Europe's New Rogue States, Poland and Hungary: A Narrative and Its Perspectives

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Abstract This analytical essay is a short investigation into the narrative that there are new “rouge states” in Central Eastern Europe (CEE), namely Poland and Hungary. The text discusses the politically relevant backgrounds as well as pros and cons of such an imaginary and the perspectives in the framework of Europe's current critical transition.

Keywords Poland · Hungary · Central Eastern Europe · Europe · European Union · Conservative turn · Crisis · Rule of law · Contextual politics · Global imaginary

1 Introduction

On May 17, 2016 during a campaign stop in New Jersey, Bill Clinton said on behalf of his wife referring to Poland and Hungary: “They want Putin-like leadership: Just give me an authoritarian dictatorship and keep the foreigners out”. In addition, he claimed that “Poland and Hungary, two countries that would not be free but for the United States and the long Cold War, have now decided this democracy is too much trouble” (Moskwa 2016).

Such statements, in the case of Clinton less than diplomatically desirable, given that Poland and Hungary have been some of the closest Central European NATO allies of the US since 1999, fit well with a current political discourse on Central and Eastern Europe (CEE) among Western pundits. For example, like many others Mitchell Orenstein and Daniel Keleman (2016) in their January 2016 *Foreign Affairs* article “Europe's Autocracy Problem: Polish Democracy's Final Days?” already counted the days of Polish democracy and saw the nation in the claws of an autocratic regime headed toward authoritarianism. The editorial of *The New York*

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Times (2016) on March 18, 2016 argued that “[t]his crisis is evidence of [Polish conservative party leader] Mr. [Jarosław] Kaczyński’s illiberal view of democracy—shared with his friend, Prime Minister Viktor Orbán of Hungary—as license for a majority to ride roughshod over any institutional checks and balances, whether internal or inherent in EU membership”.

Whereas critical voices on Hungary and Poland also abound in Europe (e.g., Dawson and Henley 2016; Ágh 2015), the “reverse democratization” perspective seems to take on a particular strong twist with American politicians, journalists, and pundits. In the process, both Hungary and Poland come close to the image of rogue states, a recurring narrative quite popular in the US political discourse since WWII. There is a sizable amount of literature on the role of the rogue states rhetoric in US foreign policy (e.g., Hoyt 2000; Thomas 2002; Homlar 2011). Still, the insight prevails that there is either a serious gap between rhetoric and reality (Caprioli and Trumbore 2005) or that conventional policies such as the sanctioning of rogue states are rarely effective, unless they pose an immediate security threat (O’Sullivan 2000; Lennon and Eiss 2004).

In the following we briefly discuss the role which alleged new rogue states in Central Eastern Europe (CEE), namely Poland and Hungary, seem to play in the current Western political debate. Then we explore two questions: (1) Is the negative twist in the Western political sphere with regard to Warsaw and Budapest justified, and if yes, to which extent? (2) How can the conflicts surrounding the alleged reverse democratization trend be solved cooperatively? To do so, we consider three aspects: essential differences between Poland and Hungary, pathologies of CEE governance that gave birth to the current conservative turn in both countries, and a specific “attention economy” that fuels the rogue state rhetoric. Against this backdrop, we analyze the conflict surrounding the Polish Constitutional Court, in particular the EU dimension of the conflict. We conclude with possible solutions of the problem at hand, which we partially draw from the OECD structural recommendations for the CEE area.

2 Expressions of a Narrative

There have been various expressions of the “new rogue states in Central Eastern Europe” narrative in recent times both directly and indirectly. As always with contextual political factors, they have presented both conscious and subconscious traits (Goodin and Tilly 2006). While presidential candidate Bernie Sanders visited his Polish ancestry in February 2016 being overwhelmingly welcomed after initial suspicion that he wanted to reclaim family property (Smith 2016), the case of US Republican presidential candidate Donald Trump’s “Polish workers” escalated with his party colleague’s Marco Rubio’s suggestion to the public to Google the allegedly thousands of “Polish workers” who the billionaire had hired—in the view of Rubio—on dumping contracts and to whom he later had to pay compensations (Mathis-Lilley 2016; Chmurak 2016).

Ironically more or less in the same timeframe, there was a strong rhetoric about the “Trumpization” of Central and Eastern Europe, suggesting that the current

Polish and Hungarian governments had de facto implemented “the politics of Trump” and were therefore his natural allies or even “soul mates” (Ames 2015), if not the expression of a de facto new “Trumpism” in Europe. Hungary’s and Poland’s prime ministers Viktor Orbán and Beata Szydło were regarded by Western media and opinion-makers as “Europe’s Donald Trumps” (Faiola 2015) as they were allegedly realizing “Europe’s Donald Trump moment” (Krol 2015).

Interestingly, the Polish conservative party PiS (*Prawo i Sprawiedliwość*, Law and Justice) which has governed the country since its victories in the presidential elections of May 2015 and the parliamentary elections of October 2015, was indeed modeled from its very beginning after stripes of the Republican Party of the US, both ideologically and symbolically. For instance, the first general convention of the PiS in 2001, after which the party was officially registered, clearly resembled the iconography and ideological appeal of GOP conventions. This was long before the GOP leadership discovered its relationship as much flirtatious as tumultuous with the Tea Party, Sarah Palin and, eventually, Donald Trump.

