Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union

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Rule of Law, Common Values, and Illiberal Constitutionalism

This book challenges the idea that the Rule of Law is still a universal European value given its relatively rapid deterioration in Hungary and Poland, and the apparent inability of the European institutions to adequately address the illiberalisation of these Member States.

The book begins from the general presumption that the Rule of Law, since its emergence, has been a universal European value, a political ideal and legal conception. It also acknowledges that the EU has been struggling in the area of value enforcement, even if the necessary mechanisms are available and, given an innovative outlook and more political commitment, could be successfully used. The authors appreciate the different approaches toward the Rule of Law, both as a concept and as a measurable indicator, and while addressing the core question of the volume, widely rely on them. Ultimately, the book provides a snapshot of how the Rule of Law ideal has been dismantled and offers a theory of the Rule of Law in illiberal constitutionalism. It discusses why voters keep illiberal populist leaders in power when they are undeniably acting contrary to the Rule of Law ideal.

The book will be of interest to academics and researchers engaged with the foundational questions of constitutionalism. The structure and nature of the subject matter covered ensure that the book will be a useful addition for comparative and national constitutional law classes. It will also appeal to legal practitioners wondering about the boundaries of the Rule of Law.

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Poland and Hungary within the European Union

Edited by Tímea Drinóczi and Agnieszka Bień-Kacała

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Foreword

These are truly extraordinary times. At time of writing, a health emergency is sweeping the globe in the form of a pandemic which has already led multiple countries on multiple continents to effectively shut down economic and social life for the foreseeable future, with a view to containing and managing the serious health effects of the spreading virus.

Amongst the many unfolding consequences is the emergence of a narrative which suggests that authoritarian or illiberal systems may have managed the initial stages of the outbreak better than democratic systems. The suggestion is that in societies where people have developed habits of obedience to government orders, in which there is a high degree of centralised control even in normal times, and in which restrictions on personal freedoms are commonplace, it has been much easier to implement an effective response to the spread of COVID-19 than in democratic systems. Democratic societies, by comparison, are less likely – at least at first – to tolerate and comply with the kind of severe restrictions on movement, association, and assembly that have been recommended for bringing this crisis under control. The virtues of illiberalism and authoritarianism, in other words, seem to be on display in this moment of global emergency. Needless to say, many voices have been raised to challenge this simple equation, but it is nonetheless true that in previous periods of emergency, many of the civil liberties and constitutional protections of ordinary times have been suspended.

The topic of this book, which concerns the resurgence of illiberalism in Hungary and Poland in recent years, gains fresh and renewed resonance in light of the global pandemic and the apparent opportunities it has created for authoritarian measures. For some years, those concerned with democracy and the Rule of Law have watched with increasing alarm as first Hungary and then Poland have gradually dismantled their constitutional checks and balances, replacing political systems of constitutional democracy with elected 'soft-authoritarian' regimes. Despite a number of interventions by the European Commission and the European Court of Justice, there has been little or no political will, either at the European level or at the collective level of EU Member States, to take any serious action against Poland or Hungary to reverse or prevent the further

dismantling of the Rule of Law in those jurisdictions.[1] Hence we now have, at the heart of the European Union and of its institutional functioning, two highly illiberal Member States whose ruling parties continue to capture independent institutions and courts, to commandeer the media, and to suppress and dominate political opposition, including through changes or attempted changes to the electoral rules.

While many observers view what has happened in Poland and Hungary as the dismantling of the Rule of Law and of constitutional democracy, the editors of this volume take a different approach and attempt to challenge some of these arguments and assumptions. They argue that, although Poland and Hungary have certainly rejected the substantive version of liberal constitutional democracy and the Rule of Law espoused and promoted by the European Union, they have nonetheless adopted their own distinctive version of a constitutional system, which the editors call 'illiberal legality' or illiberal constitutionalism. They take the view – contrary to authors such as Wojciech Sadurski and Jan Werner Mueller who have argued that the illiberalism of the Polish and Hungarian governments at present is incompatible with any meaningful notion of democracy despite the presence of elections – that the concept of illiberal democracy is not necessarily an oxymoron. The illiberal legality of Hungary and Poland, they argue, does not amount to fully fledged authoritarianism, even if it is headed in that direction.

Indeed, one of the aims of the book is to spell out the contours of this 'illiberal constitutionalism' as it has been developed in Poland and Hungary. At the same time, even while they make clear that the version of illiberal constitutionalism developed in Poland and Hungary is at odds with the substantive version of the Rule of Law promoted by the EU, the editors argue that their membership of the European Union nonetheless provides some kind of constraint on the political and legal systems in these two states. The various chapters of the book spell out different aspects of these arguments.

The distinctive contours of illiberalism in Poland and Hungary, and its coexistence with a European Union supposedly founded on respect for a substantive conception of the Rule of Law, are matters of grave concern for anyone who cares about the future of liberal democracy and the supposed commitment of the European Union to its protection. This is undoubtedly an interesting and timely book, whose provocative arguments and informative accounts of events in these two EU Member States should make for both interesting and uncomfortable reading.

Gráinne de Búrca

1 For an interesting analysis of why the EU is willing to tolerate the 'soft authoritarian' regimes in Hungary and Poland, see R Daniel Kelemen 'The European Union's Authoritarian Equilibrium' (2020) 27 Journal of European Public Policy 481.

Preface

1. Given the relatively rapid deterioration of the Rule of Law ideal in Hungary and Poland, and the apparent incapability of the European institutions to adequately address the illiberalisation of these Member States in a legal and political manner, the book challenges the idea that the Rule of Law is still a universal European value.

There are several objectives of this monograph – the main goal and some less general purposes. The main goal of this volume is to convincingly argue that the Rule of Law can or cannot be considered (or to what extent it can still be viewed as) a universal European value. Therefore, it focuses on three distinct but interrelated areas in the context of the consolidated Hungarian and Polish illiberal constitutionalism and the different Rule of Law concepts.

As for the context, this book uses the concept of illiberal constitutionalism and introduces the concept of the European Rule of Law. We, the editors, settle for presenting only a summary of our concept of illiberal constitutionalism, which is characterised by an illiberal type of democracy (as opposed to liberal democracy, which implies competitive and repetitive elections, inclusion, respect of political and other related rights, etc.), misuse of the language of human rights (as opposed to the theory of human rights which implies individualism and protection of group rights, high respect of human dignity and equality, inclusion, institutional and procedural protection against the state and any actors having actual power over the individual), and the illiberal version of the Rule of Law, which we propose to call 'illiberal legality'. This book focuses only on this latter component of illiberal constitutionalism in order to answer the question of whether the Rule of Law can or cannot still be viewed as a universal value in Europe.

The book also explores why and how the universal nature of the Rule of Law in Europe could be embodied in the concept of the European Rule of Law. It is argued that the European Rule of Law embraces the context- and culture-dependent nature of the Rule of Law and, therefore, represents its thick version, with which the Hungarian and Polish illiberal legality is at odds, but which still can serve as a weak constraint on the domestic public power.

Against this background, the first area we study is how values can be conceptualised because we are asking if the Rule of Law is still a common value.

Another interrelated area that needs to be highlighted is how the Rule of Law has historically been conceptualised in the European legal theory because it will help us to prove that it has been a universal value. Lastly, we need to have a good recollection of precisely how the Rule of Law has been dismantled in Hungary and Poland and what the wider community, e.g., the EU tried to do to rectify the situation.

Based on these historical, theoretical, legal, and cultural phenomena, we can have a better understanding of how the content of the Rule of Law has been changed, how illiberal legality has emerged, and how it can be conceptualised in Hungary and Poland. When the degree of divergence, the fading away nature of the European Rule of Law, and the emergence of illiberal legality become apparent, the reader will be able to answer the question of whether the Rule of Law is still a universal value, and, if not, what to do with it. This book offers an optimistic, pessimistic, and more realistic assessment, but the final judgment needs to be reached by the reader, which will be a value judgment based on their temper.

There are other, less general purposes of the volume, which we editors think to be its strengths: the first purpose is to invite Polish and Hungarian authors that are experts in their fields in their respective countries but whose views have not yet been generally shared in the international arena. The second purpose is to provide a more comprehensive account about the Rule of Law and constitutionalism, as they are experienced in Poland and Hungary, as compared to other types of edited volumes in the field. Nonetheless, we also wish to offer more diverse but country- or region-specific accounts of ideas, as compared to a monograph. The advantage of this approach is that the book can be read as a monograph (from the first page to the last) and as a volume of collected papers (reading chapters alone or in a deliberately or randomly chosen sequence). This characteristic distinguishes this volume from other books on the Rule of Law or the constitutional remodelling in Hungary and Poland.

2. There are many works on Hungary and Poland, the Rule of Law and democratic decay that cover parts of the subject matter, which this volume aims to partly unite and transcend. All of them, however, are radically different in terms of design and the theory informing them, as none approach the Hungarian and Polish backsliding as comparable, unique among states in democratic decay in the world and, most importantly, constitutional.

This book deals with the Hungarian and Polish illiberal constitutionalism and transformation of the Rule of Law ideal. Even if both Hungary and Poland are affected by the EU law and the inability of European law and politics to address the remodeling of constitutionalism as being contrary to EU values, this volume does not engage in addressing the challenges the EU has in the area of enforcement of its own values and acquis but relies much on the merits of the edited volumes published in this field. *The Enforcement of EU Law and Values* edited by Dimitry Kochenov and András Jakab (Oxford, 2017) and *Reinforcing the Rule of Law Oversight in the European Union* edited by Carlos Closa and Dimitry Kochenov (Cambridge, 2016) are scholarly reactions to the enforcement difficulties the EU has to face due to the different types of crises, including the inability

of the EU to be effective in ensuring that all its Member States comply with the principles and values underlying the integration project in Europe.

The *Handbook of the Rule of Law* edited by Christopher May and Adam Winchester (Edward Elgar, 2018) intends to be a bridge between the legal and the common sense of understanding of the Rule of Law in the global arena. Our volume has an admittedly narrower and thus deeper scope as it focuses on Poland and Hungary, as compared to the *Handbook*, which collects different definitions and approaches of the Rule of Law, and investigates its various forms of application and institutions. It is further encouraged by these diversified notions but develops its own understanding of the Rule of Law as it seems to have emerged, evolved and transformed in the countries under scrutiny.

Constitutionalism and the Rule of Law, edited by Maurice Adams et al. (Cambridge, 2017), engages in discussions on the Rule of Law in country-specific settings, including Hungary. It however does not include Poland, and, in his chapter, Attila Gábor Tóth confronts the two types of constitutionalism of Hungary, labelling them Lockian (before 2010) and Hobbesian (after 2010) types of constitutionalism, while rejecting the term illiberal constitutionalism and failing to shed light on what illiberal Rule of Law (the title of his chapter) means. Our book goes much further and ensures a profounder approach than Part II of *Constitutionalism and the Rule of Law* (country-by-country analysis) could achieve: it conceptualizes the term illiberal Rule of Law in the Polish–Hungarian context. The main focus of our book, again, is the remodeled constitutional law of the selected Member States – in this sense it deliberately offers much less than Part III of *Constitutionalism and the Rule of Law*.

Wojciech Sadurski, in his recent book on *Poland's Constitutional Breakdown* (Oxford 2019), focuses on Polish events without making Hungarian insight analysis and sees Polish events as having a mostly anti-democratic dimension rather than transforming the meaning of the Rule of Law. The latter is connected mainly to the anti-constitutional part of Sadurski's concept of anti-constitutional populist backsliding. Polish events, for the author, are gravitating towards populist authoritarianism rather than illiberal democracy. He claims that illiberal and populist actions of PiS are in fact anti-democratic; thus the system that has emerged in Poland cannot be called a 'democracy'. Moreover, Sadurski opines that the Rule of Law is simply breached, but does not assert it a changed content. In our volume, however, we offer a different understanding of the events in both states by providing a theory of illiberal constitutionalism and illiberal legality. We ask rather 'Why?' it was done than how and what was done. By asking 'Why?' we focus on the human factor (value system) more than analyzing tools of state-provided propaganda. The value dimension is the input of our research to the comprehensive picture of Hungarian and Polish constitutional remodeling.

This approach might be similar to the one applied by András Lászlós Pap in his book (*Democratic Decay in Hungary*, Routledge, 2017), but our book goes much further than the Hungarian author, in terms of the covered time period, the depth and breadth of the Rule of law decay, and the methodology used (comparison). *Democratic Decay in Hungary* demonstrates how illiberalism is present

in Hungary but does not explain the phenomenon of illiberal constitutionalism and the illiberal understanding of the Rule of Law. It also discusses the reconstituted and re-conceptualized relationship between the state and its citizens but reaches a different conclusion as for the value attitudes of Hungarians.

