

# Ideas of democracy and the rule of law across time and space: Developments in the EU, Poland and Italy

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Lise Rye

Tomasz Tadeusz Koncewicz

Cristina Fasone

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# Ideas of democracy and the rule of law across time and space: Developments in the EU, Poland and Italy

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Authors: Lise Rye, Tomasz Tadeusz Koncewicz, Cristina Fasone



# Content

1. Introduction .....	5
2. Foundational notions of democracy and the rule of law .....	6
2.1. The Europe of Jean Monnet.....	7
2.2. The priority of law over politics in the Treaty of Rome.....	9
2.3. Empowering the Commission in trade.....	12
3. Understanding Poland: On the regime trajectories, unconsolidated democracy and the rule of law in disarray .....	18
3.1. The legacy of the past.....	18
3.2. A promise of the rule of law post-1989 .....	19
3.3. A reality of the rule of law.....	21
3.3.1. Law: a blunt sword and a punctured shield .....	22
3.3.2. The weight of the past as the key to understand the present .....	22
3.3.3. Responding to the rule of law crisis and framing the debate around ‘the rule of law on the ground’ .....	24
3.3.4. Quo vadis? .....	25
3.4. Poland 2015-2019 and beyond .....	27
3.4.1. Limits of law and institutions .....	27
3.4.2. Meet the new constitutional doctrine: The demise of the post-1989 liberal order and of the constitutional paradigms .....	30
3.5. On regime trajectories: From the Politics of Resentment to a ‘Democracy on the periphery’ ...	33
4. The Italian ‘version’ of the rule of law: the Stato di diritto under pressure.....	34
4.1. The Italian democratic Constitution.....	34
4.2. The Italian notion of Stato di diritto and its domestic and EU challenges.....	38
4.2.1. The medium-term effects of the financial crisis .....	43
4.2.2. The reaction to the migration crisis .....	48
4.3. Lights and shadows.....	56
5. Reflections on the European dimension of democratic backsliding .....	58
6. Conclusion .....	61

## 1. Introduction

The present-day politics of resentment is a backlash against key features of the European Union (EU) which were initially introduced as guarantees against the risk that politics would undermine the law. The architects of the Union's founding treaties of the 1950s designed agreements that prioritized efficiency over popular participation. From their perspective, common institutions with an authority of their own were necessary in order to realize the agreed ambition of common markets. The approach was pragmatic yet still marked by a concern with political legitimacy. The opinion at the time was that the legitimacy of supranational institutions followed from or resided in the Member States' decision to set up common markets. The result was an institutional architecture with conspicuous technocratic and elitist features, of which the European Commission and the European Court of Justice were (and still are) the foremost expressions.<sup>1</sup> Later efforts to strengthen popular participation in European level politics have had a strong focus on the European Parliament's powers and on its relationship with the Commission, but the basis for critique against the role of the Commission and of the activism of the Court of Justice has largely remained valid.

This paper juxtaposes the ideas that informed the EU founding treaties with present-day ideas of democracy and the rule of law in Poland and Italy with the view to deepen our understanding of the nature of EU contestation in these countries. The comparison in time allows us to identify connections between the initial focus on efficiency and today's politics of resentment. The critique against the elitist and technocratic aspects of the EU once thought of as guarantees of the rule of law is a case in point. The analysis gives, however, also reason to suggest that the focus on efficiency that defined the founding treaties established a depoliticized and technocratic culture that also defined the situation in Poland post 1989 and the handling of the Eurozone crisis in Italy post 2009. The paper illustrates how the ideas of supranational institutions have changed across time and space as well as how this mode of thinking, dominated by elites and technocracy, has affected national politics.

The comparison in space between a founding member state (Italy) and a country that formed part of the fifth enlargement (Poland) provides, in turn, a basis for discussion of the consolidating effects of EU membership on democracy and the rule of law in EU Member States. In both Poland and Italy, the politics of resentment feeds on the idea of the EU as a technocratic and elitist enterprise. However, while the politics of resentment in Poland is a backlash against the values of the EU, the Italian case is a backlash against the lack of parliamentary debate and the (alleged) insufficient representation on EU level. In both countries, the politics of resentment is historically and culturally rooted. The transition to liberal democracy in Poland post-1989 was elite-dominated and marked by a marginalization of the public voice. As a result, Poland has failed, in the eyes of many, to develop according to the

