the number of Supreme Court justices or set an age limit for them, with the avowed

[40]"Do we still have the right to choose a conservative government in Europe? " by Anne-Marie Le Pourhiet, Professor of Public Law at the University of Rennes-I and Vice-President of the French Association of Constitutional Law, in *Figaro Vox* (https://www.lefigaro.fr/vox/monde/anne-marie-le-pourhiet-a-t-on-encore-le-droit-de-choisir-un-gouvernement-conservateur-en-europe-20201228)

aim of tipping the majority in their favour, you don't hear any great progressive conscience speaking out against the violation of the rule of law."

Citing an October 2018 report by the French National Assembly on "respect for the rule of law in the European Union", Max-Erwann Gastineau writes in his book *Le Nouveau Procès de l'Est*[41] (The new trial of the East)

"*The idea contained in the rule of law* "is that the distribution of powers should aim to open up the widest possible space for individual freedoms*" (sic); to bind the legislator to "*a principle of respect for individual rights that should be imposed on him absolutely*". This definition reveals the heart of the discord surrounding the notion of the rule of law. Unlike Western Europeans, Eastern Europeans do not make an absolute of the "*respect for individual rights*" promoted by the European institutions and the Sargentini report. They recognise it, they sanction it, but they do not make it absolute. For they subordinate it, limit it, stop it by affirming or restoring other principles or commandments deemed more essential, which refer to collective aims, responsible for ensuring the historical and cultural continuity of the nation. The Eastern states believe that the continued affirmation of the rule of law leads to the primacy of the legal (the judge) over the political (the popular will), placing sovereign nations under the domination of a new Empire. After all, didn't the former President of the European Commission, Manuel Barroso, define the European Union as "*a non-imperial empire*", which imposes its discipline not by force but by law? "*

Addressing the European parliamentarians gathered to hear him, the Hungarian Prime Minister took note of these philosophical and political divergences which seemed to lead to a dead end: "I know that your opinion will not be changed by my statements*". Referring to history, which has made Hungary an integral part of "*the Christian family of the peoples of Europe for 1,000 years*", Orbán highlights the* "great martyrdom for democracy and freedom*" that his people had to endure. The time has come, he says, to "*bring democracy back into European politics*", because on the pretext of defending the values of Europe, the Strasbourg Parliament are simply be putting the Hungarian people on trial, guilty of having voted the wrong way by bringing to power a majority anxious to preserve the cultural unity of its society - in the face of the 'migratory threat' - and the independence of politics and the nation - in the face of the power of judges and supranational bodies.*"

Referring later to the words of the Hungarian László Trócsányi, Minister of Justice from 2014 to 2019, Gastineau explains that " *according to him, the independence of judges should make it possible to limit power, not to control the content of laws, which is the role of the people and of the people alone. This concept of the separation of powers is reminiscent of the "French concept" formulated by the Constitutional Council in 1987. A "concept" which differs from the classic theory (the American doctrine of "checks and balances") in that it removes legislative and executive powers from the control of the courts, the latter not having sufficient legitimacy "to judge acts emanating*

[41]Published by Éditions du Cerf, 192 p, 1st ed. 2019

from authorities deriving from universal suffrage and acting in the name of the general interest".

"*What is the rule of law?*" asks Thibaud Gibelin rhetorically in his book *Pourquoi Viktor Orbán joue et gagne - Résurgence de l'Europe centrale*[42] (Why Viktor Orbán plays and wins - Central Europe's resurgence) And he responds as follows: "*An institutional system in which public power is subject to the law. Hungary subscribes to this framework, without which the international animosity since 2010 would not have been confined to "suspicions" and the Venice Commission would not have amicably resolved the differences that opposed it to Budapest; but the Hungarian political elites also intend to contain the subversive applications of a neutral law. They adopt a practical approach to the rule of law rather than a dogmatic one. They refuse to allow a particular interest to systematically take precedence over the general interest, since the public authorities are the guarantors of the latter. The intention is to ensure that the legal bridle does not turn into a political mutilation. According to illiberal thinking, law does not base its authority in itself, but in a political body that institutes it. Alternatively, it is based on the sovereignty of the same body politic, now embodied in the electorate and consulted by voting. The rule of law contributes to the common good, but it is not enough; the spirit must prevail over the letter.*

At the opposite end of the spectrum are the dogmatic advocates of the rule of law, who favour disembodied international sovereignty over democratic sovereignty. "

In the dominant discourse in Europe, the rule of law is generally equated with the separation of powers. But while this separation of powers can hinder the exercise of democracy by resulting in a government of judges when the judiciary exercises control over both the other two powers - legislative and executive - and also over itself, without the other powers having any control over it, it is not an indispensable condition for democracy either, as the English example shows.

In one of Europe's oldest liberal democracies, the United Kingdom, the separation of powers is not self-evident, since British democracy is based on the principle of the unlimited sovereignty of Parliament. In an article entitled "*Fixing the Supreme Court should be Boris Johnson's constitutional priority*[43] ", Telegraph columnist Charles Moore wrote in February 2020 of the view of a Brexit that was " *a struggle between the shameless 'populists' and the righteous determined to resist anything that might have 'an extreme effect on the foundations of our democracy'*", the last words being a quote from the September 2019 decision of the UK Supreme Court, which had been set up in its time by Tony Blair, and which had overturned Johnson's suspension of Parliament when the anti-Brexit opposition, aided by Speaker John Bercow, had taken control of the House of Commons agenda while refusing

[42]Published by Éditions Fauve, 248 p, 1st edition 2020

[43]"Fixing the Supreme Court should be Boris Johnson's constitutional priority", Charles Moore, *The Telegraph*, 7 February 2020 (https://www.telegraph.co.uk/politics/2020/02/07/fixing-supreme-court-should-boris-johnsons-constitutional-priority/)

new elections. To ensure this does not happen again in the future, Boris Johnson then promised to repeal the Fixed Term of Parliament Act 2011 to give the government back the ability to call general elections whenever it wishes. Moore also advised the government and its majority in Parliament to find a way of restoring the prerogative of prorogation (the suspension of Parliament for a specified period) that would not be subject to judicial review. He also felt that " *we need to review the 'independent' panel responsible for appointing judges, which gives the establishment an almost unlimited capacity for self-reproduction*". Indeed, wrote Moore, "*the 1689 Bill of Rights* […] *protects political freedom by insisting that no 'Parliamentary proceedings' can be 'set aside' by a court* […] *There has never before been a formal separation of powers in this country. It was for the best*," said the British Conservative columnist.

Donald Tusk and the rule of law

Poland's Donald Tusk, Prime Minister from 2007 to 2014, President of the European Council from 2014 to 2019, President of the European People's Party (EPP) since December 2019 and once again President of the Civic Platform (PO) since July 2021, set out his vision of the rule of law and the independence of the judiciary at the Kampus Polska Przyszłości ("Poland of the Future Campus") summer schools organised at the initiative of Warsaw Mayor Rafał Trzaskowski in August 2021. His comments were reproduced on the website of the conservative weekly *Do Rzeczy*[44]:

"I *know how to get rid of all those who are making Polish politics an unbearable hell for all of us. You know, it will take two years, three years at the most. I am convinced of this, but I am also here not to take anyone's place, but to make these places vacant for you* ", Tusk promised his supporters, while specifying with regard to judges appointed since 2018, and therefore after the reform of the National Council of the Judiciary (KRS): " *If someone has been appointed a judge by an illegally elected KRS, they probably have very radical views. After the change of power in Poland, these judges will cease to be judges.* "

Thus, Donald Tusk apparently does not intend to concern himself with the Constitution, which prohibits the removal from office of judges on an individual basis (the principle of irremovability of judges dear to Brussels in order to ensure respect for the rule of law), but only authorises them to be suspended with continued salary or transfer as part of a modification by a law passed by Parliament on the organisation and structure of the courts. As for the alleged illegality of the appointments to the KRS, whatever Mr Tusk may say, the fact that the 15 judges on the KRS have now been elected by Parliament is not in itself contrary to the Polish Constitution, which states that " *the organisation, scope of action and mode of operation of the National Council of the Judiciary, as well as the method of appointing its members, shall be defined by law*", and therefore by Parliament.

II. Conservatives come to power in Hungary and Poland

A. The socio-economic and political context in which Fidesz came to power

1) The political crisis of 2006, which paved the way for Fidesz's resounding victory in 2010

Viktor Orbán had already governed Hungary at the head of a Fidesz government from 1998 to 2002. While the

[44]"Ci sędziowie przestaną być sędziami. Tusk uderza w KRS", 27 August 2021, dorzeczy.pl (https://dorzeczy.pl/opinie/196589/donald-tusk-uderza-w-sedziow-wybranych-przez-krs.html)

polls showed the outgoing majority winning in 2002, the post-communist left was able, no doubt at least in part thanks to its domination of the media, to return to power in coalition with the liberals. Eight years later, in 2010, the electoral coalition formed by the conservative Fidesz party and its Christian Democrat ally KDNP won the elections with 53% of the vote in the first round.

So how was Fidesz able to return to power with a majority that even enabled it, to the great dismay of the European left, to replace the constitution inherited from communism with a constitution whose preamble reaffirms the pride of Hungarians in who they are and their attachment to their Christian traditions and values? One explanation for this is that, after losing the elections in 2002 and then a second time in 2006, Fidesz systematically relied on civil society and local organisations. It organised national consultations and petitions (one of which, in 2004, attracted a million signatures in this country of 10 million inhabitants), and also organised its own conservative media to win back the country for the long term.

But above all, unlike the centre-right and/or Christian Democrat-inspired parties in Western Europe (UMP/LR in France, CDU-CSU in Germany, PP in Spain, Tories in the UK, Forza Italia in Italy...), Fidesz has not abandoned its values, it has not allowed uncertainty, and has not sought to adopt the ideology of the left or to please the dominant progressive media in order to return to power: on the contrary, it has chosen to create media that would be favourable to its conservative themes, bringing back to Hungary a pluralism that had disappeared (or had never appeared after the fall of communism, as the communists had managed to maintain their positions at the head of the main media at the time of the transition to democracy and a market economy).

Its firm values-based political line is largely due to the personality of its leader Viktor Orbán himself, a former liberal with anti-clerical leanings (but also deeply anti-Communist from his youth) who converted to Christianity and became a member of the Presbyterian Church. Unlike many French politicians who claim to be Christians, Viktor Orbán is not afraid to say that his faith plays an important role in his politics, and he does not consider himself a Christian only on Sundays or only in church and at home. He was very impressed in 1987 by a trip he made to Gdansk, Poland, to see the Pope with his friends from Solidarność. Impressed by this Polish pope, but also by the religious dimension of Solidarność's fight against the Communist dictatorship.

But it is also true that Fidesz was greatly helped by a recording broadcast on the radio in 2006 in which the Hungarian Prime Minister of the coalition government of socialists and liberals in power since 2002 was heard to declare to his party's MPs, a month after the 2006 elections: "*We have done nothing for four years. Nothing. You can't give me a single example of serious government action that we can be proud of, other than the fact that we've taken back power with crap. Nothing. When we have to account to the country and they ask what we've done, what are we going to tell them? We blew it. Not just one thing, but everything. For a year and a half, we've been lying morning, noon and night.*"

The disclosure of the Hungarian Prime Minister's confession sent Hungary into turmoil. It's one thing to know that the government is lying to us, but quite another to hear it from the country's most senior leader. The people took to the streets and the police violence only ramped up the phenomenon, even though the European political and media elites in 2006 felt no concern for Hungarian democracy, since it was a socialist-liberal government that was beating up the people. The Hungarian demonstrations in 2006 even turned into riots at times.

"In Hungary, Fidesz has imposed pluralism on the media"
(Extract from an article published in April 2016 by the Journalism Observatory)

"The *post-communist monopoly of the media is finally enraging Hungarians, who have had enough of the pro-government, leftist-libertarian propaganda. In 2006, angry crowds stormed and set fire to the headquarters of public television channel MTV. It was the only time this had happened in Central Europe since 1989. The small private cable television channel HirTV was the only one to broadcast the event. As a result, it was accused by Deputy Prime Minister István Hiller of terrorism and organising social unrest, which almost cost it the licence.*

In fact, 2006 marked the apogee of post-communist governments and the leftist-libertarian media that support them. In November 2006, the leftist-libertarian daily Magyar Hirlap was bought by businessman Gábor Széles, a friend of Viktor Orbán, who completely transformed the paper's profile. Shortly afterwards, the dominance of the weekly HVG was challenged by the conservative weekly Heti Válasz. The new media law of 2011 did the rest by limiting the possibility of media concentration in the same hands, and by guaranteeing sufficient funding for the public media (radio and television) through budget subsidies (100 billion Ft, or around €350 million) and advertising.(...) *But contrary to what was said a few years ago, there was no government censorship after Fidesz came to power in 2010. In fact, it is still the left-libertarian media that dominate, as confirmed by reports from the Mertek Muhely think tank, which is no fan of Orbán's government. On the Internet, the Origo and Index websites are the leaders, in the print media it's still Népszabadság and HVG, and on television it's RTL. Nevertheless, it is no longer absolutely dominant, thanks to the emergence of conservative media that are thriving, such as the dailies Magyar Nemzet and Magyar Idök (No. 2 and No. 3 in the daily press market), the weekly Heti Válasz (No. 2 in the weekly press market) as already mentioned, and several public and private television channels (MTV1, MTV2, Duna, Duna World, etc.) As a result, there is more or less a pluralism of opinion, and the quality of political debate is all the better for it.* "

Viktor Orbán and Fidesz have been cautious. They didn't want to make a bad situation worse. But by dint of motions, petitions and protests, and thanks to the support of an angry people, they eventually led to the resignation of the government in 2009 and to their historic victory in their historic victory in 2010 when Hungarians gave them a mandate, with a two-thirds majority in Parliament, to change the constitution, diversify the media, fight corruption, get rid of the judges trained under the communist regime, limit the power of a Constitutional Court that had been won over by liberal socialism which was blocking many legislative initiatives by the people's representatives, but also to support Hungarian businesses in their dealings with multinationals, to adopt a policy of support for families, to reduce welfare payments, to re-establish respect for life from conception to natural death, and so on.

At the beginning of 2012, Viktor Orbán replied to the Socialist and Liberal Members of the European Parliament, who had literally insulted Hungarians by accusing the government they had chosen of being totalitarian in nature and prone to fascism. The debates were broadcast live on Hungarian television and, three days later, at least half a million Hungarians demonstrated in Budapest to express their support for their government.

European Parliament resolution of 10 March 2011 on the Hungarian media law

Less than a year after Fidesz returned to power, the European Parliament adopted a resolution criticising Hungary's new media law. The European Parliament Resolution of 10 March 2011 on the Hungarian media law already accused Hungary of failing to respect the values of Article 2 of the Treaty on European Union with its new media law and called on the European Commission to intervene.