Our book offers a new, constitutional law-oriented insight and theory of the Rule of Law in illiberal constitutionalism and expands but, at the same time, limits itself to the discussion of the two most renegade Member States of the European Union: Hungary and Poland.

3. Especially because the book is about Hungary and Poland, a summary of the key historical events linking these two states, including a short account of the most critical attacks on the Rule of Law since the beginning of the constitutional remodelling, could serve as a recap and contribute to a better understanding of the arguments presented in this volume.

Both countries transformed their constitutional order to liberal constitutionalism based on European standards, established their new constitutional democracy ruled by the Rule of Law in 1989 and 1990, and joined the Council of Europe (1990–1991) and the European Union (2004). Poland adopted its new and liberal constitution in 1997 (with the Interim Constitution in 1992), while Hungary failed to do so. However, both states passed a series of substantive amendments to their constitutions, which by the end of 1990 added up to substantively new constitutions. The formal and symbolic process of constitution-making to show the abruption from the socialist past, however, was delayed in Hungary. This moment came when, in 2011, the illiberal Fundamental Law was quickly adopted in an exclusive political process and was, in the following years, even more intensively amended. The illiberal constitutional remodelling process started in 2010 when Fidesz won the general election and gained the two-thirds and, thus, constitutional majority in the Parliament. The PiS could not achieve a constitutional majority in the 2015 Polish parliamentary election; nonetheless, right after the election, it too started a similar illiberal remodelling to Hungary, but used unconstitutional measures.

Dismantling the Rule of Law occurred in a series of attacks against the most critical pillars of constitutional democracy; the first victims were the constitutional courts and the ideal of the supremacy of the constitution, as early as 2010 in Hungary and 2015 in Poland. In both states, the process has continued in a non-linear way affecting, among others, the independence of media, civil society, the judiciary, and politically or economically sensitive fundamental rights. In the past couple of years of Hungarian and Polish illiberal constitutionalism, these attacks, both individually and collectively, generated many criticisms, reports, opinions, and procedures. The non-observance of what the reports and opinions delivered by several national, international, and supranational organisations, actors, and bodies (e.g., NGOs, UN, EU, Venice Commission, OSCE ODIHR) has contributed to an almost identical Rule of Law deterioration in both Hungary and Poland. The accompanying populist and nationalistic propaganda widely corroborated with the emotional needs of the population. It resulted in continuous popular support for illiberal populists who could secure a comfortable

constitutional majority in Hungary in three consecutive general elections and a simple majority in 2015 in the Polish *Sejm* and *Senat*. The support decreased by 2019 when the opposition could win the majority of seats in the *Senat*, and when the Polish and Hungarian opposition could win several positions in the local election. These, however, serve as quite a weak balance to the power of the central government and its actual populist leader. Today, the procedure envisaged in Article 7 TEU is an ongoing process against Poland (2017) and Hungary (2018); concerned judges, scholars, and citizens demonstrate against Poland's judicial reform, and Hungary has begun to stop executing judicial decisions (segregation of Roma pupils in schools).

An even more concise image is portrayed in the timeline in Figure 0.1 on the following page, and a more detailed description of events and their consequences to the Rule of Law ideal are captured in the chapters.

4. Against this background, and in an endeavour to accomplish the goals set for this book, the first chapter, entitled Rule of Law: In context, supplies a basic overview of the different approaches towards the Rule of Law and the development of illiberal constitutionalism. It introduces the notion of the European Rule of Law, which is viewed as a weak but present constraint on the public power of the Member State, and a certain benchmark that could be used for comparison. It follows that the approach this book takes is a legal, constitutional law perspective, and, as such, it tries to stay in the field of law even though it acknowledges the fact that the Rule of Law ideal has a non-legal, value-oriented, and political understanding as well. In this context, the authors of the following chapters attempt to answer the question of whether the Rule of Law is still a common value in Europe.

The other section of the volume, Rule of Law: A common value, offers a philosophical, historical, and axiological overview of the concept of constitutionalism and the Rule of Law. As the title of Part I – 'Rule of Law: A common value' – indicates, the authors of Chapters 2 and 3 (Andrzej Madeja and Wojciech Włoch, respectively) take a positive view of the Rule of Law.

As suggested by the title of the following section – Rule of Law in national practice: Is it a common value?' – when investigating national and supranational practice in the Rule of Law field the response is more pessimistic. This assessment is palpable in the chapters written by András Jakab and Eszter Bodnár, who give a more general overview on the constitutional developments that have taken place in Hungary over the last 30 years (Chapter 4), Tímea Drinóczi, who offers a more focused analysis on the Hungarian Rule of Law situation (Chapter 5), and Iwona Wróblewska. Chapter 6 explains the fading away feature of the importance of the Rule of Law in Poland. These authors give vivid but quite depressing accounts of the tendencies that could explain experiences in Hungary and Poland from 1989 until 2020.

The next section of the book deals with the Rule of Law and supranational struggles. In its title – 'Rule of Law and supranational struggles: Is it a common value?' – the question ('Is it a common value?') shows the multifaceted challenges that have arisen in realising the Rule of Law as a value and legal concept.

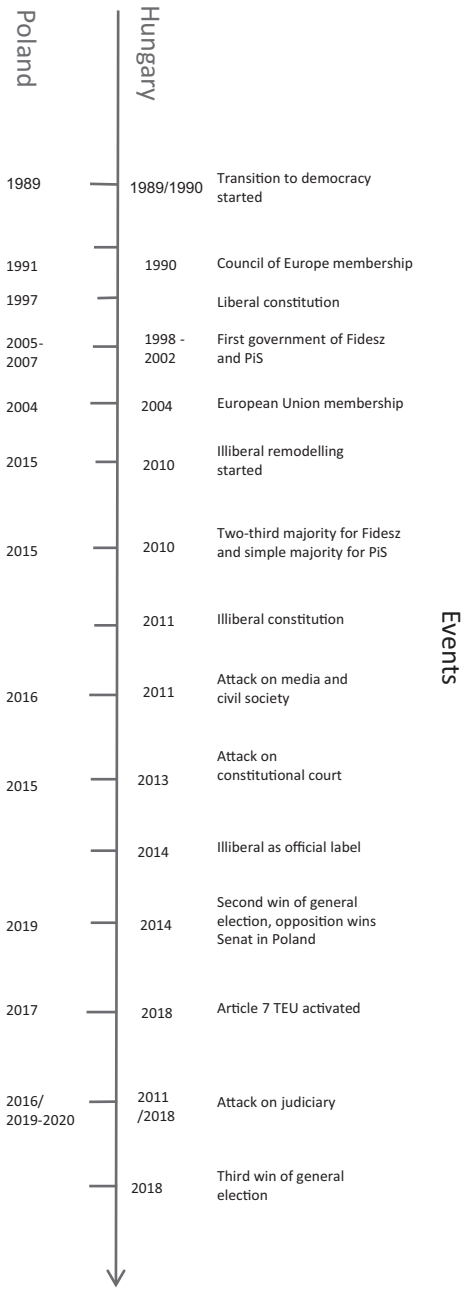

Figure 0.1 Constitutional development in Hungary and Poland. Source: authors.

The obvious challenge is to ensure that the constituent elements of the Rule of Law bind all public authorities in the EU and its Member States. The picture becomes even more complicated and blurred when the Rule of Law is interrogated from the perspective of the success of the Rule of Law mission in Poland (Sylwia Majkowska-Szulc, Chapter 8) and in Hungary, combined with the issue of trust (Lórán Csink, Chapter 7), and as a constraint on the power of national authorities (Agnieszka Grzelak, Chapter 9).

The last section offers an overview within the framework set by Chapter 1, answering the question asked at the beginning of the book from different perspectives. The core finding is that the Rule of Law is still a common, though fading, value, which is still implied in the version of the Rule of Law now found in Hungary and Poland. This version is called 'illiberal legality', and it emphasises the instrumental use of domestic law in both legislation and the application of the law. Another characteristic is the weak constraint that the European Rule of Law poses on the domestic public power because it requires the implementation and application of the EU law, i.e., both the values and the acquis.

Tímea Drinóczi and Agnieszka Bień-Kacała
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Part I

Rule of Law

In context

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1 Illiberal constitutionalism and the European Rule of Law

Tímea Drinóczi and Agnieszka Bień-Kacała

1.1. Framework and problem statement: Contested concepts

There are many theories and opinions in the literature concerning the Rule of Law. It is viewed as a national, supranational, transnational or international concept[1] or ideal, or an applicable, and thus enforceable, legal principle or value.[2] There is disagreement on its definition and constituent elements, ranging from a 'thin' to a 'thick' version in a continuum,[3] or from short positive descriptions to negative definitions that list what the Rule of Law does not mean, and on its measurability and suitable methods.[4] One can recall its recognition throughout history as a rule against the arbitrary use of power as summarised by, e.g., Martin Krygier and Wojciech Włoch in Chapter 3.[5] Another conceptualisation of the term is that 'government officials and citizens are bound by and abide by the law' as defined by Brian Z Tamanaha.[6] According to Dimitry Kochenov and Petra Bárd, the concept of the Rule of Law certainly does not extend to human rights and democracy, nor does it mean a mere adherence to law.[7] Scholars interrogate

1 M Adams et al., eds, *Constitutionalism and the Rule of Law* (Cambridge University Press 2017); H Krieger, G Nolte, and A Zimmermann, eds, *The International Rule of Law: Rise or Decline?* (Oxford University Press 2019).

2 J Waldron, 'The concept of the rule of law', 1 *Georgia Law Review* (2008) 59–60; D Kochenov and A Jakab, eds, *The Enforcement of EU law and values* (Oxford University Press 2017); C Closa and D Kochenov, eds, *Reinforcing the Rule of Law oversight in the European Union* (Cambridge University Press 2016).

3 C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018).

4 See e.g., M Versteeg and T Ginsburg, 'Measuring the rule of law: a comparison of indicators', 1 *Law and Social Inquiry* (2017) 100.

5 M Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures,' 12 *Annual Review of Law and Social Science* (2016); W Włoch, '"Where the Laws Do Not Govern, There is No Constitution": On the Relationship between the Rule of Law and Constitutionalism', Chapter 3 of this book, 77–101.

6 BZ Tamanaha, The History and Elements of the Rule of Law, *Singapore Journal of Legal Studies* (2012) 233.

7 D Kochenov and P Bárd, 'Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasizing Enforcement', *Working Paper No. 1* (July 2018) 20.

the Rule of Law from the perspective of international law and examine the role of international law in a changing global order,[8] while others study it from the perspective of axiology, as Andrzej Madeja in Chapter 2,[9] or in the light of the history of the Western political philosophy on the Rule of Law, as Wojciech Włoch.[10]

Notions such as constitutionalism,[11] to which many adjectives can be added, similarly attract various approaches.[12] The generally accepted view on the term 'constitutionalism' is that it cannot be anything else but liberal, which is why the expression of illiberal constitutionalism is opposed. Another reason is that constitutionalism entails constraints on public power, which is seen in neither Hungary nor Poland.[13] Consequently, when states like Hungary or Poland fail to show the attributes of their former 'liberal'-selves and weaken their former constitutionalism along with their constraints on the public power, they are called (modern) authoritarian[14] or anti-democratic regimes.[15] Others look at the concept differently: they either use other adjectives for constitutionalism (authoritarian) or, while studying the possibility of illiberal constitutionalism, claim that constitutionalism is feasible in the absence of liberal entitlements and democratic processes.[16] For us, illiberal constitutionalism is not only a 'possibility' but a reality, i.e., illiberal constitutionalism has an ever-weakening but still-existing constraint on public power, visible in the Hungarian and Polish constitutional states over this last decade.

This diverse background makes it particularly challenging to conceptualise the deterioration of the Rule of Law in Poland and Hungary. Nevertheless, in the literature, there seems to be agreement on two issues: firstly, that most of these

8 H Krieger, G Nolte, and A Zimmermann, eds., n 1.

9 A Madeja, 'The European Values and the Rule of Law', Chapter 2 of this book …

10 Włoch, n 5.

11 See e.g., BP Frohnen, 'Is constitutionalism liberal?', 33 *Campbell Law Review* (2011); JM Farinucci-Fernós, 'Post-liberal constitutionalism', 1 *Tulsa Law Review* (2018); A von Bogdandy et al., eds, *Transformative constitutionalism in Latin America. The emergence of a new ius commune* (Oxford University Press 2017); H Alviar Garcia and G Frankenberg, eds, *Authoritarian constitutionalism* (Edward Elgar 2019); M Tushnet, 'The possibility of illiberal constitutionalism', 69 *Florida Law Review* (2017).

12 See e.g., M Loughlin, 'The contemporary crisis of constitutional democracy', 2 *Oxford Journal of Legal Studies* (2019) 446.