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<sup>1</sup> On the relationship between law and politics in shaping the European integration process, see P. Pescatore, *Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, Leiden (Sijthoff) 1972; M. Cappelletti, M. Seccombe & J.H.H. Weiler, *Integration Through Law: European and the American Federal Experience*, in M. Cappelletti, M. Seccombe & J.H.H. Weiler (eds.), *Integration Through Law*, vol. 1, New York (Walter de Gruyter & co) 1986: 3ff.; A. Vauchez, *L'union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Paris (Sciences Po-Les Presses) 2013; L. Azoulai, "Integration through law' and us', *International Journal of Constitutional Law*, 2016, 14(2): 449-463.

canon of Western Europe's constitutional culture, which in turn has enabled the development of a 'democracy on the periphery'. That democracy on the periphery puts forward a new narrative, which competes with the prevailing narrative of liberalism and constitutionalism. It undermines the linearity inherent in the prevailing narrative and critically questions the assumption of irreversibility of democratic consolidation.

The attempt of politics to dominate law is one of the characteristic features of the politics of resentment, and one that has also been apparent in Italy over the last few years. The case study on Italy highlights the country's international commitments and its participation in the EU, which have spurred important reforms that have strengthened the rule of law. While the corruption of the 1990s discredited the political elites and, subsequently, the courts in the eyes of the citizens, key institutions in the country, such as the Constitutional Court, the judiciary and the Head of State, have proved much more resilient and resistant to political pressure than has been the case in Poland. This leads to the conclusion that despite the attempts by politics to dominate law, the final bulwarks of the Italian *Stato di diritto* are safe for the time being.

This introduction is followed by five sections. Section two examines the process that led to the creation of supranational institutions with powers of their own. The third section explores the case of Poland. The fourth section analyses the Italian case. The fifth section offers some general reflections on the consequences of the politics of resentment for the EU, as well as on how the situation may be addressed. Finally, the sixth session concludes the paper.

## 2. Foundational notions of democracy and the rule of law

The 1950s may seem long gone and without obvious relevance for the Union's present-day challenges. Yet, a fuller understanding of the current opinions on EU-level democracy and the rule of law demands that this foundational decade be reconsidered. While the EU institutional architecture has developed considerably since the 1950s through a host of treaty revisions, it still reflects ideas that prevailed at the time and circumstances long since changed. One of the key arguments of this paper is that there is a connection between the focus on efficiency that defined the founding treaties, manifesting itself in elitist and technocratic institutions, and the politics of resentment that has come to the fore, with varying degrees of intensity, in Poland and Italy in recent years. This section examines the process leading up to the 1957 Treaty establishing the European Economic Community (henceforth the Treaty of Rome) with a view to explaining its institutional architecture, the delegation of authority to Community institutions that it entailed and the notions of democracy and rule of law that informed it.<sup>2</sup>

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<sup>2</sup> The creation of the EEC has been the object of comprehensive historical research. See for instance A. S. Milward, *The European Rescue of the Nation-State*, London (Routledge) 1992; W. Loth, *Der Weg nach Europa — Geschichte der europäischen Einigung 1939– 1957*, 3rd edition, Göttingen (Vandenhoeck & Ruprecht) 1996; A. Deighton and A. S. Milward (ed.), *Widening, deepening and acceleration: the European Economic Community, 1957–1963*, Baden-Baden (Nomos Verlag) 1999; M. Trachtenberg, *A Constructed Peace. The Making of the European Settlement 1945-1963*, Princeton (Princeton University Press) 1999 and M—T. Bitsch, *Histoire de la construction européenne de 1945 à nos jours*, 5th edition, Bruxelles (Éditions complexes) 2006.



The section is the result of a historical analysis of primary sources from the CM3/ NEGO series held by the Historical Archives of the European Union (HAEU) in Florence.<sup>3</sup> It offers an evidence-based explanation of why the architects of the Treaty of Rome gave priority to efficiency over citizens' participation, why they decided to authorize the Commission to negotiate trade agreements, and why a proposal to introduce direct elections to the EP was initially dismissed. In so doing, it offers up some revealing insights into the current day problems facing the Union, which will be explored further in the case studies on Poland and Italy.

