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Constitutionalism Today: The Prospects of the European Constitutional Community

SUSANNE BAER, KRISZTA KOVÁCS AND MAYA VOGEL

IN THE LATE 1940s a consensus emerged: a post-World War II, post-colonial, post-authoritarian, grand consensus in Europe and beyond. Dignity, liberty, and equality should not merely be promises on paper or an elitist privilege for the few, and representative democracy should be the way to run societies.¹ This consensus certainly gave birth to a variety of legal regimes, but it also defined a baseline for the political systems we call constitutional democracies: first, power should be distributed to parliament and representative government via fair elections that ensure equal voting rights and a realistic option of a peaceful change of government and, second, power should be limited by fundamental human rights and by legally enforceable commitments to checks and balances, ie, with separated powers or in a version of federalism. As such, legality is not just a form or a fetish but a substantive notion, and democracy is based on the substantive rule of law.² In a constitutional democracy, the law is then *conditio sine qua non* to live together, a safeguard of deliberation, and a foundation of trust. We call this constitutionalism.

Certainly, there are profound assumptions that inform this claim regardless of whatever version of constitutionalism is implemented in real life. The first assumption is the *telos* of constitutionalism itself. Here, the foundational promise of constitutional democracy is, in essence, that people may enjoy their lives as they deem fit, yet no one should ever be permitted to trample over any other because each and every human being deserves the same respect. Normatively speaking, dignity, liberty and equality serve as a foundational triangle of fundamental rights.³ Often, these normative promises are constructed as separate

¹ K Kovács, 'Parliamentary Democracy by Default' (2020) 2 *Jus Cogens* 237–258.

² R Dixon, 'Rule of law teleology: against the misuse and abuse of rule of law rhetoric' (2019) 11 *Hague Journal on the Rule of Law* 461–64.

³ S Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59:4 *The University of Toronto Law Journal* 417–68.

values, which may inform a hierarchy of importance. But this only results in a partial understanding. For dignity tends to be but a value, liberty a prime interest, and equality a comparative exercise. The foundational triangle leaves the hierarchy behind. To paraphrase a famous claim in legal philosophy,⁴ this triangle is based on taking all three rights seriously, and assuming a connection between all three of them and not treating them in isolation from each other. This is because the legal guarantees of dignity, liberty and equality are informed by, and historically result from, struggles that did not separate the three, but demanded emancipation, liberation, respect and equal citizenship as a means of capturing the very foundational recognition of humans as social beings. The normative promises of dignity, liberty and equality are not just mere values; they are rights. As such, they may be claimed in court, and these promises may be delivered by judicial review.

It is this version of constitutionalism that has been attractive to social movements in many rather different settings around the globe and that is alive in the twenty-first century. All over the world there is what Amartya Sen calls a ‘democratic commitment’,⁵ with varieties of what Bruce Ackerman calls ‘constitutional moments’,⁶ producing a wave of constitutional texts that ensure fundamental rights and democracy not merely as a pacifying compromise and rhetoric, but implementing what some call ‘new constitutionalism’ that features judicial bodies to exercise judicial review.⁷ Worldwide, judicial bodies have become an essential means of replacing fascist, colonial, military or otherwise dictatorial rule with democratic governance, from Colombia or South Africa to Central Europe, South Korea or Taiwan. For a while, constitutionalism with that kind of backup looked like the standard.

Yet, in the twenty-first century, constitutional democracy is not well. In fact, it is severely threatened,⁸ not only in the wars around the world and in the wake of severe economic and social crises in Latin and South America and Asia, but also in Europe, which proudly conceives itself as the region with the highest standard of democracy worldwide. Rather prominently, the Covid-19 pandemic saw constitutional democracy under stress, when governments constructed and prolonged exceptional measures in states of emergency and when populist politics mobilised around a rallying cry that ‘their rights’ had

⁴ R Dworkin, *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1978).

⁵ A Sen, ‘Democracy as a Universal Value’ (1999) 10 *Journal of Democracy* 3–17.

⁶ B Ackerman, *We the People: Foundations* (Cambridge, Harvard University Press, 1991). See also C Klein and A Sajó, ‘Constitution-making: process and substance’ in *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 419.

⁷ M Schor, ‘Mapping Comparative Judicial Review’ (2008) 7 *Washington University Global Studies Law Review*, 257–87; G Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Singapore, Springer Singapore, 2018).

⁸ See T Ginsburg and A Simpsen (eds), *Constitutions in Authoritarian Regimes* (Cambridge, Cambridge University Press 2014); T Kochi, ‘The End of Global Constitutionalism and Rise of Antidemocratic Politics’ (2020) 34:4 *Global Society* 487–506.

been taken from them.⁹ Yet the crisis of constitutional democracy started before that. During the ‘war on terror’ after 9/11, many governments prioritised safety and security over liberty and non-discrimination sometimes declaring emergencies, sometimes a new normal.¹⁰ Similarly, after the 2008 financial crisis and after the 2015 wave of migration, public institutions in most European countries were confronted with serious doubts as to their legitimacy and their ability to meet the challenges of the day. In many societies, louder voices challenged, or even denounced, the value and relevance of constitutionalism.¹¹ Such voices, expressing resentment and emotions of fear and anger, have become worryingly powerful.

In what follows, we will revisit the meaning of constitutionalism, based on the rule of law and backed up by courts, to understand what is at stake and what to do about it. We will first analyse the role of courts within a democratic political system and then revisit what constitutional erosion looks like in some EU Member States. The Hungarian and Polish governments have been the most prominent actors seeking to undermine the very foundations of the EU community itself, but they have not been the only ones. In response to this, the EU launched its rule of law mechanism, which has not been very effective to date.¹² Thus, section III poses the question of whether the European constitutional community is capable of dealing with the challenges to transnational democracy in the region. More specifically, the Court of Justice of the European Union has the mandate to intervene. But domestic courts of Member States, both constitutional and regular, must also contribute to the effort. Yet it is important not to forget that political, social, economic, and academic actors are called upon to revisit their commitments and stand up for them. The concluding section IV summarises the findings.

I. WHY DO COURTS MATTER?

Courts are essential institutions of constitutionalism; they do not just review contracts or tort claims or administer justice to criminals. More fundamentally, courts also review majority decisions, as in legislation, and they make sure

⁹ J Grogan and A Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (London, Routledge, 2022).

¹⁰ In its ruling on the Federal Anti-Terrorism Data Base, the FCC pointed out that even terrorism must be addressed legally and not as an exempt from constitutional requirements based on an exceptional state (*Ausnahmезustand*). BVerfG, Judgment of the First Senate of 24 April 2013 – 1 BvR 1215/07.

¹¹ P Kratochvíl and Z Sychra, ‘The end of democracy in the EU? The Eurozone crisis and the EU’s democratic deficit’ (2019) 41 *Journal of European Integration* 169–85; J Bast, F v Harbou and J Wessels, *Human Rights Challenges to European Migration Policy (REMAP study)* 2020.