The irritation that still followed the “Trumpization” rhetoric in the CEE area was not the first one. Many people in Central Eastern Europe still remember President Barack Obama’s gaffe when during a speech in 2012 he spoke of “the Polish dead camps”, a taboo phrase in Poland since it suggests that Poland was co-responsible for the Holocaust enacted by the Nazis on Polish soil (The Economist 2016). Given the protests, Obama in 2012 apologized—while in 2016 Clinton did not, and Trump seemed not to care, which is his default position.

To further worsen the already ambiguous Western imaginary, at quite the same time there was the return of the seemingly never-ending tug-of-war between the US, Poland, and the EU for extradition of movie director Roman Polanski because of sexual misconduct allegations, a case that started as early as in 1977. The case reached new prominence and high media coverage during May–June 2016, i.e., at the peak of the “rogue state” rhetoric on Central Eastern European states in the Western debate. After the Polish courts rejected to extradite Polanski to the US in October 2015, surprisingly the new controversial Polish attorney general and minister of justice in personal union Zbigniew Ziobro announced to submit his appeal to Poland’s Supreme Court on May 31, 2016 in favor of the US request (BBC 2016a).

In the eyes of some Western observers, the case of Polanski, which by now has acquired a half-mythological undertone throughout Central Eastern Europe, nevertheless continued to provide proverbial Polish Catholicism with a touch of subversion in the Western public perception (Hume 2016). In contrast, Polish critics, both from the left and the right, immediately spoke of a “human sacrifice” by the new conservative government. They missed that Ziobro’s move in favor of the extradition of Polanski meant exactly to contradict the “rogue state” image in the US and to manifest his political goodwill to PiS’ Western critics. By highlighting what could be perceived as new praise for law and order in accordance with the name of the governing Polish party, “Law and Justice”, Ziobro wanted to convey the message that legality is not negotiable for the current conservative Polish government, even 40 years after a crime was committed.

3 Major Controversial Questions

Such controversies in reality reflect two questions around which most contemporary discussions consciously or unconsciously circle:

1. Is the pejorative touch of the current narrative on Poland and Hungary, and more in general on the political development in Central Eastern Europe legitimate?
2. How can the Polish case of an alleged reverse democratization in particular, if confirmed by facts, be solved jointly between the Polish government and the European Union, by in addition pro-actively including the constructive criticism of close partners such as the US? We deal with this crucial question in detail in Sect. 6.

To get to well-thought-out answers to both questions, it is recommended to start with an objective fact check.

First fact is, in January 2016 the European Union started a formal investigation into the rule of law in Poland. It was the first time in EU history that such a probe was introduced against one of its full members. Despite critique of rule of law encroachments in Hungary since 2010 such procedure had never been applied. Poland's "conservative turn" since 2015 entails indeed partially constitutionally problematic changes, which became subject to supervision of the Council of Europe's Venice Commission (not to be confounded with the European Council of the EU) (Radio Poland 2016a).

In the framework of this constellation, the first question of whether the "rogue state" image of Poland and Hungary is justified, seems easier to be answered, in particular when compared to countries with clear authoritarian features including contemporary Russia and Turkey. While a good part of the critique on Poland's and Hungary's political changes is justified, the other part misses the point that controversies belong to the realm of the normal and necessary self-assertion within democratic cultures. Contentious politics is even the quintessence of the West's rational tradition of enlightenment that is indispensable for the life and survival of open societies (Gay 1954; Bristow 2010; Benedikter 2012).

Under such conditions, some criticism assumes caricature-like forms missing the core of the problem. An example of such approach was the open letter to Beata Szydło—the Polish Prime Minister—by the three US. senators John McCain, Benjamin Cardin, and Richard Durbin in February 2016. In it they complained, among other issues, about alleged dangers to the free press in Poland. They did not realize that the controversial reforms by the Polish government did not have anything to do with the free press (Cardin et al. 2016). Instead, these contested reforms focused on state media, particularly state TV, which in most of the Central Eastern European nations has been traditionally a playground for party politics, whereas the press in Poland remains entirely private, internationalized, and free. Since there is no similar state TV in the strict sense in the US as there is in European countries (and given that individual TV outlets in the US espouse very clear partisan

inclinations), the respective power games are hard to understand particularly for parts of the American political and public sphere.

While the forceful interventions of the current Polish PiS government into the program contents and personnel are unusual even for European standards, many democratic countries in Europe, including Spain and Germany, allow for significant political impact on state media (Agence France Press 2012). In this sense, the political ownership of state media in Poland has been a question of degree, rather than of principle. Previous governments in Poland including the PO-PSL government (Civic Platform-Peasants' Party) in 2007–2015 wielded significant power over state media, even though the political control of the state media was less conspicuous.

The issue of the Polish Constitutional Court is both more profound and complex, even for domestic legal experts.

It all started in June 2015 when the former government of PO-PSL passed a new law on the functioning of the Constitutional Court allowing the government to install judges long before the term of the current judges ends. In this way, critics say, the then government wanted to rig the Constitutional Court with their friendly judges. After the PiS came to power in November 2015, the new government and the parliamentary majority changed the law again, by stipulating that the Court will now have to use a two-third majority out of 15 judges in the presence of at least 11 (of them) as well as to address constitutional issues chronologically, rather than based on their relevance. The Court itself rejected these changes as unconstitutional in March 2016 with the argument that they hamper the work of the Court making it dysfunctional. The PiS government, in turn, refused to recognize this rejection by the Court, claiming its ruling was invalid, as based on an illegal personal set-up of the judges, which the very law was about to change.