13 For a collection of terms used to describe democratic decay and backsliding, see www.democratic-decay.org/.

14 G Halmai, 'Populism, authoritarianism, and constitutionalism', 20 *German Law Journal* (2019); GA Tóth, 'Illiberal rule of law? Changing features of Hungarian constitutionalism', in M Adams et al., eds, *Constitutionalism and the Rule of Law* (Cambridge University Press 2017); KL Scheppele, 'Autocratic legalism', 85 *The University of Chicago Law Review* (2018).

15 W Sadurski, *Poland's constitutional breakdown* (Oxford University Press 2019) 243.

16 See M Tushnet, 'Authoritarian constitutionalism', 100 *Cornell Law Review* (2015); H Alviar Garcia and G Frankenberg, n 11; Tushnet, n 11; T Ginsburg and AZ Huq, *How to save constitutional democracy?* (The University of Chicago Press 2018), respectively. Other alternative views can be found in Frohnen, n 11 and Farinucci-Fernós, n 11.

terms are contested in nature,[17] and secondly, that we have to define first what we want to talk about or, as a matter of fact, measure if we are interested in how a country or the EU is faring in the Rule of Law field.[18] Therefore, in the following sections, we clarify these two contested concepts: the Rule of Law and illiberal constitutionalism.

1.2. Contested concepts: The Rule of Law

1.2.1. The Rule of Law: What is commonly accepted and shared and what is not

Christopher May argues that the Rule of Law has reached a status of a global common sense,[19] which seems to be in line with the view of Fallon, who opines that a general theory of the Rule of Law needs to be thin and abstract.[20] Without discarding this interpretation and its use in theory and practice, especially in the Rule of Law measurements and development projects, we, in line with the views of, e.g., Mortimer Sellers and Dimitry Kochenov, argue that there is also a value in viewing the Rule of Law in a thick(er) sense, especially when it is connected to the European constitutional development.[21] Zimmermann observes that the Rule of Law is traditionally connected to classical liberalism, i.e., the power is limited by the individual rights of the citizens. This perspective is embedded in the concepts of *État de Droit* and *Rechtsstaat*,[22] and its Hungarian version of *jogállam* and Polish version of *państwo prawa*. The values that are demanded to supplement the formal or thin understanding of the Rule of Law are usually viewed as liberal values, such as the effective protection and realisation of human rights and governing in a way that promotes a social coexistence in which the state acts for the individual and not vice versa.

In the context of a general theory v. a regional (Western European) concept, and having regard to different political philosophies, scholars differentiate between thin and thick conceptions of the Rule of Law. They also use various

17 Besides the already mentioned sources e.g., in n 1–5, see, e.g., J Waldron, 'Is the Rule of Law an essentially contested concept (in Florida)?' 21 *Law & Philosophy* (2002) 137.

18 J Moller, 'The advantages of a thin version', in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018) 32–33.

19 C May and A Winchester, 'Introduction to the Handbook of the Rule of Law', in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018) 1.

20 RM Fallon, Jr, '"The Rule of Law" as a concept in constitutional discourse,' 1 *Columbia Law Review* (1997) 7.

21 See also M Sellers, 'What is the rule of law and why it is important?', in JR Silkenat, JRE Hickey Jr, and PD Barenboim, eds, *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (Springer 2014) 3–6 (the Rule of Law has Western European origin). D Kochenov, 'The EU and the Rule of Law – Naïveté or a grand design?', 5 *University of Groningen Faculty of Law Research Paper Series* 2018, 10 (the EU emerged as a particular type of constitutionalism based on the rule of law through national democracies).

22 A Zimmermann, 'Understanding the rule of law: conceptions and perspective', http://alrf.msk.ru/understanding_the_rule_of_law_conceptions_and_perspectives

terms to express their different views on the Rule of Law, such as formal, procedural, and substantive.

Apparently, the thin and abstract concept of the Rule of Law has been enriched, and there now exists a 'thinnest' and a 'thin' understanding. Earlier, Fuller and Raz (1969 and 1977, respectively) gave a quite narrow definition ('thinnest'), while nowadays, some other principles or elements have been added, and it is suggested to be called 'formal legality'. Both of these thin versions claim that it does not concern itself at all with the content of the law.

The accounts of Fuller and Raz are the prototype of the thinnest concept of the Rule of Law and only contain principles that describe the characteristics of the law. For Lon Fuller, it comprises the following: generality, publicity, stability, prosperity, clarity, consistency of the law, the possibility of compliance with the law, and congruence between rules announced and their actual administration.[23] According to Raz, the principles of the Rule of Law are as follows: reasonably clear, reasonably stable, publicly available general rules and standards that are applied prospectively and not retrospectively.[24] These attributives alone are capable of guiding and, to a certain extent, limiting the exercise of power,[25] which phenomenon seems to be a generally accepted primary function and normative foundation of the Rule of Law in the literature.[26] As Moller comprehensively defines formal legality, this term requires the above-explained characteristics of the law, a power exercised via law (rule by law), the state actions to be subjected to law, and equality before the law.[27]

The advantages of this version of the Rule of Law are its measurability, its capability of investigating causal relationships between, e.g., formal legality and democracy, and if it has any consequences for economic growth and human development. Moreover, the thin concept will not take the researcher to the 'murky waters of the politico-institutional requirements of the rule of law',[28] and ensure that politics do not contaminate the law. Thus, it can be used as a general theory where the law can reflect the common legal grounds of a diverse range of societies.[29] Contrariwise, it also means that this concept of the Rule of Law cannot reflect the characteristics of a particular (legal) cultural context.

As compared to the thin concept of the Rule of Law, its substantive (thick) version[30] emphasises additional elements that are attached to the thin version. These components can be certain values, e.g., that the law shall be 'just', or the need that the law shall bear some specific content or be 'good law'. It can also be

23 L Fuller, *The Morality of Law* (New Haven, Yale University Press 1969).
24 J Raz, 'The Rule of Law and its Virtue', 93 *Law Quarterly Review* (1977).
25 J Moller, n 18, 30.
26 A brief summary is offered by the entry of Rule of Law at https://plato.stanford.edu/entries/rule-of-law/. See also e.g., Zimmermann, n 22, Krygier, n 5.
27 Moller, n 18, 29.
28 Moller, n 18, 30.
29 May and Winchester n. 3, 9.
30 See a summary, e.g., Zimmermann, n 22.

demanded that the law shall dictate the internal form of the realm of power (e.g., to be organised democratically).[31]

Consequently, there is another commonly accepted phenomenon of the Rule of Law. The formal legality, or its variations used by scholars advocating the thin concept, is the core element of any thick understanding of the Rule of Law. It can be seen perfectly in how Tom Bingham and Adrian Bedner depict the thick concept. Bingham adds the following components: the law must protect fundamental human rights, courts must be able to resolve legal disputes, adjudicative procedures must be fair, and states must comply with both international and national legal obligations.[32] For Adrian Bedner, the Rule of Law has procedural elements, including the rule by law (legality and adherence to legal measures), legal certainty, democracy in terms of involvement, substantive elements referring to the fundamental principles of justice and protection of each of the generations of human rights, including group rights, and control mechanisms which are constituted by the independent judiciary and 'other institutions charged with safeguarding elements of the rule of law'.[33] Constitutional texts usually provide all of these components of the Rule of Law. The question is the extent to which these provisions are implemented, or, in other words, whether the constitution is an effective instrument or merely a symbol or façade.

1.2.2. Controversies and uncertainties

There is, however, no agreement on the constitutive elements of the conception of the Rule of Law. It is difficult to determine whether it is possible to exactly demarcate a line between the thin and thick versions, as the Rule of Law can range in a continuum from the thinnest to the thickest end.

For instance, Christopher May narrows down the formal concept even more and claims that the core component of the Rule of Law is predictability, which is in harmony with the concept of the Rule of Law that has already reached the

31 Cf, G Palombella, 'Beyond legality – before democracy: rule of law in the EU two level system', in C Closa and D Kochenov, eds, *Reinforcing the Rule of Law oversight in the European Union* (Cambridge University Press 2016). See also, e.g., A Zanghellini, 'The Foundations of the Rule of Law', 2 *Yale Journal of Law & the Humanities* (2016) 214, Krygier, n 5. Cf also with the works of Friedrich Hayek (FA Hayek, *The Constitution of Liberty*, The University of Chicago Press 1960; connection between the Rule of Law and liberty), Ronald Dworkin (R Dworkin, 'Political Judges and the Rule of Law', Proceedings of the British Academy 1979, 262, www.thebritishacademy.ac.uk/pubs/proc/files/64p259.pdf; connection between the Rule of Law and substantive justice and moral rights).

32 T Bingham, *The Rule of Law* (Penguin 2011); The report of the Secretary-General of the UN on The rule of law and transitional justice in conflict and post-conflict societies, 23/0/04, 4; Rule of Law Checklist (Adopted by the Venice Commission at its 106th Plenary Session [Venice, 11–12 March 2016]).

33 A Bedner, 'An Elementary Approach to the Rule of Law', 2 *Hague Journal on the Rule of Law* (2010) 67, 48; D Boies, 'Judicial Independence and the Rule of Law', 22 *Washington University Journal of Law & Policy* (2006) 60.

status of global common sense. He argues that, if a state is unable to provide a sustained level of predictability, it cannot claim to have implemented the Rule of Law. Predictability is achieved when a predictable legal environment is provided that can guide people's behaviour and regard their freedom and autonomy;[34] it requires even less than the theories of Fuller and Raz. It would result in an even greater proliferation of the adjectives we have to add to the Rule of Law to be able to briefly but adequately express what we mean, i.e., the differences between the thin understandings of the Rule of Law. This difficulty is observable in Table 1.1.

Moreover, the idea that the commonly shared understanding of the Rule of Law, i.e., to prevent the arbitrary use of power, is ambiguous as it depends on the definition of 'arbitrary'. It could imply that the law is not arbitrary if it considers individual liberty, which is already a value that the Rule of Law would demand, which would mean a thick(er) understanding of the term. In contrast, it can also be asserted that, if rulers comply with the characteristics of the law or if they rule with the use of legal measures (rule by law), they cannot act arbitrarily and in unpredictable ways, regardless of how their regulations affect the addressees, including the liberties of individuals. It also brings about one of the disadvantages of the thin(est) concept: the Rule of Law can coexist with systems that are illiberal, authoritarian, and undemocratic.

Along this line, Krygier,[35] when discussing how the Rule of Law gained importance worldwide and how this concept claimed to be a point of reference to the migration of ideas of constitutional borrowing or transplants,[36] warns about the pitfalls of both the thin/thick or formal/substantive approaches. The formal conception would emphasise the importance of institutions and procedures. Authoritarian governments, however, have imported the institutions and procedures essential to the Western understanding of the Rule of Law but could or would not want to operate them properly. Indeed, they would insist on being assessed against formal criteria (the thinnest possible), which is easier to satisfy than the thick, morally demanding ones. Besides this isomorphic mimicry,[37] non-state actors that exercise public power can also be mentioned as they, due to the non-operational procedures and institutions, also can act arbitrarily. Krygier also notes that the substantive concept of the Rule of Law might be meaningless, because 'loading wide-ranging substantive ideals into the concept threatens to melt it into everything else we might like'.[38]

34 C May, The centrality of predictability to the rule of law, in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018) 1–7.

35 Krygier, n 5.

36 See e.g., W Osiatyński, 'Paradoxes of constitutional borrowing', 2 *International Journal of Constitutional Law* (2003) 244–268.

37 L Pritchett, M Woolcock, and M Andrews, 'Capability Traps? The Mechanisms of Persistent Implementation Failure', *CGD Working Article* 234, Washington, DC, Center for Global Development (2010), www.cgdev.org/content/publications/detail/1424651; Krygier, n 5.

38 Krygier, n 5.

Opposing this latter view, Ronan Cormacain appreciates the thick concept and acknowledges the duality to the Rule of Law. He explains that 'at one level, the rule of law is a basic principle that we are all subject to the law. At another level, the rule of law is the ideal of the values that a legal system ought to possess'.[39] For him, the mere thin version of the Rule of Law is unacceptable as the Rule of Law cannot be compatible with gross human rights violations, which are indifferent to the thin understanding of the notion.[40] He especially challenges Raz's original view, according to which the content of the law does not matter if certain formal requirements have been met during the law-making and drafting process.