B. The economic and financial crisis of 2007-2008

Governed by the Fidesz-KDNP coalition since 2010, after eight years of a coalition of socialists and liberals, Hungary has come a long way since 2008, when it was forced to turn to the IMF two years before Greece. This was during the financial crisis that broke out in 2007, which hit Hungary very hard because of the poor management of previous years. In an article entitled "The rise and fall of Hungary" published in 2008[45], the British newspaper *The Guardian* explained that public debt, fuelled in particular by the record deficit of 9.6% of GDP in 2006, an election year, had risen from 52% in 2001 to 66% in 2007 (compared with 45% in Poland and 29% in the Czech Republic and Slovakia, the other countries in the Visegrád group). At the time, public spending represented over 50% of GDP, much higher than in other Central European countries, with very high taxes and one of the lowest employment rates in Europe. The *Guardian* continued: "*Of the EU member states in central Europe, Hungary has been hardest hit because of its massive public debt so largely in foreign hands",* and that is why *"it has become clear that, without outside help, the government could have big problems financing its spending.*" *It was forced to turn to the IMF and accepted conditions under which, despite the economy being in recession, it must cut spending and aim for a deficit of 2.6% in 2009. So, while the major economies are discussing costly programmes to boost*

[45] https://www.theguardian.com/business/blog/2008/oct/29/hungary-imf

The Hungarian lesson

Translation of an article by the Pole Maciej Szymanowski published at the beginning of 2016 under the title "Węgierska Lekcja" (The Hungarian Lesson), just after the arrival of the conservatives in power in Warsaw, in the Polish liberal-conservative weekly Do Rzeczy*, reproduced here with the kind permission of the author and the editors of* Do Rzeczy*. Maciej Szymanowski is a recognised specialist in Poland and the countries of the Visegrád group. He is fluent in Hungarian, Czech and Slovak. Director of the Wacław Felczak Institute for Polish-Hungarian Cooperation and former special adviser to the President of the Polish Sejm on V4 issues, he teaches at the Pázmány Péter Catholic University in Budapest.*

Threats of sanctions and disenfranchisement from European institutions, German journalists and international political leaders fulminating... The Polish government went through the same experience as the Hungarian government before it.

Spring 2010. After eight years on the opposition benches, Fidesz triumphed in the presidential elections and then in the legislatives. Initially stunned by its defeat, the left quickly went on the counter-attack, first mocking the new taxes on banks and supermarkets, then internationalising the national political debate via Berlin and Brussels. The rallying cry was Prime Minister Viktor Orbán's conference against a backdrop of national flags only, without the European flags, exactly as for Prime Minister Beata Szydło more recently. This is not the only similarity or the only attack that the new Polish government would face on the European stage, like it or not.

FIRST ROUND

In Hungary, MTV public television, the symbol of leftist-libertarian propaganda, whose headquarters were burnt down by angry demonstrators in 2006, had never attracted the attention of international journalists' organisations such as the European Federation of Journalists. But the situation changed after Fidesz came to power, when Hungary adopted a new media law requiring the presentation of "balanced information" and banning media attacks on human dignity and insults to people motivated by their religious faith

growth, Hungary is having to tighten its belt".

In other words, at the start of the financial crisis, Hungary was in a situation similar to that of Greece, with which it was often compared. Indeed, in 2007, the year the financial crisis broke out, Hungary had a budget deficit of 5% of GDP compared with 6.7% for Greece, and Hungarian public debt was 65.5% of GDP compared with 103% for Greek debt. Greece was nevertheless a much richer country than Hungary in 2007, with a GDP per capita of €22700, or 86% of the EU average, compared with €10,400 per capita in Hungary, or 39% of the EU average. But unlike Greece, when the 2007-2008 financial crisis broke out, Hungary had not adopted the euro and therefore still had its own currency. It had originally planned to adopt the euro in 2007 or 2008, but the large deficits of the first decade of the 21st century and the slowdown following the introduction of austerity measures by Prime Minister Ferenc Gyurcsány after the elections meant that the Maastricht criteria were not met. An initial draft plan for the adoption of the euro was nevertheless presented in 2008. But then, after the Fidesz-KDNP coalition won a landslide victory in the 2010 elections, Prime Minister Viktor Orbán declared in 2011 that Hungary was not yet ready and that it would not be able to adopt the euro before 2020.

Then, in 2013, he announced that Hungary would not adopt the euro until its GDP per capita reached 90% of the eurozone average. This is very similar to what the leaders of Poland's Law and Justice (PiS) party have said, and which was repeated by Prime Minister Mateusz Morawiecki in January 2019, namely that Poland will join the eurozone when Poles have incomes close to those of Germans.

So, unlike Greece, which no longer had its own currency, Hungary did not have to implement the drastic austerity plans devised in Brussels by a troika made up of the European Central Bank (ECB), the European Commission and the International Monetary Fund (IMF) Orbán's first government was even quick to cancel the measures imposed on Hungary by the IMF, and in 2013 the entire remaining balance of the debt linked to the 2008 loan was repaid in advance. What's more, during the financial crisis, the Hungarian forint was able to fluctuate freely according to the country's economic and financial situation, giving its companies a competitive edge when they needed it most. A useful advantage in times of crisis, which Greece gave up for good when it switched to the euro in 2001. World view. The hysterical protests of the opposition, who spoke of "new censorship", were quickly supported by Martin Schulz, then President of the Socialist Group in the European Parliament. He criticised the new law for "seeking to dismantle democracy by bringing the media to heel". In an open letter to the Hungarian authorities, 70 "human rights defenders and former opponents" protested. Some German headlines even began referring to the Hungarian Prime Minister as a "Führer" and describing a supposed "stifling atmosphere of anti-Semitism reminiscent of the 1930s in Hungary" (*Die Welt*). To increase the pressure on Budapest, the media began to increasingly issue anonymous statements by Brussels officials, for example on the plan to take back Hungary's presidency of the EU Council or to impose sanctions.

SECOND ROUND

However, these were only the first steps towards what was to come in the spring of 2011, when the Hungarian Parliament

adopted a new constitution to replace the one personally drafted by Stalin, which was still in force at the time even though it had been amended many times after 1989. Its preamble, which begins with the words "God bless the Hungarians", which defines marriage as the union of a man and a woman, and which notes the presence of Hungarians beyond Hungary's borders, was enough for the new fundamental law to be considered to be suffused with, respectively, clericalism, homophobia and nationalism.

Guy Verhofstadt, chairman of the Liberal group in the European Parliament, criticised Prime Minister Orbán for "not taking the opportunity to make Hungary a more modern and democratic country". France's Minister of Foreign Affairs, Alain Juppé, asked the European Commission to check whether Hungary's new constitution violated "what is common to all the countries of the European Union, namely the rule of law and respect for the great democratic values". Werner Hoyer, State Secretary at the German Foreign Ministry, described the new Hungarian constitution as a "step backwards". Amnesty International and Human Rights Watch also voiced criticism, and UN Secretary-General Ban Ki-moon declared that even when a free country redrew up a constitution, it must comply with international principles, thus implying, without any knowledge of the issue, that this was not the case with the new Hungarian constitution.

It is hard to say how long these attacks would have lasted if the Hungarian government had not simply sent the European Commission the full text of the new constitution translated into English, together with detailed explanations, politely asking the Commission to point out the specific provisions alleged to be in breach of European law. The Brussels experts were only able to legally justify their objections to two points that were not included in the Constitution itself but in its implementing texts: lowering the retirement age for judges from 70 to 62 and certain powers of the President of the Office for Personal Data Protection. Budapest accepted these objections and made the requested changes.

As a result, the Belgian Guy Verhofstadt, pressed by the Hungarian media, began to prevaricate: "*The problem is not this or that paragraph, but the overall philosophy and what lies behind it*", he replied. For his part, the then President of the European Commission, José Manuel Barroso, defended himself with arguments that were almost psychiatric in nature: " *I feel a certain anxiety when I read the Hungarian constitution*", he said.

THIRD ROUND

The Hungarian government's victory, achieved by refocusing the controversy on the facts and paragraphs of its constitution, has not prevented the European Commission and the European Parliament from attacking again. The next time it was the Hungarian government's efforts to replace the President of the Hungarian National Bank, András Simor. This was interpreted as a violation of the central bank's independence. In this case too, the Hungarian authorities sought to reduce the discussion to concrete legal arguments, without ruling out concessions on its part in advance. András Simor - one of the world's worst-rated central bank presidents in Global Finance's annual rankings - was finally stripped of his post only in 2013, to be replaced by Orbán's Minister of the Economy. On the banks of the Danube, it was considered more important to preserve the limitations imposed on the Constitutional Court which since 2012 has only been able to examine questions of due process, without being able to refer to its previous case law, which was annulled en bloc by Parliament.

The European Parliament's reaction was to draw up a list of recommendations in the Tavares report in July 2013, again threatening to deprive Hungary of its right to vote in the European institutions. Of course, these threats were not carried out, partly because the European Parliament's recommendations were based on abstract generalities.

THE KEY TO SUCCESS

Today, nobody in the EU is talking about censorship or a "constitutional coup" in Budapest. However, the long list of political leaders favoured by the media who have made rash statements - and this is quite the euphemism- about Hungary is truly impressive. But this has not prevented Hungary from emerging victorious from these conflicts. How did it do it? Admittedly, the accusations against it were mainly based on lies and manipulation. But in the European politico-media context, it was not enough to expose the reality of the facts.

Viktor Orbán's personality contributed greatly to the Hungarian victory. Involved in politics at national level since 1989, vice-president of Liberal International for a decade, vice-president of the European People's Party until 2012, Orbán is no newcomer. He handles Shakespeare's language with ease (and often with humour). He is friends with Helmut Kohl, David Cameron, former President of the European People's Party Joseph Daul and other European political leaders. Leaders who have been routinely invited to Fidesz congresses for years. When the need arises, Hungary can always count on a few strong

statements from Roger Scruton, Vladimir Boukovski and other media intellectuals.

EXPRESSIONS OF SUPPORT

In addition to its external action, the Hungarian government has also made major efforts within the country. It took the time to explain its plans and intentions at length to the people of Hungary. If the policies of the Budapest government had not been understood in Hungary itself, there would not have been the hundreds of thousands of citizens who came to show their support in the streets, or the millions of clicks for the 'yes' vote in the Internet referendums when Brussels protested against energy price rises for individuals (but not for businesses) in 2013 or, a year later, against the new tax on advertising that hit German holdings, which had a strong presence in the Hungarian media, particularly hard.

In its disputes with Brussels, the Hungarian government has always avoided head-on clashes. It procrastinated, dragged it out and even backed off a little when it had to, looking for the right moment to put its plans into action. Poland would do well to study Hungary's experience of relations with Brussels.

Especially as the Polish opposition is already modelling its actions on the Hungarian example by seeking support in Brussels. The Committee for the Defence of Democracy (KOD) is itself a copy of a successful initiative by post-communists and Hungarian liberals in the 1990s. And the first delegation received by the President of the Polish Constitutional Court, Andrzej Rzepliński [very involved on the side of the opposition to PiS - Ed.] after the parliamentary elections was made up of judges from the Hungarian Constitutional Court.

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C. Budapest to Warsaw

1) 2015: Andrzej Duda wins the presidential elections, PiS wins the parliamentary elections

Prior to their victory in the parliamentary elections on 25 October 2015, the supporters of the Law and Justice (PiS) party had been saying for several years that they dreamed of a "Budapest in Warsaw", i.e. of replicating in Poland the success of Fidesz in Hungary, and also its policies. The victory in May of PiS candidate Andrzej Duda over outgoing Civic Platform (PO) president Bronisław Komorowski - by 51.55% to 48.45% - came as a surprise to Donald Tusk's friends. Despite the issues undermining the PO's popularity, in autumn 2014 President Komorowski still enjoyed a comfortable lead over his main rival. Back in January, Adam Michnik, editor-in-chief of the liberal-libertarian newspaper *Gaze-taWyborcza* said[1] of the outgoing president: " *It seems to me that barring unforeseeable events, such as Bronisław Komorowski driving drunk and running over a pregnant disabled nun on a pedestrian crossing, it is clear that he will be elected President.* [46]"

Even after the election of Andrzej Duda, the PiS was not sure that it would be able to govern after the legislative elections in October and the Polish media speculated on the possibility of an alliance between the PO coalition and the PSL agrarian party, in power since 2007, and the social-democrat SLD (heir to the former communist party) Elections to the Sejm, the lower house of Parliament, are held on a proportional basis in Poland, according to the D'Hondt system, with a threshold of 5% for parties and 8% for electoral coalitions. However, two factors enabled the United Right, the electoral coalition formed by the PiS and two small right-wing parties[47], to win an absolute majority of seats: 235, with 37.58% of the vote, out of a total of 460, against 138 for the PO (24.09% of the vote) and 16 for its ally the PSL (5.13% of the vote). It was the first time that a party or electoral coalition had obtained an absolute majority in the Sejm since the democratic transition of 1989-1990.

Poland and the euro

While Poland was in a much better financial situation than Hungary and Greece in 2007, after two years of coalition government led by the PiS, and with the liberals of the Civic Platform (PO) coming to power that year alongside the PSL, for a period that lasted until 2015 (after another electoral victory under Donald Tusk in 2011), fluctuations in the national currency also helped the Polish economy a great deal after the financial crisis of 2007-2008.

In 2007, Donald Tusk's government made the adoption of the euro one of its strategic objectives, and a roadmap towards the euro was even drawn up in October 2008, with the intention of replacing the Polish zloty with the European currency from 2011. President Lech Kaczyński and the Law and Justice party (PiS) were against the idea of setting a date for the changeover to the euro. PiS leader Jarosław Kaczyński felt that adopting the euro within this timeframe was "very risky" and would inevitably lead to an impoverishment of Polish society. With the financial crisis and deteriorating public finances, it became clear in 2009 that Poland would not adopt the euro on schedule. Tusk subsequently abandoned the idea of setting

[46]Remarks made on TVN on 5 January 2015

[47]"Poland Together" (Polska razem) - which became "Entente" (Porozumienie) in 2017 - of Jarosław Gowin who was to become after the elections Minister of Science and Higher Education, with the rank of Deputy Prime Minister, and "Poland in Solidarity" (Solidarna Polska) of Zbigniew Ziobro who will be appointed after the elections as Minister of Justice.

a deadline for the changeover to the euro, as opinion polls showed a clear majority of Poles in favour of keeping the national currency.

Thanks to its uninterrupted, albeit slower, growth during the financial crisis, Poland, until then the poorest country in the V4, had even been able to catch up with Hungary in terms of nominal GDP per capita.

After Greece, Poland and Hungary have now overtaken Portugal in terms of GDP per capita calculated on the basis of purchasing power parity, but unlike in Hungary, the economic and financial results of the outgoing parliamentary majority did not contribute to the defeat of the Liberals in Poland in 2015, even though these results had improved even further before the arrival of the Covid-19 pandemic in spring 2020, under the social-conservative governments of the PiS and its allies in the United Right.

2) The programme on which PiS won the 2015 parliamentary elections and its similarities with the Fidesz programme in Hungary.

