Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

12

EU Democratic Oversight and Domestic Deviation from the Rule of Law

Sociological Reflections

PAUL BLOKKER*

I Introduction

The troublesome Hungarian, and possibly Romanian, developments regarding democracy, constitutionalism and the Rule of Law call for the attention of the European Union and its Member States, in particular regarding violations of the principles of Article 2 TEU. Various proposals for monitoring mechanisms or even new institutions of oversight have been put forward, including a Copenhagen Commission and a systemic infringement procedure.[1] The core problem faced by the European Union regarding the democratic nature of its Member States seems to be one of 'safeguarding of the core values on which the Union has been established'.[2] If reasonable justifications for why the EU should engage in safeguarding those values can be found, then the Union will be adamant that it should scrutinise the structural efficacy of potential instruments and mechanisms for addressing this issue.[3] The larger part of the debate on this matter – which erupted with particular vigour with the Hungarian constitutional 'coup' and subsequently the Romanian constitutional and Rule of Law crisis – identifies a generally *legalistic* approach to the problem and endorses distinctive *legal* remedies, some of which need reform of the Treaties.

* University of Trento and Charles University, Prague.

[1] See, for example, the chapters by J.-W. Müller, 'Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission' and K. L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in this volume.

[2] C. Closa, D. Kochenov, and J. H. H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union' EUI Working Papers No. 2014/25, RSCAS, 3.

[3] *Ibid.*

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

My argument here will interrogate the purely formalistic and legalistic approach, and for that matter, will be less 'policy-applied' and 'problem-solving', but rather a suggestion for a more comprehensive analysis, grounded in sociological and political reflections. My approach will be a sociology of constitutional democracy and the Rule of Law, and I will ask whether current considerations and the solutions on offer sufficiently consider the distinctive dimensions of the functioning of constitutional democracy. Such dimensions are crucial for the actual 'safeguarding of the core values' of the EU, but are in my view unlikely to be satisfied through a one-sided legalistic and formal-procedural approach.

The problems raised by the constitutional *coup d'État* in Hungary and the constitutional crisis in Romania are at least twofold, the first having to do with issues of constitutionalism and the Rule of Law, the second with the actual operation of the liberal, democratic state. Regarding constitutionalism and the Rule of Law, I will argue that the problematic issues are not confined to the abandonment or violation of distinctive constitutional or legal procedures (such as with the troublesome manner in which the four-fifths rule regarding legitimate constitutional change was annulled in the Hungarian context, or the problematic tinkering with the referendum law in Romania) or to the arbitrary, partisan or particularist use of political power. For the short-term correction of such matters, a legalistic approach might be largely sufficient. However, constitutionalism and the Rule of Law as such lack a firm social and politico-cultural entrenchment in civil and political society, as well as lacking support in empowered and critical democratic counter-forces. The democratisation of political and constitutional cultures and the fostering of capabilities oriented towards the common good are notoriously difficult to capture and understand,[4] but are unlikely to be constructed by mere legal instruments alone.

Regarding the status of the liberal, democratic state in a number of EU Member States, a key set of problems relate to self-interested, partisan and corrupted forms of politics, detached from ideas of the common good and largely alienated from wider society. Reflections of this include the predominance of *constitutional instrumentalism* as well as *legal resentment*. Constitutional instrumentalism entails the downgrading of comprehensive constitutional reform to an instance of doing politics as usual, often serving narrow majoritarian or partisan objectives rather than the common good, or worse, abusing constitutional reform for illiberal or

[4] M. Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009), p. 45.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

non-democratic purposes.[5] Legal resentment consists of a political reaction against liberal and legal constitutionalism.[6] The concept of legal resentment has affinity with notions of 'nonliberal constitutionalism',[7] 'illiberal constitutionalism',[8] 'abusive constitutionalism'[9] and 'counter constitutionalism',[10] in that it indicates a sceptical or critical relationship to legal formalism, the Rule of Law and liberal democracy, and proposes a different understanding of constitutional law. While liberal constitutionalism promotes a universally valid and formalistic programme for the separation of powers, the Rule of Law (rather than the rule of men) and the neutrality of the state, illiberal forms of constitutionalism question the universality of such notions, prioritise particularist and historical values related to a distinctive political community and on this basis justify political interference in legal matters. Liberal constitutionalism is put to the test in a variety of ways. As also captured by Landau's notion of 'abusive constitutionalism', legal resentment can enhance and justify the instrumental use or abuse of instruments of constitutional amendment to structurally favour or enhance the interests and power of particular groupings (such as in Orbán's Hungary and Ponta's Romania; Landau also mentions Egypt, Colombia and Venezuela). Legal resentment equally takes the form of questioning a decontextualised, universalistic understanding of constitutional and legal orders, and the proposition of the defence and recuperation of national legal-constitutional traditions instead (described by Scheppele in the case of Hungary as 'counter-constitutionalism').

In order to reinvigorate domestic democratic politics in deviant democracies, and to address tendencies such as constitutional instrumentalism and legal resentment, a purely legalistic set of instruments is in my view insufficient. Democracy in Europe is under general strain due

[5] D. Landau 'Abusive Constitutionalism', 47 (2013) *UC Davis Law Review* 190.

[6] P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (London/New York: Routledge, 2013).

[7] G. Walker, 'The Idea of Nonliberal Constitutionalism', in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997). According to Walker, in 'postcommunist lands as elsewhere, there is sometimes less than full enthusiasm for the liberal, individual rights-oriented approach to constitutions' (p. 154).

[8] L.-A. Thio 'Constitutionalism in Illiberal Polities', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), p. 133; M. Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?', 25(1) (2014) *EJIL* 177.

[9] Landau, 'Abusive Constitutionalism'.