Both moves led to a stalemate which amounts to an ongoing constitutional crisis generating *de facto* two legal systems in Poland: the one backed by the Constitutional Court—whose personal set-up was largely determined by today's parliamentary opposition—and the other supported by the PiS-government. The PiS government continues to reject some of the rulings of the Court based on the Court's own interpretation of its way of working; and the Court takes for itself the right to decide about its own personal set-up and the decision-making mode. Critics argue that the governing party's PiS' backed changes were designed to paralyze the Court, which has the main task to decide whether laws passed by parliament are in tune with the Polish constitution (Radio Poland 2016b). The representatives of the PiS again claim that the Court itself has become highly politicized, thus not only violating the principle of political independence but also the constitution, as the Court cannot determine its own mode of proceeding. It has to be noted here that in Poland the Constitutional Court and the Supreme Court are two different bodies unlike in the US. Thus, one could argue that Poland's Supreme Court could rule on the controversial issues of the Constitutional Court as a less-biased referee. In any case, with or without such ruling a fast solution is not on the horizon.

4 Do Hungary and Poland Belong to the Same Category?

In contemporary Western analysis, both Hungary and Poland are often discussed together as examples of the same phenomenon, sometimes even in the less than flattering company of Venezuela's populism (cf. Taggart and Kaltwasser 2016). Admittedly, there are certain ideological affinities between the Hungarian governing party Fidesz and the Polish PiS, as the heads of both parties, Viktor Orbán and Jarosław Aleksander Kaczyński, have already met twice since the PiS came to power, i.e., in January and in August 2016.

Still, the case of Hungary is substantially different from Poland's despite some ideological commonalities and the initial focus on constitutional changes, which the Orbán government introduced in the timeframe 2010–2014. Hungary's "conservative turn" under Viktor Orbán was sensibly more populist and authoritarian than the one in Poland since 2015, as the Orbán government had a constitutional majority at its disposal allowing for direct changes in the Hungarian constitution with regard to the Constitutional Court, both public and private media, limitations to the freedom of speech as well as problematic changes in the electoral law favoring large parties such as Orbán's own Fidesz party. Fidesz changed the constitution in many ways, but one of the key new provisions was the "fourth amendment" which seriously limited the independence of the judiciary, put universities under greater governmental control, criminalized homelessness, and weakened human rights guarantees in general (Bugaric 2015: 226).

In addition, Fidesz has closely collaborated with the openly anti-Semitic and neo-fascist *Jobbik* party (Jobbik Magyarországért Mozgalom, i.e., Movement for a Better Hungary) since 2010 (Bankuti et al. 2012; Rupnik 2012). Orbán has not only heavily meddled with the constitution—in contrast to the Polish PiS, which is using ordinary laws for their controversial reforms—, but also openly and actively advocated the term "illiberal state" as positive legitimation for his politics. Orbán's "illiberal state" is interpreted to be modeled after Putin's Russia and Erdogan's Turkey to some extent (Simon 2014).

Moreover, the Hungarian government put pressure on private media owners to influence coverage as a new advertising tax affected private television stations significantly. That is why Hungary scores relatively low in the Press Freedom Index of 2015 as only "party free", while Poland's press remains classified as "free". According to the Freedom House report (2015),

"[in Hungary] [d]efamation remains a criminal offense, and both defamation and related charges—for example, breach of good repute and hooliganism—are regularly brought against journalists and other writers" (Freedom House 2015).

While following the path of extremely populist nationalism, Orbán was able to establish a constellation with a much narrower spectrum of independent media than the PiS in Poland, and to silent critical voices, which in Hungary for a couple of years have seemed to be unable to present different views from the often radical positions of Orbán to a broader public. In 2011, Dániel Papp, co-founder of Jobbik, a Hungarian radical nationalist political party, was installed as editor in chief of television news, and in 2014, he was put in charge of all news content on public media.

The most recent case of Orbán's nationalist populism became apparent in the anti-refugee campaign preparing the popular vote for a referendum on the issue in October 2016, in which the government wants the population to reject any EU plans to redistribute refugees according to EU agreements. Many of the public posters Orbán has distributed across the country are based on crude xenophobic propaganda, plain lies, and half-truths (Petrovski 2016).¹

Still, a similar amount of populist propaganda, largely inaccurate and consciously misleading, was applied by the pro-Brexit campaigners in the UK and British conservative politicians, including David Cameron, who willingly stirred up negative emotions in particular against CEE migrants, especially against Poles living in England. According to official statistics, Poles are the biggest immigrant group both in the UK in general (BBC 2016b) and in Scotland in particular (BBC 2016c). According to their accounts they decided to emigrate into other EU nations due to insufficient life conditions in their homeland even long after Poland joined the European Union on 1 May 2004 (BBC 2016d).

Thus even though the recent anti-immigration propaganda in some European nations has been hostile (leading to numerous violent attacks on Polish citizens in the UK), it does not automatically mean that democracy has been abolished, as populism seems to be a recurrent—if not integral—aspect of mass democracy, rather than a defining feature of authoritarianism. Just to give one example from a consolidated democracy: In the 1999 election campaign to Germany's regional parliament in the *Bundesland* Hessen, the leading CDU (the conservative Christian Democratic Party) politician Roland Koch (supported by other leading CDU/CSU members such as Wolfgang Schäuble and Edmund Stoiber) deliberately used nationalist and populist slogans against double citizenship that were close to the positions of the Right and are used today by the rightist populist AfD (Alternative for Germany). It polarized the public, but Koch won the elections in 1999 and became the Prime Minister of Hessen. Afterwards nobody seriously questioned his democratic legitimacy (Schumacher 2004).