Raz, recently, has offered a new account of the formal concept of the Rule of Law, revising his previous view because that could not guarantee to eliminate the possibility of arbitrary government.[41] He still asserts that substantive matters, such as fundamental rights protection, cannot form part of the concept of the Rule of Law; however, he listed some requirements that might intrinsically entail 'just' elements (which are obviously not considered as such by Raz). Having looked at these elements, Raz's position can be challenged: he claims that the Rule of Law principles 'are not about the content of the laws, but about its mode of generation and application'.[42] Due to the need for acting in the interest of the governed, he added the requirements that decisions have to be reasonable and relative to their declared reasons, and the process shall involve various degrees of representation and hearing to consider relevant arguments and information.[43] Acting in the interest of the governed, representation and involvement in decision-making can obviously be a mere formality, especially in legislation, but if this is so, it does not make much sense, as this process would disregard everything that representation and involvement stands for: hearing the voices of others, avoiding the tunnel vision of decision-makers, and curbing arbitrary actions. Moreover, non-compliance with these elements, depending on their regulatory level and degree, though, should trigger different legal actions, such as the involvement of the judiciary, including constitutional courts as well,[44] which might already be the beginning of the use of a more substantive concept.[45]

39 R Cormacain, *Legislative drafting and the Rule of Law* (PhD Thesis, IALS School of Advanced Study, University of London 2017).

40 Ibid., 22–23.

41 Raz, n 24; J Raz, 'The law's own virtue', 1 *Oxford Journal of Legal Studies* (2019).

42 Raz, n 41, 2.

43 Raz, n 41, 8–9.

44 More about that see P Popelier, 'Consultation on Draft Regulation: Best Practices and Political Objections', in MT Almeida and L Mader, eds, *Proceedings of the 9th IAL Congress Quality of Legislation – Principles and Instruments* [Lisbon, 24–25 June 2010] (Nomos 2011) 140; P Popelier and A Mazmanyan and W Vandenbruwane, eds, *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013); H Xanthaki and U Karpen, eds, *Legislation and Legisprudence in Europe. A Comprehensive Guide for Scholars and Legislative Practitioners* (Hart 2017).

45 Raz, n 41, 15.

It is difficult to argue with this above claim of Raz. However, if the Rule of Law in the formal (narrow, thin) sense, i.e., the prohibition of detrimental retroactive legislation, which is the component of the thinnest formal conceptualisation, is not to or cannot be enforced, why should we talk about the Rule of Law at all? Enforcing, e.g., predictability (prohibition of detrimental retroactive legislation) requires a judiciary that is independent of those whose cases it adjudicates or whose legal measures it reviews. An independent judiciary is not bound to deliver 'just' decisions but come up with rulings that are in line with laws and the constitution. In this sense, because modern constitutions are committed to human rights, democracy, and inclusion, even the thin concept of the Rule of Law should not disregard the enforcing mechanism as another constituent element of the concept. Thus, in a constitutional democracy, the Rule of Law has to be 'less thin' or 'thicker' than its 'original' (Raz, Fuller) or 'simplest' (May) conceptualisation.

All of this, however, does not mean that the Rule of Law would be equal to human rights, their protection, or democracy. However, it certainly means that a particular human right or some aspect of democracy may prevail if the principles and the core role of the Rule of Law in the legal system are taken seriously. Enforcement of rights or a constitutional principle can even be supported by the application of the Rule of Law principle.[46] In the process of enforcing and implementing constitutions and international human rights obligations, human rights, democracy, and the Rule of Law are not mutually exclusive but, to a certain extent, overlapping and interdependent concepts.

1.2.3. The Rule of Law: A context-related concept and a common value

1.2.3.1. APPROACHES

Having these approaches, controversies, and uncertainties in mind, Jorgen Moller and Adrian Bedner have collected the advantages of the thin and thick understandings of the concept and came to the same conclusion: the Rule of Law is a context-related concept.[47] The definition of the Rule of Law depends on the purpose of the specific investigation. The thin version is usually supported and used by certain (communist, illiberal, etc.)[48] states, as it is easier to comply with;

46 See e.g., how the social rights are enforced in K Wojtyczek, ed, *Social rights as fundamental rights: XIXth International Congress of Comparative Law/le XIXe Congrès international de droit compare* (Eleven International Publishing 2016); particularly about Hungary and Poland see, T Drinóczi and G Juhász, 'Social rights in Hungary', in K Wojtyczek, Ibid., 171–206; J Trzciński and M Szwast, 'Social rights in Poland', in K Wojtyczek, Ibid.

47 Moller, n 18, 33; A Bedner, 'The promise of a thick view', in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018) 41.

48 The thick concept of the Rule of Law, as explained by Gosalbo-Bono, is either refuted in the socialist regimes, or transformed, as it happens in the Islamic law. R Gosalbo-Bono, 'The significance of the rule of law and its implications for the European Union and the United States', 72 *University of Pittsburgh Law Review* (2010), 289. Islamic law is not examined here, as it has been an applicable law neither in Hungary nor in Poland.

some scholars who use the term for analytical purposes; and those who engage with legal-historical, legal-philosophical, and pragmatic research, because they are concerned with the quality of the legal system, therefore they focus on procedural and formal elements. The thick concept is popular among social activists, different (international) organisations, and those who criticise existing authoritarian regimes or states in democratic decay because this version can strongly support their criticism.[49]

Beyond these considerations, it also follows that the Rule of Law can be a political ideal (Włoch), a theoretical construct (Madeja), a constitutional principle or value (other papers in this volume) to be unfolded by interpretation, or a set of quantitative indices (as indicated later in Section 1.4). It also can be noted that its content is historical and geographical context-related, and its interpretation is enabled by a certain tradition in which both the texts on the principle of the Rule of Law and the interpreter participate.[50] That is why, even if we acknowledge that the usefulness and necessity of the idea of the Rule of Law as a universal and, therefore, thin concept, we shall differentiate between legal systems (Western, Asian, socialist, etc.),[51] the scholarly fields in whose framework we are examining it (e.g., political philosophy or law), and its distinct approaches (e.g., formal and substantive or thin and thick) when we are investigating the extent of compliance with the particular Rule of Law concept.

1.2.3.2. LEGAL SYSTEM-ORIENTATION

Different outcomes concerning the meaning and the components of the Rule of Law can be reached if we stay in the realm of political philosophy or consider the jurisprudence of the constitutional courts. Constitutional interpretation contributes to the implementation of the constitution, including many abstractly stipulated constitutional principles such as the Rule of Law. Constitutional court judges may undoubtedly follow a particular political philosophy that they can identify with, but when interpreting the constitutional text they shall be (more) bound by the constitution, the already established case-law, and the rules of constitutional interpretation, however contested and diverse this exercise may be.[52]

49 Moller, n 18, 31–33, Bedner, n 47, 41.

50 Tamanaha, n 6, 247, Zanghellini, n 31, 216.

51 Whichever classification we use, either be based on families (Arminjon, Nolde, and Wolff), multidimensional methodology (Zweiert and Kötz), or be ideologically inspired (Rene David), there is always a clear distinction between 'Western' and 'non-Western' states.

52 On the practices of constitutional interpretation in the USA, Germany, Poland (until 2015), in e.g., DE Finck, 'Judicial Review: The United States Supreme Court Versus the German Constitutional Court', 1 *Boston College International and Comparative Law Review* (1997); DM Beatty, 'The forms and limits of constitutional interpretation', 49 *The American Journal of Comparative Law* (2001); A Bień-Kacała, 'Informal constitutional change' 6 (40) *Przegląd Prawa Konstytucyjnego* 2017, 199–218; T Groppi, 'Constitutional revision in Italy: A marginal instrument for constitutional change', in X Contiades ed, *Engineering Constitutional Change* (Routledge 2016) 218–220.

The Hungarian Constitutional Court (CC), for instance, already in the beginning of its operation, established that it perceives the Rule of Law principle of the Constitution in a formal sense; thus, would not link it to any other existing constitutional provisions, e.g., those on fundamental rights, and yet, it interpreted it widely.[53] In Poland, before 1997 (the Constitution of the Republic of Poland), the Constitutional Tribunal (CT) perceived the Rule of Law in a substantive way linking it with human rights.[54] After constitutionalising most of the human rights in the 1997 Constitution, the perception of the Rule of Law in the jurisprudence of the CT become more formal. The CT, however, still, even though less intensively, links it to human rights. Both courts were also engaged with the interpretation of the Rule of Law when it deemed necessary to decide on the constitutionality of laws.[55]

Scholars taking different perspectives, including the assessment of the jurisdiction of constitutional (supreme) courts, will hardly find themselves on the same page and come to a common understanding of the definition and content of the Rule of Law. Therefore, for the scope of this chapter and the volume, it is more relevant what Michel Rosenfeld notes concerning the conceptualisation of the Rule of Law in Germany during the second half of the 20th century. As opposed to the positivist *Rechtsstaat*, which emphasised legality and predictability, its contemporary version called *Verfassungsstaat* aims at fairness through constitutionalising substantive norms and values.[56] This constitutionalisation and the subsequent jurisprudence of the German Constitutional Court could explain why 'some present day positivists are committed to a substantive conception of the rule of law ideal',[57] whatever its exact content may be. As McDonald observed, it is a misleading simplification to assume that 'that various forms of natural law inspired jurisprudence (such as Ronald Dworkin's) are wedded to "substantive" or "thick" conceptions of the rule of law, whereas positivist theory is committed to a "formal" or "thin" rule of law ideal'.[58]

As said, constitutional courts are usually not concerned with the labelling of what they apply as a benchmark of constitutionality; they consider, among others, the text of the constitutions which usually recognises the particular state as a Rule of Law state, with or without an identifying adjective, and other provisions of the constitution, e.g., fundamental rights or other value-related rules. What

53 A Jakab and E Bodnár, 'The Rule of Law, Democracy and Human Rights in Hungary: Tendencies from 1989 until 2019' and T Drinóczi, 'The Rule of Law: The Hungarian Perspective', Chapters 4, 106 and Chapter 5, 126–127 of this book, respectively.

54 I Wróblewska, 'The Rule of Law: The Polish Perspective', Chapter 6 of this book.

55 Until 2012, neither the CT nor the CC had any power to review the constitutionality of a judicial decision per se, i.e., without focusing on the applicable law.

56 M Rosenfeld, 'Legitimacy of Constitutional Democracy', 74 *Southern California Law Review* (2001) 1313, 1350.

57 Zanghellini, n 31, 216.

58 L McDonald, 'Positivism and the Formal Rule of Law: Questioning the Connection', 26 *Australian Journal of Legal Philosophy* (2001) 93.

constitutional courts interpret as the Rule of Law in a particular country make up the definition and constituent elements of that particular country. The particular texts inform their decisions; if it reads as 'democratic state of the rule of law' [*demokratikus jogállam*] or 'a democratic state ruled by law' [*demokratyczne państwo prawa*], as in the case of the Hungarian Constitution (until 2012) and Fundamental Law (from 2012), and the Polish 1997 Constitution, they might be inclined to give a more value-oriented (thicker) understanding of the Rule of Law, simply because it has received a modifying adjective, i.e., democratic.[59] In the ideal case, the core elements of the domestically interpreted and implemented Rule of Law in the legal sense is in line with the expectations of the supranational (EU) and international community (e.g., CoE) the state belongs to and in whose decision-making processes it participates.

With multilevel constitutionalism, for example, the Rule of Law Checklist of the Venice Commission from 2016, could be used as a benchmark, out of many, when assessing the Hungarian and Polish approaches to the European Rule of Law as a value.[60] The Rule of law Checklist mentions the criteria of equality, non-discrimination, and an independent judiciary, which maintains the constitutional supremacy and legality, legal certainty, prevention of abuse (misuse) power, and access to justice. The Rule of Law concept of the Checklist seems to embrace a more substantive understanding of the Rule of Law, as it fits the European or Western type of (liberal) constitutionalism the EU and the European states have nurtured.[61]

As the Rule of Law is a time- and location-bound, context-related concept, it is worth offering an understanding of the Rule of Law that could be applied in the European region, particularly in the European Union and its Member States.

1.2.4. The European Rule of Law

It is thus proposed that the Rule of Law shall be viewed as a triangle. The two sides adjoining at the top represent a twin legal obligation that stems from

59 They could as well decide to separate these two distinct principles and give a more formal understanding of the Rule of Law. It would satisfy Raz's claim that the law has to possess other different values, beyond the rule of law. Nevertheless, it does not mean that the formerly mentioned interpretation would be unjustified or illegitimate.

60 Rule of Law Checklist, n 32. Undoubtedly, the role and mission of the Venice Commission and that of the EU are different; but as they profess the same values, including the rule of law, they do cooperate. See e.g., the new EU Framework to strengthen the Rule of Law, n 7; W Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', 2 *European Journal of International Law* (2014) 595. It thus makes sense to use the already available Checklist.

61 Even the ECJ seems to have thickened up judicial independence by the decision on the Polish judicial independence. MA Simonelli, 'Thickening up judicial independence: the ECJ ruling in Commission v. Poland (C-619/18)', https://europeanlawblog.eu/2019/07/08/thickening-up-judicial-independence-the-ecj-ruling-in-commission-v-poland-c-619-18/. This indirectly supports the view on the thick (European) understanding of the Rule of Law.