[10] K. L. Scheppele 'Counter-constitutions: Narrating the Nation in Post-Soviet Hungary', paper presented at George Washington University, Washington DC, 2 April 2004.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

to an increasing gap between wider society and political elites. Such a gap is exacerbated by the financial and economic crisis, as indicated by diminishing public support for the European integration project in recent years[11] and the European-wide support for populist parties and movements.[12] The increasing public distance from and distrust towards institutions of liberal, representative democracy[13] importantly relates to the emergence of illiberalism and legal resentment in societies such as Hungary and Romania.[14] Populist movements frequently propose to close the society-elite gap by means of the direct representation of a homogeneous, ethno-national majority, to the detriment of various minorities as well as political pluralism in general. For example, in Orbán's project of 'national unification' in Hungary, the political project involved the defence of the Hungarian majority and the public announcement of the abandonment of liberal-democratic practices in favour of a nationalist approach.[15]

To counter illiberal tendencies and the populist threat to democracy, and to potentially diminish their causes, it is clearly important to safeguard legal institutions. Countering populism and illiberalism definitively needs to include the heightened protection of rights (for instance, regarding the freedom of expression or the freedom of conscience) and the strengthening of democratic procedures. But I suggest that it also needs a variety of a different kind of 'safeguards', including more society-based and informal ones.

In this chapter, I will first discuss what I see as the prevalence of a formalistic-technocratic view in the EU promotion of the Rule of Law and constitutionalism. I will relate three *problématiques* to this formalistic view: a *problématique* of formal and informal dimensions of the

[11] See the results of the Eurobarometer survey, December 2014, at http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_first_en.pdf. Admittedly, the last quarter of 2014 has seen some improvement in public support for the EU.

[12] Y. Mounk, 'Pitchfork Politics: The Populist Threat to Liberal Democracy' (September/October, 2014) *Foreign Affairs*.

[13] The Eurobarometer survey of Spring 2013 found that circa fifty percent of the EU population is 'dissatisfied with the way in which democracy works in their country', at http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_publ_en.pdf.

[14] According to the Eurobarometer survey of Spring 2013, the percentages of people who expressed satisfaction with how democracy works in their country were 31 and 18 percent in Hungary and Romania, respectively.

[15] G. Halmai, 'Illiberal Democracy and Beyond in Hungary', Verfassungsblog, 28 August 2014, at www.verfassungsblog.de/en/illiberal-democracy-beyond-hungary-2/#.VMDQ2-ZdrMs.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

law; a *problématique* of universalist and particularist perceptions of the law and a *problématique* of representative and alternative dimensions of constitutional democracy. In the second part I will briefly discuss the domestic problems of the Hungarian case, particularly in light of the three *problématiques*. In conclusion, I argue that three areas need greater attention in the debate on democratic oversight: the sociological legitimacy of the constitutional framework and political and social commitment to the Rule of Law and constitutional democracy, existing constitutional and legal traditions, and the societal role in democratic oversight and checks and balances through empowerment of local societal actors.

II Promotion of Democracy and a 'Thin' Rule of Law

The legalistic approach now offered as a solution for systematic deviation from the EU's core values is a variation on a familiar theme.[16] In various relevant EU policy areas (e.g. Enlargement policy and the European Neighbourhood Policy) and also in the more general understanding of Article 2 TEU, the concept of the Rule of Law adhered to is largely a 'thin' one.[17] A 'thin' conception tends to understand the Rule of Law in largely formalistic terms and prioritises legal institutions and procedures. The emphasis is on a system of Rule of Law in which the arbitrary nature of the 'rule of a person or persons' as well as ad hoc decisions is avoided.[18] In general, the formalistic view of the law proposes to avoid the use of arbitrary power and/or forms of domination, to stabilise social relations by making such relations predictable, and to protect individual autonomy from being interfered with by 'malicious and unpredictable interferences by public authorities and others'.[19]

[16] See for the notion of a 'thin' understanding of the rule of law, for instance, B. Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232, 233–6. In Tamanaha's view, a 'thin' understanding of the rule of law refers to the fact that this concept of the Rule of Law does not include notions of democracy and human rights, but focuses strictly on citizens and institutions abiding to and bound by the law. I will use the adjectives 'thin, formal', and 'formalistic' regarding the Rule of Law in an interchangeable fashion.

[17] Cf. K. Nicolaïdis and R. Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma', 49 (2012) *SIGMA Papers*; A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 (2014) *CMLRev.*

[18] R. Bellamy, 'The Rule of Law and the Rule of Persons', 4(4) (2001) *Critical Review of International Social and Political Philosophy* 221.

[19] *Ibid.*, 225.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

The formalistic idea is that, by means of adherence to an instrumental rationality and the support of robust formal, legal institutions, it is possible to tame political power and to channel its exercise in transparent and predictable directions. There is an important emphasis on the output legitimacy and the effectiveness of the law. This formalistic or 'anatomical' approach perceives the Rule of Law as strictly related to 'particular sets of legal arrangements'[20] or 'legal and institutional checklists'.[21] Such checklists highlight formalistic institutional set-ups which are supposedly easy candidates for legal transfer, but which the wider social and political conditions, preconditions and implications remain largely unexamined. In such a narrow view of the Rule of Law, the Rule of Law is almost fully equated with the law itself, rather than with the law as a 'social fact'. Indeed the social function of the law – its 'social role as the default mechanism to solve social and political conflicts'[22] – is downplayed in favour of narrow, technocratic formalism based on supposedly universal standards.