¹² L Pech, ‘The Rule of Law’ in PP Craig and G De Búrca (eds), *Evolution of EU Law*, 4th edn (Oxford, Oxford University Press, 2021) 307–72.

that fundamental rights guarantee that everyone has a voice in politics via free speech, media and marches, associations and parties, elections and the vote since constitutionalism is a structure for democracies. Thus, in any form of constitutionalism that deserves its name,¹³ independent courts have the power of judicial review and are indispensable institutions that stand for a distribution of power that does not allow any majority to trump anyone or leave anyone behind.¹⁴ There is a need for a counter-majoritarian power, ie, courts, to tackle disrespect, oppression, exploitation, or abuse of those not in power, be it a political opposition, manipulated majority, or other people not ‘on the agenda’.

Yet, the recent crises in democratic countries have sparked criticism of courts. The British campaign to Brexit was driven not only by a longing for empire or economic gain but also by deliberately manufactured mistrust in European institutions, specifically courts. It was the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and ultimately also the UK Supreme Court itself, that were characterised as illegitimate. Along the same lines, the nationalist and ethnonationalist populist parties that have kept gaining momentum in nearly all EU Member States have also challenged courts as truly independent safeguards of democratic procedure and individual human rights. It is noteworthy that even those EU Member States which practice autocracy in corrupt forms try hard to keep a legalistic façade;¹⁵ indeed, it is an indication of the strength of the standard once achieved in constitutionalism. To clear their way, authoritarian leaders take over the judiciary (some examples are discussed in Part II of this volume). When they refuse to play by the rules once agreed to, such countries attack the very foundation of the EU.¹⁶ After all, the EU is a union not based on some essential commonality but has been founded as a ‘Rechtsgemeinschaft’, a community, then a union, based on law.¹⁷ Therefore, attempts to defend or restore the rule of law are struggles to ensure that this notion of a legal union is not merely a formal one but a substantive key component of constitutionalism.¹⁸

Certainly, the attacks on the courts target values and European solidarity and undermine representative democracy. But they are also embedded in

¹³ We tend to disagree with those who list abusive forms as one version, eg, M Tushnet, ‘Authoritarian Constitutionalism’ (2015) 100 *Cornell Law Review* 393.

¹⁴ ‘LNOB’ is Principle 2 of the 2030 UN Agenda for Sustainable Development and its Sustainable Development Goals and has been used widely to frame politics of equal consideration and participation.

¹⁵ GA Tóth, ‘Constitutional Markers of Authoritarianism’ (2019) 11 *Hague Journal of Rule Law* 37–61.

¹⁶ CJ Schneider, ‘Euro-scepticism and government accountability in the European Union’ (2019) 14 *The Review of International Organizations* 217–38.

¹⁷ In French: *communauté de droit*; in English, often also: the community based on the rule of law. Famously, the term was inspired by Walter Hallstein, eventually picked up by Jacques Delors, the first and eighth President of the European Commission.

¹⁸ S Baer, ‘Who Cares? A defence of judicial review’ (2020) 8 *Journal of the British Academy* 75–104.

long-established and widespread scepticism. This is the critique of courts known as ‘the problem of judicial review’ or the ‘counter-majoritarian difficulty’, thus, more precisely, the problem of ‘constitutionalisation’¹⁹ and ‘judicialisation’ of politics. Thus, even if courts have already contributed to safeguarding and implementing fundamental rights, they are an easy target for attacks since they are confronted by the question of whether they are acting too political or not.²⁰ They are continuously accused of engaging in (judicial) ‘activism’ and advised to practice more ‘restraint’. These attacks on human rights courts and courts with a constitutional mandate of judicial review force us to rethink judicial review. When is judicial review too much, and for whom, exactly? In protecting fundamental rights and democracy, judicial review forms the basis of constitutionalism in that it holds power accountable. Law without an institution to back it up remains an empty promise, which is why strong judicial review is essential for stable constitutional democracies. Here, strength is not activism. Rather, we suggest considering courage, based on legal skills and institutional wisdom, essential in taking the law seriously even if political pressure points in other directions. In constitutional democracies, the law eventually adjudicated in such courts is the means to defend or, when necessary, to create equal participation in matters of general concern, the *res publica*, in politics. As such, it is a structure of governance with truly independent watchdogs to ensure that it works.²¹

Interestingly, the attacks that threaten such constitutional democracies are often made in the name of the law, subverting its very meaning. Javier Corrales²² and Kim Scheppele²³ call these attempts to use law in a perfidious way ‘autocratic legalism’. András Sajó refers to the phenomenon when laws and institutions are used in a mala fide way to achieve anti-constitutionalist aims ‘ruling by cheating’.²⁴ But how can the law be used as an instrument against these attacks, if the attacks themselves appear legal? The search for an answer should compel us to revisit critical approaches in legal studies. They have consistently exposed the law as a siren call, ambivalent, Janus-faced, sometimes even hydra.²⁵ In fact, the law is not only repressive but also productive; it may

¹⁹ M Loughlin, ‘What is Constitutionalisation?’ in P Dobner and M Loughlin, *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010).

²⁰ M Blauberger and D Sindbjerg Martinsen, ‘The Court of Justice in times of politicization: “law as a mask and shield” revisited’ (2020) 27 *Journal of European Public Policy* 382–99.

²¹ Baer (n 17).

²² J Corrales, ‘The Authoritarian Resurgence: Autocratic Legalism in Venezuela’ (2015) 26 *Journal of Democracy*, 37–51. M Neves, ‘Lateinamerikanische Verfassungen: Zwischen Autokratismus und Demokratisierung’ (1997) 30 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 503–19.

²³ KL Scheppele, ‘Autocratic Legalism’ (2018) 85 *University of Chicago Law Review* 545–83.

²⁴ A Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge, Cambridge University Press, 2021).

²⁵ The notion is a classic in feminist legal studies. See C Smart, *Feminism and the Power of Law* (London, Routledge, 1998); discussed by M Drakopoulou, ‘Feminism and the siren call of law’ (2007) 18 *Law and Critique* 331–60. The ambivalent nature of law is also exposed by critical race theory, critical approaches to international law, etc.

allow for action but also be a means of oppression. To better understand what happens in autocratic regimes, it helps to start by looking at this ambivalence. Then, and based on critical approaches to the law, it seems helpful to look at the realities the law produces, or the realities its absence allows for, and reveal its abuse. Recent attacks on constitutional democracy provoke the question of who suffers, why, and who profits from what. Such an attitude moves beyond the androcentricity of the law and a rallying cry for the rule of law and the primacy of EU law. Instead, it focuses on who constitutionalism is designed to protect, and who will be, or is, left behind or outside when attacks succeed. To uncover the perversion of autocrats, we should focus on the harm done and the question of to whom it was done.