Table 1.1 Overview of the versions of the Rule of Law

Version	*Source*	*Content*		*Explanation*
Thin/ Formal	Raz (1977)	reasonably clear, reasonably stable, publicly available general rules and standards that are applied prospectively and not retrospectively		Characteristics of the law – what drafters shall observe
	Fuller	generality, publicity, stability, prosperity, clarity, consistency of the law, the possibility of compliance with the law, and congruence between rules announced and their actual administration		
	May	predictability		Core element of the Rule of Law
	Moller	power exercised via law (rule by law) the state actions to be subjected to law equality before the law characteristics of the law (based on Raz/Fuller; above)		Moller calls it formal legality
	Raz (2019)	same as in 1977 decisions have to be reasonable and relative to their declared reasons the process involves various degrees of representation and hearing to consider relevant arguments and information		
Thick	Bedner	Thin/Formal version	formal legality (above)	Bedner calls them procedural elements of the Rule of Law
			independent judiciary, specialised institutions	Bedner calls them enforcement mechanism

(*Continued*)

Table 1.1 (Continued) Overview of the versions of the Rule of Law

Version	*Source*	*Content*		*Explanation*
		Becoming thicker	justice, rights	Bedner calls them substantive elements: the more rights are included the thicker the concept is
			democracy	Bedner calls it procedural element, and if the concept includes it, the Rule of Law understanding is thicker
Thick concept	Bingham	Thin/Formal version	accessible, intelligible, clear, predictable	Characteristics of the law – what drafters shall observe
			the application of the law and not the exercise of discretion is what resolves disputes	
			law applies equally to all	
			conferred power must be exercised in good faith	
		Becoming thicker	attention to human rights means must be provided for resolving disputes without unnecessary delay and cost	

(*Continued*)

Table 1.1 (Continued) Overview of the versions of the Rule of Law

Version	*Source*	*Content*		*Explanation*
			fair adjudication process compliance with international obligations	
	Cormacain	Thin/Formal version Becoming thicker	everybody subject to the law values the legal system have to possess, including human rights with all the implications	Cormacain calls it the duality of the Rule of Law
	Rule of Law Checklist of the Venice Commission	Mixed in each element	constitutional supremacy, legality, legal certainty equality, non-discrimination prevention of abuse (misuse) power independent judiciary and access to justice	

Source: authors.

constitutional rules and the EU law to be observed by the Member States. These are based on a foundation of shared values and political ideals that derive from the common constitutional traditions of the European states.[62] Thus, when the compliance of a Member State to the Rule of Law is examined, the term represents the observance of a unique Rule of Law concept in a particular kind of constitutionalism, namely the Western type of constitutionalism that has been accommodated by Member States (nation-states) and the European Union (supranational community).[63]

Consequently, the twin concept of the Rule of Law is seen as having a core common and intertwined normative meaning for both the EU and its Member

62 Similarly, see G Palombella, n 31.
63 See e.g., D Kochenov, n 21, 10.

States. As a political ideal, which is the foundation line of the triangle, it requires, at least, that no power is exercised arbitrarily. It also implies the demand for the respect[64] and protection[65] of the individual. The Rule of Law also translates to an applicable legal concept, which dictates that law binds all, including the state and the people. The need to obey the law demands that individuals are aware of the law, a prerequisite facilitated by the regulatory state. In this sense, and in order to achieve these purposes, the Rule of Law calls for the fullest possible compliance of state power with the rules of 'formal legality'. Formal legality presupposes the rule by law (power exercised via the law), that state action is subject to law, equality before and under the law, and adherence to specific core characteristics of the law (generality, publicity, predictability, clarity, etc.[66]).[67] Formal legality needs to be enforced by the judiciary, which includes the constitutional courts; otherwise it loses its constraining power. In this process, it is subject to different forms of interpretation and application, such as respecting the legal hierarchy, allowing the necessary time for adjusting to a new regulation (congruence), and respecting legitimate expectations (predictability) (Figure 1.1).[68]

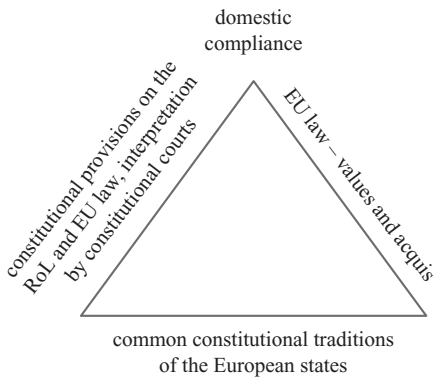

Figure 1.1 The European Rule of Law from the perspective of the national constitutional system. Source: Drinóczi, n 68, 12.

64 Respecting the individual is the underlying idea of limiting power. See Waldron, n 2, 59–60.

65 Protection is an implied component of the prevention of the exercise of arbitrary power, otherwise the underlying idea itself becomes questionable.

66 For this, see L Fuller, n 23; J Raz, 'The rule of law and its virtue' in J Raz, ed, *The authority of law: essays on law and morality* (Oxford University Press 1979).

67 Referring to the theories of Raz, Fuller and Finnis, Moller uses this approach in Moller, n 18, 29.

68 This volume, given its topic, does not make any investigation to the constraint power of the human right documents and human right enforcement mechanism or the rule of law understanding of international or regional human rights law. We are however in agreement with Ricardo Gosalbo-Bono, who calls this phenomenon "European way" of the rule of law,

In domestic legal systems, the national constitutions accommodate EU law and direct state authorities to participate in the EU decision-making process, demanding its enforcement. Suspicion that the Rule of Law is not entirely enforced by a Member State amounts to a violation of, first, constitutional norms on the 'domestic Rule of Law' and the so-called EU clauses, and second, Article 2 TEU.[69] Therefore, the enforcement of these rules and compliance with EU values is the task of national legislative authorities, adjudicative bodies, constitutional courts, and the EU itself. The observance, maintenance, and enforcement of the Rule of Law, as a political ideal, rest with the political community.

The enforcement or non-enforcement of the Rule of Law as a value and legal concept are equally complex and confusing at the EU level. Challenges concerning the observance and enforcement of the value system, including the Rule of Law, democracy, and human rights, on which the European integration project is based, have surfaced in the last decade and have triggered the attention of both EU institutions and scholars.[70] This has been informed by the cumulative effects of the rise of populist nationalism over Europe[71] and the very nature of the contemporary EU, which is neither a community loosely based on economic interest nor a (supranational) federation that could effectively interfere with the domestic affairs of its member states. Therefore, similar to national polities, the EU has been so far ineffective in ensuring that Member States comply with its values and principles. There are many reasons for this: first, the design of the EU is based on the doctrine of delegated powers and mutual trust; second, priority has always been given to the enforcement of the acquis and not to the values.[72] Once a country becomes a Member State, the principle of mutual trust and the presumption that all values and principles are shared, implemented, and enforced internally by the Member States are activated. Therefore, value enforcement has yet to develop effective mechanisms,[73] and to all intents and purposes has not found adequate tools to deal with ideologically induced non-compliance.

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as it 'derives from the law of the European Union and from the system established under the European Convention of Human Rights'. Gosalbo-Bono, n 48, 259. For the European Rule of Law concept and its implementation in Hungary, see T Drinóczi, 'The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary', 16 *MTA Law Working Papers* (2019), https://jog.tk.mta.hu/uploads/files/2019_16_Drinoczi.pdf.

69 See the explanation of the two levels concerning the Rule of Law in a supranational community at Palombella, n 31.

70 See, among others, the books mentioned in n 1, and the different rules of law mechanisms the EU has been experimenting with, such as the rule of law conditionality, the idea of strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement, and the new EU Framework to strengthen the Rule of Law (COM/2014/0158 final).

71 It had either a weaker or an overwhelming effect on the population of the Member States.

72 Csink deals with the problem of mutual trust between the EU and Hungary. L Csink, 'Rule of Law in Hungary. What Can Law and Politics Do?, in Chapter 7 of this book, 153–173.

73 See e.g., Krygier, n 5; Closa and Kochenov, eds, n 2.; L Pech and D Kochenov, 'Strengthening the Rule of Law within the European Union: diagnoses, recommendations, and what to avoid', *Policy Brief* (June 2019), https://reconnect-europe.eu/news/policy-brief-june-2019/.

The deviation from the EU acquis can also have Rule of Law implications. These include the careless use of law or the random abuse of political power, which, however, can be corrected with time through the available enforcement mechanisms and the functioning of democracy in any given Member State. The same applies to other types of defiance, such as infringing the provisions of the acquis by non-compliance through errors of judgement or interpretation, and incorrect or non-timely implementation of a directive, taking advantage of the fact that there are grey areas in EU economic regulations. None of these non-compliances, however, is confined to a particular regime.[74] The implementation and application of EU law (acquis) have over the years become the daily practice of Member States, including Hungary and Poland.[75]

The European Rule of Law can never be a mere instrument that is misused or abused by a national populist leader. It is also proposed that the European Rule of Law represents a thick(er) understanding of the Rule of Law that has emerged throughout history as a common European heritage, value, and principle.[76] It composes a particular political theory, which demands prevention from any arbitrary use of power with all its necessary preconditions and implementation mechanisms. It also means a legally enforceable concept that is present in the national constitutions and the European legal order and distinctively interpreted by national and supranational courts as per their respective positive constitutional law. Thus, the European Rule of Law, both at the European and domestic arena, is necessarily a less thin (or a thick) concept as it does not only prescribe formal and legal features. It requires the domestic law to bear some specific content, which would make it a 'good domestic law' informed by the political agenda and decisions reached by the EU and, intrinsically, its Member States. The European Rule of Law, as Palombella explained,[77] expresses a limitation on the domestic political decision-maker because there is another positive law (i.e., EU law) that the holder of the domestic rule-making power cannot manipulate and override. No domestic populist leader can hijack the EU law and law-making process in the same way as they could do so with their national legislation and law-making authorities. It would also demand a kind of enforcement mechanism, such as

74 A Jakab and D Kochenov, 'Introductory remarks', in D Kochenov and A Jakab, eds, *The enforcement of EU law and values* (Oxford University Press 2017) 2–3; C Closa, D Kochenov, and JHH Weiler, 'Reinforcing rule of law oversight in the European Union', *EUI Working Paper RSCAS 2014/75 Robert Schuman Cetre for Advanced Studies Global Governance Programme*, 4.

75 M Varju, 'A magyar jogrendszer és az Európai Unió joga: tíz év tapasztalata [The Hungarian legal system and the law of the European Union: experiences of ten years]', in A Jakab and G Gajduschek, eds, *A magyar jogrendszer állapota* (MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, 2016) 143–171; Annual reports on monitoring the application of EU law, https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

76 See also S Majkowska-Szulc, 'Safeguarding the European Union's Core Values: The EU Rule of Law Mission in Poland', in Chapter 8 of this book, 174–193.

77 Palombella, n 31.

the preliminary ruling procedure.[78] This latter requires an independent judiciary with judges of anti-authoritarian attitudes[79] who can serve as national judges of a supranational entity, either as members of the ordinary judicial system or constitutional courts.[80]

These features of the European Rule of Law provide a minimum or thin constraint on the public power of Hungary and Poland. It is precisely this mechanism that makes their systems still constitutionalist. Thus, in this sense, compliance with the European Rule of Law by the Member States should not be restricted to the study of Article 2 TEU (value-level) but the application of EU law as well.[81]

1.3. Contested concepts: Illiberal constitutionalism

1.3.1. Choice of words

Regardless of their differences,[82] Hungary and Poland exemplify the distinct characteristics of illiberal constitutionalism. The use of the term illiberal constitutionalism is intentional: it describes the Hungarian and Polish governmental systems, between 2010 to 2020, and 2015 to 2020, and highlights the paradox that these countries present within the European Union. It is what makes the case of Hungary and Poland unique as compared to authoritarian regimes and any other non-EU Member States in democratic decay: while Member States of the EU, they transformed their constitutional system to an extent that is almost incompatible with the values of the EU.

The choice of the word (illiberal) is based on the speech of the Hungarian prime minister, Viktor Orbán, which was later, contentwise, used by the leader

78 Morten Broberg acknowledges that from a Rule of Law perspective the importance of the procedure is high, although it has not been designed as an enforcement mechanism. M Broberg, 'Preliminary references as a means for enforcing EU law', in D Kochenov and A Jakab, eds, *The enforcement of EU law and values* (Oxford University Press 2017) 111.