The PiS election manifesto bore a striking resemblance to the policies implemented in Hungary by the coalition of Fidesz and Christian Democrats under Prime Minister Viktor Orbán.

Tax and social policy

The PiS promised its voters a pro-natalist policy, as in Hungary, and also, as in Hungary since 2010, a special tax on banks (adopted in February 2016) and another on supermarkets (finally abandoned under pressure from the European Commission), a reduction in the taxes paid by SMEs and a policy of reindustrialising the country. Displaying a social-conservative philosophy and claiming to be Christian Democrat, the PiS also promised a number of social measures: a reduction in the retirement age to bring it back to levels prior to the 2012 reform [1] by Donald Tusk (although this had not been part of his electoral programme for the 2011 elections, which led to large-scale demonstrations when the PO-PSL coalition voted to raise the retirement age to 67), an increase in the tax-free limit for income tax (a reform that was ultimately implemented only for low-income earners), the introduction of a minimum hourly wage [2] and free medication for senior citizens aged 75 and over. The flagship measure of the PiS programme, which had a pro-natalist objective but a very strong social impact in a country where extreme poverty affected large families in particular, was the introduction of family allowances from the second child onwards, with no income requirement, and from the first child onwards for low-income households. Here too, the Polish PiS was modelled on the Hungarian Fidesz's pro-natalist policy. To finance these measures, PiS promised, in addition to taxes on banks and supermarkets, to step up the fight against tax fraud.

Reforming the justice system

In the area of state institutions, the PiS promised to merge the posts of Minister of Justice and Attorney General once again, returning to the situation prior to the PO-PSL governments, to introduce control of the courts and to give the Minister of Justice the possibility of bringing appeals under an exceptional procedure, even several years after a judgment has become res judicata, for particularly scandalous court decisions. These appeals, which were to concern certain decisions taken by the public prosecutor's office, were to be examined by a special chamber of the Supreme Court .

An admission of powerlessness from the man who was "independent" public prosecutor from 2010 to 2016

"*During my 6 years in office, I have always said that the public prosecutor's office does not tolerate excessive democracy. (...) If we put a public prosecutor in charge of the public prosecutor's office, let's give him the tools and hold him to account for his actions or inaction. But give him a chance and real power. During my term of office, the public prosecutor's hands were tied by all sorts of structures, initiatives and institutions blocking his abilities.* "

(Andrzej Seremet, public prosecutor in the years 2010-2016, to explain his lack of action to MPs on the Commission of Inquiry into VAT Fraud of the Tusk years during his appearance in October 2018).

Source: *Nasz Dziennik* newspaper, 30 October 2018

In order to put an end to the problems that have been present in the courts since the democratic transition, PiS also promised to create a genuine disciplinary mechanism for judges with a form of democratic control, to be exercised in particular by the Minister of Justice, in order to break the corporatist spirit of the judicial institution. Among the reforms announced in the PiS programme was a change in the method of appointing the 15 judges on the National Council of the Judiciary (KRS), which has 25 members in all.

Rebalancing the audiovisual landscape by taking control of the public media

Like Fidesz in 2010, PiS also wanted to rebalance the media landscape, starting with the public television group, which was then under the control of people close to the former PO-PSL coalition and also the SLD, against the two major private groups that were in favour of the PO and hostile to the PiS and its conservative and more 'sovereignist' programme than that of its predecessors. For both Hungary in 2010 and Poland at the turn of the year 2015-2016, this rebalancing of the media (in Hungary through a new law requiring the presentation of "balanced information" and prohibiting in the media attacks on human dignity and insults to people motivated

by their religious faith and world view, and in Poland through a "small media law" adopted on 31 December 2015 with the aim of changing the direction of public media) was one of the first targets of attacks by the European Commission and the European Parliament as well as the Western European media. The United Right coalition led by the PiS had also announced its intention to "repolonise" the Polish press, which was largely in the hands of German capital, by means of a media deconcentration law. But this project was ultimately shelved because of the difficulty of 'repolonising' the media without violating EU law.

Rejection of the relocation of "migrants" decided in Brussels

These issues were compounded by the relocation of "migrants", with the major migratory crisis of summer and autumn 2015 and the decision by German Chancellor Angela Merkel, without consulting her European partners, to open Germany's borders. In this area too, the Polish PiS and its United Right coalition adopted the same views as the Hungarian Fidesz coalition with the KDNP. In addition to refusing to accept that immigration to Poland should be decided in Brussels and the security issues brandished by the PiS in the wake of the terrorist attacks in Western Europe, this was an opportunity for the conservatives to put forward their proposal of a more Atlanticist foreign policy, a more proactive European policy and a more active defence of Polish interests within the EU with a rejection of the gradual erosion of Polish sovereignty. The United Right promised Polish voters that it would join the positions of the Visegrád Group (V4) and make this cooperation forum an instrument of Polish European policy, in order to be able to speak on an equal footing with Berlin and Paris. Here again, the Polish PiS had a line very close to that of the Hungarian Fidesz. It is important to point out that neither PiS nor Fidesz want to see the end of the EU, which they consider to be of strategic importance for their national interests, but these parties are opposed to the federalist vision of the European Union.

Conflict with Brussels fuelled by liberal opposition

From the very first months of the new legislature, the government of Beata Szydło, chosen by Jarosław Kaczyński's party as Prime Minister in accordance with promises to the electorate, found itself in conflict with Brussels, and more specifically with the European Commission and the European Parliament. As during the period 2005-2007, when the PiS governed in coalition with an "anti-system" agrarian party and a small right-wing sovereignist party. Poland also very quickly came under fire from the major Western European media, particularly the German media. Officially, the concerns expressed by the European institutions related to compliance with the decisions of the Polish Constitutional Court by Ms Szydło's government and by the United Right majority in Parliament, as well as the first reform of the public media implemented by the parliamentary majority in January 2016 in order to regain control over the media which were in the hands of the PO, the PSL and the SLD social democratic party.

111. Reforms at the heart of accusations of undermining the rule of law

A. The Hungarian reforms of the early 2010s

1) The new 2011 constitution replaces that of 1949

Unlike the other countries in the region, Hungary amended its constitution without replacing it at the time of the transition to democracy and a market economy in 1989. Its constitution, for example, was adopted in 1949 by copying the Soviet constitution of 1936. The 1989 amendments to this Stalinist-style constitution were adopted on the basis of agreements between the Hungarian Socialist Workers' Party - the Communist Party - and the opposition, by a Parliament still in Communist hands but which played only a subordinate role. The Hungarian constitution still in force in 2010 had therefore never been approved by the Hungarian people, and it was cruelly lacking in democratic legitimacy. Initially, it was agreed that the first democratically elected parliament would adopt a new constitution, but this never happened, and it was left to the Constitutional Court to resolve the doubts arising from the gaps and contradictions of the old Stalinist constitution, which was radically amended in 1989 to bring it into line with the requirements of democracy and the rule of law, while retaining its original structure. Prior to 2010, however, there had not been a sufficient majority in Parliament to draft a new constitution. The alliance of socialists and liberals that succeeded Viktor Orbán's first government in 2002 also promised voters the adoption of a new constitution. In 2005, under Socialist Prime Minister Ferenc Gyurcsány, the Minister of Justice prepared a new constitution but, after the 2006 elections, he failed to secure the two-thirds majority needed to pass it. During the 2010 election campaign, Viktor Orbán promised that there would be a new constitution if the majority given to his side by the voters allowed it, and the coalition of Fidesz and the Christian Democrats of the KDNP therefore had indisputable democratic legitimacy to adopt a new constitution thanks to the two-thirds majority in Parliament that they had won with 53% of the vote in the spring 2010 general election. A month and a half after the formation of the new National Assembly at the end of June, a committee of 45 MPs was set up with the task of drafting a new constitution for the country. The Socialist Party (MSZP) and the Green Party (LMP) withdrew from the committee in October of the same year over disagreement about limiting the prerogatives of the Constitutional Court. The far-right Jobbik party (which has since become a centrist party allied with the liberals and the left) withdrew the following month because of disagreement over the general design of the new constitution. The parliamentary committee responsible for preparing the Hungarian constitution has held consultations with representatives of minorities, local authorities, law institutes and other organisations representing society. Each party represented in Parliament could designate up to five social organisations to formulate opinions on the new constitution. The majority coalition brought in four churches historically present in Hungary, associations of large families and organisations representing Hungarians living

abroad, the MSZP brought in workers' unions, the LMP human rights NGOs and environmental organisations, while Jobbik brought in Hungarian minority organisations abroad and human rights organisations.

Although some of the opposition's demands were taken into account in the constitution adopted by a two-thirds majority in Parliament (such as the abandonment of the rule requiring approval by two successive parliaments for any amendment to the new constitution), the opposition subsequently criticised the absence of a referendum for its adoption. However, the old constitution did not require a referendum, and this practice is not routine in Europe.

Hungary's current Fundamental Law, which replaced the former Constitution of the Republic of Hungary, was adopted on 18 April 2011 by the National Assembly following a month of plenary debate, with the support of Fidesz MPs, KDNP MPs and one independent MP: 262 votes in favour, 44 against and one abstention. Signed by the French President on 25 April, it came into force on 1 January 2012.

The new constitution, known as the Fundamental Law, maintained the separation of powers and extended the possibilities for reviewing the constitutionality of laws, by authorising, in addition to the President, Parliament or a quarter of the deputies, as well as the Commissioner for Fundamental Rights - a post created by the new constitution - to refer cases to the Constitutional Court, and by allowing the latter to review court decisions in the light of fundamental rights in the event of an appeal for unconstitutionality by legal entities or individuals. It has created an ombudsman's office and a Budget Council with a chairman appointed for a six-year term by the President of the Republic, and on which sit the President of the National Bank of Hungary and the President of the Court of Auditors. This Budget Council has the right to veto the budget voted by the parliament in the event of an excessive deficit, in application of the principle now set out in the Fundamental Law (and absent from the previous constitution), according to which "*Hungary applies the principle of equitable, transparent and sustainable budgetary management*".

Preamble to the Hungarian Fundamental Law of 25 April 2011

God bless the Hungarians!

National avowal

WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian hereby proclaim the following:

We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago;

We are proud of our forebears who fought for the survival, freedom and independence of our country;

We are proud of the outstanding intellectual achievements of the Hungarian people;

We are proud that our nation has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence;

We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country;

We promise to preserve our nation's intellectual and spiritual unity, torn apart in the storms of the last century. We proclaim that the national minorities living with us form part of the Hungarian political community and are constituent parts of the

State;

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources

We believe that our national culture is a rich contribution to the diversity of European unity;

We respect the freedom and culture of other nations, and strive to cooperate with all nations of the world.

We hold that human existence is based on human dignity;

We hold that individual freedom can only be complete in cooperation with others;

We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love;

We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind;

We hold that we have a general duty to help the vulnerable and the poor;

We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty;

We hold that democracy is only possible where the State serves its citizens and handles their affairs in an equitable manner, without abuse and impartially.

We honour the achievements of our historic constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation;

We do not recognise the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship;

We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid;

We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution;

We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order.

We hold that after the decades of the twentieth century, which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal;

We trust in a jointly shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength;

Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live;

We, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation.

English version at: https://njt.hu/jogszabaly/en/2011-4301-02-00?)

Apart from the adoption process, the main points criticised by the Western European media and in Brussels circles, as well as in certain Western capitals, concerned the reference to Christianity in the preamble to the Constitution, the article affirming the right to life from conception ("*Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.*") In Hungary, abortion is still permitted on request up to the twelfth week of pregnancy, even though abortion is not a recognised right under international law. Additionally, the article affirming the nature of marriage as the union of a man and a woman (" *Hungary shall protect the institution of marriage as the union of one man and one*

woman established by voluntary decision, and the family as the basis of the survival of the nation. Hungary shall support the commitment to have children. The protection of families shall be regulated by a cardinal Act"). However, enshrining the true nature of marriage in the constitution is not the sole preserve of Hungary or even Poland (which enshrined the nature of marriage as the union of a man and a woman in its 1997 constitution, without being criticised for doing so when it joined the European Union in 2004).

Fidesz-KDNP policy on abortion

" *The Hungarian Constitution states that human life is protected from the moment of conception. But it is the law that defines what a person is, and the law tells us that a baby is a person from 12 weeks of pregnancy. So in Hungary you have the right to kill your baby up to the 12th week of pregnancy. In fact, there are four conditions under which abortion is permitted in Hungary: when the mother's life is in danger, when the baby is seriously ill or disabled, when it was conceived by rape, and, up to the 12th week, when the woman is in a difficult economic or social situation or in any other situation that makes it more difficult to welcome the child. No one asks the woman who wishes to have an abortion any questions if she invokes this fourth condition. I don't think [the Fidesz-KDNP governments] are pro-life. They don't touch on this issue. The laws today are the same as they were before 2010. Although the number of abortions is falling, more than one in five children conceived in Hungary is still aborted. (...)*

Fidesz is in the process of making adoption easier, but only recently. In Hungary, before having an abortion, you have to see a counsellor twice. The first time, you will be told what an abortion is, what the consequences are, and what other options exist. At least, that's the theory, but I know that this visit is often simply box ticking. You then have a three-day cooling-off period before a further consultation, which may lead to an abortion. (...) In one year, we have around 90,000 children and over 25,000 abortions. By the way, if there are fewer abortions, it's also because there are fewer women of childbearing age. But as Hungarian women want to have children later and later, it's often people my age who want to have an abortion, for example when they're still at university. Admittedly, Fidesz's pro-family, natalist policies are having a positive impact on people who might want to have an abortion for economic reasons. In fact, I have no doubt that, even in Fidesz, the majority and also the leaders are against abortion. But it's a very sensitive subject and they don't want to take any risks. They know that if they touch this issue, they could lose the next elections. (...) The pro-life community is not very large, but we can make ourselves heard in the conservative media, which are pro-life, and that can give the impression that we are an important movement. But if you watch the liberal media or ask people on the street, you won't know anything about the pro-life movement in Hungary. (...) I've spoken to television several times and they're open to what we have to say. There are some very good journalists who interview us and who are themselves pro-life. We still don't have a very high profile, but our situation is undoubtedly better than that of pro-life activists in Western Europe."

(Lidia Meuwissen, Hungarian pro-life activist, in a July 2020 interview with the author of this report for the *French* newspaper Présent)

Another criticism concerned the use of cardinal laws under the new constitution These are laws supplementing the constitution that are adopted by a two-thirds majority, which makes it more complicated for a future parliament to amend or repeal them. The extensive use of cardinal laws by the Fidesz-KDNP majority in the years following the adoption of the Constitution has added to the criticism. The advantage of these laws is that they make it possible to stabilise certain policies in areas where such stability is a prerequisite for effectiveness. As a

result, family policies are largely governed by cardinal laws, since the 2011 Constitution states that "*The protection of families shall be regulated by a cardinal Act.* "

Similarly, "*The detailed rules for the powers, organisation and operation of the Constitutional Court shall be laid down in a cardinal Act*".