For contemporary autocrats, the law is a means for them to gain power, further their interests and crush those in the way. They ‘reform’ courts, yet, in fact, destroy the independent institutions with a mandate to limit and exercise control and protect fundamental freedoms, which further endangers the existence of those courts. It is no coincidence that constitutional and international courts are first on the list to be silenced or denied authority and eventually enlisted after ‘reform’, since they are the institutions with the power to stand in a government’s way.²⁶ Sometimes, minor and seemingly technical changes in procedure amount to an unfriendly takeover.²⁷ Similarly, modifications of pay, budget, disciplinary power, protocol or even location may, in fact, destroy the institution. There are people who serve in regimes as new ‘judges’ or ‘lawyers’ and pervert the law. Likewise, legal academics, lawyers, politicians, media, and other social actors who collaborate and profit from the regime speak out. What they express is not a criticism of courts geared towards improvement, but attacks geared towards dismantlement and destruction, thus categorically different. In such cases, the foundations of constitutional democracy are eroded. Legal protection before independent courts is the domino in governance arrangements throughout Europe that brings everything to fall once it falls itself.

This is worrisome for all of us, although it often targets others, specifically those already stigmatised as different – minorities, such as refugees, those now summarised as LGBTIQ, and other non-conforming women and men – by using established resentment and mobilising emotions of fear and anger. But when constitutions only serve as decorum, and when courts are not independent but enlisted in politics, then people suffer and are left without protection. Independent courts may not matter as much to those in the mainstream, but they matter for people in pain. And depending on the autocrat’s will, the mainstream

²⁶ Regarding European law, autocratic regimes are also bothered that each and every court may challenge their ways by referring to the ECJ, which is why this procedure may also be subject to what is then called ‘reform’.

²⁷ K Kovács and KL Scheppele, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union’ (2018) 51 *Communist and Post-Communist Studies* 189–200.

may change. Certainly, courts that exercise judicial review are particularly important for those not privileged but marginalised or fully excluded. There, the rule of law and the independence of the judiciary are not just concepts but protective devices against the changing moods of political majorities. However, anyone may easily fall into that position at any given moment in time. Autocrats have the power to define at will who belongs to the people and who does not. Today, it may be them, and tomorrow, you.

II. THE EROSION OF CONSTITUTIONALISM

In the 1950s, Walter Hallstein, who was a driving force behind the construction of the European Community and then the Union, said that Europe is a ‘community of law’ that ‘puts the rule of law in the place of power and its manipulation’ and ‘replaces violence and political pressure’.²⁸ For Hallstein, the concept of a union based on shared values agreed upon in law was a concept deeply embedded in an attempt to learn from the violent history of the 1940s in Europe. If this is accurate, what happens when the rule of law is destroyed is obvious. If law loses, power and manipulation win and reign again. Taking today’s powers into account, this will look different, but there will be suffering for sure. So, when the rule of law is attacked and dismantled or modified into oblivion in the EU Member States in the twenty-first century, this is what is at stake. These attacks on fundamental principles of constitutionalism come in a variety of ways that destroy the fabric of democracy. There has been a forceful resurgence of anti-Semitism, as well as Islamophobia and ethnonationalist racism,²⁹ and note that this has been orchestrated, inspired, or tolerated by governments once constitutionalism is gone. And constitutional courts, right next to independent media and education, have been dismantled rather quickly in some places.³⁰ There seems to be a recipe, most prominently associated with Orbán’s Hungarian government, for mixing these ingredients into a toxic dish. They serve populism, crude essentialist nationalism, and contempt of democratic institutions, including courts.

As such, populism is not only dangerous in general. It is especially dangerous for the law as the backbone of constitutional democracy. Different versions of populism have, as Nicola Lacey explains, different degrees of systemic or contingent proximity to the rule of law.³¹ Nevertheless, it is not by chance that

²⁸ W Hallstein, *Europe in the Making* trans Ch Roetter (London, Allen & Unwin, 1972).

²⁹ A Zick, B Küpper, A Hövermann, *Intolerance, Prejudice and Discrimination. A European Report* (Berlin, Friedrich-Ebert-Stiftung, 2011).

³⁰ Kovács and Scheppele (n 26). This has been described as ‘plucking the chicken’ by M Albright, *Fascism: A Warning* (New York, HarperCollins, 2018).

³¹ N Lacey, ‘Populism and the Rule of Law’ (2019) 15 *Annual Review of Law and Social Science*, 79–96. S Baer, ‘Grundrechte unter Druck’, in M Ruffert (ed) *Europa-Visionen* (Baden-Baden, Nomos, 2019). B Bugarcic, ‘Central Europe’s Descent into Autocracy: A Constitutional Analysis

the World Report of Human Rights Watch³² begins with a description of a human rights crisis that comes along with populism. National populists who seek to turn an ethno-religious national majority against minorities and individual freedoms do not only have an anti-liberal political agenda. They oppose the very idea of constitutionalism by stating that it is the will of the people that counts and ‘a mandate of more than three million voters overwrites everything and gives the right answers to everything’.³³ Populists turn ‘we the people’, a call for fundamental human rights³⁴ and democracy in the ‘velvet revolution’ marches in East Germany before 1989, into a rallying cry of hatred.³⁵ Once conceived as an associational democratic glue, the ‘we’ is turned into an ethnically and religiously based concept of a group, defined by exclusion, namely of ‘foreigners’. Here, the ‘we’ is racist, antisemitic, and Islamophobic, as well as sexist and heteronormative that seeks to appeal to a ‘natural normal order of things’.

Such populism does not like critics that emphasise diversity over homogeneity. Neither does such populism want its leadership exposed as a group of people who construct the ‘we’ to simply serve themselves and enrich their families and friends.³⁶ But when a political programme centred around the ‘we’ is defined by inequalities, constitutional courts get imminently in the way. This is why human rights and constitutional courts are the first to be attacked, deemed in need of ‘reform’, and ordered to be dismantled as soon as possible, because they could protect everyone else from being left out and harmed and the commons from being stolen from the people. That is why populists offensively and often very explicitly target courts.

Yet these attacks are, again, complicated. Where courts have a mandate to control branches of government, scholars have warned of a ‘*gouvernement de juges*’,³⁷ which became a *topos* in constitutional theory.³⁸ Now, such

of Authoritarian Populism’ (2019) 17 *International Journal of Constitutional Law* 597–616. N Walker, ‘Populism and constitutional tension’ (2019) 17 *International Journal of Constitutional Law* 515–35.

³² Human Rights Watch (2018), ‘The Pushback Against the Populist Challenge’ www.hrw.org/world-report/2018/country-chapters/global-4.

³³ S Zsiri cites Judit Varga, the Hungarian Minister of Justice in ‘Brussels says Hungary’s rule of law situation has deteriorated, as Budapest digs heels in’, *Euronews* 23 May 2022.