A formal view seems corroborated in the EU's promotion of the Rule of Law in for instance the Eastern Enlargement Policy, where it was largely a technical view of the Rule of Law which prevailed, grounded in an instrumental legitimacy of outcomes, while substantive aspects such as democratic rule and social justice were largely sidelined.[23] As argued by Bogdan Iancu, discussing conditionality in the Romanian case,

> The Commission was and continues to be interested in the measurable constitutional problem areas of judicial reform and the fight against corruption. These objective matters, broken down into the four benchmarks of the Cooperation and Verification Mechanism (CVM), can be sub-itemized into a number of concrete, clear tasks. Guidelines can be advanced, deadlines can be set, overall progress can be monitored, and results can be periodically assessed.[24]

In my view, such a technical-instrumental view of the Rule of Law tends to be equally upfront in the current debate on democratic oversight and prevention of democratic backsliding, and the correction of states which

[20] Krygier, 'The Rule of Law', 46.
[21] Nicolaïdis and Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda', 6.
[22] *Ibid.*, 8.
[23] J. Přibáň, 'From "Which Rule of Law?" to "The Rule of Which Law?": Post-Communist Experiences of European Legal Integration', 1(2) (2009) *Hague Journal on the Rule of Law* 337; B. Iancu, 'Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania', 6(1) (2010) *ECLRev.*; Cf. Blokker, *New Democracies in Crisis?*
[24] *Ibid.*, Iancu, 30.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

persistently challenge EU values. In for instance Kim Lane Scheppele's proposal for a 'systemic infringement action',[25] the emphasis is on the 'simple extension of an existing mechanism', which would bundle a 'group of individual infringement actions together under the banner of Article 2'.[26] This extended mechanism would provide more effective powers to the European Commission and the CJEU. Furthermore, the emphasis is on a somehow *indirect* mechanism which reacts to the violation of allegedly universal EU objectives and core values, rather than addressing the structural dimensions of domestic democratic backsliding and the distinctive democratic problems in a Member State head on. It is the technical violation of EU law, rather than substantive issues with non-democratic domestic practices, which seems the predominant concern. The assumption is that 'systemic compliance' resulting from a systemic infringement action could be limited to the compliance of domestic institutions with formal EU law, rather than also requiring important sociopolitical structural and cultural changes.

From a sociological point of view, there are at least three *problématiques* raised by a 'thin' understanding of the Rule of Law and a one-sided insistence on a technocratic-legalistic 'solution' to national democratic deviation and systemic threats to the Rule of Law. The first *problématique* – regarding the *formal* and *informal dimensions of law* – is that of the insufficiency or incompleteness of a view which merely considers formal legal institutions (e.g. the formal independence of the judiciary) and the technical transfer of rules and norms. While legal institutions supporting the Rule of Law are a *conditio sine qua non*, this does not mean such institutions are in themselves sufficient guarantees for the Rule of Law to actually operate in a satisfactory manner. In the words of Martin Krygier, 'legal institutional features' 'always need *supporting circumstances*, social and political structures and cultural supports, which are not always available and are difficult to engineer'.[27] Such supporting circumstances include not least a general, diffused legal (and constitutional) culture, or in other words, prevailing, shared cultural value orientations *vis-à-vis* the Rule of Law (and constitutionalism) in a given society. Legal cultures offer insight into the level of compliance with the law, the social legitimacy of the law, and levels of impersonal trust in given societies.[28] As argued by Krygier, it

[25] See Chapter 5 in this volume. [26] *Ibid.*
[27] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 52 (emphasis added).
[28] D. Nelken, 'Using the Concept of Legal Culture', 29 (2004) *Australian Journal of Legal Philosophy* 1.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

is possible to imagine a society in which all the formal institutions of the Rule of Law exist, but in which the law does not rule after all.[29] In order for the law to rule, it has to *count* or *matter* in a given society, in the exercise of social power, and the Rule of Law has to be effective. The law has to count as a 'constraint on and an *ingredient* in the exercise of power and as a source of social guidance, both for the officials who exercise power as well as for the subjects of such power'.[30] Krygier outlines four indicators (two negative, and two positive) of what it means for the law to count in a society. A first indicator is the general obedience by citizens and officials to the law, and their expectation of fellow citizens or fellow officials to show the same. A second indicator is the extent and substance of such obedience. We could roughly distinguish here between obedience merely informed by fear of legal sanctions, on the one hand, and the consideration of the law as legitimate, on the other. In the latter case, we would expect a much more solid social and political embedment of the law.[31] A third indicator is the extent to which the law counts among the people who politically, socially, economically or religiously count, that is, those 'people or institutions which wield effective power'.[32] A fourth indicator regards not the mere obedience to the law but its actual use and how it is used. In other words, the extent to which politics operates through or by the law, as well as under the law, and the extent to which we can speak of 'legality' (laws understood as public guidelines and facilities) rather than of 'legal instrumentalism' (law as one instrument among others, used when convenient).[33] In social terms, it is important that the law is an 'institution of the everyday lifeworld itself, available to citizens as a resource and protection in their relations with the state and with each other'.[34]

The formal–informal *problématique* indicates that EU attempts to safeguard democracy in Member States would need to include attention to the political and sociological legitimacy of both the Rule of Law and the constitutional framework. Sociological legitimacy is understood here as

[29] M. Krygier 'Transitional Questions about the Rule of Law: Why, What, and How?', 28(1) (2001) *East Central Europe* 1.
[30] *Ibid.*, 12–3.
[31] In this regard, it can be argued that in the case of EU sanctions, as proposed for instance by Scheppele (*inter alia* in her contribution to this volume), a likely result would be a heightened 'fear' of sanctions on the part of non-complying states, but not necessarily an increase in the perception of *legitimacy* of EU norms and principles.
[32] Krygier, 'Transitional Questions about the Rule of Law', 15.
[33] *Ibid.*, 15–6. [34] *Ibid.*, 16.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

a 'matter of justifications of rule empirically available, one that the citizens, groups, and administrative staffs are likely to find valid, under the given historical circumstances'. Attention needs to be paid to the prevailing norms in society and views of legitimacy as held by relevant actors.[35] A key, related issue is whether it is institutions (the 'hardware') which produce 'supporting conditions' (the 'software') for the Rule of Law or whether it is the availability of supporting conditions which makes the set-up and functioning of institutions possible in the first place.[36] I cannot provide a definitive answer to this complex problem here, but it seems clear that a mere transfer of the formal institutions of the Rule of Law to an otherwise indifferent or even hostile (e.g. post-authoritarian) context is very likely not to produce positive results.[37] From a legal-sociological perspective, it seems a *conditio sine qua non* that local social and political actors, who value the Rule of Law as a principle differently, have ways of engaging in ('investing in') the actual design and setup of (political, legal and constitutional) institutions (this point will be further elaborated in the context of the third *problématique*). This would not only have the advantage that the Rule of Law would be created in a way that reflects local mores and needs, but also that it contributes to a political learning *process* in which a variety of actors engage with the production, implementation and use of the law.