## 2.1. The Europe of Jean Monnet

The 1951 Treaty of Paris established an institutional architecture that reflected contemporary political, economic and social concerns and the personal experience of key (political) actors. The centerpiece in this new treaty was the High Authority – the mighty predecessor of today's European Commission and the brainchild of French bureaucrat Jean Monnet. The historical literature traces Monnet's insistence on a powerful supranational institution to his positive experience with inter-allied executive committees during the World Wars as well as with economic planning in France after World War II.<sup>4</sup> The existing scholarly research argues that the legacy of the Monnet Plan that led to the creation of the European Coal and Steel Community (ECSC) was to establish the notion of a technocratic approach as well as a corporatist mode of operation.<sup>5</sup> On a more general level, the faith in experts, the elite-orientation and the delegation of authority to supranational institutions that would eventually characterize the ECSC was also a reaction against the mobilization of masses associated with totalitarianism and the more intergovernmental League of Nations, which failed to prevent World War Two.

The 1951 Treaty of Paris represented a victory for the functionalist approach to European integration. Equally, it represented a setback for the competing, constitutional approaches that other European federalists had advocated during the final years of the war. With this treaty, the signatories condoned a type of co-operation that was predominantly pragmatic and technocratic. It was also undemocratic, in the sense that it paid little concern to citizen participation. The Europe that took shape from the beginning of the 1950s was the Europe of Jean Monnet, – the French bureaucrat who inspired the Schuman Plan<sup>6</sup> –, not that of Altiero Spinelli, – his Italian contemporary who conducted a life-long battle for a more democratic Europe.

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<sup>3</sup> CM3/NEGO (short for 'Conseil spécial de ministres CECA – Négociations du traité instituant la CEE et la CEEA') is a collection of documents relating to the Treaty of Rome negotiations. The collection has been compiled by the General Secretariat of the Council. It includes 418 dossiers, and covers the period 1955-57.

<sup>4</sup> On the connection between Monnet's international experience and his viewpoints on European institutions, see J. Gillingham, *European Integration 1950-2003. Superstate or New Market Economy*, Cambridge (Cambridge University Press) 2003: 20-21. For a thorough account of Monnet's international experience during and between the world wars, see F. Dûchene, *Jean Monnet. The First Statesman of Interdependence*, New York (W.W. Norton & Company) 1994.

<sup>5</sup> K. Featherstone, 'Jean Monnet and the 'Democratic Deficit' in the European Union', *Journal of Common Market Studies*, 1994, 32(2): 150.

<sup>6</sup> D. Spierenburg and R. Poidevin, *The History of the High Authority of the European Coal and Steel Community. Supranationality in Operation*. London (Weidenfeld & Nicolson) 1994: 10.

The Treaty of Paris was also, as Anne Boerger-de-Smedt demonstrates in her research, a pragmatic compromise.<sup>7</sup> The Schuman Plan had devised a vague institutional structure, making no mention of either a Council of Ministers or an assembly. Its focus was on the new and supranational body – the High Authority –, while stressing that ‘appropriate measures’ would be provided ‘for means of appeal against the decisions of the Authority’.<sup>8</sup> At the opening of the Paris negotiations, it soon became clear that while the other delegations accepted the supranational institution in principle, they were adamant that political and judicial measures had to be put in place to limit and control its powers.<sup>9</sup> Dirk Spierenburg, the head of the Dutch delegation, later recalled how Monnet, in his capacity as chair, tried to solve the institutional problems beforehand in restricted sessions with the heads of delegation.<sup>10</sup> In a draft treaty presented orally to the other delegations on the second day of the negotiations, Monnet argued the case of the High Authority, but he also introduced the creation of an assembly representing the national parliaments:

*Independent of governments, its members would take decisions by majority voting and be accountable to an assembly representing the parliaments of the member countries. It would have contacts with all interest groups through a series of advisory committees, and it would have its own resources, rather than depending on government subsidies.*<sup>11</sup>

The literature on the ECSC negotiations seems to agree that France was responsible for adding the assembly, which Alan S. Milward argued was a means to ‘blunt the technocratic edge of the Authority’<sup>12</sup>. Anne Boerger-de-Smedt traces the decision back to the critique by socialist politician, André Philip, ‘who had sternly condemned the lack of democratic supervision in the new organisation’.<sup>13</sup> Confronted with concerns from the other delegations, most notably the Benelux countries, Monnet also agreed to demands for a council of ministers and a judicial body that could settle disputes. The Benelux countries wanted not only a certain level of governmental supervision, but also a clear definition of the powers of the High Authority.<sup>14</sup> Along with West Germany, they championed the introduction of a permanent court, however for somewhat different reasons. The Benelux countries argued the case for an international court that would not only review the legality of the High Authority’s decisions but also assess, in its rulings, the economic facts and circumstances in which this authority had acted. Bonn favored a court that could also act as a constitutional court. The result was, Boerger-de-Smedt concludes, a court that defies an easy categorization:

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<sup>7</sup> A. Boerger-de-Smedt, ‘Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome’, *Contemporary European History*, 2012, 21(3), 339-356: 347.