³⁴ In 1989, citizens in the then GDR peacefully pressured their government on the Monday marches to hold free elections and ensure human rights. Famously, their rally call was: ‘Wir sind das Volk’, ‘we are the people’ – not you, a government that does not have the right to speak in our name.

³⁵ For instance, recently, the far-right German party (AfD) insists that those who belong to them are ‘the people’. Their slogan today, ‘Wir sind das Volk’ is loaded with nationalist, racialised and gendered meaning. G Dietze ‘Rechtspopulismus und Geschlecht: Paradox and leitmotiv’ (2018) 27 *Femina Politica* 34–46. S Hark and PI Villa, *Unterscheiden und herrschen* (Bielefeld, transcript, 2017).

³⁶ A Sajo, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge, Cambridge University Press, 2021).

³⁷ A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000).

³⁸ Early comparative studies in France warn of a ‘*gouvernement de juges*’. E Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis, l’expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Lyon, Persée, 1921).

academic warnings are enlisted by populist autocrats, who can also easily tap into the dissatisfaction of people with lengthy and ever more complicated legal proceedings. Thus, ‘those judges’ and ‘these courts’ are easily denounced as ‘out of touch’, ‘not there for us’. Yet courts are precisely the institutions designed to restrain reckless rulers, they are hence intentionally conceived as out of touch with prejudice, intolerance, and ideology, and designed to look after those who lose when the ‘we’ and only the ‘we’ rules. If populist parties or actors start abusing the constitution³⁹ or other forms of law to endanger this very system, it is constitutional and human rights courts that have the task of securing democracy and rights against such threats. This is, again, why constitutional courts or their equivalents are one of the basic pillars of constitutional democracy. A constitutional court is essential for a functioning democracy; it is attacked to destabilise this very power. Therefore, every such court needs ‘*amici and amicae*’,⁴⁰ as strong supporters taking a clear stand against attacks. When the foundations are at stake, it is crucial to distinguish between critique and attack and to do the former to rebuke the latter. Certainly, there is always a need for critical discussions of what courts do, and friends of the court do not need to applaud any decision taken. But as friends, they need to defend courts as such, to help secure democracy and enforceable protection of fundamental rights. In fact, it is helpful when courts work in contexts that produce critical readings of the law, as criticism helps judges make more informed decisions. Yet it is also necessary to clearly reject the destructive strategies of others. Put differently, the friends of courts are critical companions, but they are not out to destroy a constitutional or human rights court within its system.

When democracy is at risk, the law is desperately needed as a stabilising mechanism, a non-violent means to solve conflicts, a product of deliberation itself that also safeguards deliberation as practice. Again, when the European Community and then Union were designed based on law, this was not an abstract concept, nor a call for bureaucracy or institutionalised authority for the sole sake of status. Rather, the European version of the rule of law was and still is a substantive idea, to restrain power, and especially to organise democracy so that people can live peacefully together. This idea has been heavily informed by the agreements within the larger Europe of the Council of Europe. This Europe included Russia until the Putin government started to wage war against Ukraine.⁴¹ It still includes Turkey, even if Turkey’s membership is under severe strain.⁴² And it covers the UK, despite highly problematic attacks on

³⁹D Landau, ‘Abusive Constitutionalism’ (2013–14) 47 *University of California Davis Law Review* 189.

⁴⁰S Baer, ‘Democracy in peril: a call for *amici and amicae curiae* and critical lawyering’ (2019) 10 *Transnational Legal Theory* 140–62.

⁴¹On 15 March 2022, because of the Russian invasion of Ukraine, Russia ceased to be a member of the Council of Europe.

⁴²IZ Yılmaz, ‘Z Erdoğan’s presidential regime and strategic legalism: Turkish democracy in the twilight zone’ (2020) 20 *Southeast European and Black Sea Studies* 265–87.

the ECtHR during the Brexit campaign calling for a more British version of human rights.⁴³ Several countries, including Hungary, Turkey, and the UK, have refused to implement ECtHR decisions.⁴⁴ The packed yet still so-called Polish Constitutional Tribunal held that Article 6 of the Convention, which guarantees the right to a fair trial, and was recently applied by the ECtHR to punish Poland for firing judges without explanation, was inconsistent with the Polish constitution.⁴⁵ Again, we see the same dynamics. The more the Venice Commission and the ECtHR breathe life into a European ‘we’ committed to democracy and human rights, the more these institutions are attacked by autocrats. Thus, when the authority of the ECtHR is called into question, and when judgments of this court are dismissed or simply ignored, these are attacks on constitutional democracy in general, and it endangers people all around Europe.⁴⁶

As Member States of the Council of Europe, we are in this together; thus, what happens in another Member State cannot be irrelevant to us. And as we are tied together globally, erosion also has a global dimension. If the Council of Europe, founded to provide a set of fundamental values that would be accepted in all Member States and to prevent another European war, loses its power, another building block of peace and democracy will be gone. This is why it is of high importance that not a single one of the European states stops respecting these values and the rulings taken to give them meaning in real life.⁴⁷

The EU consists of substantially fewer Member States than the Council of Europe. But even with a smaller number of states, there have been difficulties agreeing on basic values. By signing the treaties, agreeing to the *acquis communautaire* and profiting from EU laws that organise economics, Member States do agree on the basics of democracy and the substantive rule of law. Yet recently, EU institutions have had to deal with serious breaches of these basic principles. When the Hungarian Prime Minister propagates ‘illiberal democracy’,⁴⁸ it is not a problem of ‘another’ country but an attack on our shared and agreed upon

⁴³ See the contributions in M Farrell, E Drywood, E Hughes (eds), *Human rights in the media: Fear and fetish* (New York, Routledge, 2019).

⁴⁴ A Cozzi, et al, *Comparative study on the implementation of the ECHR at the national level* (Belgrade, Council of Europe Office in Belgrade, 2016).

⁴⁵ ‘Constitutional Tribunal’ judgment K 6/21 (24.11.2021). E Łętowska, ‘The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal’, *VerfBlog*, 29.11.2021, <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/>.

⁴⁶ Council of Europe Steering Committee for Human Rights, *The longer-term future of the system of the European Convention on Human Rights* (Council of Europe, 2016) <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4>.

⁴⁷ S Greer and A Williams, ‘Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?’ (2009) 15 *European Law Journal* 462–81.

⁴⁸ Prime Minister V Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tuşnad), Romania. <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

political and legally secured order. Also, when he announces that an ECJ decision for the relocation of refugees in the EU is not being accepted,⁴⁹ it is perilous. And this is a real threat, first and foremost for the refugee but for us as well. We wonder whether there is any room for compromise. What if the refusal to accept the ruling on the distribution of refugees across the EU is accepted? This is the beginning of a very slippery slope that entails accepting or rejecting judgements that fit or do not fit a given political agenda at will. If that becomes precedent, the law – as the foundational structure of Europe – will be destroyed.