2) Reform of the Constitutional Court

Compared with the previous constitution, the 2011 constitution and the cardinal law governing the Constitutional Court have changed the ways in which cases can be referred to the Constitutional Court, placing greater emphasis than before on the protection of individual rights. An organisation or an individual may appeal to the Constitutional Court if they believe that a law used against them in a trial has violated their rights as guaranteed by the Constitution. Appeals may also concern a specific judgment, and therefore the judge's interpretation of the law, and not just the law itself, and the Constitutional Court may overturn such judgments if the law or its interpretation are deemed unconstitutional. On the other hand, a natural or legal person may no longer bring a case before the Constitutional Court in the abstract, as was previously the case with the institution of *actio popularis* for appeals against the unconstitutionality of laws in force, which led the Constitutional Court to examine around 1,600 complaints per year in the period 1990-2001[48].

"Hungary is a blot on the EU"

In the early days of January 2012, when Hungary's new constitution came into force, Jean Asselborn, Luxembourg's Minister for Foreign Affairs, said that " *Hungary is a blot on the EU* ". For his French counterpart, Alain Juppé, in a statement also made in the early days of January 2012, " *it is up to the European Commission to check that these new constitutional texts respect what is common to all the countries of the European Union, i.e. the rule of law and respect for the major democratic values*". The French minister was already convinced: "*There is a problem today, and we call on the European Commission to take the necessary initiatives to ensure that its fundamental principles are respected everywhere, including in Hungary*", because " *that is its job, its responsibility, its duty under the Treaties*".

As for Asselborn's compatriot Viviane Reding, Vice-President of the European Commission for Justice, Fundamental Rights and Citizenship, she declared in December 2011 in a Luxembourg newspaper: " *Hungary has a totalitarian government that is hiding behind democratic trappings. With the change of constitution, the regime wants to abolish the separation of powers. If Budapest wants to remain a member of the European Union, European values must no longer be trampled underfoot.* "

Even before the new constitution came into force, on 5 July 2011 the European Parliament had adopted a resolution "on the revised Hungarian constitution", in which Hungary was criticised, among other things, for the fact that " *the constitutional process was marked by a lack of transparency and that the drafting and adoption of the new constitution was completed in an exceptionally short timeframe, which did not allow for an in-depth and substantial public debate on the draft text, (...) that the Constitution has been strongly criticised by NGOs and national, European and international organisations, by the Venice Commission and by representatives of the governments of the Member States, and that it was adopted exclusively with the*

[48]Source: "The Hungarian constitutional court in transition - from actio popularis to constitutional complaint", by Fruzsina Gárdos-Orosz in *Acta Juridica Hungarica* (https://akjournals.com/view/journals/026/53/4/article-p302.xml)

votes of MPs from the parties in power, so that no political or societal consensus was reached ".

Although the new Hungarian constitution reaffirmed the separation of powers, while introducing a certain amount of democratic, parliamentary control over the judicial system, one of the criticisms levelled against Hungary from Brussels concerned, particularly in the years following the adoption of the new constitution, the tendency of the Hungarian Parliament, where the Fidesz-KDNP coalition has had a constitutive majority almost uninterruptedly since 2010, to react to unfavourable rulings by the Constitutional Court by amending the constitution. Several amendments were adopted shortly after the Constitution came into force, such as that of 11 March 2013, which was already the fourth, limiting the capacities of the Constitutional Court by prohibiting it from challenging amendments to the Constitution on their merits (the Constitutional Court can only challenge them if the procedure laid down for amending the Constitution is not followed) and by prohibiting it from referring to its case law from before1 January 2012, i.e. before the new Constitution came into force. This new amendment was immediately criticised by the European Commission, which saw it as a source of concern in terms of respect for " *the principle of the rule of law, EU law and Council of Europe standards*". According to its statement of 11 March 2013[49], the Barroso Commission would have liked to have been consulted in the preparatory phase of this amendment.

No written constitution and unlimited sovereignty of Parliament in the United Kingdom

While Warsaw and Budapest are criticised for reforms described as an abuse of power by Parliament and as calling into question the system of checks and balances and thus, it is said, the rule of law and democracy, in one of Europe's oldest democracies, the United Kingdom, the sovereignty of Parliament is *defined* as *follows* [50] *"Parliamentary sovereignty* is *a principle of the British Constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.* "

Furthermore, the United Kingdom does not have a Constitutional Court and its Supreme Court, which is considered by many observers to be contrary to British parliamentary tradition, was only created in 2009 by a law passed by Parliament under Tony Blair's Labour government. Since, according to British constitutional principles, "*no Parliament can pass laws that future Parliaments cannot change*", the British Supreme Court could easily be abolished by the current parliamentary majority (and by a simple majority at that).

As it happens, the Attorney General for England and Wales appointed by Prime Minister Boris Johnson in February 2020, Suella Braverman, believed that, for the sake of democracy, Parliament had to recover the sovereignty that had been taken from it not only by the European Union but also by the British courts. Braverman wrote in January 2020 that the Supreme Court's judgment in September 2019 that Boris Johnson's suspension of Parliament (as part of the dispute between Johnson's government and Parliament over the terms of the exit from the EU) was unlawful and a further example of the "*chronic and continuing intrusion by judges*" into the political arena. She criticised "judicial activism" and said: "*Yes, the courts must act to contain abuses of power by government, but if a small number of unelected and unaccountable judges continue to determine major public policy in opposition to elected decision-makers, our democracy cannot be called representative. Parliament's legitimacy is second to none and that's why we need to take back the reins, not just from the EU, but also from the judiciary*. " As Attorney General, Braverman became Chief Solicitor for England and Wales, General Counsel for Northern Ireland and

[49] https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_13_201
[50] https://www.parliament.uk/about/how/role/sovereignty/

the Government's first Legal Adviser in 2020.

Despite its doctrine of the unlimited sovereignty of Parliament, the United Kingdom, while a member of the EU from 1973 to 2020, was never subject to a sanction procedure under Article 7 of the EU Treaty and has never been accused of violating the rule of law, as Hungary has been since 2010 and Poland since 2015.

3) Justice reform

The Hungarian Constitution of 2011 and the cardinal laws that accompanied it were the occasion for reforms to the justice system that were contested by the European Commission and the European Parliament.

In December 2011, Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship sent a letter to the then Hungarian Minister of Justice, criticising him for reducing the retirement age for judges from 70 to 62 (a measure designed to purge the judicial system of former communist judges more quickly, but which Hungary eventually reversed after an unfavourable ruling by the CJEU); the transfer to the President of the National Office for the Judiciary (OBH), appointed by Parliament with a two-thirds majority for a nine-year term, on a proposal from the President of the Republic, of the power to appoint and dismiss the presidents of courts, with inadequate supervision, from the Commission's point of view, by the National Judicial Council (OBT), whose members are appointed by their peers; the transformation of the Supreme Court into the Kúria, which raised concerns about the possibility of replacing the judges of the existing Supreme Court before the end of their term of office; the replacement of the Data Protection Authority by a new institution, which meant shortening the term of office of the head of the existing body.

The National Judicial Council (OBT) as it functioned from 1997 to 2010 was criticised in Hungary for various reasons, but in particular because its members were often themselves presidents of courts, and were therefore responsible for supervising themselves. In addition, the President of the OBT was also President of the Supreme Court and the other members of the OBT also held other positions, and the fact that the OBT only met once a month undermined its effectiveness as a supervisory body for the judicial system.

The process by which judges are appointed by their OBT peers was also criticised for its lack of transparency and objectivity.

The Fundamental Law of 2011 entrusted Parliament with the task of regulating the organisation and administration of the courts, the status of judges and the remuneration of judges by means of a cardinal law (which must therefore be adopted by a two-thirds majority). The Fundamental Law also provides that, at the request of the President, the National Assembly shall elect by a two-thirds majority the President of the new Supreme Court, the Kúria, which is a court of cassation. The drafting of the new rules was preceded by consultations involving around half of Hungarian judges, in cooperation with the Hungarian Association of Judges (MABIE) and in consultation with the Hungarian Association of Administrative Court Judges (MKBE) and leaders of the National Association of Labour Court Judges (MBOE). Other stakeholders also took part in the consultations.

The new Supreme Court, or Kúria, has new powers: it, rather than the Constitutional Court, must rule on the conformity of local authority decrees and orders with the law. The President of the Kúria may no longer hold any other office (prior to 2012 he was also head of the National Judicial Council (OBT)).

Since 1 January 2012, the President of the OBH, who must be a judge and therefore cannot belong to any political party, has been appointed by Parliament by a two-thirds majority vote and is responsible for the central administration of the courts. Proposed by the President of the Republic, they have to go through the National Assembly's Justice Committee and the National Judicial Council (OBT). The OBT is made up of judges elected by their peers, and while the president of the OBH is responsible for appointing the presidents of the courts and the judges, the OBT supervises the appointment of court presidents and the running of competitions for judges, for which it proposes the ranking of candidates according to the criteria defined by law. The President of the OBH can only choose between the first three candidates in the ranking, and must justify their decision in writing if they do not choose the first candidate in the ranking presented by the OBT.. The President of the Republic then appoints the successful candidate to the post of judge.

The President of the OBH may assign cases to the court of their choice if this is necessary to shorten case processing times, depending on the workload of the various courts. As for the judges of the Supreme Court (Kúria), it is the President of this institution who organises the competitions. The OBT is responsible for the financial supervision of the courts. The President of the Republic or OBT may initiate proceedings in the National Assembly for the dismissal of the President of the OBH.

From the point of view of the authors of the Hungarian reform of the justice system, the president of the OBH, appointed for a term of office of nine years and not exercising any other judicial function during their term of office or any other remunerated function (apart from remuneration authorised in very limited areas, such as copyright, activity as a sports trainer, university teaching, etc.), is less prone to lobbying than the former chairman of the OBT. In addition, the new organisation of the supervision of the judiciary, in addition to the democratic control conferred by its appointment with the participation of the President of the Republic and Parliament, is both more efficient and more transparent.

While the European Commission, in the chapter devoted to Hungary in its report on the rule of law for 2021, remains highly critical of the Hungarian judicial system, which it considers insufficiently independent of political power, in particular Parliament, it does note that " *efficiency in civil and administrative cases remains high. According to the EU Justice Scoreboard 2021, Hungary performs very well in terms of the estimated time taken to decide administrative cases at first instance and at all levels of court; the number of administrative cases pending before courts of first instance; and the number of civil, commercial, administrative and other cases pending*.

Hungary also performs well in terms of the estimated time taken to settle contentious civil and commercial cases at first instance, and the rate at which civil, commercial, administrative and other cases are decided. Since 9 July 2020, new procedural rules have authorised fast-track procedures in cases involving civil claims by victims of crime."

The same certainly cannot be said of the Polish justice system following the reforms introduced in 2017.

Organisation of the Hungarian judicial system

(Extract from the European Commission's report on the rule of law in 2021[51])

"*Hungary has a four-tier ordinary court system. 113 district courts operate at first instance, while 20 regional courts hear appeals against district court decisions and decide on certain cases at first instance. Five regional appeal courts decide on appeals against decisions of the regional courts. The main role of the Supreme Court (Kúria) is to guarantee the uniform application of the law. The Fundamental Law tasks the President of the National Office for the Judiciary (OBH), elected by Parliament, with the central administration of the courts. The National Judicial Council is an independent body, which, under the Fundamental Law, supervises the OBH President and participates in the administration of the courts. Judges are appointed by the President of the Republic following a recommendation of the OBH President based on a ranking of candidates established by the local judicial councils (composed of judges elected by their peers) The OBH President cannot deviate from this ranking without the prior consent of the National Judicial Council. The Constitutional Court is not part of the ordinary court system, and reviews the constitutionality of laws and judicial decisions. The prosecution service is an independent institution vested with powers to investigate and prosecute crime. The Hungarian Bar Association and the regional bar associations are autonomous self-governing public bodies*"

4) Electoral reform

Between the 2010 and 2014 general elections, the new Hungarian coalition carried out a major electoral reform, implementing one of its campaign promises but attracting fresh criticism from Brussels and the major Western European media, focusing mainly on the electoral redistribution described as 'gerrymandering', i.e. carried out in such a way as to party in power (a practice not unfamiliar to the great democracies of Western Europe), and also on the supposedly nationalist nature of these reforms, since the right to vote in Hungarian parliamentary elections was granted to the Hungarian-speaking communities descended from the large Hungarian population that had found itself outside the national borders after the 1920 Treaty of Trianon.

In line with its election promises, the new Fidesz-led coalition has reduced the number of MPs from 386 to 199. The electoral system remained mixed, but the proportions changed, with 106 deputies elected by single-member constituencies with one round of voting (as opposed to two rounds previously) in redrawn constituencies, and 93 MPs elected by proportional representation list system. Although the redrawing of the constituency boundaries was considered opportunistic by the opposition and its Brussels allies, it has greatly reduced the disproportions

[51]Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021SC0714

between the different constituencies in terms of the number of voters per MP, with variations no longer exceeding 15% of the national average, whereas this ratio could previously be as much as one to three, when, for example, 27,000 voters elected a Member of Parliament in the county (region) of Vesz-prem and 67,000 voters elected a member of parliament in the city of Gödöllő[53]. In addition, the new boundaries mean that ethnic and religious minorities are better represented in the National Assembly, Hungary's single-chamber parliament. If a national minority does not have a deputy, it is represented by the Ombudsman for National Minorities. The Hungarian Fundamental Law of 2011 stipulates that the electoral law is a cardinal law, which means that it can only be amended with the support of two-thirds of the deputies.

One of the criticisms levelled at Viktor Orbán's Hungary is the vote granted to Hungarians outside the country, who vote by post for the list ballot, which, according to the Hungarian government's detractors, is aimed at strengthening the Fidesz vote and consolidating its hold on power, in addition to the supposedly nationalist nature of this reform (although Fidesz has never been in favour of a revision of borders, despite the Hungarian trauma inherited from the unjust Treaty of Trianon). But in reality, in 2014, in the postal vote for the list ballot (which is open to Hungarians abroad but not to Hungarians living abroad who have to vote in consulates), Fidesz obtained 95.49% of the votes, i.e. 122,638 votes out of the 2,264,780 obtained in the proportional ballot by Fidesz[52]. This resulted in two more MPs for Fidesz out of a total of 199. While the accusation is disproportionate to the potential impact on the elections, it is true that in practice, and this was difficult to predict, it enabled the Fidesz-KDNP coalition to extend its very narrow two-thirds constitutional majority in 2014 and 2018. On the other hand, this reform was part of a wider political programme designed to rebuild links between Hungarians in Hungary and Hungarians abroad. It is worth remembering that when the Treaty of

[53]Source: *Węgry, co tam się dzieje* (Hungary, what's going on), a book containing the authors' explanations of the Hungarian reforms for a Polish audience, translated and published by Fronda PL in collaboration with the Hungarian Embassy in Poland.