<sup>8</sup> The Schuman Declaration, 9 May 1950. The full text of the declaration is available at [europa.eu](http://europa.eu)

<sup>9</sup> Boerger-de-Smedt, 2012: 342; Alan S. Milward, *The Reconstruction of Western Europe 1945-51*, London (Routledge), 1984: 409.

<sup>10</sup> Spierenburg and Poidevin, 1994: 14. The other heads of delegations were Walter Hallstein (West-Germany), Maximilien Suetens (Belgium), Paolo Emilio Taviani (Italy) and Albert Wehrer (Luxembourg).

<sup>11</sup> Spierenburg and Poidevin 1994: 14-15.

<sup>12</sup> Milward, 1984: 409.

<sup>13</sup> Boerger-de-Smedt, 2012: 341.

<sup>14</sup> Milward, 1984: 409.



*More than an international Court, but not quite a constitutional Court either, it was mainly an administrative Court, empowered to ensure that the HA would act within the powers granted by the Treaty.<sup>15</sup>*

All in all, the architects of the first European community paid little concern to popular participation. The ECSC was designed to protect the peoples of Europe from their tendency to wage war. Five years after World War Two, the established opinion was that peace would best be ensured by a greater emphasis on technocracy. The political legitimacy of the new construction was indirect – borrowed from the democratic member states that chose to participate in it. This approach was not without critics. Altiero Spinelli – a champion of the competing constitutional approach to European integration – was one of them. 'Monnet has the great merit of having built Europe', he reportedly said, 'and the great responsibility to have built it badly'.<sup>16</sup>

## 2.2. The priority of law over politics in the Treaty of Rome

The 1955 decision to move from integration by sector, in two industries, to a general common market triggered a revision of the institutional architecture that had been established with the Treaty of Paris. It was at the Messina Conference in June that year that the foreign ministers of the six ECSC member states had agreed to make the establishment of a common market the objective of economic policy. The decision to pursue European integration in the economic sphere broke the impasse that had occurred the year before, when the French National Assembly rejected the plan for defense integration among the six and thereby closed the door to the accompanying plan for foreign political cooperation. The shift to further economic integration was a way out of the deadlock and a reflection of the fact that the small and highly trade-dependent Benelux-countries had assumed the role as the drivers of European integration.<sup>17</sup>

By 1955, the idea for a European common market had already existed for three years. Motivated by his own country's dependence on exports and inspired by the experience of the Benelux Union (based on a customs union agreement dating back to 1944), Johan Willem Beyen, Dutch Minister of Foreign Affairs, had made two previous attempts to convince the members of the ECSC of the virtues of a general common market. From his own experience as an international banker and businessperson, Beyen also recognized that protectionism was an issue that was difficult to address unilaterally and one that, consequently, required a multilateral approach. French resistance had blocked Beyen's previous advances. This time, he allied with his Belgian colleague, Paul Henri Spaak, who linked Beyen's vision to France's interest in atomic energy cooperation. Together with Joseph Beck, Luxembourg's Minister of Foreign Affairs, they formulated their proposal in a May 1955 memorandum that was presented to the French, German and Italian governments later that same month. At the Messina Conference in June that same year, the ECSC member states adopted a declaration

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<sup>15</sup> Boerger-de-Smedt, 2012: 346.

<sup>16</sup> M. Burgess, *Federalism and European Union*, London (Routledge) 1989: 55-56, cited in Featherstone 1994: 150.

<sup>17</sup> Milward, 1992. On the key role of the Netherlands in the process leading up to the Treaties of Rome, see A. G. Harryvan, *In Pursuit of Influence. The Netherlands' European Policy during the Formative Years of the European Union*, Brussels (P.I.E. Peter Lang) 2009.

identifying the establishment of a common market as one of the ways through which to ensure progress in the uniting of Europe.