Also, when the majority in the Polish parliament has abolished the independence of the courts as part of a campaign named ‘justice reform’,⁵⁰ it is not ‘their’ problem but ‘ours’ as well. This is not just the case because the framework for cross-border proceedings, ranging from arrest warrants to trade and to travel, might not be intact anymore. It is also because the legal obligation that protects us is also being destroyed. Even if the law is often still seen as strongly connected to the nation state by ‘status-quo lawyers’,⁵¹ the law is by now a transnational phenomenon, a reality of multinormativity. So, if a national legal system betrays the basics, it does not only harm those directly affected, but it is harmful to all of us. There is hence an urgent need to counter these developments.

III. THE PROSPECTS FOR THE EUROPEAN CONSTITUTIONAL COMMUNITY

How can this, and how should this, be done? Although it is not a state or an international organisation, the EU is a legal construct, and with its treaties distributing power and securing rights, it may be conceived as a European constitutional community. But does it have the tools to respond to the challenges arising from attacks? Is this community able to defend itself? Is it a ‘militant’, or better put, ‘defensive’ constitutional community?⁵² The treaties, including the EU Charter of Fundamental Rights, serve as a legal framework that organises and limits power. Can they prevent or sanction abuse? Also, EU institutions and mechanisms are designed to protect what constitutionalists often call the ‘community of values’, the bedrock of constitutionalism itself. Are these institutions able and willing to protect it? Finally, domestic courts in all Member

⁴⁹ ‘Hungary continues to reject migrant quotas’. See the official website of the Hungarian Government: <https://2015-2019.kormany.hu/en/ministry-of-justice/news/hungary-continues-to-reject-migrant-quotas>.

⁵⁰ See, eg, the Position of the Board of the Polish Society of Constitutional Law, 28 October 2020: <http://konstytucyjny.pl/zarząd-polskiego-towarzystwa-prawa-konstytucyjnego-krytykuje-rozstrzygnięcie-tk-w-sprawie-aborcji/>.

⁵¹ Baer (n 39).

⁵² The concept by K Loewenstein, ‘Militant democracy and fundamental rights’ (1937) 31 *American Political Science Review* 417–32, was an argument in the wake of Nazi Germany, by a scholar who had fled Germany, after being removed from his professorship for being Jewish. For comparative material, see N Dorsen et al, *Comparative Constitutionalism* 4th edn (St Paul, West, 2022). See also A Sajó and LR Bentch (eds), *Militant Democracy* (Den Haag, Eleven, 2004).

States have the mandate to implement EU law. Can they serve as safeguards of these common constitutional values?

A. Treaties and the Charter of Fundamental Rights

Historically, the EU started with economic agreements in the West, with what has been called the social dimension ultimately gaining attention. This resulted in several treaties to organise and ensure the fundamental freedoms, most notably, the Lisbon Treaty.⁵³ But there is an ongoing scepticism, disregard and rejection of the socio-cultural and political dimension of this transnational entity.

In the twenty-first century, the EU is not a community that regularly acts as one entity in the face of international crises, although it must be noted that reactions to the Covid-19 pandemic and the Russian invasion of Ukraine have brought Europe closer together. But there is no European political community across the Member States that serves as an equivalent to the *polis* as the site of democratic deliberation. While ‘Brussels’ serves as a stand-in for the centrifugal forces, which are often met with snootiness, the diverging forces seem stronger, or at least louder. Europe lacks the cultural mechanisms to underpin it as an economic structure and a cultural and political home. The Erasmus programme by which the EU allows students to develop such a feeling seems like a somewhat singular and privileged activity. Thus, it seems that Europe needs an upgrade rather quickly, specifically to counter the challenges posed by nationalistic populist autocrats.

After 1989, there was a moment of hope that a political, cultural and economic union would eventually evolve. Many people active in public office and in constitutional and EU law believed that the injustices that inspired post-World War II and post-Cold War constitutionalism would not happen again, at least not right here. The rapid emergence of constitutional erosion thus came to many as a shock. The EU seemed not just unprepared but ill-equipped. The treaties were not designed to counter an illiberal and authoritarian trend, and specifically not the destruction of the constitutional order practised by some Member States. For a long time, political actors seemed to wait and see rather than stand up and act persistently. However, appeasement and accommodation did not work.

Currently, Europe is on a learning curve. It has to develop more of a constitutional dimension, not because it desires to but because it needs to. This must include devices of resilience and self-defence. The founding treaties could serve as the starting point. Although the EU is not a state, the treaties are a

⁵³ I Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2009) 15 *Columbia Journal of European Law* 349–407.

legal framework with a constitutional function of limiting political power and preventing abuse. Especially the Lisbon Treaty created an ‘ever closer’ union in Article 1 TEU, with a commitment to values, rights and principles. According to Article 2 TEU, the EU is not just a political or economic community, but a community of values built on the ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. The treaty adds that ‘these values are common to the Member States in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. And as the ECJ emphasises, the values contained in Article 2 ‘define the very identity of the European Union as a common legal order’.⁵⁴ Any state that joins the EU must meet these criteria because they were not invented to give birth to the EU but were taken from the constitutions of Member States at the time. Therefore, their respective traditions have to be reconciled as common ground; this is what Article 6 TEU emphasises when guiding the interpretation of the Charter of Fundamental Rights.⁵⁵

To ensure the realisation of the common values, some mechanism is needed. After all, it is difficult to have people, politics, and even courts in all Member States agree on the basics. As the treaties are, formally speaking, not constitutions but international treaties, they are secured by domestic constitutionalism, entangled in the Union, and thus embedded in a shared legal context. This, then, presents the additional challenge that many actors have one job: to protect democracy and fundamental rights in Europe. This calls for a cooperative structure in which responsibilities are shared, entailing a rather specific conversation among courts of equal standing and not a hierarchical order that clearly defines responsibilities. This is called constitutional pluralism by some⁵⁶ and multilevel constitutionalism⁵⁷ or ‘Verbund’ by others.⁵⁸ This is a challenging situation, both for national courts, who were formerly on their own, and for the ECJ, which is sometimes taken to be the only one out there. Yet they together must ensure that the foundations remain stable in every Member State.

⁵⁴ Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97, para 127.

⁵⁵ This informs the Right to be Forgotten rulings of the FCC, in which the First Senate emphasised the commonality throughout Europe, as an *in dubio* rule that allows national courts to also interpret the Charter of Fundamental Rights. See BVerfG, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 –, para 57 et seq.

⁵⁶ It comes in variations, see N Krisch, ‘Beyond Constitutionalism: The Pluralist Structure of Postnational Law’ (Oxford, Oxford University Press, 2010); A Stone Sweet, ‘The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law’ (2013) 11 *International Journal of Constitutional Law* 491.