Even if there are clear negative effects of the new constitutional and political changes in Hungary, compared to Belarus and Russia these can also be interpreted as manifestations of a historically notorious power concentration and a certain authoritarian tendency in the CEE area, rather than signals towards a full-blown authoritarian regime, or even of a slide toward authoritarianism of the kind of Turkey under Erdogan after the attempted coup of July 15, 2016.²

Moreover, there are at least two further aspects differentiating Poland from Hungary that stand in the way of an authoritarian slide in Poland. First, Orbán's flirtatious relationship with Putin's Russia can, for different reasons, not be replicated in Poland. Orbán's political collaboration with Putin in August 2016 was demonstratively emulated by Turkish president Erdogan in the same month and partly imitated even by the inexperienced British Brexit government of Theresa May who, in open conflict with the rest of the EU members, offered Putin "better

¹ For the argument on essential differences between Poland and Hungary see Karolewski and Benedikter (2016e).

² For the opposite view see Ágh (2016) and Kornai (2015).

cooperation” and “intensified cooperation between secret services” independent of EU sanctions (Daily Mail 2016) thus contributing to an unexpected geopolitical pincer movement against the EU in the second half of 2016.

Nevertheless, Hungary is bound to remain a key troublemaker when it comes to EU policies toward Moscow (Bai 2015). Orbán’s inspiration of the neo-Russian concept of “sovereign democracy” is obvious, as is his Belarusian style of playing the EU against Russia and vice versa (Krastev 2006). In stark contrast, strong aversion against authoritarian and imperialist Russia has been a constant of Poland’s foreign policy since the 20th century, if not for centuries. Given its deep-reaching historical feeling of being geopolitically threatened by Russia and despite the rather unsound critique of a current “Putinization” of Poland (BBC 2016b), Warsaw will unlikely be drawing its political inspiration from Moscow and will not be leaning toward Russia as an alternative to the EU.

Second, Hungary’s civil society as a consequence of years of Orbán’s grip has become comparatively tame, while the contemporary Polish civil society in comparison is vibrantly constraining the power of the PiS. For example, the Polish political movement KOD (*Komitet Obrony Demokracji*, or Committee for the Defense of Democracy) which has been organizing opposition rallies against the PiS government since December 2015 has been able to gather more than 100,000 protesters on any given Saturday (Felder and Kalverkamp 2016; Karolewski 2016a) and seems not to be out of breath yet after 8 months of nonviolent demonstrations. Poland’s society is in its core socio-culturally anarchistic and traditionally sceptical of any government. This culture functions as a “contextual political” bulk against authoritarian tendencies. If there was any further need of proof for the different standings of the civil society in the two nations, it was Orbán’s latest affront against American-Hungarian investor and billionaire George Soros in June 2016. It was domestically widely undisputed even after innumerable previous insults. Similar to his ally Vladimir Putin, Orbán accused Soros of “intrusion” into “internal Hungarian affairs” because of Soros’ sponsorship of civil society organizations in the nation partly founded by him. Orbán’s accusation: Through his NGO-sponsorship Soros wanted to foster “chaos” in Hungary (Austrian Press Agency 2016a). Such blunt rhetoric was in turn a welcome confirmation for critics considering current CEE leaderships in general anti-democratic, and in essence as representatives of a “rogue mentality”—although Orbán’s statements were not coordinated, and in essence had barely anything to do with Poland, the Czech Republic, Slovakia or other CEE nations.

5 Three Aspects for the Sake of Differentiation

As a consequence, with regard to the narrative of Europe’s “new rogue states” *three* aspects in particular have to be considered.

First, despite certain similarities Poland and Hungary are two different cases, in which not only the degree of “illiberalism” differs in each state and within the sectors of its application in each nation. Also, the international configuration of the Polish and Hungarian rightist governments in 2016 entails radically different

consequences—mainly vis-à-vis the Russian Federation (Budapest Business Journal 2016). While Hungary supports many of Moscow's policies and despite EU sanctions actively lobbies for Russian loans and investments, Poland is heavily arming itself against Russia and is one of the leading NATO and EU members advocating containment policies against Moscow, especially after the annexation of Crimea by Russia in 2014. To contain Russia, Poland advocates stronger NATO presence in all CEE nations, including the Baltic ones, and is considered one of the thriving forces behind US president Obama's new "commitment to Europe" that seems to rebalance his programmatic "pivot to Asia" in the last years of his tenure (Crowley 2016). Often to the dissatisfaction of Germany, France and Italy that would rather strengthen economic ties with Moscow, in September 2016 Poland

"will start recruiting a new 35,000-strong paramilitary defense force because of tensions with Russia" (BBC 2016e),

as Defense Minister Antoni Macierewicz announced on 3 June 2016. As the minister underscored, the

"top positions in the [so-called] *Territorial Defense Force* had already been decided" by June 2016 (BBC 2016f).