79 L Henderson, 'Authoritarianism and the Rule of Law', 66 *Indiana Law Journal* (1991) 396.

80 See e.g., the preliminary ruling procedures concerning, among others, the independence of the judiciary initiated by Polish and Hungarian judges. See more in Majkowska-Szulc, n. 76, this book 186–190, Drinóczi, n 53, 124–125, A Grzelak, 'Are the EU Member States still Masters of the Treaties? The Euroean Rule of Law Concept as a Means of Limiting National Authorities', in Chapter 9 of this book, 210–213. Jakub Kościerzyński edited a volume entitled *Justice under Pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019,* https://ruleoflaw.pl/wp-content/uploads/2020/02/Raport_EN.pdf (2019). In the Introduction, the authors, the Polish Judges, express that 'As judges, we stand guard over the civil rights and freedoms enshrined in the Constitution. We pay a high price for this already, but we are ready to pay even the highest. We do not and will not agree to politicise the courts. We will not allow citizens to be deprived of their right to a fair trial before an impartial and independent court'. Ibid., 8.

81 The following chapters investigate domestic Rule of Law compliance. See, n. 80.

82 See more in T Drinóczi and A Bień-Kacała, 'Illiberal constitutionalism – the case of Hungary and Poland', 20 *German Law Journal* (2019) 1140–1145.

of the PiS (Law and Justice Party), Jarosław Kaczyński, as well.[83] Orbán used the expression of 'illiberal state', referred to the concept that democracy can be illiberal, and later used it to legitimise the constitutional remodelling in his political communication.[84] Thus, the term 'illiberal democracy' described by Fareed Zakaria[85] as another alarming possibility in the path of democratic development,[86] was borrowed and revitalised by the Hungarian prime minister as an adaptable and desirable version of democracy. In our theory, however, illiberal democracy, as a version of democracy, is only one component of illiberal constitutionalism. Illiberal constitutionalism does not only refer to the fact that democratically elected leaders misuse their power. It also encompasses the almost smooth and undisturbed remodelling of the entire liberal constitutional system (constitutional democracy) within a European cultural and legal community represented by the Western ideal of legal and democratic development and appearing under the aegis of the Council of Europe, but most prominently, the European Union. Illiberal constitutionalism is characterised by an illiberal type of democracy (as opposed to liberal democracy which implies competitive and repetitive elections, inclusion, respect of political and other related rights, etc.), misuse of the language of human rights (as opposed to the theory of human rights which implies individualism and protection of group rights, high respect of human dignity and equality, inclusion, institutional and procedural protection against the state and any actors having actual power over the individual), and the illiberal version of the Rule of Law. Based on this and the following chapters, we propose that the illiberal version of the (European) Rule of Law be called 'illiberal legality', which we conceptualise in the last chapter.

Illiberal constitutionalism is not yet an authoritarian system, but it is heading towards that direction. Membership in the EU makes it possible to keep 'constitutionalism', but the actual legal remodelling, legislative, and other legal actions and political behaviours call for the label 'illiberal'. The palpable oxymoron in the term of illiberal constitutionalism, thus, intends to highlight the paradox in which Hungary, Poland, and the EU find themselves. First, the EU, which is built on certain principles, is still having two Member States that keep disrespecting those very same principles. Second, it seems that both the EU, and Hungary and Poland are comfortable with the regime-sustaining and legitimising role of

83 Even if Jarosław Kaczyński has never used the term illiberal democracy, he expressed the will of following Hungarian pattern with words: 'there will be Budapest in Warsaw', www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f.

84 Orbán Viktor beszéde a XXV. Bálványosi Nyári Szabadegyetem és Diáktáborban 2014. július 26. Tusnádfürdő (Băile Tuşnad). www.kormany.hu/hu/a-miniszterelnok/beszedek-publikaciok-interjuk/a-munkaalapu-allam-korszaka-kovetkezik.

85 "Democratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms." F Zakaria, The Rise of Illiberal Democracy, 6 *Foreign Affairs* (1997) 22.

86 Ibid., 24.

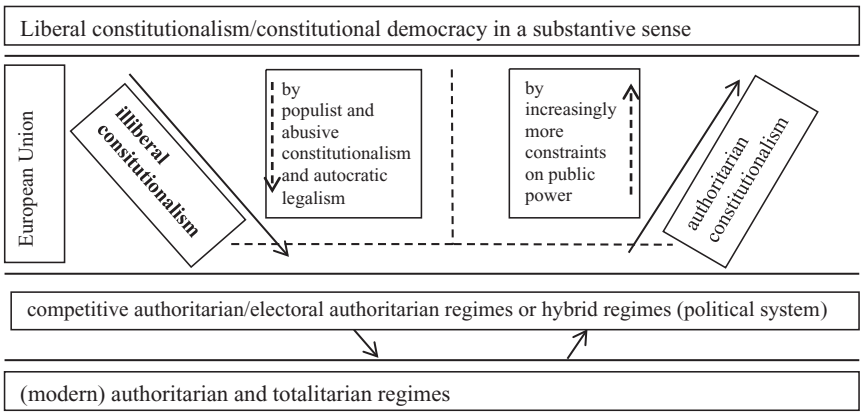

Figure 1.2 Illiberal constitutionalism in comparison. Source: Drinóczi, n 68, 10.

the EU.[87] Third, the populist leaders of Hungary and Poland act like children testing the boundaries of their actions and keep pushing as far as they can. Furthermore, Poland and Hungary have been slowly sliding from their previous constitutional democracy status to authoritarianism, but have not reached it yet. In their degradation, the matter of degree becomes a matter of kind. The uniqueness of the Hungarian and Polish illiberal constitutionalism rests on these phenomena.

In order to remain within the scope of the book, we will focus solely on how illiberal constitutionalism has emerged and what distinguishes it from other systems (Figure 1.2).[88]

1.3.2. Emergence of illiberal constitutionalism from substantive constitutional democracies

Illiberal constitutionalism has emerged through the populist capture of constitution and constitutionalism. The 'capturing' mechanism appears in the manner in which the constitutional changes are implemented, political and legal constitutionalism is theorised, and constitutional/national identity interpreted. It is also present in the relativisation of the Rule of Law and human rights, the constitutionalisation of populist nationalism, identity politics, new patrimonialism,

87 These functions are borrowed from A Bozóki and D Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union', 7 *Democratization* (2018) 1174.

88 All other issues are discussed in Drinóczi and Bień-Kacała, n 82; T Drinóczi and A Bień-Kacała, 'Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland', 4 *Hungarian Journal of Legal Studies* (2018); T Drinóczi and A Bień-Kacała, 'Illiberal constitutionalism in Hungary and Poland: the case of judicialization of politics', in A Bień-Kacała, et al., eds, *Liberal constitutionalism – between individual and collective interests* (Wydział Prawa i Administracji/Faculty of Law and Administration, Uniwersytetu Mikołaja Kopernika w Toruniu/ Nicolaus Copernicus University in Toruń Toruń, 2017) 73–108.

clientelism, and corruption. Illiberal constitutionalism is viewed as the functioning of a public power that upholds the main constitutional structure but, while it lacks normative domestic constitutional commitment to constraints on public power, to a certain extent, it remains within the boundaries set by EU law and politics, as well as international minimum requirements. In these states, all elements of constitutional democracy, such as the Rule of Law, democracy, and human rights, are observable, yet none of them prevails in their entirety.[89]

Illiberal constitutionalism has emerged peacefully from the constitutional democracy that has found its first contemporary manifestation after the 1989 and 1990 transition in the Central Eastern European (CEE) region. After the transition, constitutional democracies in the CEE pursued compliance with, or, depending on their national needs even exceeded, the minimum standards laid down by the Rule of Law, human rights, and democracy requirements in Europe, under the aegis of the Council of Europe and the European Union.[90] For our region, therefore, a constitutional democracy is not only a constitutionalised form of democracy but also a constitutional regime in which the Rule of Law and the protection and promotion of human rights as such prevail.[91] Constitutional democracy embodies constitutionalism (in which no power can be exercised without constraints) and democracy (rule of the people) at the same time; they cannot be mutually exclusive or competing factors neither at a constitutional design level nor in terms of constitutional interpretation. The reason for this is that a constitutional democracy, as established after the transition in the CEE region, required a written constitution, in a legal sense, that encompasses all of its essential principles. These principles include the Rule of Law, human rights, and democracy – in the form in which they have arisen during (Western European) constitutional development, as the core values of modern societies and political systems. As a counter-effect of the former socialist regime, legal procedures and legal constitutions were preferred in the CEE over any political considerations and approaches to the exercise of public power. These constitutions, based on the Kelsenian tradition and relying on the very notion and function of the legal understanding of a constitution, were seen to be senseless unless defended and enforced. Insofar as these instruments focus on the defence of individual human rights, a complying state could be called 'liberal', as this is the politico-philosophical stream that has raised human beings to the forefront of any public action. Nevertheless, we also believe that if a state is a constitutional democracy

89 Instead, some flaws may even be remedied, removed, or even smuggled back in and proudly announced that they are national traditions and, as such, belong to the identity of Hungary and that of Hungarians. See e.g., the treatment of churches and the changing constitutional content of family and marriage, the constitutionalised constitutional identity in Hungary. See e.g., T Drinóczi, 'Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System', 1 *Vienna Journal on International Constitutional Law* (2017) 139–151.

90 On these impacts in general, see RR Ludwikowski, 'Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy', 9 *Cardozo Journal of International & Comparative Law* (2001) 253–296.

91 For a definition, see Drinóczi and Bień-Kacała, n 82, and T Ginsburg and AZ Huq, n 16, 224.

in today's Europe, though, theoretically it does not need any adjective to express its commitment towards the Rule of Law, human rights (including not only civil and political rights and liberties) and democracy.

States undergoing a democratic backsliding change from their 'original state' to something new, which is perceived to be worse. Democratic decay, however, has been seen to affect constitutional democracies.[92] Some of these states face significant economic and financial crises; others struggle with migration challenges and the threat of terror. Populist politicians tend to amplify each of these challenges. Even where the results of populist influence are undeniable, there are remarkable differences among states in democratic decay. These appear not only in terms of institutional and structural mechanisms,[93] but also due to the circumstances of their emergence as constitutional democracies, which is usually referred to as the third wave of the democratisation process. As is well known, this has led to three results. The first was a constitutional democracy, which still has not shown any sign of regression.[94] Second, it resulted in an authoritarian (re)consolidation, which, according to Steven Levitsky and Lucan Way, is not to be viewed as a democratic rollback.[95] Third, democracy in some other states has reverted to a more or less authoritarian form, as Alina Rocha Menocal and others observe relying on Latin-American[96] and African experiences. While the authoritarian (re)consolidation (the second result) does not typify the CEE states, because those in power in the regime from which the democratic transition emerged (the communist-socialist party) differ from those that hold power now (right-wing parties, conservatives), the authoritarian form (the third result) could fit the CEE context[97] regardless of the label we attach. The reason is simple, as stated by Menocal et al. about the countries in which they are interested: the

92 See e.g., TG Daly, 'Diagnosing democratic decay', www.academia.edu/34052302/Diagnosing_Democratic_Decay

93 Compare, for example, the unpopularity of Brazilian politicians and the new role of the judiciary in fighting against corruption (see e.g., FJ Gonçalves Acunha and JZ Benvindo, 'Democratic decay in Brazil and the new global populism', https://iacl-aidc-blog.org/2017/06/06/democratic-decay-in-brazil-and-the-new-global-populism/) with the continuing popularity of the Fidesz Party in Hungary or the popular support of PiS in Poland. Further, while in Hungary and Poland the judiciary, including the constitutional courts, has apparently been compromised, the US continues to enjoy an uncompromised judicial system. For more, see Drinóczi and Bień-Kacała, n 82.

94 See e.g., the Baltic states, especially Estonia.

95 S Levitsky and L Way, 'The myth of democratic recession', 1 *Journal of Democracy* (2015) 46–48.

96 In this Introduction, we do not wish to contrast the Latin American new constitutionalism with the European illiberal constitutionalism; in our view, point II offers sufficient context for understanding illiberal constitutionalism.

97 AR Menocal, V Fritz and L Rakner, 'Hybrid regimes and the challenge of deepening and sustaining democracy in developing countries', 1 *South African Journal of International Affairs* (2008) 15–30.

leading political players, forces, and institutions do not accept democracy as 'the only game in town'.[98]

We partly disagree with this view because, as argued below, we contest the categorisation of Hungary and Poland as authoritarian states. We see the events as depicted in Figure 1.2: since 1989–1990, a vector of changes led towards a fully fledged constitutional democracy; since 2010 (in Hungary) and 2015 (in Poland), this vector turned 'down' and now points towards authoritarianism. It also means that in Hungary and Poland, due to the constitutional and historical development of the European states, constitutionalism, the Rule of Law, the ideal of democracy, and the European Union, constitutional democracy and multilevel constitutionalism should be the only game in town. This playfield, however, seems to be taken seriously by Hungarian and Polish actors only in one case. It occurs when they have already 'hit the wall' and receive immediate or prolonged political and legal reminders about the extent of the boundaries that are still tolerated by the political and legal actors of the European Union.