⁵⁷ I Pernice, ‘Multilevel constitutionalism in the European Union’ (2002) 27 *European Law Review* 511–29. See also C Callies and G van der Schyff (eds), *Constitutional identity in a Europe of Multilevel Constitutionalism* (Cambridge, Cambridge University Press, 2020).

⁵⁸ Most prominently articulated by A Vosskuhle and R Gerhardt, ‘Wir leben in einem europäischen Gerichtsverbund’ (2015) 48 *Zeitschrift für Rechtspolitik* 61.

B. EU Institutions and Mechanisms to Protect the Community Values

In a system designed by law, courts are most prominently tasked with implementing the Article 2 TEU commitment to a union of common values. However, in a democratic system, several other institutions are responsible for achieving this aim: domestic and EU institutions alike. The EU institutions can be divided into intergovernmental and supranational ones. Intergovernmental institutions like the European Council of Ministers are directly accountable to the national constituencies and cater to the wish for strong nation-states. And there are many politicians and scholars who would like to leave most legislative power and all budgetary competencies with them. In contrast, supranational institutions like the European Parliament are designed to represent the interests of the EU as a whole.⁵⁹ To many, they are less accountable because their mandate comes from Europe-wide elections, in which one vote has minimal, albeit not zero, impact on the overall course of European politics. Also, the European Commission has a decisive role and tends to work as a transnational unit. To date, all decisions taken in the EU need both types of institutions so that shared interests and the interests of Member States are equally considered.

For years, and partly based on criticisms that there was a democratic deficit in EU politics and criticism of the pivotal role of the ECJ, there was a trend towards strengthening the supranational EU Parliament. However, recent years have seen a growing demand to return to intergovernmental politics, most radically from the national populist autocrats. This again taps into widespread scepticism regarding the power of supranational institutions, and often, this tends to ignore what such supranational politics did and do for nation states and its citizens. However, the call to ‘take back control’ over what is considered an internal affair and the rejection of European institutions exercising control over ‘domestic measures’ is loud. As prominent examples, Hungary and Poland have engaged in such manipulation by launching their ‘judicial reforms’.⁶⁰ Yet as described above, these ‘judicial reforms’ are not purely internal affairs. As shown above, constitutionalism only deserves its name if it comes with independent courts committed to democracy and fundamental rights. Likewise for constitutionalism to be truly present, EU law must be implemented in its mix of fully determined normative schemes and room for Member States to find their ways. Yet, in a Union based on law and a commitment to some basic principles, rights and values, domestic judicial reforms are not pure internal affairs but affect us all.

EU institutions thus have reason and have the power to respond to anti-constitutionalist attacks. Article 7 TEU allows for the suspension of voting

⁵⁹RJ Goebel, ‘Supranational: Federal: Intergovernmental: The Governmental Structure of the European Union after the Treaty of Lisbon’ (2013) 20 *Columbia Journal of European Law* 77–142.

⁶⁰For more on this, see chapters five and six in this volume.

rights and links EU funding to respect for the rule of law and an annual rule of law review. Envisaged by its authors as a means of sanctioning wrongdoing, Article 7(1) TEU should start working when one Member State breaches the rule of law and endangers it within the EU. Consequently, the European Commission has already activated an Article 7(1) procedure against Poland, and the European Parliament has triggered Article 7(1) against Hungary. Eventually, the Council can impose sanctions and suspend voting rights under Article 7(2) TEU, but the Council is restrained as an intergovernmental institution because Member States in the Council do not act against each other.

After its experience with Hungary, the European Commission created a new Rule of Law Framework to give itself the leverage to act the next time when national safeguards are no longer capable of effectively addressing systemic threats to the rule of law. Initially, the framework was meant to ensure that all Member States implemented what they signed in the treaties and just added more cooperation and control. Also, in parallel to the Commission's Rule of Law Framework, the Council launched a new tool called the annual rule of law dialogue.⁶¹ Then, the Commission's annual Rule of Law reporting mechanism was established to look at the key rule of law developments in each Member State. But little is required in a 'peer review' format with a thirty-minute discussion focusing on one state every three years. And as the developments of Hungary and Poland demonstrate, dialogue alone will not be sufficient to get tangible results.⁶²

The challenges to constitutional commitments are not limited to Hungary or Poland. Autocratic populism and illiberalism are spreading in several other European societies. Many still democratic legal systems have already applied administrative law in an authoritarian manner.⁶³ Furthermore, to fight the Covid-19 pandemic, consolidated democratic states have struggled with keeping the rule of law by introducing ill-fated extreme legal measures (eg, declaring state of emergency) justified on the basis of the urgency of the situation.⁶⁴ Therefore, more effective measures will be needed to stabilise the rule of law and defend democracy.

If it is to manage the challenges in this transnational democracy, the EU needs to employ robust constitutional mechanisms to safeguard and support the political commitment enshrined in Article 2 TEU. The ECJ has a pivotal role, with much more to handle than European integration. It should gain a constitutional function beyond its role as a supreme court. After all, it is on the ECJ to

⁶¹ Council of the European Union, 'Press Release No 16936/14' (Brussels, 16 December 2014) 20–21.

⁶² Pech (n 11) 326–27.

⁶³ B Schotel, 'Administrative Law as a Dual State. Authoritarian Elements of Administrative Law' (2021) 13 *Hague Journal on the Rule of Law* 195–22.

⁶⁴ European Commission, '2021 Rule of Law Report. The Rule of law situation in the European Union' COM(2021) 700 final (Brussels, 20 July 2021).

protect fundamental rights and the separation of powers, democracy and legality, and ultimately declare Member States' legal measures invalid if they do not fit the standards once agreed upon.

C. The Role of Domestic Institutions: Applying the Concept of 'Constitutional Identity'

Yet the ECJ is not alone. Domestic courts also play an essential role in protecting the legal framework of European democracy in the form of principles, rights and values. In addition to genuine EU institutions there are domestic courts, both ordinary and constitutional. Regarding the latter, Article 6 TEU and Article 52(4) of the Charter of Fundamental Rights explicitly require the ECJ to recognise and build on the constitutional traditions of the Member States. At the same time, national constitutional courts or supreme courts with a mandate to review legislation must take Europe into account. As such, national constitutions are entangled with each other and embedded in the larger European frame.

Here, the challenge is obvious, and the concept of 'constitutional identity' illustrates this point remarkably well. In German constitutional jurisprudence, the FCC has developed the doctrine of constitutional identity to protect the core values of the German Basic Law. While this has often been taken to be a creative move, it is based on the explicit 'eternity clause' in Article 79(3) of the GBL, which does not allow for any constitutional amendment ever to change the core content of the constitution. The FCC called this constitutional identity, or '*Verfassungsidentität*'⁶⁵ and held that neither domestic law nor any international agreement or institutional arrangement could change this core content.⁶⁶ Note that this is *ultima ratio* to eventually stop the state's participation in European activities and the FCC has not deemed it violated to date. The FCC, like all other actors, has had to try hard to find a European friendly way to solve a problem. Before it stops the state from participating in European activities, the FCC must interpret the act in question in a friendly manner trying to find common ground.