A second, related *problématique* – regarding a tension between *universalistic* and *particularist* understandings of the law – inquiries into a universalistic perception of the Rule of Law, and the related identification of a universally valid template of 'best practices' or checklist of institutions and norms, and understands the Rule of Law as it has emerged (historically and semantically) since time immemorial. A universalistic understanding tends to ignore local, particularistic dimensions of law, which unavoidably influence and shape the day-to-day operation of the law in distinct societies. An important issue which emerges in this problem field is that of 'legal transplant' and the tension or irritation between an abstract norm, rule or institution, and the local interpretation, functioning and sociopolitical implications of the law. This dimension is obviously of particular relevance in the new EU Member States which have been

[35] A. Arato 'Regime Change, Revolution and Legitimacy in Hungary', in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (New York/Budapest: Central European University Press, 2011), p. 40.

[36] I thank the editors for bringing this point up.

[37] G. Frankenberg (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Cheltenham and Northampton: Edward Elgar, 2013).

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

engaging in a massive legal transplantation process through the accession, and are still dealing with their significant legal and political legacies. The existing legal and constitutional cultures – in terms of the systems of legal meaning-giving or perceptions of the Rule of Law and constitutionalism – at the receiving end are important factors in the transplantation process. The tension between the abstract nature of a universally articulated rule and the application of such a rule in a distinctive context plays a role here, as well as prevalent legal understandings and perceptions of the law. This *problématique* indicates that an effective form of EU democratic oversight needs to include a historical and cultural-contextual sensibility, and due attention for 'living' legal and constitutional understandings and narratives. This means that EU democratic oversight would need to take into account:

1. Distinctive local problems with the Rule of Law and democracy (e.g. issues of transitional justice or lustration, or complex problems of political community-building in the wake of authoritarian experiences);[38]
2. Relevant legal-constitutional legacies, which inform for instance the behaviour and operation of legal personnel or compromise the idea of the independence of judicial institutions[39] and
3. The possibility of a 'subversive reception' of external legal transplants, which could fundamentally alter the meaning of a received abstract norm.

A third *problématique* – regarding the *representative* and *alternative dimensions of democracy* – is that of the social and political (formal *and* informal) institutions lying beyond the formal building blocks of representative, liberal democracy. Of particular relevance here are different forms of civil society organisation. The third *problématique* overlaps with the first (the formal–informal dimensions of the law) in that it concerns the societal dimensions of the Rule of Law. However, while the first *problématique* emphasises the general importance of sociocultural entrenchment of the law, here the emphasis is on active civil society engagement with the law and its critical monitoring capacity *vis-à-vis* formal institutions. I

[38] J. Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Aldershot: Ashgate, 2007); Iancu, 'Post-Accession Constitutionalism with a Human Face'.

[39] M. Guțan, 'The Challenges of the Romanian Constitutional Tradition. I. Between Ideological Transplant and Institutional Metamorphoses', 25 (2013) *Giornale di Storia Costituzionale* 223; G. Skapska, *From 'Civil Society' to 'Europe': A Sociological Study on Constitutionalism After Communism* (Leiden: Brill, 2011).

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

take inspiration here from the work of Pierre Rosanvallon, who describes a 'decentering' of democratic systems, and emphasises the importance of tendencies towards diffraction and pluralism in contemporary democratic systems which relate to novel answers and practices regarding democratic political interaction. The belief that the issue at hand is 'protecting liberal democracy' in the debate on democratic oversight and the Rule of Law in the EU[40] contrasts importantly with Rosanvallon's suggestion that '[n]o one believes any longer that democracy can be reduced to a system of competitive elections culminating in majority rule'.[41]

Rosanvallon proposes a 'mixed regime', which involves a plurality of powers of oversight and includes multiple layers and agents. A European dimension of democratic oversight would be adding to the mix of a mixed domestic regime, but would in itself probably not be sufficient.[42] At the domestic level, parliamentary oversight would need additional forms of oversight, such as independent institutions of oversight, but also societal ones, including those of public opinion and the media (including the new media), a critical role for opposition parties, social movements and citizen organisations, and ad hoc democratic institutions.[43] While the EU can act as an external provider of incentives and/or sanctions, it is difficult to perceive how a vital and sustainable democratic Rule of Law state could do without the deeper knowledge, social embedment and engagement of local political and social actors. This *problématique* hints at the idea that an effective form of EU democratic oversight would need to stimulate the empowerment of not only formal-political and legal actors, but also of a variety of civil society forces as well as the media.[44]

Let us now turn to a brief analysis of the case that most prominently triggered the debate on EU democratic oversight – Hungary[45] – with due attention to the three *problématiques* mentioned above.

[40] J.-W. Müller, 'Defending Democracy within the EU', 24(2) (2013) *Journal of Democracy* 138.

[41] P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton, New Jersey: Princeton University Press, 2011), p. 219.

[42] Compare Nicolaïdis and Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda', 48.

[43] P. Rosanvallon, *Counter-democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008), p. 301.