Trianon decided to carve up Hungary in 1920, it left 3.3 million Hungarians outside the borders of their thousand-year-old homeland, amputating two-thirds of its traditional territory. Viktor Orbán's success has been to reunite the Hungarian nation in a way, notably through citizenship and the right to vote, and to emphasise the defence of the Magyar minorities, while greatly improving relations with traditionally antagonistic countries where Hungarian minorities live, and in particular with Slovakia (where members of the Hungarian minority have not been able to obtain Hungarian nationality because of an emergency vote by the Slovak Parliament providing for forfeiture of Slovak citizenship in the event of acquisition of another citizenship) and Serbia, thus providing the best possible refutation of the accusations of nationalism coming out of Brussels in connection with this policy aimed at

[52]Source : https://static.valasztas.hu/dyn/pv14/szavossz/hu/orszlist.html

Hungarians from outside the country.

Klaus Iohannis and the good nationalism of Europhiles

The choice of Romanian President Klaus Iohannis as the winner of the 2020 Charlemagne Prize came as no surprise. In - Romania, it is the left that has chosen social conservatism and the right the libertarian progressivism dear to Brussels, and President Iohannis, from the "right", is a convinced Eurofederalist. The Charlemagne Prize is a German prize created in Aachen after the Second World War and awarded to individuals or institutions "distinguished for their outstanding contribution to the unity of Europe or the union of its States".

The Aachen jury justified its choice by explaining that, " *while other Member States are adopting national-conservative or even right-wing populist attitudes towards the European Union, Klaus Iohannis […] made Romania espouse a pro-European policy* ". In addition to the Romanian President's merits in favour of European integration and cooperation, the jury also praised him for "*protecting minorities and cultural diversity* ".

However, Iohannis was fined by the Romanian National Anti-Discrimination Council (CNDC). That was on 20 May 2020, the day before he would have been awarded the Charlemagne Prize at a ceremony in Aachen had it not been for the Covid-19 pandemic. Since 2015, the Romanian President has been actively contributing to the deterioration of relations with Romania's Hungarian minority, which is allied to the PSD social democratic party in the Romanian Parliament, and therefore to his political enemies. He crossed a red line on 29 April 2020 by accusing the PSD of plotting with the Hungarians to cede Transylvania to Hungary and beginning his statement with a "*Hello, PSD* " said in Hungarian, before asking PSD president Marcel Ciolacu: "*What did the Budapest leader, Viktor Orbán, promise you in exchange for this agreement?* " The Romanian CNDC considered that these trumped-up accusations "*constitute an act of discrimination and violate the right to dignity on the basis of ethnicity/nationality*".

It would appear that, for the Europhiles who award the Charlemagne Prize, playing the nationalist card is a laudable thing to do when it's about one of their own against the "right-wing populists" So, since a "right-wing populist" governs in Hungary, bashing Romania's Hungarian minority would in no way detract from his merit as a protector of minorities or a champion of European integration and cooperation between peoples.

5) The sovereign and democratic decision of the Hungarian electorate

Despite a barrage of attacks on the conservative, Christian Democrat-inspired Fidesz-KDNP coalition in Brussels, in the capitals of Western Europe and in the major European media, the Hungarian electorate chose to keep this coalition in office in both 2014 and 2018, by a majority large enough to give it a constitutional majority of two-thirds of the seats in the National Assembly. In 2014, the Fidesz-KDNP coalition won almost 45% of the vote (compared with almost 53% in 2010), compared with 25% for the Socialist Party, heir to the former Communist Party MSZP (19% in 2010), 20% for the far-right party Jobbik (less than 17% in 2010) and 5% for the Green Party LMP (more than 7% in 2010). What enabled the Fidesz-KDNP coalition to extend its constitutional majority in Parliament with just 44% of the vote was, of course, the first-past-the-post constituency voting system, in which the candidates of the outgoing coalition won in almost every constituency.

In 2018, at a time when the attacks on Hungary had greatly intensified in 2015-2016 against the backdrop of the migration crisis, the Fidesz-KDNP coalition won more than 49% of the vote, compared with 19% for Jobbik, which had begun its shift towards the pro-EU centre, less than 12% for the MSZP-Dialogue electoral coalition led by the current mayor of Budapest, Gergely Karácsony, and just over 5% for DK, a left-wing party founded by the former socialist prime minister (MSZP) Ferenc Gyurcsány, and 7% for the LMP greens.

It is therefore no exaggeration to say that, in the case brought against the successive governments of Viktor Orbán, the verdict of the Hungarian people's jury was final, which did not prevent the European Parliament from launching the Article 7 sanctions procedure against Hungary just five months after the April 2018 elections.

The opinion of Czech Věra Jourová
Breaking with the European Commission's principle of neutrality, the Vice-President of the European Commission responsible for Values and Transparency within the von der Leyen Commission declared on 26 September 2020 in an interview for the German newspaper *Der Spiegel* about Viktor Orbán that he was building a " *sick democracy*" and, with regard to Hungarian voters, that "*most of them are not in a position to form an independent opinion*[54] ".

The next parliamentary elections will take place in April 2022 and for the first time the opposition, after a primary process in September-October 2021, will present a single candidate for Prime Minister in the person of Péter Márky-Zay, a conservative disillusioned Fidesz, and single candidates in the constituencies supported by DK, MSZP, Jobbik, the centrist liberal Momentum, LMP, and the other progressive green party that split from LMP, Párbeszéd. For the first time since 2010, the opposition therefore has a real chance of winning against the Fidesz-KDNP

[54]See the questions put on this subject to the European Parliament on 1 October 2020 by a group of Hungarian MEPs (https://www.europarl.europa.eu/doceo/document/P-9-2020-005388_EN.html)

coalition. Even in the event of victory, the outgoing coalition will very probably no longer be able to count on a constitutional majority. " *My hope would be to have a technocratic government, a management government, whose main objective would be to restore democracy, freedom of the press, the rule of law, the market economy and a commitment to European integration*", declared the joint opposition candidate[55].

Faced with this highly polarised discourse, which has unfortunately been fuelled by the EU institutions for more than ten years now, the Hungarian electorate will have to decide once again.

"Jobbik: a brief history of a 180° turnaround"
(excerpt from an article published in March 2019 on the Visegrád Post website[56])

Long considered Europe's most radical parliamentary party, Jobbik has in the space of a few years mutated into a centrist, pro-EU party, completely abandoning its radical anti-EU, anti-NATO, anti-LGBT and anti-Gypsy-criminality rhetoric . (...) So the Fidesz prophecy has come true. Viktor Orbán, his party and the media close to him have been saying it for years (at least since 2016): the former radical nationalist party Jobbik and the Hungarian liberal left have joined forces to bring down the government. Before the parliamentary elections in April 2018, despite many, many signs of rapprochement, this was still not 100% true. Since 15 March 2019, this has been the case. (...) For the first time, Jobbik has agreed to appear with the DK (Demokratikus Koalíció, Democratic Coalition - a party formed from a split in 2011 with the MSZP, the Hungarian Socialist Party), the party led by Ferenc Gyurcsány, the former Prime Minister (2004-2009) who has long been Jobbik's top adversary. DK was represented by Klára Dobrev, Mr Gyurcsány's wife and head of the DK list for the European elections. Since the demonstrations in April 2018 following the new Fidesz victory, Jobbik has demonstrated numerous times with DK but always denying any agreement. Other organisations represented included the Socialist Party (MSZP), the Green and Liberal Party LMP, Momentum - the Hungarian 'En Marche!' as well as the independent mayor of Hódmezővásárhely, Péter Márki-Zay, who was among the first to openly call for a coalition ranging from DK to Jobbik to overthrow Orbán.
All the parties represented have undertaken to implement a strategy of joint opposition (or "independent") candidacies in the October 2019 municipal elections, with the aim of preventing Fidesz candidates from winning.

B. Polish reforms in the second half of the 2010s

1) The conflict surrounding the Constitutional Court

Unlike the Hungarian Fidesz-KDNP coalition in 2010, 2014 and 2018, the Polish United Right*(Zjednoczona Prawica*) coalition led by Jarosław Kaczyński's Law and Justice (PiS) party has never enjoyed a constitutional majority. Since elections to the Polish Sejm are based on proportional representation, whereas Hungary has a mixed electoral system with part of the seats allocated on the basis of proportional representation and another part on the basis of majority voting by constituency, the simple fact that the United Right electoral coalition, which in fact presented its candidates on the PiS lists (the deputies of the United Right coalition sitting in the PiS group in the Sejm), obtained an absolute majority in the lower house in the elections in October 2015 was a first since the democratic

[55] https://visegradpost.com/fr/2021/10/18/peter-marki-zay-vainqueur-de-la-primaire-de-lopposition-hongroise/
[56] https://visegradpost.com/fr/2019/03/24/jobbik-breve-histoire-dun-virage-a-180/

transition of 1989-1990. That the PiS repeated this performance in October 2019 shows that the attacks from Brussels and the Western European mainstream media against the governments of Beata Szydło and Mateusz Morawiecki have had no more effect than those conducted against the successive governments of Viktor Orbán. Or, if they have had an effect, it will have been to mobilise the Conservative electorate. From 2015 to 2019, the United Right enjoyed an absolute majority in the Sejm and Sénat (where seats are filled by a first-past-the-post system). Since 2019, the United Right has been two seats short of a majority in the Senate, due to the opposition fielding single candidates in the 2019 elections, so the opposition now holds the Senate. When it comes to passing laws, however, the Sejm has the final say in the event of disagreement between the two Houses of Parliament.

In the absence of a constitutional majority, the rulings of the Constitutional Court could potentially block the reforms sought by PiS. The fifteen judges of Poland's Constitutional Court are elected by a simple majority of the Sejm for a non-renewable nine-year term, after eight years of government by the coalition of liberals from the Civic Platform (PO) and the agrarian party PSL, it is hardly surprising that the majority of judges on the Constitutional Court were in favour of the parliamentary majority in place until 2015. A politicised Constitutional Court is not unique to Poland, and unlike the French Constitutional Council, whose nine members are appointed on a discretionary basis by the President of the Republic, the President of the National Assembly and the President of the Senate respectively, the members of the Constitutional Court must have recognised legal skills, based on their professional experience, and cannot simply be politicians.

Three contentious judges

The crisis that developed in 2015-2016 around the Polish Constitutional Court began when the PO-PSL majority, fearing that it would lose the forthcoming parliamentary elections, wanted, with the participation of the President of the Constitutional Court Andrzej Rzepliński and two judges of the same court, to make five early appointments of judges whose terms of office were due to expire respectively on 6 November 2015 (for three judges) and on 2 and 8 December 2015 (for the remaining judges), and therefore after the parliamentary elections scheduled for 25 October. The President of the Constitutional Court was notoriously close to the PO and had in the past been put forward by Donald Tusk's party as a candidate for a number of important positions, such as Ombudsman.. According to the PO-PSL majority, however, the aim was to avoid a situation in which the posts of judges on the Constitutional Court might remain vacant for some time because the period between the elections scheduled for 25 October and the expiry of the term of office of the five judges concerned was considered to be too short. For PiS, it was an attempt to transform the Constitutional Court into a third chamber of parliament, which would remain in Liberal hands for several years and thus be able to block the reforms promised to the electorate. The violation of the letter and spirit of the Constitution was obvious, since the Constitution gives the Sejm full power to fill vacancies on the

Constitutional Court but does not empower it to act in place of the next Sejm.

In any case, by virtue of the powers conferred on it by the outgoing Parliament in the Act of 25 June 2015 on the Constitutional Court, the Sejm adopted resolutions on 8 October 2015 appointing five judges to fill the vacancies that were to arise shortly after the elections, in which all the opinion polls showed PiS to be the winner. Polish President Andrzej Duda, who had won the May 2015 elections as the PiS candidate, therefore refused to swear in these judges as he considered their appointment to be unconstitutional, as the outgoing Sejm had arrogated to itself a right to appoint judges that should have fallen to the new Sejm. At the time, there had been no reaction in Brussels from the Juncker Commission or its First Vice-President responsible for Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights, Dutch Labour MEP Frans Timmermans. This was only activated after the conservatives won the general election.

What the Polish Constitution says about the appointment of judges to the Constitutional Court

Art. 194.1. The Constitutional Court is made up of 15 judges appointed individually for 9 years by the Sejm from among persons of outstanding legal ability. A judge of the Constitutional Court may not be reappointed.

On 25 November 2015, the new majority of the conservative Law and Justice party (PiS), supported by the opposition party Kukiz'15, declared the 8 October resolutions appointing the five new judges null and void. The Civic Platform (PO), now sitting on the opposition benches, then took its own June law to the Constitutional Court. On 2 December, the Polish Sejm (the lower house of Parliament, which is responsible for choosing judges) appointed five new judges, whom President Duda swore in. The president of the Constitutional Court assigned them offices, but at the same time decided that they would not be assigned any cases until the legality of their appointment had been confirmed.

In a judgment handed down on 3 December 2015[57]in a hearing to five judges nominated by President Andrzej Rzepliński, the Constitutional Court then affirmed that the June Act did indeed violate the Constitution, but only in relation to the early appointment of judges whose terms were due to end in December. For the Constitutional Court chaired by Andrzej Rzepliński, the appointments to replace the three judges whose terms of office were due to expire at the beginning of November complied with the Constitution. The judgment of 3 December 2015 in fact concerns the conformity with the Constitution of the Act of 25 June 2015 on the Constitutional Court. It is only empowered to rule on the constitutionality of laws and international treaties, along with their implementing legislation.

The new parliamentary majority therefore considered that the Constitutional Court was only competent to rule on

[57]Judgment of the Constitutional Court of 3 December 2015 in case K 34/15

the constitutionality of the June law, but not on the resolutions annulling the early appointment of five judges by the former PO-PSL majority and appointing five other judges in their place. In its judgment of 3 December 2015, the Polish CC therefore ruled on the legal norms but did not assess the act of election of judges by the Sejm. A month later, in its decision of 7 January 2016 (Case U 8/15), the CC confirmed that the review of acts (resolutions) appointing judges to the Constitutional Court did not fall within its remit, and decided to terminate the constitutionality review procedure for the Sejm resolutions of 25 October 2015 and 2 December 2015. However, despite this decision, the President of the General Court Andrzej Rzeplińskia decided to include only Judges Julia Przyłębska and Piotr Pszczółkowski, who were taking over from the two judges whose terms of office had expired in December, in the judging panels. In the case of the other three judges, although he had no legal basis for doing so, the President of the Constitutional Court decided to allocate them offices and pay them their salaries as judges of the Constitutional Court, but without including them in the judging panels. Subsequently, President Rzepliński, whose term of office ran until December 2016, consistently refused to assign cases to three of the five judges appointed by the new parliamentary majority. The majority, for its part, continued to criticise Rzepliński for his political involvement and his failure to comply with his duty of reserve in the media (in breach of Article 195.3 of the Polish Constitution), and also his involvement in the preparation of the June 2015 law that the CC subsequently recognised as partially unconstitutional. Since then, part of the Polish opposition has referred to the three judges in dispute as "duplicates", claiming that they occupy the place of the three legitimate judges who were appointed on 8 October by the outgoing Sejm to replace the judges whose term of office expired in November 2015.