In addition to performing 'identity control', the FCC also checks whether institutions whose competences have been handed to them by the state do indeed act within such limitations or '*ultra vires*'. Finally, the FCC also checks whether EU measures respect fundamental rights, first withholding its authority as long as (*solange*) the standard of the GBL is met,⁶⁷ and recently, in the *Right to be Forgotten* rulings I and II, moved to reviewing acts itself, based on the EU

⁶⁵ For more on this, see chapter two in this volume.

⁶⁶ BVerfGE 113, 273; 123, 267; 126, 286; 129, 78; 134, 366; 140, 317.

⁶⁷ BVerfGE 37, 271; BVerfGE 73, 339.

Charter if fully determined by EU law, or based on the national constitution whenever EU law leaves room for pluralism.⁶⁸ However, these checks are deeply embedded in a constitutional scheme that is predicated on European integration, from the Preamble to clauses on multi-level law-making and conformity with fundamental rights.

Yet the concept of constitutional identity also carries serious risks. Several other constitutional courts have used the concept of constitutional identity to establish limits on European integration.⁶⁹ One of the reasons for this might be that not all courts have included the whole concept. Rather, some constitutional courts have tended to load identity with diffuse notions of nationalism⁷⁰ rather than applying it based on the respective democratic constitution and the universal constitutional principles. In fact, it seems crucial from a constitutional point of view to limit the notion of identity to a strictly legal claim. Otherwise, those who see the EU primarily as an economic organisation may transform their rejection of EU rights, principles and values into national identity claims. This is especially tempting for autocrats who use legalistic makeup to cover their greed and authoritarian ways – they claim to be ‘simply following what others are doing’, which is in fact an abuse of comparative constitutional law. Although the legal concept is not per se a nationalist trap, the term ‘identity’ certainly invites ideological overload.

Thus, it is even more important to point out that the doctrine in German constitutional law is not a theoretical concept⁷¹ but formally doctrinal since it is based on the explicit ‘eternity clause’ in the constitution. Such an eternity clause is fully compatible with the commitment to European values in Article 2 TEU. Based on an integration clause in Article 23 of the GBL, the FCC had thus held the doors open to European integration when it emphasised European commonalities and not the differences in its rulings on the main treaties and, more recently, on fundamental rights.

No country can take for granted that the internalisation of universal constitutional principles that are legally addressed by fundamental rights will endure. Rather, societies often have to learn the hard way that there must be such limits to governmental power. Yet this learning process is a feature of constitutionalism as such and not a specificity of Europe. In constitutional democracies, the basic legal texts were always promises made in rather specific constitutional moments to turn to a better future. It takes an ongoing commitment to deliver, and it is on all of us to show this commitment.

⁶⁸ Order of the First Senate of 6 November 2019 – 1 BvR 16/13 (*Right to be forgotten I*) and Order of the First Senate of 6 November 2019 – 1 BvR 276/17.

⁶⁹ See, eg, the Italian Constitutional Court decision: Corte Cost, 27 dicembre 1973, n 183, Giur it 1973, II, 2401 (It) and the decisions of the French Constitutional Council: Conseil constitutionnel decision No 2004-505 DC Nov 19, 2004, Rec 173; Conseil constitutionnel decision No 2007-560 DC Rec 459.

⁷⁰ See Part II of this volume.

⁷¹ But see chapter one in this volume and see also GJ Jacobsohn, *Constitutional Identity* (Princeton, NJ, Princeton University Press, 2010).

While the Member States identify with different histories and positions in shared historical events, and while such different developments informed different constitutions, and constitutional identities thus differ, joining the EU means emphasising and working with the overlapping consensus. Differing constitutional frameworks or identities can be in tension with European commitments. Many people first identify as citizens of their nation state, and law alone is not sufficient to change such understandings. Yet legal practice may help us get there. Since constitutional identities have to be brought in line when joining the EU, the option is there, as is the task. Therefore, revisiting what was meant in drafting the treaties and the Charter of Fundamental Rights is like revisiting a national constitution; all of these have to be interpreted in light of their purposes and functions. And the basic assumption of the European project is that Member States are all constitutional democracies that share the commitment to universal constitutional principles.

As contradictory as this may sound, respect for national constitutional identity is key to the European project.⁷² There is a reason for the existence of Article 4(2) TEU, which mandates EU institutions to respect the national constitutional identities of Member States. While a literal understanding of this provision may suggest that any domestic interpretation of national identity would be consistent with EU law, Article 4(2) does not give a blank cheque for the Member States to construct whatever national identity they may prefer at a given time. Rather, there is common ground and space for cultural diversity, like the protection of national languages, provided that they are connected to the national constitutional identity embodied by the domestic legal system from the moment of the foundation of the independent and democratic state.⁷³ So, although Article 4(2) expressly refers to national identity, its concept is a constitutional one. As the ECJ puts it, the values on ‘which the European Union is founded’ and which ‘define the very identity of the European Union as a legal order common to those States’⁷⁴ are the bases that have to be agreed on within all Member States. Consequently, the EU has an obligation to respect national identities as long as identity retention does not undermine the EU foundational principles ensured by Article 2 TEU.⁷⁵

This is the spirit that must inform European and domestic institutions and the practices they adopt to align their legal commitments and politics. The idea is to form a common European constitutional identity based on the entangled

⁷²For more on this, see the introductory chapter of this volume.

⁷³K Kovács, ‘Constitutional or Ethnocultural? National Identity as a European Legal Concept’ (2022) 8 *Intersections. East European Journal of Society and Politics* 170–190.

⁷⁴C-156/21, *Hungary v Parliament and Council* and C-157/21, *Poland v Parliament and Council*, Judgments of 16 February 2022.