[44] Cf. Nicolaïdis and Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda', 49.

[45] For a discussion of the case of Romania, see Blokker, *New Democracies in Crisis?*. See also P. Blokker 'Constitution-Making in Romania: From Reiterative Crises to Constitutional Moment?', 3(2) (2013) *Romanian Journal of Comparative Law* 187.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

III The Hungarian Case

It was not least the rapid and largely non-participatory and majority-driven drafting of a new constitution by the centre-right *Fidesz* government that has triggered the current debate on democratic oversight and backsliding in the EU. The new constitution, drafted and adopted in 2010–11, entails a shift away from the Hungarian attachment to a 'secular state based on a pluralist society', grounded in European traditions, as has been evident in the constitutionalisation process since 1989. It has led to the institutionalisation of a new constitutional order which has its foundations in sovereignist, 'historical and religious considerations'.[46] In 'many respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on the European Union', as observed by a number of critical Hungarian legal scholars as well as by the Council of Europe's Venice Commission.[47]

The illiberal developments in Hungary have been analysed and condemned widely, but relatively less sustained attention has been paid to how the context emerged in which a 'constitutional *coup d'État*' could become reality in the first place. My argument is that the backlash against liberal constitutionalism, pluralist democracy and the Rule of Law – culminating in the *Fidesz* constitutional project – needs to be situated in the distinctive transformational path that Hungary has followed since 1989. This path needs specific attention because in the early transition years it was based on the opposite rationale of the current political project: an elite narrative which strongly emphasised liberal, representative democracy, the Rule of Law, European constitutionalism and technocratic governance. Hungary was long considered a frontrunner in the Eastern Central European region, with the most successful record in adopting a form of legal or 'new constitutionalism', including an enormously strong Constitutional Court, an elite endorsement of a Europeanist constitutional culture and powerful forms of rights protection.[48]

[46] K. Kovács and G. A. Tóth, 'Hungary's Constitutional Transformation', 7(2) (2011) *ECLRev.* 183, 198.

[47] A. Arato, G. Halmai and J. Kis, 'Opinion on the Fundamental Law of Hungary' (June 2011), at http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf, 3.

[48] A. Örkény and K. L. Scheppele, 'Rules of Law: The Complexity of Legality in Hungary', in M. Krygier and A. Czarnota (eds.) *The Rule of Law in Post-Communist Societies* (Aldershot: Ashgate, 1999). Cf. Blokker, *New Democracies in Crisis?*

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

In the light of current developments, a key question becomes: how did the most successful liberal constitutional regime in the region turn into its opposite almost overnight? My argument is that, in part, the unentrenched, elitist nature of the legal-constitutionalist-cum-rule-of-law state and the lack of widespread support for the liberal-constitutional framework[49] facilitated strong counter-reactions. From the Roundtable Talks of 1989 onwards, the project of constitutional democracy was one driven by technocratic elites, who promoted a programme of 'Westernization, free speech, freedom of the press, human rights, checks and balances, Rule of Law with strong guardian institutions like the constitutional court and the ombudsman'. As András Bozóki argues, '[i]t was a very sophisticated set of institutions – but without the *spirit* of democracy' and the '*participatory aspect* of democracy was missing'.[50] Various observers have noted the lack of a robust, positive consensus on a constitutional framework in the early 1990s.[51] Some observers have criticised the 1989 arrangement for merely constituting 'formal constitutionalism', devoid of shared values and principles which could have invoked an integrative constitutional dimension.[52] When the – anyhow limited – elitist liberal consensus started waning in the late 1990s, a counter-reaction had room to emerge, mobilised by a transformed *Fidesz* party which manipulated nationalist and populist sentiments amongst the losers in the transformation.[53] *Fidesz* mobilised parts of the population by

[49] G. A. Tóth, 'Macht statt Recht. Deformation des Verfassungssystems in Ungarn' (2013) *Eurozine*, at www.eurozine.com/articles/2013-06-05-totha-de.html; G. Lengyel and G. Ilonszki, 'Simulated Democracy and Pseudo-Transformational Leadership in Hungary' 37 (2012) *Historical Social Research/Historische Sozialforschung* 107, 110.

[50] A. Bozóki, 'Hungary's U-turn', at www.johnfeffer.com/hungarys-u-turn (emphasis added).

[51] J. Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law', in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (New York/Budapest: Central European University Press, 2011), p. 1. G. Halmai, *Perspectives of Global Constitutionalism* (Utrecht: Eleven International Publishing, 2014); Tóth, 'Macht statt Recht'. A public opinion poll held in April 2011 found that only eleven percent of the Hungarian population thought the 1989 Constitution was 'good as it is'. Thirty percent thought a new constitution was needed. See http://hvg.hu/itthon/201115_megoszto_alkotmany.

[52] Hörcher, mentioned in: Halmai, *Perspectives of Global Constitutionalism*, p. 213.

[53] Support for *Fidesz* appears to come predominantly from the rural, socially conservative, religiously-oriented, nationalist and anti-communist parts of Hungarian society, G. Tóka and S. Popa 'Hungary', in S. Berglund et al. (eds.), *The Handbook of Political Change in Eastern Europe*, 3rd edn (Cheltenham: Edgar Elgar, 2013), p. 291.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

identifying liberalism and the Rule of Law increasingly with a Western import, foreign interests and upper class ideas.[54]