The Benelux-countries argued from the outset that the creation of a common market presupposed the establishment of a common institution with its own authority.<sup>18</sup> Eventually, the Messina Declaration identified the study of ‘institutional agencies appropriate for the realization and operating of the common market’ as one of the prerequisites for a common market.<sup>19</sup> The declaration gave no guidance on the authority that would be invested in such agencies. It made no mention of the need for oversight through some kind of democratic apparatus. It merely established that intergovernmental conferences would be convened to draft the relevant treaties and that these conferences would be prepared by an Intergovernmental committee assisted by experts and under the leadership of ‘a political personality’.<sup>20</sup>

That political personality was Spaak, a member of the Belgian Socialist party and a holder of numerous ministerial positions. The intergovernmental committee included, in addition to Spaak, the heads of the six national delegations – four politicians, an ambassador and a university professor.<sup>21</sup> A representative of the British government also attended the committee’s meetings. The Intergovernmental committee held its constituent meeting on 9 July 1955. A steering committee comprising the heads of the national delegations and chaired by Spaak was immediately appointed to initiate, direct, coordinate and regularly monitor the work of the specialized committees. These included a committee on the common market, investments and social problems; a committee on conventional energy sources; a committee on nuclear energy; a committee on transport and public works plus several sub-committees. In accordance with the Messina Declaration, the intergovernmental committee would submit its report by 1 October 1955. The general assumption was that this deadline would be too tight. ‘The date of 1 October will probably come and go’, *Le Figaro* wrote the day after the constituent meeting.<sup>22</sup>

Spaak played an influential role in the process leading to the Treaty of Rome. One of his decisive contributions was the formulation of the principles that supplemented the Messina resolution and formed part of the basis for the work in the specialized committees. By means of these principles, Spaak set the Intergovernmental committee on a track that led it to recommend the establishment of a supranational executive with powers of initiative.

There were four of these principles. The first established that the solving of problems related to the common market could not be dependent on consensual or majoritarian decision-making.

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<sup>18</sup> Mémorandum des pays Benelux aux six pays de la CECA. Undated. Historical Archives of the European Union (HAEU), CM3/NEGO 3.

<sup>19</sup> Résolution adoptée par les Ministres des Affaires étrangères des Etats membres de la CECA, réunis à Messine le 1er et 2 juin 1955. HAEU, CM3/NEGO 6.

<sup>20</sup> Ibid.

<sup>21</sup> The national delegations were led by Ambassador Ophüls (Germany), Baron Snoy (Belgium), Félix Gaillard (France), Ludovico Benvenuti (Italy), Lambert Schaus (Luxembourg) and Professor Verryn Stuart (the Netherlands). P-H. Spaak, *The Continuing Battle. Memoirs of a European 1936-1966*, London (Weidenfeld and Nicolson) 1971: 238.

<sup>22</sup> ‘Conference on European Revival opens today in Brussels’, *Le Figaro*, 10 July 1955.

Such problems included the supervision of application of commitments, compliance with competition rules and the administration of safeguard clauses. The concern with the administration of safeguard clauses must be seen in connection with the position of the French government, which was the one of the Six that was less in favour of trade liberalization than its involvement in the creation of a common market would imply. The French protectionist tradition was strong, and Paris was eager to maintain as many of its protective measures for as long as possible.<sup>23</sup>

Spaak's notes to the heads of delegations give some insight into the reasoning behind the first of his four principles. A consensus-based system of decision-making implied the likelihood of vetoes and the risk that the law would disappear in interstate bargaining. Majoritarian decision-making could, in turn, pave the way for the emergence of interest coalitions. Therefore, Spaak wrote to the heads of delegation in October 1955 arguing that '(...) la création d'un organe doté d'une autorité propre et d'une responsabilité commune apparaît indispensable'.<sup>24</sup>

The second principle established a distinction between economic policy in general and the specific problems related to the functioning of the common market. In so doing, it also paved the way for the European Commission's power of initiative. Pending harmonization of monetary, budgetary and social policies, Spaak explained to the heads of delegation how the distinction between general economic policy and common market-related problems was a necessity. The member states would retain their competences in general economic policy. Given the impact that this policy would have on the common market, a certain level of coordination would nevertheless be required. Consequently, the power to conduct studies and make proposals in economic policy should be conferred upon the common institution.

The third principle stated the need for an appellate and dispute-settling institution. The need for a legal and binding mechanism was accompanied by little discussion, perhaps unsurprisingly, given that a common court with corresponding competences already existed in the ECSC. In the matter of this institution, Spaak merely pointed out that there was a need for a body where appeals against the decisions of the common institution could be addressed and that could settle disputes between the common institution and the member states as well as disputes between member states.