⁷⁵T Konstadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of national Constitutional Settlement’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 195–218, W Sadurski, *Poland’s Constitutional Breakdown* (Oxford, Oxford University Press, 2019) 223.

national ones, which are in turn deeply embedded in Europe. In the German example, the jurisprudence of the FCC contains several warnings that the court issued to European institutions. In these instances, the FCC called on European institutions to live up to the common constitutional commitments based on treaty law: the principle of democracy (Article 2 TEU and Article 20 of the GBL) and the rule of law (also in Article 2 TEU and Article 20 GBL). These ‘warnings’ corresponded to Article 23 GBL, which obliges German state institutions to participate in and facilitate the integration process.⁷⁶

In the 1970s, the famous *Solange I and II* decisions of the FCC emphasized that ECJ rulings would be accepted as long as (in German: *solange*) they conformed to the protection of fundamental rights, at a time when there was no such Charter.⁷⁷ Yet it is important that there was no divergence of basic values but a debate over what would best realise these values in a given case.⁷⁸ Recently, the Right to be Forgotten rulings have given rise to a dialogue between the EU Charter, the European Convention on Human Rights, and the German Basic Law.⁷⁹

By contrast, the national identity concept applied by some constitutional courts in the Visegrád countries is very different. The institutions still called constitutional courts have been dismantled, and they have also applied a hollow copy of the concept of constitutional identity by filling it with the nation’s (ethno)cultural characteristics.⁸⁰ This leads down a path of dismissing EU law and ECJ rulings on the grounds of nationalistic ideology.⁸¹

To counter such a trend, European institutions need to act. Accordingly, the ECJ found a Member State to have violated the principle of judicial independence (Article 19(1) TEU) in the cases of the so-called Polish ‘judicial reforms’.⁸² Since then, the ECJ has seen a ‘proliferation of cases’ raising judicial independence concerns.⁸³ Later, the ECJ decided that Poland’s Supreme Court’s disciplinary chamber must be completely changed in order to guarantee its

⁷⁶ Arnold, R, ‘Contemporary constitutionalism and integration’ in *Constitutional Studies* Vol I (Constitutional Court of the Republic of Bulgaria, 2019) 127.

⁷⁷ BVerfGE 37, 271; BVerfGE 73, 339.

⁷⁸ BVerfGE 146, 216.

⁷⁹ Order of the First Senate of 6 November 2019 – 1 BvR 16/13 (*Right to be forgotten I*) and Order of the First Senate of 6 November 2019 – 1 BvR 276/17.

⁸⁰ Kovács (n 72) 176.

⁸¹ F Fabbrini and A Sajó, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 457–73; G Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E(2) of the Fundamental Law’ (2018) 43 *Review of Central and East European Law* 23–42; K Kovács, ‘The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts’ (2017) 18 *German Law Journal* 1703–720.

⁸² Case C-192/18 *Commission v Poland* EU:C:2019:924; Case C-619/18 *Commission v Poland* EU:C:2019:531. In 2011, the Hungarian government fired judges *en masse* by lowering their retirement age. The Commission brought a procedure against Hungary before the ECJ, but at that time, the ECJ was not yet ready to apply Article 19(1). The ECJ held that the Hungarian government violated the prohibition of age discrimination. Case C-286/12 *Commission v Hungary* EU:C:2012:687.

⁸³ Pech (n 11) 332.

independence.⁸⁴ These are measures to review national regulations and institutions, with a transnational power and instruments to stop further violations of EU foundational principles.

In addition, the ECtHR is not only a protector of individual rights but has a systemic role to play. Confronting the trends of constitutional destruction and the rise of populist autocracies, the Strasbourg Court has also reviewed domestic legislation that violates constitutional commitments shared throughout Europe. As such, it has delivered several judgments on the rule of law violations committed by the Polish authorities.⁸⁵ Notably, the first is an example of a human rights court reacting to a misuse of the power of a national constitutional court, when the ECtHR ruled that the Polish tribunal was and still is irregularly composed, and that, therefore, every bench that includes one of the three irregularly appointed ‘judges’ amounts to an unlawful one under Article 6 of the Convention.⁸⁶ Consequently, the largest association of Polish judges decided not to recognise as legitimate the tribunal’s ruling when issued by panels that include unlawfully appointed members.⁸⁷

IV. CONCLUSION

Europe still enjoys the highest standard of the rule of law worldwide as a key ingredient of constitutionalism. However, this is a fragile state of affairs. It can neither be taken for granted nor release anyone from the responsibility to defend such a state; these days, it is more of an incentive, a calling, to prevent this achievement from being lost. There is work to be done to maintain the EU as a community committed to constitutionalism, including the rule of law. If the EU is understood as merely a place of cooperation between Member States intended to foster economic progress, it might be questionable how much it can stabilise the rule of law and how much it can protect domestic courts as independent

⁸⁴ Case C-791/19 *Commission v Poland* EU:C:2021:596, T Wahl (2020) ‘CJEU Rules on Independence of Poland’s Disciplinary Chamber of the Supreme Court’ www.eucrim.eu/news/cjeu-rules-on-independence-of-polands-disciplinary-chamber-of-the-supreme-court/.

⁸⁵ *Xero Flor v Poland*, App no 4907/18, Judgment of 7 May 2021; *Broda and Bojara v Poland*, App nos 2669/18, 27367/18), Judgment of 29 June 2021; *Reczkowicz v Poland*, App no 43447/19, Judgment of 22 July 2021; *Dolinska-Ficek and Ozimek*, App nos 49868/19, 57511/19, Judgment of 8 November 2021; *Advance Pharma v Poland*, App no 43572/18, Judgment of 3 February 2022.

⁸⁶ M Szwed, ‘What Should and What Will Happen After Xero Flor – The judgement of the ECtHR on the composition of the Polish Constitutional Tribunal’ (2021) *Verfassungsblog* www.verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/. In a follow up, the ECtHR was concerned with the irregularly appointed member of the National Council of Judiciary. *Grzeda v Poland*, App no 43572/18, Judgment of 15 March 2022.

⁸⁷ Position of the Polish Judges Association IUSTITIA over the status of the Constitutional Tribunal, 30 October 2020: <https://www.iustitia.pl/en/activity/opinions/4022-position-of-the-polish-judges-association-iustitia-over-the-status-of-the-constitutional-tribunal>.

guardians of constitutional democracy.⁸⁸ Yet the more one revisits common ground, shared commitments, and the embeddedness of each national legal system in Europe, the more obvious it seems that a concerted effort could hinder at least some of the adverse effects of the so called ‘reforms’ that attacks the foundations of constitutionalism.⁸⁹ Then, the power of law is crucial to make Europe a space of equal liberties, peace, and a shared future.

Consequently, we should not underestimate the necessity of investing in the rule of law. No law comes to life on its own. National commitments are needed to back up transnational legal entities like the EU. It seems we need additional measures to deepen this, for EU organs and national institutions, civil society, business and culture, media and academia, and the larger political allies in the world. Everyone can contribute to a politics that may then indeed inform ‘identities’, yet this must take place in a shared, deep and lasting commitment to safeguarding the spirit of the post-1945 and post-1989 consensus, one that democratic constitutions and the EU treaties embody. This is not a status quo, but a process we are all actively involved in.

⁸⁸ C Tomuschat, ‘The ruling of the German Constitutional Court on the Treaty of Lisbon’ (2009) 10 *German Law Journal* 1259–262.

⁸⁹ A Bodnar, ‘Strasbourg Steps in’, *Rule of Law*, 8 July 2020, <https://ruleoflaw.pl/tag/grzeda-v-poland/>.