In terms of the formal and informal dimensions of the law, the Hungarian path in the early transition years prioritised a formalistic approach to the institutionalisation of constitutional democracy, with a certain disregard for supportive political and sociocultural institutions (including limited attention being paid to the symbolic and integrative aspects of the Constitution).[55] The Hungarian constitutional transformation was unique in that it did not involve a major legal rupture with the preceding communist Act XX of 1949, but was rather a case of legal continuity. The intensive amendments which started with the Roundtable Talks produced a *novel* modern constitution that 'met all the standards a modern, democratic constitution is expected to meet', based on 'binding norms', and protected by extensive judicial review powers of the Constitutional Court.[56] It is undeniable that the formal-legal setup of the post-communist system closely followed a well-established European template. But while the constitutional agreement of the Roundtable Talks produced a new constellation of formal-legal institutions, the informal, political and cultural support for the legal-rational make-up of the Hungarian democratic state proved much less inspiring. The political forces which unreservedly defended a liberal-democratic conception of constitutionalism were only few even in the early 1990s (in practice restricted to the *Alliance of Free Democrats* and *Fidesz*). Then, throughout the 1990s, it was the Constitutional Court which took up the role of 'consolidating force', while the 'political class became progressively estranged from the constitution'.[57] A 'low degree of respect for the constitutional provisions in force'[58] translated into a more general constitutional instrumentalism, which involves disobedience on strategic grounds as well as a heightened willingness to change the rules of the game (as becomes *inter alia* apparent in the large number of amendments made: twenty-three until the 1989 Constitution was replaced by the Fundamental Law).

Turning to the tension between universalistic and particularistic views of the law, the lack of a widespread legal-rational engagement with the

[54] Indeed, *Fidesz* has on various occasions portrayed liberal democracy as a foreign import. In a speech given in August 2014, Orbán portrayed civil pro-democracy organisations as 'political activists attempting to promote foreign interests' (cited in Halmai, *Perspectives of Global Constitutionalism*).

[55] Cf. Tóth, 'Macht statt Recht'; Halmai, *Perspectives of Global Constitutionalism*.

[56] Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law'.

[57] *Ibid.*, 10–11. [58] *Ibid.*, 9.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

1989 Constitution signals the absence of a strong universalistic, liberal-democratic tradition as well as of a widespread consensus on the constitutional order in post-1989 Hungary. Instead, various political actors articulate the constitutional views of a 'primacy of politics' and majoritarianism or partisanship, and tend to question a universalistic attachment to rights and democratic principles in favour of a contextualised view. On the centre-right of the Hungarian political spectrum, a historically relevant illiberal tradition can be identified (not least related to the interwar period).[59] This tradition has lent significant support to the emergence of the counter-constitutionalism which informs the current project, and has helped to cast the economic and political crisis of the mid-/late 2000s as an outcome of the weaknesses of the post-1989 legal constitution.

The culmination of this illiberalism came with *Fidesz* winning an absolute majority in the 2010 elections, which allowed it to start its constitutional counter-project. This project involves clear dimensions of what I have labelled 'legal resentment' above.[60] The thrust of much of the counter-constitutional process is against the democratic-constitutional order which has emerged since 1989, as the leaders 'sensed a fundamental (and in the short term irremediable) disillusionment with the liberal democratic system across all segments of the Hungarian political community and think they have a long-term solution that will appeal to the masses'.[61] Resentment is being justified by reference to a different idea of constitutionalism, the unwritten 'historical constitution'.[62] The conservative thrust in the *Fidesz* project can be related to 'communitarian' as well as 'illiberal' views of constitutionalism.[63] What identifies such forms of constitutionalism is the perception of a 'common enemy' in

[59] Orban's project is now openly about 'illiberal democracy' (G. Halmai, 'Illiberal Democracy and Beyond in Hungary'). Various observers have noted the *Fidesz* invocation of the interwar period in its 'national unification' project. As Bozóki argues, *Fidesz* 'feeds nostalgia for the period between 1920 and 1944, characterised by Admiral Miklós Horthy's nationalist and revanchist policies' (A. Bozóki 'Occupy the State: The Orbán Regime in Hungary', 19(3) (2011) *Journal of Contemporary Central and Eastern Europe* 649, 656). For the illiberal character of counter-constitutionalism and the historical constitution, see Scheppele 'Counter-constitutions'.

[60] See also Blokker, *New Democracies in Crisis?*

[61] K. Szombati, 'The Betrayed Republic: Hungary's New Constitution and the "System of National Cooperation"' (2011) *Heinrich Böll Stiftung*, at www.cz.boell.org/web/52-972.html.

[62] Scheppele, 'Counter-constitutions'.

[63] Cf. Thio, 'Constitutionalism in Illiberal Polities'.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

liberal constitutionalism, and a critique of both the 'meta-liberal value of normative individualism' and its understanding of the 'neutral state'. In contrast, illiberal constitutionalism emphasises community interests and the active promotion of a particular vision of communal life.[64] If liberal or legal constitutionalism emphasises a 'court-centric rights-based constitutionalism', legal resentment invokes a contrasting vision of individuals embedded in and owing allegiance to a given community, and endorses an understanding of constitutionalism as a means to protect a distinct community, its ethos and its traditions.[65] A communitarian view understands the individual as a 'socially embedded' self and the community as highly important in forming the individual.[66] In this view, courts play a 'secondary rather than counterbalancing role' in that a political view of constitutionalism is regarded as corresponding best to a community preservation project.[67] What emerges as a problem for EU democratic oversight is those tensions which stem from the perception that the Rule of Law has been imposed from the outside, undermining local traditions and identities.

Turning to the counter-democracy dimension and the range of existing forms of democratic oversight and civic engagement, the Hungarian case reveals the availability of only a limited range of such forms before the emergence of the counter-constitutional project, and a clear deterioration afterwards. This modest set of options for public engagement and counter-democratic scrutiny has made widespread resistance against the *Fidesz* project more difficult. Here I will explore only one dimension of counter-democratic activity, namely, in the routes to societal engagement with constitution-making, constitutional rules and reform. I tend to

[64] In the Hungarian Fundamental Law, the emphasis on the Hungarian nation and its cultural legacy is more than evident in the elaborate preamble, which starts with 'We, Members of the Hungarian Nation', as well as in such articles as Article D (protection of Hungarians living abroad) or Article L on marriage ('the family as the basis of the nation's survival'), Fundamental Law 2011. The Fundamental Law further makes the enjoying of rights conditional on satisfying duties, Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law', 1. In religious terms, the Fundamental Law has been identified as an 'Ode to Christianity and a Reluctance to Separate Church and State'; R. Uitz 'Freedom of Religion and Churches: Archeology in a Constitution-making Assembly', in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (New York/Budapest: Central European University Press, 2011), pp. 197–236.