Finally, the fourth principle established that the responsibilities of the common institutions had to be clearly defined. If these principles were recognized, Spaak explained to the heads of delegations in November 1955, the parties would succeed in establishing an institution with decision-making powers in the areas of competition rules and safeguard clauses, and with the power to conduct studies and present proposals in economic policy in general.<sup>25</sup>

A preoccupation with legitimacy accompanied the formulation of these principles. From Spaak's 1955 perspective, a common supranational institution was advantageous not only because it would enable the members of the common market to steer clear of the pitfalls associated with consensus or majoritarian rule. The independent authority that he prescribed

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<sup>23</sup> L. Rye, 'In Quest of Time, Protection and Approval: France and the Claims for Social Harmonization in the European Economic Community, 1955-56', *Journal of European Integration History*, 2002, 8(1), 85-102.

<sup>24</sup> Note to the heads of delegation, 24.10.55. HAEU, CM3/NEGO 41.

<sup>25</sup> Ibid.

would also be in a position to take qualified majority decisions legitimately, as the common market was an area where the members had a shared responsibility, and where they, consequently, did not represent the specific interests of the national governments:

*L'avantage immédiat d'un organisme commun est qu'il peut légitimement statuer à la majorité parce que ses membres ont une responsabilité commune, au lieu d'être les représentants individuels de gouvernements nationaux.*<sup>26</sup>

The heads of the national delegations discussed Spaak's principles on several occasions in the months that followed, but they never altered them.<sup>27</sup>

Spaak further contributed to the successful completion of the Intergovernmental committee's work by insisting on a strict division of labor between politicians and experts that catered to the concern with national sovereignty by making sure that all decisions emanated from the participating states. The point of departure was the Messina declaration. The steering committee developed its directives to the specialized committees on basis of the provisions of this declaration. The specialized committees' mandates were restricted to a discussion of technical issues only. When presenting the committee's work to the foreign ministers of the Six in Nordwijk in September 1955, Spaak explained that by limiting the experts' mandate to technical issues, they would be free to approach these issues without any a priori or doctrinal ideas. Their sole concern would thus be to identify the most effective solutions. The proposals for institutional structures should in turn follow from the experts' technical recommendations:

*Ils ne doivent présenter de propositions en ce qui concerne l'établissement de certaines institutions que dans le cadre des solutions proposées et pour autant que ces solutions l'exigent. Ainsi, les propositions en matière institutionnelle devront-elles apparaître comme une conséquence des propositions techniques, les problèmes étant abordés sans aucun a priori et sans aucune idée doctrinale, mais uniquement avec le souci de l'efficacité à atteindre.*<sup>28</sup>

The experts in the specialized committees were explicitly instructed *not* to present proposals regarding the establishment of common institutions. To the ministers gathering in Nordwijk, Spaak emphasized that more general statements remained in the domain of the national politicians, who had a link to public opinion. He also took care to point out that the political responsibility resided with the director and, eventually, with the ministers.<sup>29</sup>

### 2.3. Empowering the Commission in trade

One of the advances in the 1957 Treaty of Rome was the chapter on a common commercial policy. In contrast to the ECSC, which had no external powers, this chapter, inter alia, delegated

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<sup>26</sup> Ibid.

<sup>27</sup> Document de travail No. 6. Institutions. Comité intergouvernemental créé par la conférence de Messine, Bruxelles, le 8 novembre 1955. HAEU, CM3/NEGO 30.

<sup>28</sup> Projet de Procès-Verbal de la réunion des Ministres des Affaires Etrangères des Etat membres de la CECA, tenue à Nordwijk, le 6 septembre 1955. HAEU, CM3/NEGO 180: 9.

<sup>29</sup> Projet de Procès-Verbal de la réunion des Ministres des Affaires Etrangères des Etat membres de la CECA, tenue à Nordwijk, le 6 septembre 1955. HAEU, CM3/NEGO 180: 10.

authority to negotiate trade agreements from the member states to the European Commission. The decision to authorize the Commission in trade, together with a concurrent decision to postpone the introduction of direct elections to the common assembly, amplified the technocratic and elitist features of European integration.