1.4. Illiberal constitutionalism and the Rule of Law

1.4.1. Constraint on domestic public power?

As we know, the domestic political community in Hungary and Poland could not resist populist nationalism and remains in support of the anti-Rule of Law politics, which have successfully remodelled Hungarian and Polish constitutionalism.[99] As a result, constitutional courts, which in theory are charged with protecting constitutional principles and other constitutional institutions, actually aid in promoting the anti-Rule of Law political agenda. Nevertheless, in fact, despite the 'business-as-usual-non-compliances' and the systematic Rule of Law value infringements by the public legislative and regulatory powers, EU law is still applied every day by both the Polish and Hungarian ordinary courts. Moreover, the annual transposition deficits do not outstandingly deviate from the EU 28 average.[100] Moreover, in some cases, the constitutional courts uphold their former Rule of Law interpretation[101] and, in others, they expand it.[102]

98 Ibid., 31. See also von Bogdandy et al., eds, n 11.

99 Drinóczi and Bień-Kacała, n 82, 1140–1166.

100 Varju, n 75; Annual reports, n 75.

101 See the chapters by András Jakab and Eszter Bodnár, and Iwona Wróblewska in this book.

102 See e.g., decision 45/2012 (XII. 29) of the Hungarian Constitutional Court (CC) [the principle of constitutional legality of the Fundamental Law, which is deduced from the Rule of Law provision, (Article B), binds the constituent power as well]. In the case of the National Council of Judiciary [20 April 2017 (K 5/17)], printer v. LGBTQ [26 June 2019 (K 16/17)] or the pardon of the PiS politician who is also Minister of the interior and administration [17 July 2018 (K 9/17)], the Polish Constitutional Tribunal (CT) misused the previous understanding of the Rule of Law to serve political intentions. See also I Wróblewska, Chapter 6 of this book, 146–148.

Other constitutional actors, such as the ombudsman,[103] ordinary judges,[104] the corruption agency, or the state audit office[105] are successfully attempting to maintain some core tenets of constitutionalism, including the observance of the Rule of Law.

It is undeniable though that the systemic changes in Hungary and Poland are pointing towards authoritarianism, and there are warning signs of authoritarianisation,[106] albeit to a different extent, which is due to their five years' difference since the beginning of regression. In recent years, there have been many reasonable accusations concerning both Hungary and Poland because of non-compliance with the Rule of Law. The Venice Commission issued numerous opinions in which it did not applaud many of the constitutional changes and legislative reforms. The Article 7 procedure was triggered for the first time against Poland in December 2017 by the European Commission after dialogue based on the Rule of Law Framework (2016).[107] The Sargentini report, which alleged that Hungary has seriously violated the principles on which the EU is based, was approved by a comfortable majority of the members of the Committee on Civil Liberties, Justice and Home Affairs against Hungary, and the Article 7 procedure was initiated in September 2018. Besides, according to the WJP Rule of Law Index and other indices (EIU Democracy and Freedom House), neither Hungary nor Poland are doing well as compared to other EU Members or Western countries.

The overall picture on the Rule of Law compliance and its effect on our understanding of constitutionalism is thus puzzling. In our view, it cannot be oversimplified by using the binary code of (liberal) constitutionalism v. authoritarianism, because this might be ill-suited to describe and explain the Hungarian and Polish

103 The Hungarian ombudsman's petitions to the CC have been considered admissible and the Court concurred with the ombudsman concerning the unconstitutionality of the restrictive use of the concept of marriage and family, and the extent of criticism politicians, among others, have to endure in the interest of unfettered democratic public opinion. See decisions 14/2014 (V. 13.) and 6/2014 (III. 7.) of the CC respectively. Conversely, the Polish ombudsman ceases cases (already diverted to the CT) and withdraws already logged ones (e.g., on the Prosecutor General's competences in 2018 or the status of civil servants in 2019) due to the changes in the adjudication panel of the CT. The panel is composed of judges irregularly appointed by *Sejm* to the CT, which raises doubts as to the independence and impartiality of the CT and the constitutionality of its decisions. Nevertheless, the ombudsman is quite vocal in his public speeches about violations of the Polish Rule of Law.

104 Both Polish and Hungarian judges use the possibility of preliminary ruling procedures extensively. See e.g., Varju, n 75, and Sadurski, n 15, 211–213.

105 In 2018, these Polish authorities have expressed concerns about the use of public money, which triggered investigations and sanctions, which turned out to be flawed, https://freedomhouse.org/report/freedom-world/2019/poland.

106 Authoritarianisation is a gradual erosion of democratic norms and practices by democratic leaders, elected at the ballot box through reasonably free and fair elections. E Frantz and A Kendall-Taylor, 'The evolution of autocracy: why authoritarianism is becoming more formidable', 59 *Survival: Global Politics and Strategy* (2017) 57.

107 See e.g., Grzelak, n 80, 201–203 and Majkowska-Szulc, n. 76, 178–182.

constitutional remodelling. When trying to understand the democratic decay in Hungary and Poland, one should not forget that sometimes the matter of degree (what is indicated by different types of indices) is a matter of kind. Not to mention the fact that Hungary and Poland are still members of a regional community that is built on democracy, the Rule of Law, and human rights. Insofar as both parties, i.e., the EU and the two renegade states, maintain this membership, Hungary and Poland should be considered as having a constitutionalist structure, which implies some constraints as well. These Member States remain constitutional democracies even if both are flawed or can momentarily only provide for a thin or formal version of the term.

1.4.2. Constraint on domestic public power in a comparative perspective

As already mentioned, there are many contested concepts, and their categorisation sometimes leaves us with more confusion than clarity. Despite these classifications, and even though Hungary has recently been labelled as partly free by the Freedom House (while Poland still retains its free status), in our view, the democratic degeneration of the systems of both countries has not reached the extent of that of Turkey or Russia – the two countries Hungary and Poland have been mentioned with as examples of authoritarianism or modern authoritarianism.[108]

Quantitatively, according to different indices, neither Hungary nor Poland are in as bad a shape as Turkey or Russia, but, admittedly, they are doing worse than their European counterparts. As stated at the beginning of this chapter, all concepts used here are contested, and so are the methods of measuring the Rule of Law. There is, however, some agreement among scholars relating to this issue, too. The first is that there is no definite way of interrogating the Rule of Law, and, before measuring anything, we have to define what we are going to measure. The second is that the measurement of the Rule of Law is far less developed than that of democracy, but the WJP Rule of Law Index, notwithstanding its imperfections, produces more definitive and authoritative measures of the Rule of Law across the globe.[109]

Based on the WJP Rule of Law Index, we can detect some distinctive differences between Hungary and Poland on the one hand, and Russia and Turkey on the other. According to the WJP Rule of Law Index (Table 1.2),[110] the overall

108 GA Tóth, 'Authoritarianism', *Max Planck Encyclopedia of Comparative Constitutional Law*, February 2017; A Puddington, 'Breaking down democracy: Global strategies, and methods of modern authoritarians', https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf June 2017.

109 Moller, n 18, 2–24, A Bedner, n 47, 41; May and Winchester, n 3, 11, 15; Versteeg and Ginsburg, n 4, 101.

110 See directly at https://worldjusticeproject.org/our-work.

score of Hungary and Poland has been decreasing since 2015,[111] but has never reached below 0.5, while Russia and Turkey have stably stayed within the range of 0.42 and 0.47. The overall score for Hungary has firmly decreased from 0.58 to 0.53, while for Poland, it is the same but within the range of 0.72 (2015) and 0.66 (2019). The WJP measures the Rule of Law in eight categories, but for now, we only focus on the sub-category of constraints on government power. Steady decrease can be seen in the case of Hungary and Poland, while Russia scores around 0.4, reaching 0.45 in 2019. Turkey produced a backsliding from 0.37 (2015) to 0.32 (2019). In the region, Hungary, with its score changing from 0.49 (2015) to 0.41 (2019), was ranked 23rd out of 24 for three years (2015–2018) and fell to the last position in 2019. It is notable that it scored 0.63 in 2012–2013. Poland fell back 0.2 points since 2015: in that year, it scored 0.77 and reached 0.58 by 2019. Simultaneously, its regional rank dropped from the 15th to the 18th place.

Qualitatively, Hungary and Poland accommodated (liberal) constitutionalism for a while, unlike, for instance, Singapore or Venezuela – another set of countries with which they are usually mentioned together. It seems difficult to dismantle a substantive constitutional democracy completely, as it must take time. Besides, there is a weak but tacitly existing constitutional constraint on public power, which is EU law, even though it has partly failed, as its value defence mechanisms have not worked so far. The mere existence of EU law with its admittedly flawed implementation at the legislative level, but its everyday application by adjudication bodies (see point 1.4.3 below) may influence and prevent illiberal politicians from leading their countries into authoritarianism even faster (Table 1.2).[112]

Conversely, Singapore, which features authoritarian constitutionalism, obviously performs better at the WJP Rule of Law Index but, according to the EIU Democracy Index and the reports of Freedom House (Table 1.3), it does not do the same in other fields. The reason is that in authoritarian constitutionalism, liberal freedoms are protected at an intermediate level, elections are reasonably free and fair (but without genuine party competition), and there is a normative commitment to constraints on public power. Against this background, Tushnet differentiates between the abusive constitutionalism of Hungary and the authoritarian constitutionalism of Singapore. He speculates that the 'normative commitment to constraints on public power', which he extracted from the 'description

111 We have chosen 2015 as a baseline for two reasons. First, the reports are more comparable from 2015 despite the fact that they include more and more countries to be measured: it increased from 102 (2015) to 126 (2019) while in the years 2016–2018 the number of the studied countries was 113. Second, Polish deterioration started in 2015, when the Hungarian one was already ongoing.

112 Venezuela is not indicated as it finds itself at the bottom of the lists with its overall score of 0.32 in 2015 and 0.28 in 2019. Corrales argues that Venezuela's shift from competitive authoritarianism towards authoritarianism has been facilitated by authoritarian legalism. J Corrales, 'The authoritarian resurgence: autocratic legalism in Venezuela', 26 *Journal of Democracy* (2015) 38.

Table 1.2 WJP Rule of Law Index Summary table

	2015		*2016*		*2017–2018*		*2019*	
	Overall score	*Constraints*	*Overall score*	*Constraints*	*Overall score*	*Constraints*	*Overall score*	*Constraints*
Hungary	0.58	0.49	0.57	0.46	0.55	0.44	0.53	0.41
Poland	0.71	0.77	0.71	0.68	0.67	0.61	0.66	0.58
Russia	0.47	0.39	0.45	0.4	0.47	0.39	0.47	0.45
Turkey	0.46	0.37	0.43	0.32	0.42	0.3	0.42	0.32
Singapore	0.81	0.76	0.82	0.75	0.8	0.7	0.8	0.69

The rating ranges from 0 (weaker adherence to the Rule of Law) to 1 (stronger adherence to the Rule of Law)

Source: authors.

Table 1.3 Indices – Summary table

	EIU Democracy Index	*Freedom House 2019*			
	2006–2016 (from–to)	*Aggregate score (…/100)*	*Political rights 1–7 (1=most Free, 7=least Free)*	*Civil liberties 1–7 (1=most Free, 7=least Free)*	*Freedom rating 1–7 (1=most Free, 7=least Free)*
Hungary	7.53–6.72	70	3	3	3
Poland	7.3–6.83	84	2	2	2
Russia	5.02–3.24	28	7	6	6.5
Turkey	5.7–5.04	41	5	6	5.5
Singapore	5.89–6.38	85	4	4	4

Source: authors.

of how constitutionalism operates in Singapore, might be a truly distinguishing characteristic of authoritarian constitutionalism'.[113] This claim is supported by the WJP Rule of Law Index: Singapore's overall score is around 0.8, and in the sub-category of constraints on government power it scores around 0.7 (with a range of 0.77 and 0.69), which makes it a better performer than Hungary and Poland (Table 1.2).

Moreover, if we take a look at the other indexes measuring democracy and human rights, Hungary and Poland still perform better compared to other countries (Table 1.3). According to the EIU Democracy Index (2006–2016), which designates countries as full democracies if they score between 8 and 10, Hungary and Poland are flawed democracies,[114] Turkey is a hybrid state,[115] Russia transformed from hybrid to authoritarian (2011), and Singapore has gradually upgraded from a hybrid to a flawed democracy (2014). In the measurements of Freedom House, Hungary and Poland score 70 and 84 respectively, while the aggregate scores of the other countries are: 20 (Russia), 31 (Turkey),

113 M Tushnet, n 16, 72.

114 A flawed democracy respects civil liberties, and free and fair elections but has significant weaknesses in other aspects, such as media freedom, low participation and problems in governance.

115 In hybrid regimes, there is a certain degree of pluralism but with frequent harassment of journalists, a non-independent judiciary, and substantial electoral irregularities, including government pressure on opposition parties.