Second, while both Hungary and Poland have implemented problematic laws in the past years, any serious investigation has to better explain the middle-ranked historical and structural reasons for them. In particular, the analysis has to explore the underlying socio-economic background of the CEE area since the breakdown of communism in 1989–91. This is not to justify controversial developments, but to place them in a precise socio-economic and socio-political context and thus to explain their roots, rather than emphasize superficial criticism, espoused, for instance, by Bill Clinton as quoted at the beginning of our article.

Specifically, it has to be noted that the "neo-authoritarian" "reforms" enacted by the Orbán and Szydło governments have closely been accompanied by "neo-leftist" redistributive measures since the mid of the 2000s. Their combination was meant as an answer to missed structural reforms after 1991 by previous governments. The overall development has thus to be put into the larger context of notorious CEE governance pathologies, which have never been properly eradicated, and which have been largely ignored by the "rogue states" debate on the origins of the recent development in the CEE area since the transformative process of Poland and Hungary to democracies from the mid 1990s on. What exactly does this network of problems consist in?

In essence, after 25 years of a quite successful transformation to democracy and capitalism, the CEE version of governance still remains pathological in many ways. It shows serious limitations in responding to the social needs of the region's transforming societies. Despite a positive macroeconomic development, both young people and senior citizens in Central Eastern Europe have lived under existential pressure for many years with governments unable—and partly unwilling—to strengthen the national welfare systems and reduce social inequality (Karolewski and Benedikter 2016a, d).

At the same time, numerous Polish governments used state agencies and enterprises for cronyism and politico-economic clientelism after 1989, draining financial resources from the state budget that otherwise could have been invested in higher education, research, health, and pension systems. Foreign capital has not only been unable to mitigate these structural faults and to impact the chronic problem of the mismanagement of public funds, but has also produced its own problems, such as real-estate bubbles and problematic mortgages for small savers. We have recently provided a backbone for a more balanced socio-economic and socio-political analysis of ongoing CEE governance pathologies based on historic considerations with regard to Poland (Karolewski and Benedikter 2016b, c). Our main point is that the “conservative turn” in Hungary and Poland took place mainly due to *structural* reasons, not just because inexperienced CEE societies have been manipulated by populist politicians, movements, and parties as they indeed have.

Third, it has to be considered that some of the international media discourse on Poland and Hungary make part of the global “attention economy” and thus tends to embrace simplification and selective reasoning for transnational audiences fed with dramatic problems which come to the fore in global competition for attention against each other. As a consequence, such media discourse tends to focus on partial or insufficient solutions, which mainly consist of pressure by the EU, and by the community of Western democracies on CEE governments in charge to modify their politics.

However, in the view of more sober and pragmatic international observers this is likely to exacerbate the problems, rather than to solve them. Indeed, two major problems seem to be first the often faulty diagnosis of what constitutes the “deviant” behavior of a rogue state (Wagner et al. 2014); and second, how to deal with that behavior effectively (Henriksen 2012). One of the common mistakes exacerbated by the global “attention economy” is the confusion of the rule of law with democratic standards and the principle of checks and balances which are often lumped into one and the same category by journalists and superficial pundits alike.

In reality, checks and balances are the key feature of a specific type of a democratic regime, mainly to be found in the U.S. The opposite model is the majoritarian regime of the UK, in which the democratic government is vastly centralized, where there is high constitutional flexibility and no judicial review.³ Even more, we can argue that the U.S. specific governance model is an anomaly, rather than a rule among democracies (Taylor et al. 2014), which suggests that using the U.S. model as a benchmark for democracy in other countries might be misleading.

Moreover, also in the U.S. the influential role of the Supreme Court has been critically discussed as problematic and potentially hazardous to democracy, since the Court’s decisions do not have to be inherently democratic. The scholarly discourse on “juristocracy” problematizes the power of judges in democracies (Guarneri and Pederzoli 2002; Hirschl 2004). Guarneri and Pederzoli (2002) stress a new trend of an alleged “politicization of courts” reaching not only into domestic partisan politics but also into (foreign) policies towards other nation-states. This

³ See the seminal work of Lijphart (1999).

trend actually describes a shift from parliamentary sovereignty to the rule by judges and is becoming one of the major challenges to democratic legitimacy (Stone Sweet 2000; Hirschl 2004).

Against this background, the description of any Constitutional Court as the sole defender of democracy might be rather short-sighted.

Furthermore, in the parliamentary forms of governance (other than in the presidential form of governance in the US) the traditional Montesquieu-inspired understanding of separation of power rarely occurs in the political practice. For instance, there is no proper separation of power between the legislative and executive. Rather, there is a fusion of the government (the executive) with the parliamentary majority (the legislative), since any given government is dependent on the parliamentary majority to politically survive. Hence, the actual separation of powers occurs between the government and the parliamentary majority on the one hand and the parliamentary opposition on the other hand (the so-called new separation of powers) where legislative and executive powers of the government and the parliamentary majority are enmeshed, rather than separated (Vibert 2007). Sometimes even the new separation of power is an illusion, as the case of the German grand coalition between the CDU/CSU and SPD (2013–2017) shows, where the opposition controls only around 20 % of the seats in the parliament and has very limited possibilities to control the governmental policies.

We can thus argue that the focus on the purely institutional separation of powers can be misleading. In the more up-to-date analysis other political powers (in addition to the executive, legislative, and judicial powers) would include free and vibrant press and active civil society, which would control both the government and the parliament. Against the backdrop of the role of these new powers the democratic quality of the regimes in CEE should be assessed, thus allowing for a broader perspective on the democratic quality in CEE going beyond simplistic analogies with the US or other countries (cf. Ackerman 2000).