The Treaty of Rome's Article 113, section three, stated that:

*Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.*<sup>30</sup>

Previous research explains the delegation of authority to the European Commission in the field of trade with two main factors. First, in insulating the policy-making process from domestic pressure, the assumption was that this would enable the promotion of a more liberal international trade order. Second, the expectation was that a single voice in trade policy would facilitate the conclusion of trade agreements with third countries and increase the Community's external influence.<sup>31</sup> The Treaty of Rome was, as Meunier and Nikolaïdis state, 'a revolutionary document' in the field of trade.<sup>32</sup>

To the Treaty's architects, the Commission's authority in trade was a necessary consequence of the decision to move from sectoral to general integration. The intergovernmental committee already by the autumn 1955 took the position that the negotiation of trade agreements had to become a matter for the Community. The committee's starting-point was that the establishment of a common commercial policy followed logically from the decision to create a common market. The cooperation that had been established with the ECSC was deep but, at the same time limited, confined to two industries. The reduced scope of this cooperation had allowed for a certain autonomy on the part of the member states, as trade in coal and steel were only two elements in a more comprehensive balance of payments. With the transition to a general common market, trade policy would become a matter of common concern. A November 1955 working document stated that just as the parties had acknowledged that the Community would have a common external policy, it would also be for the Community to negotiate common trade agreements:

*Quand le marché commun général est fermement établi par la suppression des cloisonnements internes, la politique commerciale est celle de l'ensemble de la Communauté, qui devra négocier des accords commerciaux communs de même qu'on a déjà reconnu qu'elle aurait un tarif douanier commun.*<sup>33</sup>

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<sup>30</sup> Treaty of Rome (1957). Article 113, section 3.

<sup>31</sup> S. Meunier and K. Nikolaïdis, 'Who Speaks for Europe? The Delegation of Trade Authority in the EU', *Journal of Common Market Studies*, 1999, 37(3), 477-501: 480.

<sup>32</sup> Meunier and Nikolaïdis, 1999: 479.

<sup>33</sup> Working document no. 7, 30.11.55. HAEU, CM3/NEGO 31.

The Intergovernmental committee's next move in the process that eventually led to the adoption of Article 113 was to propose a division of labor between intergovernmental and supranational institutions. From February 1956, the committee worked on the assumption that there would be four institutions: a council of ministers, a commission (as an executive), a court of justice and an assembly. Spaak convened the heads of delegation in the middle of this month with the view to discussing procedures, competences and the workings of the different institutions. The point of departure was the tasks that the establishment and operating of the common market required. The list of requirements was long. It included supervision of compliance with the obligations undertaken by the member states; supervision of the companies' compliance with competition rules; the settling of conditions for the maintenance or elimination of subsidies or other measures with equivalent effect, the administration of exceptions and safeguard clauses; the removal of discrimination; the mending of trade distortions and the preparation – to the degree that this would be possible – of legal harmonization and the management of restructuring- and development funds. The negotiating of trade agreements with third countries was not among the items that figured on this list.<sup>34</sup> The division of labor between the institutions that the Intergovernmental committee put forward engendered the empowerment of the Commission in all matters pertaining to the common market. The committee identified the Council as the governments' instrument for general political coordination and the organ for joint governmental decisions. The Council should, as a rule, make decisions based on unanimity. The committee substantiated this position with the argument that a majority of governments constituted no objective entity, only a coalition of interests. Unanimity would be of the essence in matters pertaining to harmonization of legislation, financial balance, employment and stabilization policy. However, decisions in these matters would also have a direct bearing on the workings of the common market. Consequently, the committee argued, to facilitate the functioning of the common market, it would be legitimate to entrust the Commission with the power to submit proposals on these matters to the Council. Occasionally, the common market would also demand a clarification of questions that were rooted in general economic policy but that were too essential to risk their blocking by veto. On such occasions, the parties could deviate from the principle of unanimity.<sup>35</sup>

The committee described the Commission as the organ entrusted with administration of the treaty. Importantly, the committee also identified this institution as the one that should oversee the functioning and development of the common market. In some matters, the Commission would have decision-making authority. These were all matters that could affect the functioning of the common market, including competition rules; subsidies and other dispositions with discriminatory effect and the use of safeguard clauses. The document made no mention of the negotiation of trade agreements.<sup>36</sup>

The Intergovernmental committee submitted its report in April 1956. Spaak later compared this document to the Messina Declaration, pointing out the progress that had been achieved. 'The ideas which had only been outlined vaguely at Messina were this time listed, defined and

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<sup>34</sup> Appendix to document no. 6 on institutions, 13.02.56. HAEU CM3/NEGO 32.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.