[65] Thio, 'Constitutionalism in Illiberal Polities', 135–6.

[66] *Ibid.*, 142.

[67] *Ibid.*, 143.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

concur with Andrew Arato's analysis that the 1989 Constitution suffered from a lack of empirical or sociological legitimacy.[68] This is particularly the result of the fact that the Roundtable Talks could not claim democratic legitimacy, that important amendments consisted of agreements between only a few political parties rather than being grounded in consensual politics involving the entire political spectrum (in particular the pact between the *Alliance of Free Democrats* and the *Hungarian Democratic Forum* in the early 1990s), and finally, because of the explicitly interim status of the amended constitution. Here I argue that this problem can be taken even further, in that not only did an actual consensus-based final text (which could have resulted in a new constitution supported by a wide range of political forces and approved of by citizens through a confirmatory referendum) fail to emerge, but the role of extra-parliamentary forces in the incremental constitutional amendment process was also limited.[69] The revision process indicates a form of restricted pluralism or parliamentary monism (both before and after 2012), where societal forces are unable to initiate constitutional revision.[70] The constitutional text did not explain the relevant institutions, but the Constitutional Court confirmed the parliamentarism of the Hungarian system in the early 1990s by confirming that only parliament has the right to an initiative for revision.[71]

If the 1989 Constitution ultimately failed to provide opportunities for social input, the 2011 Fundamental Law rather exacerbated than ameliorated this shortcoming. The need for consensual constitution-making enshrined in the four-fifths rule on the adoption of a new constitution[72] – which imposed collaboration between government and opposition – was eliminated by the *Fidesz* government by means of an amendment. The actual constitution-writing process was carried out extremely opaquely by people from the *Fidesz* party who are even now not fully identifiable,

[68] A. Arato, *Civil society, Constitution, and Legitimacy* (Lanham, Maryland: Rowman & Littlefield, 2000), p. 40.

[69] Admittedly, one unique institution with potential constitutional implications was that of the *actio popularis*, which allowed individuals and non-governmental organisations and advocacy groups, to petition the Constitutional Court directly. This institution was discontinued in the Fundamental Law.

[70] Arato, *Civil Society, Constitution, and Legitimacy*, speaks of the 'Monopoly of a Purely Parliamentary Revision Rule', 153.

[71] 2/1993 [I.22]; Arato, *Civil Society, Constitution, and Legitimacy*, 153–4.

[72] Art. 24(5) of the 1989 Constitution, introduced in 1995.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

and rushed through Parliament in March and April 2011.[73] At an earlier stage in 2010, a public consultation process had been started, in which the views of the public, NGOs and opposition parties were solicited, but this process did not involve any direct engagement on draft proposals, nor were its results taken into account in the actual drafting in March 2011.

What becomes clear from this brief discussion of alternative democratic forms in terms of civic and social engagement with Hungarian constitutionalism, is that until the Fundamental Law, few consolidated forms of societal engagement and involvement with constitutionalism developed, and that constitution-making and amendment were largely elite matters. No institutional vehicles (such as constitutional deliberative fora), nor a vibrant societal culture of constitutional 'surveillance' or 'constitutional patriotism' developed in the twenty years of political and constitutional transformation.

IV Conclusion

This chapter makes a case for a more comprehensive legal and extra-legal, sociological approach to the problem of deviating democracies or 'systemic deficiencies in the Rule of Law' within the EU.[74] I argue for the need for consideration of 'supporting circumstances' in terms of the 'social and political structures and cultural supports'[75] for institutions of the Rule of Law and constitutionalism. In my view, current proposals, including a 'systemic infringement action' and a 'Reverse Solange' mechanism have too narrow a focus and one-sidedly engage with the legal-formalistic, technical-instrumental side of the Rule of Law and constitutionalism, most tangibly expressed in the proposal for various legal mechanisms and legal and institutional checklists, without engaging in issues of democratic socialisation, value diffusion and reflection, and civic and political engagement and learning. While I realise that widening the relevant field of inquiry regarding the Rule of Law and constitutionalism tends to muddle and complicate the view and brings us further away from clear-cut solutions and modes of interference, this is in a way exactly the intention.

[73] K. L. Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)', 23 (2014) *Transnational Law & Contemporary Problems* 51.
[74] Von Bogdandy and Ioannidis, 'Systemic Deficiency in the Rule of Law'.
[75] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 52.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

In my brief discussion of the case of Hungary, I have proposed widening the analysis by focusing on three *problématiques*: of formal and informal dimensions of the law; of universalist and particularist perceptions of the law and of representative and alternative dimensions of constitutional democracy. In terms of the formal and informal dimensions of the law, it is clear that the Hungarian case displays a lack of *sociological legitimacy* of constitutional democracy as well as a lack of the political classes' commitment to constitutionalism and the Rule of Law. Instead, a high degree of *constitutional and legal instrumentalism* is evident, made evident not least in the propensity to engage in comprehensive constitutional reform. In universalistic versus particularistic terms, it is clear that commitment to the Rule of Law and liberal constitutionalism does not widely extend beyond a rather narrow political and legal elite, while both have been frequently apprehended through a particularist lens – emphasising local traditions – and have been widely instrumentalised. The lack of entrenchment of constitutional democracy can be related to a weakly diffused liberal-democratic tradition and the availability of relative well-established traditions of illiberalism and a related 'legal resentment'. Finally, counter-democratic routes and practices, understood here as important forms of societal counterbalancing and extra-institutional democratic oversight, remain relatively underdeveloped in the Hungarian case.[76]