6 How to Overcome the “Rogue State” Narrative By Solving the Problems Behind It?

The *second* question raised: How to overcome the “rogue state” narrative by solving the problems behind it? is much more difficult to answer, but proportionally also far more important.

Besides the pros and cons of the current debate which have all to be taken very seriously, at the end of the day it is the concrete solutions to be found in a forward-thinking manner that count. Only practical solutions for the problems on the ground will have the legitimacy, credibility, and concreteness to decide the fate of the “new European rogue states” rhetoric.

It is a fact that contrary to the one-sidedly confrontational narrative, the European Union and Poland have tried for a while to adopt a more conciliatory and cooperative tone (Gotev 2016)—which has widely been overseen in many commentaries. Against this background, it was hoped that sober perspectives of practical solutions might surface.

However, at the end of March of 2016, an experts' committee headed by Warsaw University professor of law Jan Majchrowski was established when premier Szydło returned the findings of the *Venice Commission* of March 11–12, 2016 to the Polish Parliament and asked it to propose possible solutions to the constitutional crisis. The *Venice Commission* in its March 2016 opinion said that the

“ongoing constitutional crisis in Poland poses a danger to the rule of law, democracy and human rights” (Radio Poland 2016a).

The Majchrowski report was expected to offer a pragmatic solution to the crisis without reverting to more drastic measures such as serious constitutional changes, favored by some parties such as the nationalistic protest party Kukiz'15 (Gazeta Wyborcza 2016; Skowron 2016).

Should such a solution be offered by the Majchrowski Committee, it could be embraced by the government and sufficient parts of the opposition. In this case, the European Commission might decide not to proceed with its rule of law probe which could end with sanctions against Poland. In fact, Jan Majchrowski has dialogued with representatives of the European Commission, mainly Ben Smulders, head of the Frans Timmermans' cabinet who is responsible for the “Polish case” within the European Commission. Also, the head of the governing conservative PiS party parliamentary faction Ryszard Terlecki argued that the recommendations of the Majchrowski Committee will be taken seriously by the government and the PiS (Gazeta Prawna 2016a).

The report of the Majchrowski Committee (Sejm 2016) was turned in on August 1, 2016 raising several controversies. First of all, it was submitted 2 days after a new law amendment on the functioning of the Constitutional Court was signed by the Polish President Andrzej Duda closely associated with the PiS government. The PiS party prepared and submitted its own new version of the law on the Constitutional Court ahead of the announcement of the experts' committee. All these might show a very limited relevance ascribed to the experts' committee by the government and the PiS, even though the experts were mainly supported by the party. While the proponents of the PiS argued that the results of the committee's proceedings were known already in June 2016 and largely influenced the new law amendment, objectively there are certain discrepancies between the new law and the committee recommendations, even though they are not substantial.

For instance, the report criticizes the findings of the Venice Commission arguing that some of its recommendations are based on lacking knowledge of the Polish constitutional order, as they offer some solutions incompatible with the Polish constitutional regime.

At the same time, the experts criticized that the Constitutional Court cannot be turned into the third chamber of the parliament. For instance, it cannot decide on its own mode of proceedings.

On the other hand, the report dealt with some of the main challenges of the controversial law on the Constitutional Court from December 2015, in particular the decision-making majority and the order of issues to be proceeded. While it recommended the majority of 11 judges out of 15 for “relevant” issues, it also allowed less-demanding majorities.

In essence, the new law amendment on the Constitutional Court signed on July 30, 2016 shared the same concept of majority, but kept the chronological order of proceedings and introduced a veto option by at least four judges which would halt the proceedings for 3 months.

For the critics of both the report and the new law neither the PiS government nor president Andrzej Duda supported any serious changes based on the Venice Commission's recommendations, as the goal was likely to induce a paralysis of the Constitutional Court (Sadurski 2016).

The new law has quickly been appealed by the opposition parties and the Polish Ombudsman. The Polish Constitutional Court decided on the new law's constitutional compatibility on August 11, 2016 and declared parts of it unconstitutional. This was again a sophisticated case, in which the Court became (necessarily) self-referential. For the PiS politicians this again according to their view turned out to be a clear proof that the Polish Constitutional Court has become a political body meddling into partisan politics, which would be in itself unconstitutional. For example, the minister of Justice Zbigniew Ziobro as well as the head of the PiS party Jarosław Kaczyński heavily criticized the decision of the Court to decide on the issue and warned that the government would not accept the ruling, as the proceedings of the Court were not based on the existing law (TVN24 2016b). In this sense, the ruling of the Court on August 11, 2016 was described by the PiS government again as a private arrangement of a random group of lawyers. After the ruling of the Court it is likely that again a further new law amendment will be prepared, thus prolonging the series of politico-legal interactions between the government and the Court.

At this point, it seems obvious that despite the fact that many political actors including the Polish government and the European Commission might be interested in solving the constitutional crisis as soon as possible, the stalemate is not over yet. Frans Timmermans visited Poland on May 24, 2016, and met with Polish Prime Minister Szydło but also with the head of the Constitutional Court Andrzej Rzepliński as well as with representatives of the opposition parties. At the same time, the speaker of the European Commission highlighted that the Commission wanted to "continue constructive dialogue and look for solutions" (MacDonald 2016). However, the current developments are less than promising.