51 (Singapore). Hungary and Singapore are labelled as partly free, Poland is free, while Russia and Turkey are not considered to be free states.[116]

Without going into details about how the party system looks like (e.g., in Singapore and Russia), how elections are manipulated not only by regulatory means (Russia and Turkey), how free speech is infringed by harassment, bringing criminal charges based on bogus allegations and using violence (Singapore, Russia, and Turkey),[117] it seems evident that there is not only a quantitative but a qualitative difference between Poland and Hungary, on the one hand, and Russia, Turkey, and even Singapore, on the other.

Nevertheless, it is also true that the Singaporean type of 'normative commitment to constraints on public power' is, to a certain extent, missing in Poland and Hungary. The systems of Poland and Hungary have been consolidated or are about to consolidate, however, must respect, to the desirable extent, EU law, which functions as an internal and implied constraint. If we consider EU law as part of the legal system of Member States, any constraint imposed through its daily application and possible influence on the populist agenda need to be seen as internal constraints. These types of constraints only exist within the EU. Thus, it follows that the new systems in Hungary and Poland could be labelled neither (modern) authoritarian regimes nor authoritarian constitutionalism.

1.4.3. Constraint on domestic public power in illiberal constitutionalism

We also assume that illiberal states emerging in Europe are still constitutional democracies, which are shaped peacefully by populist politicians from a more substantial form of constitutional democracy that prioritises (liberal) constitutional values through the use of the above-mentioned methods (populist style of governance, abusive constitutionalism, and autocratic legalism). In our cases, the minimum requirements of a constitutional democracy, such as the Rule of Law, human rights, and democracy, have been defectively worded in a constitution, or poorly implemented or enforced.[118] These states are still constitutional democracies in a formal or thin sense. Each still has a constitution, which is more than the formal (façade) constitution of an autocratic system as it, for example, maintains and allows the functioning of constitutional review mechanisms to a certain extent. Besides, both the constitution and the system are far less oppressive than in 'real' authoritarian regimes. The constitution 'locks in' the European

116 https://freedomhouse.org/report/countries-world-freedom-2019.

117 https://freedomhouse.org/report/freedom-world/2019/singapore, https://freedomhouse.org/report/freedom-world/2019/turkey, https://freedomhouse.org/report/freedom-world/2019/russia.

118 Drinóczi and Bień-Kacała, n 82; Similarly, see M Plattner, 'Populism, pluralism, and liberal democracy', 1 (21) *Journal of Democracy* (2010) 91.

law and international minimum standards.[119] Therefore, after mentioning it so many times above, we are now investigating the actual practice of the operation of EU law in Hungary and Poland and the way it could be seen as a constraint on public power.[120]

Since their accession to the EU in 2004, the application of EU law has become daily practice in the ordinary courts. Regardless of transformative reforms, EU law could have slowed down the degradation but, as Bozóki and Hegedűs observe, it is not easy to demonstrate through examples how the constraining function of the EU works in practice.[121] This is primarily because, first, recent research has focused only on the actions made against the EU and international obligations, and second, we might have never known about the original plans of populist leaders and the reason why they gave them up.[122] What we can note here is that there are some examples when the Hungarian and Polish decision-makers backed off.[123] Conversely, there are scholarly analyses and annual reports of the European Union available on how constitutional systems have accommodated EU law in the last 15 years. The Rule of Law, both as a principle and a legal norm, requires that laws are obeyed, i.e., it demands compliance, implementation, and enforcement. For the Member States, this means that they have to comply with domestic as well as EU law. Since EU institutions, as we claimed before, make EU law, 'no populist leader can hijack the law-making process in the same way as they could with their national legislation and lawmaking authorities'.[124] Nonetheless, this European Rule of Law does not mean that it is powerful enough to circumvent any misuse of non-EU related domestic law or law-making process, or prevent the populist national decision-maker from trying to avoid compliance with EU law.

From a quantitative perspective, an overview of the Annual Reports of the EU on monitoring the application of the European Union law between 2015 and 2018[125] makes us realise that neither Hungary nor Poland is the worst in terms of compliance among the EU28. The Annual Reports on the EU28 differentiate between new infringement cases by the Member States on 31 December of a particular year and the number of infringement cases by that time. The latter

119 T Ginsburg, 'Locking in democracy: constitutions, commitment, and international law', 38 *New York University Journal of International Law & Politics* (2006) 757; A Moravcsik, 'The origins of human rights regimes: democratic delegation in postwar Europe', 54 *International Organizations* (2000) 243–244.

120 Grzelak, n 107, 213–215.

121 Bozóki and Hegedűs, n 87, 180.

122 For instance, there were rumours that, when writing the new constitution, the Fidesz wanted to abolish the CC and relocate the review function to one of the chambers of the Supreme Court.

123 This happened with certain reforms regarding the decision-making process at the CT, the retirement age of the judges of the Supreme Court in Poland and the introduction of the administrative court system in Hungary.

124 Earlier in this chapter, page 19.

125 Annual Report, n 75.

is further divided into infringements for incorrect transposition and/or bad application of EU laws and late transposition infringements for the years 2015 and 2016. Since 2017, the new late transposition infringement cases are shown separately, and in 2018 the total infringement cases are broken down not only to the incorrect transposition and/or inadequate application of EU laws and late transposition infringements but infringements for regulations, treaties, and decisions as well. In neither of these categories can one find Hungary and Poland at the end of the diagram. If we divide the EU28 into four quarters in the diagram used by the Annual Reports (running from the least to the most number of cases), Hungary is placed, with some exceptions,[126] either at the end of the second or the beginning of the third quarter. Poland is different: it has had more cases than Hungary and finds itself more often in the last than in the third quarter. It is worth noting that, when it comes to the new category (infringement of regulations, treaties, and decisions), both states are placed at the beginning of the second half of the scale.

This observation needs to be coupled with some qualitative analyses, while not forgetting the fact that there is an ongoing Article 7 procedure against both Hungary and Poland. Nevertheless, when studying Hungarian EU law compliance up to 2015, Márton Varju[127] found that the degree of compliance has generally been appropriate, even if the data concerning adjudication is scarce. He detected technical problems at both the law-making and adjudication levels, which include late implementation, paying less attention to the details of implementation, and errors in court judgments. More substantial issues mainly related to the field of economic regulation, where the opportunities offered by the grey zone of EU economic policies are profoundly taken advantage of. Varju is hesitant as to whether Hungarian non-compliance is a trend, systematic deficiency, or simply inadequacy. He acknowledges, however, that there are many examples of Hungarian regulatory opportunism, regulatory bad faith, and obstruction of compliance with EU obligations. In his view, in many cases, it is not the regulatory goal that is to be criticised but the methods of its achievement and the further consequences of the enforcement of the particular regulation. There is often bad faith in how the infringement procedures are handled: the postponement of compliance facilitates the maximisation of the advantages originating from the violation of EU law for personal gain. He opines that the outstanding performance of the Hungarian judges in the field of preliminary ruling procedures, especially after 2010, is due in particular to the embeddedness of EU law in the Hungarian legal system. He suggests that it could also be due to the non-compliance of the lawmaker. This latter opinion, however, does not seem to be supported by the statistics provided in the Annual Reports. The number of cases has shown great variability in none of the categories between 2011 and 2018.

126 New infringement cases in 2016 (beginning of the last quarter of the diagram); new late transposition cases in 2017 and 2018 (in the first quarter of the diagram), late transpositions in 2017 (with the second least cases).

127 Varju, n 75, 142–164.

The number of infringement cases open at the end of the year ranged between 54 (2011) and 50 (2018) with a peak of 57 (2016); the least number of cases was 37 (2013). The number of new late transposition infringement cases ranged between 70 (2011), which was the peak, and 11 (2018), which was also the least number of cases. A drastic drop was observed in 2012 (number of cases: 26). The number of late transposition infringement cases ranged between 16 (2013) and 17 (2018), with a peak of 32 (2016); the least number of cases was 13 (2015).

Poland's compliance in 2015 was generally not satisfactory, but the country was not the worst performer, as it was among the last five or six Member States. Jacek K Sokołowski and Dariusz Stolicki suggest that the particularities of the governmental drafting stage of the legislative process could be blamed for the late transposition, but they do not exclude other possible reasons either. They submit the following explanations for delayed transposition: political reasons, i.e., no acceptance of the solutions imposed by the directive to be transposed, the complexity of the subject matter, and organisational failure.[128]

We can note that the number of infringement cases has shown considerable variability in each of the categories between 2011 and 2018 (Table 1.4). In infringement cases and new late transposition infringement cases, the trend seems to be a decrease. The number of infringement cases open at the end of the year varied between the peak of 95 (2011) and 70 (2018); the least number of cases was 68 (2013). The number of new late transposition infringement cases ranged between 44 (2011), which was the peak, and 16 (2018); the least number of cases was 15 (2013). The number of late transposition infringement cases ranged between 20 (2013), which was the least number of cases, and 33 (2018), with a peak of 39 (2016, 2017). Despite the growing numbers in this category, Poland does not perform worse here than in the other categories. If we compare the country's performance with that of the EU28, we find that Poland, since 2015, has been at the beginning of the last quarter in the category of number of infringement cases as of 31 December. The figures concerning new infringement cases are unsteady, and the country fluctuates between the beginning of the third and the beginning of the last quarter. There is a slow deterioration in the number of new late transposition cases, but Poland remains in the third quarter (it dropped back from the beginning of the third quarter to the end of it).

128 JK Sokołowski and D Stolicki, 'Przyczyny opóźnień w transpozycji dyrektyw europejskich do polskiego porządku prawnego w świetle analizy ilościowej krajowego procesu legislacyjnego [Reasons for delays in the transposition of European directives into the Polish legal order in the light of quantitative analysis of the national legislative process]', 2 *Przegląd Politologiczny* 2017, 39–54.

Table 1.4 Number of infringement cases in Hungary and Poland 2011–2018

		2011	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*
Infringement cases open as of 31 December	HU	54	42	37	44	38	57	48	50
	PL	95	82	68	79	78	76	70	70
New late transposition infringement cases	HU	70	26	21	26	17	36	13	8
	PL	44	18	15	18	22	36	21	16
Late transposition infringement cases	HU	–	–	16	18	13	32	15	17
	PL	–	–	20	23	30	39	39	33

Source: authors, Annual Reports, n 75.

1.5. Conclusion

The chapters of this book show how the Rule of Law, in the context of this investigation, is perceived as a specific political philosophy and an enforceable legal value. It has become clear that the (Western) European states and the European Union have adopted and nurtured a distinct kind of constitutionalism, which entails a particular understanding of the Rule of Law. The importance of trust[129] underlines the argument that, when it comes to the assessment of the Rule of Law situation of particular European states that belong to a wider supranational and international community, reduction of the examination of the thin version of the Rule of Law cannot bring a satisfactory result.

Hungary and Poland stand out among states in democratic decay and are noticeably different from existing authoritarian regimes. This does not mean that no increasing authoritarian tendencies can be observed in both countries. What is argued here is that Hungary and Poland are not there yet, mainly because they are still members of the European Union, which, notwithstanding its failures, imposes particular political, albeit rather weak, legal constraints on the Hungarian and Polish political leaderships – the European Rule of Law, to a certain extent and varying intensity, is still operational.

The latter is something that can be measured and reported on and can inform the overall Rule of Law assessment of Member States. How to measure, what type of Rule of Law observance to measure, which kind of indices to use and what conclusions to draw from them, and whether the results should be interpreted alongside those of other states or not, can also be puzzling. There are measurements and reports that indicate the obvious Rule of Law deterioration, and there are views claiming that Hungary and Poland have already deviated from a state of constitutionalism towards authoritarianism. One of the central claims of these views is that the Rule of Law has ceased to constrain the exercise of public power and that authoritarian legality has replaced its understanding.[130] As opposed to these views, we used indices and reports that challenge the authoritarian claim and places Hungary and Poland somewhere in-between, sliding down on a slippery slope towards authoritarianism.

The above leaves us with three implications. First, the European Rule of Law as a value will be viewed as a thick Rule of Law notion; in this regard, both the Member States and the EU have failed so far in its enforcement. Second, the European Rule of Law in its thinnest legal sense means the already explained formal legality, which necessarily includes the regulatory and judicial enforcement of EU law. Third, the fact that compliance with the value aspect cannot be secured because of noticeable ideological differences between the actors (which led to the Article 7 TEU procedure against both states) does not mean (yet) that the particular Member State does not comply with EU law at all, thus disregarding the compliance aspects of the European Rule of Law. This feature of the European Rule of Law is proposed to be called illiberal legality, which is further examined in the last chapter.

129 Csink, n 72, 168–173.
130 See e.g., Halmai, n 14; Tóth, n 14.

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