Returning to the issue of EU democratic oversight and its potential as an antidote for deviant Member States practices, I propose that three areas need more in-depth engagement in both conceptual and practical terms. These areas are related to what Thomas Carothers has indicated as 'type three reforms' in terms of 'changes in the values and attitudes of those in power',[77] but also of citizens and civil society organisations, I would add. In EU democratic oversight, it is important to consider the following dimensions:

1. Regarding the *sociological legitimacy of* and *commitment to the Rule of Law*, how the law and the constitution matter in distinctive cases, by what means, and for whom, needs to be considered and analysed.[78] While proposals for EU democratic oversight predominantly focus

[76] Similar conclusions could be made about Romania.

[77] T. Carothers 'The Rule of Law Revival', 77(2) (1998) *Foreign Affairs* 95.

[78] As suggested by Nicolaïdis and Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda', 50–3, one could develop new methodologies for sociological surveying and the assessment of civic, political and administrative attitudes. A further area of interest

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

on persuading and correcting governments, it is crucial that the civic awareness of legality, constitutionality, and rights is raised. Without significant civic engagement, it is difficult to see how durable social and political attachment to the law and 'constitutional patriotism' could emerge. As one example, the sociological legitimacy of constitutional frameworks is likely to be importantly enhanced by the allowance for consequential public constitutional debate *ex ante* in constitutional revision processes, and the use of constitutional referenda on constitutional revision *ex post*. In general, EU democratic oversight would do well to recommend governments to pursue open, transparent and inclusive legal and constitutional reform processes.

2. Regarding the *interpretative approach* towards the Rule of Law, it is crucial to identify, map and assess distinctive local contextual issues concerning the Rule of Law and democracy. These could include problematic or incomplete forms of social and political integration around constitutions, problematic legal-constitutional legacies and/or the local 'translation' of legal transplants.[79] In the case of the New Member States, such problems should at least be partially understood as parts of complex processes of post-communist transformation. A crucial issue is the incomplete *Vergangenheitsbewältigung* or confrontation with the past in various societies (for instance, regarding the contestation of the nature of the regime change, as in Hungary, or the problematic way past injustice have been dealt with, as in the case of public access to the *Securitate* archives in Romania).[80]
3. Regarding *societal democratic oversight* and *civic empowerment*, enablement, political engagement and participation by a variety of actors needs greater emphasis in democratic oversight. This points to the need for support for and empowerment of distinctive actors, such as local actors, civil society groups and an independent media.[81] Of importance here is the extent to which citizens are able to monitor and publicise the behaviour of political elites, to mobilise resistance to policies and political projects, and to use institutional channels and

could be the promotion of an intra-European dialogue on higher educational curricula regarding the Rule of Law and forms of legitimacy.

[79] It would be crucial to promote the creation of European-wide networks of scholars and professionals, in which national specificities and problems with the Rule of Law can be assessed and debated.

[80] Iancu, 'Post-Accession Constitutionalism with a Human Face'.

[81] Support for intra-European civil society networks and pro-democracy organisations is relevant here.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-12 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 11, 2016 14:23

legal instruments to counter such policies and projects. Particularly in cases in which democratic deviancy is the result of an explicit political programme (and the abuse of a dominant position) by an incumbent government, the socialisation and empowerment of societal counterforces is of great significance. As mentioned above, a crucial area in this respect is the encouragement of civic participation in constitutional reform.

Trim: 228mm × 152mm Top: 11.95mm Gutter: 18.98mm
CUUK3103-13 CUUK3103/Closa & Kochenov ISBN: 978 1 107 10888 2 July 12, 2016 17:23

13

Why Improve EU Oversight of Rule of Law?

The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption

MILADA ANNA VACHUDOVA*

I Introduction

While the focus of this book is on how the EU should monitor and foster the Rule of Law in EU Member States, the purpose of this chapter is to explain when and how the Rule of Law became a centrepiece of EU conditionality in the pre-accession process, and what lessons from this process could help create enduring and effective instruments for the EU to help combat corruption in EU Member States. I argue that EU efforts to safeguard the Rule of Law in all of its Member States should focus equally on defending liberal democratic institutions and on preventing widespread, high-level corruption that can lead to state capture.[1] Concerns about the EU's inability to sanction anti-democratic behaviour have been heightened by the Fidesz party's rule in Hungary, which has severely attacked democratic institutions and used corrupt practices to capture the state and the economy.[2] However, high-level corruption and

* University of North Carolina at Chapel Hill, Department of Political Science.

[1] On the roads to state capture in the post-communist world see: J. Hellman, 'Winners Take All: The Politics of Partial Reform in Post-Communist Transitions', 50(1) (1998) *World Politics* 203; J. Kornai and S. Rose-Ackerman, *Building a Trustworthy State in Post-Socialist Societies* (New York: Palgrave, 2004); V. I. Ganev, *Preying on the State: The Transformation of Bulgaria after 1989* (Ithaca: Cornell University Press, 2007). J. Gould, *The Politics of Privatization: Wealth and Power in Postcommunist Europe* (Boulder, CO: Lynne Rienner Press, 2011); D. Dolenec, *Democratic Institutions and Authoritarian Rule in Southeast Europe* (Colchester: ECPR Press, 2013); A. Kleibrink, *Political Elites and Decentralisation Reforms in Post-Socialist Balkans: Regional Patronage Networks in Serbia and Croatia* (Basingstoke: Palgrave Macmillan, 2015).

[2] On the anti-democratic developments in Hungary, see the chapter by K. L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in this volume.