7 Alleged Setbacks: A New Inner-European "Cold War"?

Despite some initial optimism, both the European Commission and the Polish government in recent months have not always been at the heights of their cooperativeness. While the Szydło government tried to protract the process of finding a solution, in the recent stage of the negotiation process the European Commission behind closed doors rather suddenly gave a public ultimatum to the Polish government of only a couple of days demanding substantial progress by May 23, 2016, threatening publication of a critical opinion on the "Polish case" by the EU Commission itself (Stankiewicz 2016). The reactions were easy to predict, as the Polish government declared right away that it would not bow to such pressure (EurActive 2016). On May 31 of the same year, Polish Foreign Minister Witold

Waszczykowski declared that Poland might consider taking the European Commission to the European Court of Justice, as the Commission in his view lacks solid legal grounds for the current pressure on Poland, while it is changing its own mandate into a judicial one, which in turn is not backed by the European treaties (Telewizja Republika 2016).

In response, on June 1, 2016, the European Commission published a critical statement on the rule of law in Poland, which blamed the sitting government for the existing “systemic risk to the rule of law” (European Commission 2016b). The report was based on the findings of the EU’s Venice Commission published in March. This statement paves the way for the second stage of the EU procedure in which the Commission would recommend that the Polish government solves “the problems identified within a fixed time limit” (European Commission 2016a).

Interestingly, it was not Hungary but Romania that openly supported the Polish government in its conflict with the European Commission on the Constitutional Court. On June 3, 2016, Romania’s President Klaus Iohannis said that he trusted in Polish democracy, and that the EU institutions should constructively help Poland in the EU, rather than weaken its position (Rzeczpospolita 2016a).

After President Andrzej Duda signed the new law on the Constitutional Court on July 30, 2016 the European Commission made public that the new law does not solve the main problems and challenges to the rule of law in Poland. On July 27 the European Commission formulated a number of recommendations and put a deadline of 3 months, within which the Polish government is expected to deal with the problems. Among others, the Commission has doubts about the blocking minority of four judges and the necessary presence of the prosecutor general, without which the Court could not proceed some of the issues (European Commission 2016b). Also, it recommends the Polish government to accept the judges elected by the previous government while withdrawing the judges elected by the current government. These recommendations equal the second phase of the rule of law procedure. For the Polish government the recommendations are highly problematic, as they heavily intervene into the Polish domestic politics without much legal basis in the treaties. As the Polish Minister of Foreign Affairs Witold Waszczykowski put it on August 2 2016:

“The legislative process is closed in this matter...[The recommendations] result from the internal rules of the European Commission, in which we do not intervene. We believe that they do not refer to member states”. In addition, Waszczykowski argued that the Polish government will not ask the Venice Commission for the second opinion (as recommended by the European Commission), as “the Venice Commission treated us in an extremely one-sided way. It assumed only one narrative and thus was extremely biased.” (InteriaFakty 2016)

8 Timing and Interests Intertwined

Despite such signals for a new, now seemingly inner-European *Cold War* on the East–West axis, with the Polish government in its own view once again forced into its “classical” historic condition of having to self-assert itself both against the East

(Russia) and the West (EU), neither the European Commission nor the Polish government can be interested in a further escalation of the crisis. The Commission knows to act on legally shaky grounds; and the Polish government is losing its influence within the EU with each and every month of the ongoing crisis. This is especially true after the Brexit referendum, as a potential Brexit might structurally weaken all non-Eurozone countries remaining in the EU (Karolewski 2016b).

Still, there remain different perceptions of the time frame needed or useful to get to joint solutions. On the one hand, for the EU and the US timing appears to be crucial. Europe is keen to end this unexpected additional crisis within its much bigger crisis of coherence, self-confidence, and vision as much as possible, in particular after the disastrous Brexit referendum. America seemed interested in pressuring the Polish government to find a solution before the NATO summit in Warsaw on July 8–9, 2016, which would have had a symbolic meaning for the Obama administration in the swansong of its tenure. Both attempts were unsuccessful, even though President Obama critically mentioned the issue of the Constitutional Court in his speech in Warsaw on July 8 (The White House 2016).

On the other hand, the PiS government is likely to be inclined to protract any substantial compromise until December 2016 because then the term of the Presiding Judge of the Polish Constitutional Court Andrzej Rzepliński will end, which in turn might weaken the resolve to self-assertion of the Court itself. Rzepliński has been viewed as the main actor around whom the politico-legal resistance against the PiS government has organized. Even though his role is to be independent, he became one of the most fervent critics of the PiS, associated with open sympathies for the opposition and frequent presence on TV. His media activities made him a key opponent of the PiS, which has blamed the blockade of the Court on Rzepliński's "politics", leading to a further politicization of the constitutional crisis (Rzeczpospolita 2016).

Beyond this stalemate between the PiS government and the President of the Constitutional Court on the one hand and some Court judges and the opposition on the other, there are also some voices by parties from outside of the parliament involved in the overall debate. The Social Democrats (or Post-Communists to be more precise) who missed the election threshold in October 2015 called for an open round table to find a compromise (Gazeta Prawna 2016b). Their interest was to upgrade their visibility in the hope of returning to the parliament in the next elections. There were other motives at play here too, as the round table would also involve parties and politicians from outside the parliament, thus increasing their de facto political role independent of the vote of the electorate.