Taking up this argument of the most radical part of the Polish opposition, the European Commission, and after it the European Parliament and the CJEU in its rulings against the reforms of the justice system since 2017, believe that the Polish Constitutional Court no longer has the legitimacy to rule on the constitutionality of laws passed by Parliament. However, regardless of the question of who is right and who is wrong in this internal Polish conflict, the dispute concerns only three of the fifteen judges on the Constitutional Court. However, after five years of an absolute majority for the PiS group in the Sejm, due to the expiry of the terms of office of the judges of the Constitutional Court, all fifteen judges on the Polish Constitutional Court have now been elected by the PiS majority in the Sejm. The presence of three judges appointed in advance by the outgoing majority in October 2015 would therefore not be likely to have a significant impact on the decisions taken by the Constitutional Court in 2020 and 2021, such as, for example, those that have made the most noise in the media: on the unconstitutionality of abortions motivated by a disability of the unborn child (judgment of October 2020) and on the incompatibility with the Constitution of the decisions of the CJEU concerning the legitimacy of Polish judges appointed after 2018 (judgment of October 2021).

However, the European Commission is also using the argument of decisions of the Polish Constitutional Court that have never been published in the official gazette and the supposedly illegal appointment of the current President

of the Constitutional Court, Judge Julia Przyłębska, in December 2016, to replace the Polish Constitutional Court in reviewing the constitutionality of laws passed by Parliament in Warsaw.

To understand the origin of these arguments, it is necessary to describe the conflict that took place from December 2015 to December 2016 between the Sejm dominated by the new right-wing coalition and the Constitutional Court led by its president Andrzej Rzepliński. The description below is taken from the document entitled "Understanding the political situation in Poland" written in 2018 by the author of this report[59].

Succession of laws reforming the workings of the Constitutional Court

To resolve the conflict with the Constitutional Court and its president in its favour, on 22 December 2015 the PiS majority passed an amendment to the Constitutional Court Act of 25 June. The Polish constitution states that it is the Parliament that defines the operating procedures of the Constitutional Court by a simple majority[58] and this is what the parliamentary majority has done.

Under the new provisions, the Constitutional Court was to examine appeals against laws passed by Parliament in plenary session, i.e. with at least thirteen judges (out of fifteen), and no longer in a select committee of judges chosen by the President of the Court, Andrzej Rzepliński, who had been accused of choosing the judges according to the desired decision. The second major change was that appeals were to be examined in the order in which they were received by the Constitutional Court, rather than in the order decided by the President of the Court, who was also accused of having used this prerogative to support the PO-PSL coalition over the past few years. The third change concerned the dismissal of a Constitutional Court judge for serious misconduct or incapacity. Until now, the Court itself has had exclusive jurisdiction. Henceforth, while the court still took the decision to dismiss one of its judges, the decision had to be approved by the Sejm. In addition, the President of the Republic and the Minister of Justice could also initiate such a removal, although the decision itself remained within the remit of the Constitutional Court.

On 9 March 2016, the Constitutional Court met with twelve judges (not including the three judges in dispute) to decide on the constitutionality of these amendments to the relevant legislation. Not only was the Court both judge and party, but its judgement was leaked to the media before it was even handed down. There were accusations of prior consultation of the judgement between the "PO" judges of the Constitutional Tribunal and the PO deputies of the Sejm, although this could not be proved. However, on 9 March, the Constitutional Court ruled that the amendments of 22 December were unconstitutional and that the law of 25 June 2015 still applied. However, as it

[58]Art. 197 of the Polish Constitution of 2 April 1997

had met without complying with the law (as amended on 22 December)

[59]"Comprendre la situation politique en Pologne – Comment la Pologne a basculé en 2015 dans le « Camp du Mal » (pour Bruxelles et les médias dominants) (Understanding the Political Situation in Poland - How in 2015 Poland became the "Bad Guys" (for Brussels and the mainstream media)), Report for the European Parliament, December 2018https://present.fr/wp-content/uploads/2019/10/rapport-sur-la-pologne-olivier-bault-version-definitive.pdf

regulating its operation (it had met with twelve judges instead of the required minimum of thirteen, and it had not respected the order in which appeals were received for consideration), Beata Szydło's government refused to publish the ruling. For the PiS majority and some of the constitutional law experts in the media, this was not a judgement but merely a legal opinion issued by some of the judges on the Constitutional Court. Of course, most of the opposition, as well as other experts in constitutional law, took the opposite view and considered that it was the government that was violating the constitution by refusing to publish what they considered to be a ruling.

The parliamentary majority then amended this contested law of December 2015 by passing five new laws concerning the Constitutional Court between the beginning and end of 2016. A number of decisions of the Constitutional Court adopted during 2016 were not published by Beata Szydło's government as they had been taken in violation of the law in force as passed by Parliament, the condition of the minimum number of judges in plenary session not being met, due to the refusal of President Rzepliński to allow the three contested judges to sit and the voluntary absence of the other two judges appointed by the PiS majority (three from April 2016, after the appointment of a new judge to replace a judge whose term of office had expired). The successive laws passed in the course of 2016 have, however, sought to respond to certain criticisms levelled by the CC, the European Commission and the Venice Commission, in particular by a law of July 2016 reducing the number of judges required for a plenary session and reintroducing a degree of flexibility in determining the order in which cases brought before the Constitutional Court are heard.

Replacement of the President of the Constitutional Court

The Polish Constitution stipulates that the President and Vice-President of the Constitutional Court are appointed by the President of the Republic from candidates put forward by the AGM of the Constitutional Court. With Andrzej Rzepliński's term of office expiring in December 2016, the CC AGM should have put forward new candidates, but it was unable to achieve the necessary quorum, for the same reasons explained above. The woman who was to become president of the Constitutional Court and was one of the two non-contentious judges appointed by PiS at the end of 2015, Julia Przyłębska, explained that she had not wanted to take part in the AGM on 15 November 2016 so as not to give legitimacy "to the illegal actions of President Rzepliński". Despite the absence of a quorum, the CC

AGM approved a list of candidates for the presidency of the Constitutional Court to be presented to the President of the Republic by a resolution adopted on 30 November 2016. In a press release dated 1 December 2016[59] written on behalf of the president of the court, the CC office acknowledged the absence of a quorum and explained that the judges present had decided to vote on the list of candidates in spite of everything in order to exercise their constitutional responsibilities. However, President Duda refused to appoint a CC president from among the candidates put forward.

Parliament then passed three laws between 30 November and 15 December 2016 in order, once again, to unblock the situation to its advantage. The new laws allowed the president to appoint Julia Przyłębska as interim president of the CC (in the absence of a president, Andrzej Rzepliński's term having expired). This allowed her to authorise the three judges in dispute to finally sit, and then to vote on a list of candidates to be presented to the President of the Republic in the presence of only 6 judges (the others having in turn refused to attend the AGM or having been prevented from doing so, the AGM having been convened with one day's notice). Of the two candidates put forward, President Duda appointed Julia Przyłębska, who has since been President of the Constitutional Court and whose term of office as a CC judge runs until 2024.

The new President of the Constitutional Court came under fire as well

On 12 December 2018, seven judges of the Constitutional Court (including one who had been appointed by PiS, out of a total of fifteen CC judges) published a letter on Poland's most important website, Onet.pl, addressed to President Julia Przyłębska and quickly picked up by the country's media. In their letter, they accused her of choosing the judges responsible for ruling on the various cases arbitrarily and contrary to the 2016 law in force. The CC President's written response was also published in the press on the same day. In this response, Julia Przyłębska rejects the accusations made against her and criticises the authors of this letter for not having reacted in 2016, when the previous president of the CC, Andrzej Rzepliński, was allocating cases in breach of the law in force.

This kind of manipulation on the part of the president of the CC had been made impossible by the law passed on 22 December 2015, which obliged the CC to consider all cases with at least 13 judges out of 15, and to do so in the order in which the cases arrived. However, under pressure from international institutions (the Venice Commission, the European Commission, etc.), the Polish Parliament reintroduced the flexibility that had led to these reciprocal accusations.

The end of the conflict, but legitimacy now contested

The departure of Rzepliński and his replacement by Przyłębska, as well as the proper installation of the three judges who had previously been prevented from sitting, put an end to the conflict within the Constitutional Court. Since then, however, a section of the opposition, as well as the European Parliament, the European Commission and the Court of Justice of the European Union, have challenged its legitimacy, hence the European

[59] http://trybunal.gov.pl/uploads/media/Komunikat_Biura_Trybunalu_Konstytucyjnego_z_dnia_1_grudnia_2016_r..pdf

Commission's claim that it has to continue to act in place of the Polish Constitutional Court by ruling on the constitutionality of laws passed by the Polish Parliament, in particular the three major laws reforming the judiciary. Similarly, the outgoing President of the Supreme Court (the Polish Court of Cassation), Judge Małgorzata Gersdorf, while she had not referred the constitutionality of these laws to the CC, arguing the lack of legitimacy of the then CC[60], acted in 2018 as if certain paragraphs of these laws, which she deemed unconstitutional, had no validity. However, the Polish Constitution gives the Constitutional Court exclusive jurisdiction to assess the conformity of laws with the Constitution, and it is therefore clear that in doing so Judge Gersdorf was herself in breach of the Constitution. This is all the more clear as the case law of the Polish CC considers that any law must be presumed to comply with the constitution as long as there has been no ruling to the contrary by the CC. This explains the government's and Parliament's refusal to recognise certain decisions taken by the CC in 2016, as these decisions were taken without respecting the CC's operating procedures set out in the new laws passed by Parliament.

Interference by the European Parliament and the Commission

Called to the rescue by a Polish opposition that had however itself instigated the conflict when it was still in power, the European institutions reacted immediately.

With the 'small media law' that enabled the new parliamentary majority to take control, from January 2016, of the public media from which the former PO-PSL coalition had, with the support of the post-communist Social Democrats of the SLD, expelled almost all the conservative and/or pro-PiS elements in 2010-2011, the conflict around the Constitutional Court was the first reason for intervention by the European institutions under the banner of the 'rule of law' and "European values", as early as December 2015, barely two months after the elections won by PiS.

On 19 January 2016, three months after the Polish parliamentary elections, the European Parliament held the first in a long series of "debates" against Poland. On 13 April 2016, it adopted an initial resolution criticising the policies implemented by the new Conservative majority. In this resolution[61], it expressly asked Warsaw to publish and apply the decisions of the Polish Constitutional Court so that the principles of the rule of law are respected in accordance with the European treaties. This first European Parliament resolution was passed by a large majority, with votes from the far left, the Socialists, the Liberals, the Greens and the EPP (excluding the Hungarian Fidesz MEPs, who all

[60]However, this legitimacy was de facto recognised by the Supreme Court, which ruled in September 2017, in response to a question from the Warsaw Court of Appeal, that it did not have the power to rule on whether the nomination of Julia Przyłębska to the presidency of the Constitutional Court was in accordance with the law.
[61]European Parliament resolution of 13 April 2016 on the situation in Poland (https://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html)

voted against). In their text, the MEPs referred to the Venice Commission's opinion of 12 March 2016 on the amendments of 22 December 2015 to the Act of 25 June 2015 on the Constitutional Court of Poland. This opinion, requested by the Polish government itself, is more nuanced than the European Parliament's resolution of 13 April, since it recognises that the current crisis dates back to the actions of the previous majority in May-June 2015, and that since this crisis has a political origin, the solution should also be political. At the same time, Poland was already the subject of a "structured dialogue" launched by the European Commission under the "framework for the rule of law", and the Commission had asked the Polish Parliament to suspend its work on reforming its law of 25 June 2015 on the Constitutional Court. The Polish Parliament, dominated by the PiS party and jealous of its prerogatives, naturally did not comply.

2) The major justice reforms of 2017

Why these reforms?

Justice reform was a central element of the election manifesto with which Jarosław Kaczyńskia's party won the 2015 elections. A number of legal scandals have plagued the governments of the Civic Platform and, before them, those of the post-communist SLD. In 2005, following the victory of Jarosław Kaczyński's twin brother Lech over Donald Tusk in the presidential election and the defeat of the SLD in the parliamentary elections, which had been compromised by scandal, the expected coalition between the PiS and the PO failed to materialise, given the PO's refusal to give the PiS the ministries it needed to fight corruption, which the social-conservative PiS had set itself as the main objective of its government, while the liberal-conservative PO (at the time, before its progressive turn imposed by Donald Tusk between 2007 and 2014) was more focused on the economy. At the heart of the dispute was PiS's mistrust of the PO's links with Polish business circles which, as in most former Eastern European societies, were often close to the "deep state" inherited from the old structures of the Communist regime. This is also why the other aspect of the clean-up of the country sought by the Law and Justice party was "lustration", i.e. the disclosure of the past of agents of all former collaborators of the communist political police occupying positions of influence within the State (political leaders, civil servants, journalists, academics, etc.), in order to remove them from the influence, through the risk of blackmail, of this post-communist "deep state".) Back in 2007, this lustration issue sparked an anti-Polish debate in the European Parliament, in the wake of another debate on a bill to ban the promotion of homosexuality in schools[62].

Corrupt judges on the Supreme Court?

The gambling affair (in Polish: Afera hazardowa) was one of the first major corruption cases of Donald Tusk's first government.

In concrete terms, after Lech Kaczyński won the 2005 presidential election and came first in the parliamentary elections, the PiS demanded that, in addition to the Prime Minister, it should also be able to choose the Minister of the Interior, the Minister of Justice (who was also the Attorney General, as was the case again after the PiS returned to power in 2015) and the Minister-Coordinator of the Special Services from among its own members. But according to the two main leaders in the PO at the time, Donald Tusk and Jan Rokita, there was a risk of PiS abusing its power. This fear was expressed by Jan Rokita on 25 October 2005 during a discussion on television: " *If you think we're going to let three PiS politicians get together [to decide] who to bring criminal charges against, who to arrest at five in the morning and what file to take out, don't count on our agreement.* [63]"For its part, the PiS feared, as subsequent statements by its leaders suggest, that if it controlled one of these three ministries, the PO could block the programme to combat the corruption that is endemic in post-communist Poland.

According to the Polish media, the leak probably came from Minister Drzewiecki, who was informed of the surveillance of Sobiesiak by Donald Tusk himself. This affair led to Chlebowski's suspension from the presidency of the parliamentary group and the resignation of the Minister of Sport and Tourism Mirosław Drzewiecki, and also to the dismissal, on the decision of Prime Minister Donald Tusk, of the director of the CBA who had been appointed by Jarosław Kaczyński in 2006.
However, the reason why CBA agents had put businessman Ryszard Sobiesiak under surveillance and learned of his conversations with high-ranking members of the Civic Platform (PO) was that they had been conducting an investigation since 2008 into suspected corruption involving Supreme Court judges. As part of this investigation, the CBA suspected that Sobiesiak had obtained a favourable Supreme Court ruling in return for a bribe. Thanks to wiretaps, it was possible to confirm the links of corruption between Sobiesiak, two Supreme Court judges and an emeritus judge of the High Administrative Court (NSA), as well as several lawyers. In 2012, the Public Prosecutor's Office finally dropped the proceedings, on the grounds that the evidence of corruption presented by the CBA had been obtained illegally.