Moreover, some more radical ideas have also been voiced. For example, the former President of Poland Lech Walesa (and once leader of the *Solidarność* movement), who is the political archenemy of PiS leader Jarosław Kaczyński, suggested that a national referendum should be carried out to remove the PiS from power by shortening the term of both the current President and the parliament (TVN24 2016a). This idea rather belongs in the realm of wishful thinking, but also represents a doubtful trend toward radical political options of how to overcome the current Polish crisis. Walesa participated, together with former Presidents Aleksander Kwasniewski and Bronisław Komorowski in the so-called "Freedom

marches” on 4 June 2016, which were held in many Polish cities in remembrance of the first partially free elections of 1989. The opposition movement KOD had organized them to demonstrate against what it considered the breach of legality by the PiS government (Austrian Press Agency 2016b).

Given the various and complex interests at play, both in Poland and Hungary as well as in the EU, in particular at the intersection between the European parliament and the European Commission, a fast solution seems unlikely. What becomes probable is an ongoing “blame game” (Hood 2011) between different actors, both at the domestic and European level, further weakening the EU, already overshadowed by the Brexit and Turkey taking a slide towards authoritarianism after the failed coup of July 2016.

9 Conclusion and Outlook

Overlooking the events, including the historical and media background of the “rogue states” narrative and its potential perspectives, we claim it desirable for Poland, Hungary, the CEE nations in general, and the EU, but also their closest partner, the US, to overcome the current disputed issues as soon as possible, as they may reveal themselves as side aspects in an applied greater socio-economic approach. Poland and Hungary should concentrate on the practical challenges on the ground to get their nations and the European Union forward by focusing on social and economic improvements in CEE, by strengthening democracy both in CEE and the EU, and to get beyond vanity issues.

As the OECD (*Organization for Economic Co-Operation and Development*) stated on the occasion of Poland’s 20-year celebratory OECD membership (Embassy of the Republic of Poland 2016) in its Economic Survey on the nation in March 2016 (OECD 2016a), “growth is robust, and unemployment has declined.” The OECD recommendations for 2016 onwards besides better development of macroeconomic policies were: “Moving towards higher-technology production would raise living standards. [Recommended is] enhancing employment and access to high-quality jobs, ensuring efficient public infrastructure and better conditions for private investment, further improving education to boost productivity and the ability to adopt innovations and making better use of migrants’ skills” (Ibid). By 2013, the OECD had identified the practical challenges for the improvement of Poland’s governance integration to EU standards in “developing capacity within individual ministries, defining and communicating strategic objectives more clearly, strengthening prioritization, securing that priority policies are identified, and in developing a Polish language glossary of terms” (OECD 2013a). Subsequently it repeatedly recommended that these should be the center of attention of sustained governance improvement to attract more funding (OECD Country Reports Poland 2013–16).

At the same time, the OECD identified Poland’s “Open Government” data transparency in 2015 as still being in a very early phase of development and in need of improvement (OECD 2015a). The diagnosis was that “the Open Government Data agenda in Poland today is mainly driven by legal compliance, rather than by the actual needs of the administration, society or the economy. This leads to a still

relatively wide gap between the ambitions for open government data articulated in strategic national and EU policy documents and the realities in the Polish public administration. The [government] fulfils all legal requirements that are foreseen by national laws, but it falls short of the expectations of potential re-users such as non-government organisations.” As a consequence, the OECD recommended a “more proactive and bold attitude towards Open Government Data in large parts of the administration” (OECD 2015b).

Given these indications, there is no reason why Poland should further follow highly disputed “reform” paths regarding the Constitutional Court and the state media instead of living up to the challenges on the ground identified very concretely in an international perspective. In turn, Poland should get better help by best practice examples and concrete reform contributions not only by bodies like the OECD, but also by the EU, which long neglected the CEE area’s notorious governance pathologies.

Similar views are valid with regard to Hungary. In their annual economic survey on the nation, the OECD for the year 2016 assessed that “strong economic growth has returned, investment has started to pick up, but the low-skilled have weak labour market outcomes” (OECD 2016b). As a consequence, the OECD recommended to resuming inclusive growth and to broaden the recovery by bolstering business investment and enhancing skills to boost growth (Ibid).

In the view of most sober observers, in face of these practical requests which represent concrete opportunities for progress, it makes little sense for anyone in the CEE area to “dispute” the Venice Commission’s verdict on Poland, as Minister Witold Waszczykowski announced on March 10 (TRT World 2016), or to ignore or even fight the EU’s warnings with regard to the development of democracy and the rule of law in the CEE area as a whole, and thus to further engage in a twist that will lead nowhere. At the same time, it makes little sense for the European Union to damage its reputation within the rising global imaginary (Steger 2008; Benedikter 2013) by allowing “rogue state” narratives to expand within the Union and in particular in the framework of the outside views on it (De La Baume 2016).

The dispute—and with it the rogue states narrative—can be settled if political reason in Europe prevails. Poland, Hungary, other CEE countries, and the EU with its founding members should concentrate on jointly reconstructing democracy and the rule of law, increasing governance efficiency and eliminating malpractice by finding compromising solutions. The prerequisite is to strengthen the East–West-axis of the EU, to moderate language and public rhetoric, and to get toward a more balanced tone and cooperative mode, in the ideal case using the constructive “neutral” recommendations of the OECD and other international bodies as pragmatic middle ground.

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