The eight years of PO-PSL governments and the many scandals that have marked those years have only strengthened the PiS in its convictions about Donald Tusk's party. It also became clear that the judiciary was in need of radical reform. This conviction was expressed as follows in the electoral manifesto published by PiS in 2014:

It erupted in October 2009 with the publication by the prestigious daily *Rzeczpospolita* of an article and transcripts of conversations recorded, probably by agents of the Central Anti-Corruption Bureau (CBA) - an institution created in 2006 on the initiative of the PiS government - between the leader of the parliamentary group of the PO, Zbigniew Chlebowski, and a businessman involved in the gambling sector, Ryszard Sobiesiak. On the recordings, Sobiesiak also referred to his conversations with Mirosław Drzewiecki, Minister of Sport and Tourism, and Grzegorz Schetyna, Minister of the Interior. The conversations centred on a bill introducing an additional tax on games of chance, which Chlebowski boasted of having blocked and which he promised to have cancelled. Now, in June of the same year, Minister Drzewiecki wrote to the Minister of Finance asking for this new tax to be abolished. On 12 August, the head of the CBA, Mariusz Kamiński, informed Prime Minister Donald Tusk of the illegal activities surrounding the draft amendment to the law on betting and gambling, but at the end of August CBA officials realised that Sobiesiak had been informed that he was under their surveillance.

[64]"The European Parliament rallies for Polish MEP Geremek", Euractiv, 27 April 2007

(https://www.euractiv.fr/section/avenir-de-lue/news/le-parlement-se-mobilise-pour-l-eurodepute-polonais-geremek-fr/)

[65]Source for this quotation: *Historia polityczna Polski 1989-2015* (Political History of Poland 1989-2015) by political scientist Antoni Dudek

"*The justice system and the public prosecutor's office in our country require far-reaching reform based on three principles.*

Firstly, the judiciary cannot be a "state within a state". Without prejudice to the fundamental constitutional guarantees of independence and impartiality, citizens may not be deprived of influence over the operation of the "third estate". It must serve society, the people, and not itself. There must be effective control mechanisms to prevent links in the judicial system from detaching themselves from their role as servants of society, and to correct any errors.

Secondly, criminal justice policy must ensure effective prosecution and fair punishment of offenders. This policy is to be implemented primarily through the work of the public prosecutor's office in prosecuting crimes and offences, bringing perpetrators to justice and appealing against controversial court decisions. This is why the public prosecutor's office must once again become a link in the chain of executive power, headed by the Minister of Justice, who holds the office of Attorney General, and an instrument for implementing policies for which the government will be accountable to the Sejm.

Third principle: zero tolerance for wrongdoing in the judiciary. The judiciary must be a sphere of state action totally free of corruption, nepotism and business ties. "

Judges at the service of the executive

September 2012, Gdańsk District Court.

On the telephone from the Chancellery Secretariat of Prime Minister Donald Tusk, referring to the judges due to sit on a case indirectly concerning him: " *Are they people you can trust?* "The president of the court replied: "*You have nothing to worry about, if I can put it that way.* "

This sentence illustrates the tone of the twenty-two minute conversation recorded between a person posing as the personal secretary to the Prime Minister's Head of Chancellery and the President of the Gdansk District Court, Judge Ryszard Milewski, concerning the forthcoming hearing in the Amber Gold case, named after the financial institution run, in violation of the law, by a man already convicted several times for financial malpractice. This man, Marcin Plichta, had good relations with Civic Platform (PO) circles in Gdańsk, where Donald Tusk came from. He had also set up an airline, OLT Express, financed with the help of this parabanking institution, which turned out to be a financial pyramid. And he had hired the Prime Minister's son for his airline. Although no link of corruption was established directly involving Donald Tusk, he was suspected of having contributed, either voluntarily or through negligence, to the time taken by the Polish authorities to close down Amber Gold and initiate proceedings against its owner.

Thanks to what was in fact a journalistic sting operation, the Poles realised that the president of the court in Gdańsk agreed to reassure the Prime Minister about the choice of judge assigned to the case, and even to speed up or delay proceedings at the request of the executive and to meet the Prime Minister in person to discuss the case. This was in 2012, well before the PiS reforms, which some accuse of having put an end to the independence of the judiciary in Poland.

Reform of the ordinary courts

To put an end to corporatism and corruption in the judiciary, it was necessary to strike hard. At least, that is what the authors of the reform of the ordinary courts adopted in the form of a law in July 2017 seemed to consider. This

was the only one of the three laws reforming the justice system that escaped a presidential veto, as Andrzej Duda chose to replace the law on the National Judicial Council and the law on the Supreme Court with his own plans to amend certain criticised aspects of these two laws.

Under the Ordinary Courts Act adopted in July 2017[64] [65], judges no longer have a say in the appointment by the Minister of Justice of the president and vice-president of the court in which they practise, and the Minister, who is also the Attorney General, had six months after the Act came into force to dismiss the country's court presidents without the possibility of the Judicial Council blocking his decisions. Since the end of this transitional period, any dismissal or appointment by the Minister of Justice of a court president or vice-president can be blocked by a two-thirds majority of the National Judicial Council. On the other hand, the powers of court presidents have been reduced, since cases are allocated to judges at random, using an algorithm that is outwith the control of the president of the court and the minister. The composition of the courts can no longer be changed during the course of a trial, unless a judge is unable to attend.

Reform of the National Council of the Judiciary

The law on the National Judicial Council (KRS) adopted in December 2017[67], on the basis of the presidential bill which was an amended version of the law passed by Parliament in July of the same year, changed the method of appointing the fifteen judges elected to this council, which has twenty-five members in all. In accordance with the Constitution, the KRS is made up of the President of the Supreme Administrative Court (NSA), the First President of the Supreme Court, the Minister of Justice, one member appointed by the President of the Republic, four members chosen by the Sejm from among its deputies, two members chosen by the Senate from among its senators, and fifteen members appointed from among the judges of the Supreme Court, the ordinary courts, the administrative courts and the military courts. The term of office for KRS members is 4 years. In accordance with the Constitution, it is up to the legislator to define the powers of the KRS, how it operates and how its members are appointed[68].

Under the December 2017 law, the fifteen magistrates elected to the KRS are no longer appointed by their peers but by the Sejm by a three-fifths majority from candidates nominated by a minimum of 25 judges or 2,000 citizens. However, if such a majority cannot be achieved in the first vote, a second vote is held in which each MP nominates his or her preferred candidate, and the fifteen candidates with the most votes are then appointed to the KRS. [66]The

[64]Act of 12 July 2017 amending the Ordinary Courts Act and certain other Acts (https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001452)

[66]Judgment of the Constitutional Court of 20 June 2017 in case K 5/17 (https://trybunal.gov.pl/postepowanie-i-

other new feature of the law was to implement a ruling by the Constitutional Court in 2017 which declared as unconstitutional the provision of the current law that allowed KRS members to be appointed for individual terms instead of a grouped four-year term. The law of December 2017 consequently shortened the terms of office of the sitting members of the KRS and all the elected members of the KRS were replaced in 2018 for a mandate due to last till 2022.

[67]Law of 8 December 2017 amending the law on the National Judicial Council and certain other laws (https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000003)

[68]Art. 187.4 of the Constitution of the Republic of Poland: " *The organisation, scope of action and mode of operation of the National Judicial Council, as well as the method of appointing its members, are defined by law.*" As most of the opposition chose to boycott the election of KRS members in 2018, the fifteen current KRS judges were all chosen by the PiS-led parliamentary majority, which has led to accusations of politicisation of the Polish magistrature by EU institutions. The KRS was also excluded on 28 October 2021 from the European Network of Councils for the Judiciary (ENCJ), where its participation had already been suspended from September 2018. The reason given for this exclusion is that the KRS no longer meets the criteria of independence from the executive and legislative powers, which is a condition for membership of the ENCJ.

However, the ENCJ did not adopt the same sanction with regard to the Spanish judicial council, the *Consejo General del Poder Judicial (CGPJ)*, whose members are also appointed by the Parliament. The European Commission curiously only began to criticise this, albeit timidly, after the adoption of the Polish KRS reforms. It is true that, in Spain, the election of magistrates to the CGPJ cannot take place without a three-fifths majority, as there is no second ballot procedure as there is in Poland, where the procedure was designed to prevent the opposition from blocking the election of KRS members. But the result is that, in autumn 2021, the CGPJ had members "en funciones", i.e. whose term of office had expired several years earlier. For this reason, the coalition government of socialists and the far left led by Prime Minister Pedro Sánchez passed a law in Parliament in March 2021 that limits the powers of this judicial council. Under pressure from the opposition and Brussels, Sánchez's government had, however, abandoned the idea of replacing the three-fifths election of CGPJ members with a simple majority vote, in order to get round the blocking of this election by the People's Party (PP), which demands that nominations be decided solely by the Socialist Party (PSOE) and the PP, excluding the participation of the other parties represented in Parliament, including the PSOE's far-left partner, Unidas Podemos. In addition to the questions raised by the comparison of the Spanish example and the Polish situation, we may be surprised to hear the criticism that politics has a stranglehold on the judiciary through the appointment of judges proposed to the President of the Republic by the reformed Polish KRS, whereas in Germany, federal court judges are appointed by the Minister of Justice on

orzeczenia/wyroki/art/9750-ustawa-o-krajowej-radzie-sadownictwa)

the proposal of a commission composed mainly of politicians, the *Richterwahlausschuss*: One half is made up of the justice ministers of the Länder and the other half is made up of members elected by the Bundestag. The members of this committee are rarely judges. In addition, at federal state level, in some Lander judges are appointed directly by the Minister of Justice of the Land, without input from any commission.

Supreme Court reform

The main change introduced by the December law reforming the Supreme Court[67] *(Sąd Najwyższy*, SN: the Polish Court of Cassation) is the creation of a Disciplinary Chamber and a Chamber for extraordinary review and public affairs, in addition to the Civil Chamber, the Criminal Chamber and the Labour and Social Insurance Chamber, increasing the number of Supreme Court judges from 74 active members to 120 members. As mentioned above, the Disciplinary Chamber is the main target of attack by the European institutions. It deals at first and second instance with disciplinary proceedings against Supreme Court judges and acts as the court of last instance for disciplinary proceedings against judges of the ordinary courts. As before the reform, Supreme Court judges are appointed by the President on the recommendation of the National Judicial Council (KRS) for a term that ends when they reach retirement age. The irremovable nature of the office of judge of the Supreme Court(except in the event of a reorganisation of the structures of this court by virtue of a law passed by Parliament, but it is not possible to dismiss or transfer a judge individually) should be emphasised, whereas accusations of the new Supreme Court judges' (appointed from 2018) dependence on the legislative or executive power are based on the new composition of the KRS, whose judges were elected by Parliament for a four-year term.

The conflict exacerbated by the European institutions regarding the legitimacy of judges appointed from 2018 onwards on the proposal of the reformed National Judicial Council (KRS) is unfortunately very present within the Supreme Court, where a number of former judges refuse to sit with the new judges, leading to the blocking of this institution and to the continuation by a number of judges of the strategy of sending preliminary questions that have nothing to do with the case to be examined, in order to have the CJEU say that the judicial reforms carried out by the PiS are contrary to European law and must be considered null and void by the national courts. This is why there is now talk of a new in-depth reform of the Supreme Court, which would entail a sharp reduction in the number of posts, with the aim of purging this court of cassation of former judges. Depending on one's point of view, this may be seen as yet another attack on the rule of law, or as a way for parliamentary democracy to defend itself against an attempted judicial putsch carried out under the supervision of the CJEU.

[67] Law of 8 December 2017 on the Supreme Court (https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000005)

3) The verdict of the ballot box

As in Hungary, the majority of Polish voters have so far taken a different view from that of the European institutions, since the United Right coalition led by the PiS has won every election held since its double victory in 2015 (in the presidential election and the parliamentary elections).

Between the parliamentary elections of October 2015 and those of October 2019, the PiS lists for the Sejm elections saw the number of votes cast in their favour rise from 5,711,687 (37.58% of the vote) to 8,051,935 (43.59% of the vote, with a higher turnout).In the 2019 European elections, the PiS obtained 45.38% of the vote against 38.47% for the European Coalition, which brought together the PO, the other liberal party Nowoczena (Moderne), the agrarian party PSL, the social democrats SLD and the Greens. In the October 2018 regional elections, the PiS lists obtained 34.13% of the vote compared with 26.97% for the Civic Coalition (KO) led by the Civic Platform (PO) allied with Nowoczesna and the Greens. In 2020, Andrzej Duda was elected President of the Republic with 43.5% of the vote in the first round and 51.03% of the vote in the second round.

Socialist Timmermans, the rule of law and the 'far right'

While he was First Vice-President of the European Commission with responsibility for better lawmaking, inter-institutional relations, the rule of law and the Charter of Fundamental Rights, and thus spearheading the European Commission's crusade against the Polish reforms, and while he was at the same time Spitzenkandidat for the Socialist Group in the European Parliament for the post of President of the next European Commission, Dutch Labour MEP Frans Timmermans, in an interview with the *Euractiv*[71] website, described his relationship with the "*far right*", which he described as "*the enemy of the European Union"*, and which he felt included the ECR European Conservatives and Reformists Group, where the PiS has its seat in the European Parliament:

"*The reason I don't want to cooperate with the far right is not because their ideas are not social enough, but because they have a different vision of humanity and society. I really don't understand how the traditional right can integrate this into its own ideology. (...) Given the current forecasts, I think we will also need the progressive Liberals in this equation. (...) It would be nice to be able to be picky, but we're talking about Europe, we're obliged to find coalitions and compromises and I'm going to try to make the progressive camp understand that as much as possible.* "

" *The more I listen to Timmermans talk about the rule of law and answer questions, the more it seems obvious to me that the Spitzenkandidaten should temporarily leave their paid European posts during the campaign. This casts a shadow of political suspicion over everything they do, rightly or wrongly*," said *Wall Street* Journal correspondent Laurence Norman in a tweet published on 3 April 2019[68], less than two months before the European Parliament elections. This was at the end of a press conference at which Commissioner Frans Timmermans was defending the need to introduce a mechanism making the payment of European funds conditional on respect for the rule of law.

[71]"Frans Timmermans is courting part of the ALDE", *Euractiv*, 10 April 2019 (https://www.euractiv.fr/section/elections/interview/progressive-camp-eyes-part-of-alde-macron-timmermans/)

[68]https://twitter.com/laurnorman/status/1113390433726496769

Conclusion

Why Poland and Hungary? Do the reforms carried out by the conservative governments of these countries, as announced in their respective election programmes, really threaten democracy or the rule of law? Aren't they more like a healthy reaction by people who, only three decades ago, still recently, regained their freedom in the face of a retreat from democracy linked to the endless extension of the power of judges and the retreat of freedoms under the pressure of an increasingly pervasive dictatorship of political correctness? Or should we see this conflict between the two Central European capitals and Brussels, supported by the major EU countries, as an instrumentalisation of the internal conflicts inherited from Communism in Poland and Hungary by the advocates of a fair Europe at all costs, even if this means sacrificing democracy, since the peoples of the EU tend to reject the new integration treaties proposed to them by the 'enlightened elites'?

Certainly, as major beneficiaries of EU funds and yet to catch up economically with the western part of the continent, Poland and Hungary may appear to provide a golden opportunity to develop a European jurisprudence enabling the EU institutions to supervise all aspects of the law of the member countries, in order to create "*a non-imperial empire", which imposes its discipline not by force but by* law[73] ". They are all the easier prey because their societies are split in two by a divide that Polish essayist and journalist Rafał Ziemkiewicz describes as post-colonial. This divide is typical of countries that have emerged from a long period of foreign domination, with some of the elite and the population still suffering from an inferiority complex which leads them to denigrate their national identity in favour of their affiliation to the empire, which they see as superior and more civilized "*It's unfortunate, but all the countries that have been subjected to long-term occupation are deeply divided between those who want to keep their identity and those who want to give it up, who hate it because they think it makes them inferior people, that it prevents them from being more modern and becoming like those who occupied them.*[69] "

[73] Quote from former European Commission President Manuel Barroso, taken up by Max-Erwann Gastineau in *Le Nouveau procès de l'Est*, see note 42.
The famous French political philosopher Alexis de Tocqueville wrote of "*all the confederations which preceded the American Union of our day* " in his famous work *De la démocratie en Amérique* (Democracy in America), published in 1835, that " *the federal government, in order to provide for its needs, turned to individual governments. If one of them disliked the measure prescribed, it could always evade the need to obey. If it was strong, it called for arms; if*

[69]Words spoken by Rafał Ziemkiewicz in an interview with the author of this report for the English-language news website *Remix News* (https://rmx.news/remix-exclusive/exclusive-there-is-something-sick-in-the-british-system-says-polish-journalist-banned-from-entering-uk/)

it was weak, it tolerated resistance to the laws of the Union that had become its own, using impotence as a pretext and resorting to force of inertia. So one of two things has always happened: the most powerful of the united peoples, taking in hand the rights of federal authority has dominated all the others in its name; or the federal government has remained abandoned to its own forces, and then anarchy established itself among the confederates, and the Union fell into the impotence of action[70] ".

If we apply this observation to the contemporary confederation that is the European Union, we cannot help but think of Germany, or perhaps the Franco-German couple, "*taking in hand the rights of federal authority*" in order to dominate "*all others in its name*". Doesn't the Franco-German Treaty on Cooperation and Integration signed on 22 January 2019 in Aachen stipulate that the two countries must consult each other at all levels before each major European meeting, and that they must endeavour to formulate common positions and coordinate their ministers' speeches in the Council of the European Union, with the common objectives of a common foreign and security policy, a deeper economic and monetary union, and greater social and fiscal convergence? Policy coordination that comes at a time when the United Kingdom's exit from the EU has, as the countries of former Eastern Europe feared, strengthened the dominance of the Franco-German couple within this Union of twenty-seven.

The driving force behind the Visegrád Group (V4), which brings together Poland, Hungary, the Czech Republic and Slovakia, as well as regional cooperation initiatives such as the Three Sea Initiative (3SM), Poland and Hungary, governed by the conservatives, have a much more Gaullist vision of the European Union than the governments in power in Berlin and Paris or the majority within the European institutions. Like other countries in the region, they are particularly reluctant to give up the sovereignty they regained when the Communist dictatorships fell at the end of the 1980s. This does not prevent these peoples from being deeply attached to the very idea of the European Union, or even to a deepening of common policies where this represents an interest for them. For the nations of Central and Eastern Europe, the European Union is the best protection against a return to the situation of yesteryear, when they were caught in a vice between empires: the German Empire and the Russian Empire, and once even the Ottoman Empire. Nonetheless, the pressure and blackmail for European funds now being exerted more and more openly from Brussels have a strong German connotation in the minds of many people in Poland and Hungary.

Will these two countries, which contributed most to the fall of the Communist regimes and the withdrawal of Soviet troops from Central Europe, submit or will they be the ones to put the brakes on the establishment of a new empire through law? Everything will depend on their voters' choice at the next parliamentary elections, scheduled for spring 2022 in Hungary and 2023 in Poland, barring early elections, the majority and unity of the "United Right" in Poland being much more fragile than that of the Fidesz-KDNP coalition in Hungary. The only solution still ruled out

[70]Alexis de Tocqueville, *De la Démocratie en Amérique*, Tome I, éditions Gallimard, 1986, Collection Folio/Histoire, p. 242

for the time being is a British-style exit, given the fact that these two countries are still in favour of belonging to the European Union, even though for the first time a debate has begun within the conservative right of these two countries on the possibility of a Polexit or a Huxit. For the first time, because until now this subject has been reserved for the nationalist right, which is more marginal in terms of electorate than PiS or Fidesz. But while the Polish-Hungarian common front depends very much on the ups and downs of elections, it is part of a unique, age-old friendship between the two peoples, both of whom have a tradition of resistance to the dominant empire that is deeply rooted in their history. In Poland, the still strong presence of Christianity, in its Catholic variant, is an additional and particularly important factor of resistance to the progressive ideology that the EU institutions are now promoting. Generally speaking, the Soviet experience has made the small countries of the former Eastern bloc more resistant to ideologies imposed from abroad.

Hungarian Prime Minister Viktor Orbán warned in his address to the Hungarian people on 23 October 2021, the *65*th anniversary of the 1956 uprising: "*Just as in 1849, 1920, 1945 and 1956, Europe's leading figures once again want to decide about us over our heads, and without us. They have sworn to make us Europeans, 'woke' and liberal, if it kills us. Today, Brussels speaks and behaves towards us and the Poles as it usually does towards its enemies. We have a feeling of déjà vu: the air of the Brezhnev doctrine is blowing over Europe. It's about time they realised, in Brussels too, that the Communists didn't have much luck with us either. We are the sand in the gears, the stick in the wheel, the thorn in the side. We are the David that Goliath had better hope not to meet. We are the people who, in 1956, had enough of world communism, and it was us who took down the first brick of the Berlin Wall.*"

By trying too hard to extend the competences of the Union at the expense of the nations, using the Hungarian and Polish precedents, the EU in turn runs the risk of seeing its functioning blocked. In the short and medium term, the idea that the blocking by the Commission, supported by certain Member States, of European funds from the Next Generation EU recovery plan intended for the two former Eastern Bloc countries should be subject to countermeasures, starting with a systematic blocking of decisions requiring unanimity at the European Council, is gaining ground in the circles of power in Budapest and Warsaw. Other responses could follow, particularly with regard to the EU's climate package, which is particularly costly for the former Eastern Bloc countries, and even more so for Poland, three-quarters of whose energy production is based on coal. With this climate package, there is a real risk that the financial balance linked to EU membership will become negative, if it is not already so with the European CO_2 emission rights system, and this in a context where Poland and Hungary are seeing a reduction in the European funds allocated to them as a result of their efforts to catch up economically, thanks to which in recent years they have already overtaken Greece and Portugal in terms of GDP per capita in terms of purchasing power. With their finances in better shape than those of the southern EU countries, the V4 countries were not enthusiastic about the idea of joint indebtedness accompanying the Next Generation EU recovery plan, but accepted it in a spirit of solidarity. Using the funds to blackmail Poland over its justice reforms and Hungary over

its law on the protection of minors could therefore have a boomerang effect. These countries can also borrow on the financial markets and, as proposed by Jacek Saryusz-Wolski, a member of the European Parliament and one of the architects of Poland's accession to the EU, it would not be inappropriate for these two countries to consider withdrawing from this plan by sending a message to their partners that as the conditions of the plan were not respected regarding them, Poland and Hungary are therefore withdrawing their guarantees and will not participate in the repayment of the famous €750 billion European recovery plan. Some go even further, such as Polish Justice Minister Zbigniew Ziobro, who says he is in favour not only of a systematic veto wherever possible and a - reconsideration of Poland's commitment to the EU's climate policies, but also of the suspension, if necessary, of Poland's contribution to the EU budget[76].

The other danger for the EU is that CJEU rulings that are inapplicable or unacceptable to sovereign states will be rejected, and that conflicts between the CJEU and national courts will multiply, which, through the precedents thus created, would greatly weaken the EU. In future, anyone will be able to refuse a ruling by the CJEU on the grounds that Poland, for example, has officially refused to implement this extraordinary interim order, pending a judgment on the merits, suspending the operation of its Turów mine[71] [72] whose lignite generates between 5 and 7% of the national electricity production. And if the CJEU persists in reinterpreting the Treaties by confiscating new areas of sovereignty from countries

[76]"Poland justice minister threatens EU veto over rule of law 'blackmail'", *Financial Times* (https://www.ft.com/content/8cbc411f-0b7c-4cbb-a0c4-cb538e1a8e78)

signatory to these treaties, there is a strong risk that conflicts of jurisdiction with national constitutional courts will increase, as was the case on 8 June 2021, when the Romanian Constitutional Court ruled that " *the Fundamental Law retains its hierarchically superior position (...).), as Article 148 does not give priority to the application of Union law over the Romanian Constitution, so that a court does not have the power to analyse the conformity of a provision of the 'internal laws', declared constitutional by a decision of the Constitutional Court*[78]". This judgment was a response to the CJEU's claim that Romanian courts had the right to disregard Romanian laws and constitutional principles that they considered to be contrary to European law[79]. In this respect, we should also recall the infringement proceedings initiated on 9 June 2021 by the European Commission against Germany in relation to the ruling of the German Federal Constitutional Court which, on 5 May 2020, refused to recognise a decision of the CJEU validating the ECB's secondary market asset purchase programme for the public sector. "*For the first time in its history, the German Constitutional Court is finding that the actions and decisions of the European institutions*

[71] Order of 21 May 2021 of the Vice-President of the Court of Justice in Case C-121/21 R Czech Republic v Poland (https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210089fr.pdf)

have clearly not been taken within the framework of European competences and therefore cannot have any effect in Germany", the President of the German Constitutional Court, Andreas Vosskuhle, stated at the time.[80]. In their ruling, the German constitutional judges noted that the European Union is not a federal state and that "the Member States remain the masters of the Treaties". The CJEU's judgment of 11 December 2018[73] has therefore been declared *ultra vires* and therefore inapplicable under German law.

The position of Poland and Hungary in the face of pressure from the European institutions is summed up perfectly by the response of Professor Ryszard Legutko, a Polish philosopher and Member of the European Parliament and Vice-Chairman of the European Conservatives and Reformists Group (ECR), to the President of the European Commission during the debate on "The crisis in the rule of law in Poland and the primacy of EU law" on 19 December.

1 [8]https://www.g4media.ro/ccr-sectia-speciala-este-constitutionala-si-poate-fi-desfiintata-doar-de-parlament-decizia-ccr-vine-dupa-decizia-cjue-care-spune-ca-recomandarile-mcv-privind-desfiintarea-siij-sunt-obligatorii.html

[79] Judgment of 18 May 2021 in Joined Cases C-83/19 Asociaţia "Forumul Judecătorilor Din România"/Inspecţia Judi- ciară, C-127/19 Asociaţia "Forumul Judecătorilor Din România" and Asociaţia Mişcarea Pentru Apărarea Statutului Procu-rorilor/Consiliul Superior al Magistraturii and C-195/19 PJ/QK and in Cases C-291/19 SO/TP and Others v Commission of the European Communities.a., C-355/19 Asociaţia "Forumul Judecătorilord in România" and Asociaţia "Mişcarea Pentru Apărarea Statutului Procurorilor" and OL/Parchetul de pelângă Înalta Curte de Casaţieşi Justiţie - Procurorul General al României and C-397/19 AX/Statul Român - Ministerul Fi- nanţelor Publice (https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf)

[80] Jean-Claude Zarka, "L'arrêt du 5 mai 2020 de la Cour constitutionnelle fédérale d'Allemagne concernant le programme PSPP de la Banque centrale européenne" (The judgment of the Federal Constitutional Court of Germany of 5 May 2020 concerning the European Central Bank's PSPP programme) Actu-Juridique.fr (https://www.actu-juridique.fr/international/international-etrangers/droits-europeen-ue/larret-du-5-mai-2020-de-la-cour-constitutionnelle-federale-dallemagne-concernant-le-pspp-programme-de-la-banque-centrale-europeenne/)https://www.actu-juridique.fr/international/international-etrangers/droits-europeen-ue/larret-du-5-mai-2020-de-la-cour-constitutionnelle-federale-dallemagne-concernant-le-programme-pspp-de-la-banque-centrale-europeenne/https://www.actu-juridique.fr/international/international-etrangers/droits-europeen-ue/larret-du-5-mai-2020-de-la-cour-constitutionnelle-federale-dallemagne-concernant-le-programme-pspp-de-la-banque-centrale-europeenne/

October 2021 in Strasbourg: " *Over the last decade, the EU has shown itself incapable of restraining itself and respecting the limits imposed by the principles of attribution, subsidiarity and proportionality. The confidence that it will remain within the limits of the Treaties in the years to come has disappeared. You see, Madam President, we are not afraid of European law, we are afraid of European non-compliance with the law, the tyranny of the majority, the abuse of power and the cavalier use of the Treaties. Despite what we may see in the Parliament and the*

[73]Judgment in Case C-493/17 Heinrich Weiss and Others

Commission, might is not right[74]*.* "

This intervention by the Pole Legutko addressed to Ms von der Leyen does not seem to have convinced the European Commission, which on 22 December 2021 opened infringement proceedings against Poland for violation of Union law by its Constitutional Court, due to the judgment of 7 October 2021 of the Polish Constitutional Court, which found the incompatibility between the Polish Constitution and the claim of the Court of Justice of the EU to authorise Polish judges to ignore the law and constitution of their country by not recognising judgments delivered by other judges appointed after the reform of the National Judicial Council (see above. Part One. Current conflicts - IV. Polish Constitutional Court v CJEU).

In the same spirit, the previous day the CJEU had issued a landmark judgment in response to the above-mentioned ruling of the Romanian Constitutional Court on 8 June, affirming the primacy of Union law - or more precisely of its interpretation by the CJEU and therefore of the case law of the CJEU - over the decisions of the constitutional courts taken in the light of the constitutions of the Member States. Thus, the conflict of competences around the issue of the rule of law and "European values" does not only concern Poland and Hungary, because, in creating new case law, it is a matter for all the member states of the EU that the Court of Justice, the European Commission and the European Parliament are seeking to extend the scope and powers of the European institutions ever further. The recent acceleration of this trend is bound to increase the opportunities for conflict and, ultimately, weaken a Union whose only means of gaining the obedience of the net beneficiary countries of the EU budget is financial blackmail, and only for as long as these countries remain net beneficiaries.

[74] https://www.europarl.europa.eu/doceo/document/CRE-9-2021-10-19-INT-2-025-0000_EN.html

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