explained', Spaak wrote in his memoirs.<sup>37</sup> The report thus put the governments in a position, Spaak pointed out, where they could accurately assess the implications of a policy which they until then had endorsed in principle only. The foreign ministers of the Six adopted the report at their meeting in Venice in May 1956, after less than two hours of discussion.<sup>38</sup> The Intergovernmental conference opened in Brussels the following month with the view to draft two treaties on the basis of the Spaak-committee's report, for the Common Market and Euratom respectively. Two groups were appointed to examine technical questions. Hans von der Groeben, a German diplomat, chaired the group for the common market. A drafting group was also set up, under the direction of Italian ambassador Robert Ducci. Its task was to frame the conclusions of the Spaak report in the form of articles that could serve as a basis of the first version of the treaties. A committee of heads of delegations chaired by Spaak directed the process.

Within the framework of the Intergovernmental conference, the discussion on the authority of the various institutions continued. The fundamental problem was to establish procedures for the decision-making that the implementation of the treaty demanded. From the perspective of the conference, all other problems were subordinate to this. Mechanisms for consultation, representation and management would in any case be introduced in keeping with practice in all complex international organizations. The problem had two dimensions namely the need to know who should take decisions, and the need to know who should control them. On the one hand, the treaty imposed specific obligations on its members. In such matters, it would be for the member-states to ensure implementation. On the other hand, the treaty included objectives that could not be realized by state obligations only. Consequently, the conference established that it would be necessary to charge the community, and more precisely some of the community institutions, with the task to take some decisions.<sup>39</sup> The conference also highlighted a new argument in favor of this position, which was that in a program that would cover many years, it was impossible to include all necessary decisions in the treaty. The countries would have to create common institutions and to confer on these institutions the authority to take the necessary decisions.<sup>40</sup>

As had been the case in the Intergovernmental committee, a key concern was the need to strike the balance between sovereignty and efficiency – between national interests on the one hand, and the demands that followed from the realization of the common market on the other.<sup>41</sup> Pierre Pescatore was the legal adviser to the Luxembourg Foreign Ministry and a member of the drafting group directed by Robert Ducci. He later recalled how the negotiations took place in an atmosphere of urgency and prudence. On the one hand, there was an urgent need to 'regroup in the face of a Soviet threat that was still very real'.<sup>42</sup> On the other hand, there was

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<sup>37</sup> Spaak, 1971: 240.

<sup>38</sup> Ibid.

<sup>39</sup> Note sur le système essentiel à prévoir dans le traité sur le marché commun européen. 11 octobre 1956. HAEU, CM3/NEGO 185

<sup>40</sup> Draft note from the president, 12.10.56. HAEU, CM3/NEGO 185.

<sup>41</sup> Note du Secrétariat. 11.10.56. HAEU, CM3/NEGO 185.

<sup>42</sup> 'Interview with Pierre Pescatore: the international context at the time of the Val Duchesse negotiations (Luxembourg, 10 September 2003)'. Downloaded from cvce.eu at 19 June 2019.

the awareness of limits, following the failure of the European Defence Community (EDC)<sup>43</sup> and the situation in France:

*People had had enough, given the position of the State in France and the failure of the EDC, which had been attempted in a supranational spirit: the word was taboo.*<sup>44</sup>

The question that remained was to establish which institutions should take which decisions. When approaching this question, the conference introduced the concept of ‘matters of essential interest for the member states’, distinguishing between matters of such interest and matters where the realization of treaty objectives was paramount.<sup>45</sup> The first category included decisions that exceeded existing treaty obligations, significant treaty amendments, and matters of economic policy where the member states remained accountable to national parliaments. In such matters, the concern with the most efficient realization of treaty objectives would have to yield to the need to obtain consensus. The second category included issues where concern with the realization of treaty objectives was stronger, and where national interests were less at stake. In such matters, the Council of Ministers could take majority decisions, with the consent of the Commission. A state could thus be overruled, but only if the Commission gave a ‘European guarantee’.<sup>46</sup> Finally, the secretariat envisaged a third category, where the efficient realization of the Common Market was crucial, or where the interests of every member state demanded an avoidance of vetoes or interest coalitions. In such matters, the decision-making authority could reside in the Commission, on condition of prior consulting with the Council.<sup>47</sup>

From the end of November 1956, drafts of what would eventually become Articles 110-116 shuttled back and forth between the working group on the common market and the committee of heads of delegations. In the early drafts, the Commission was entrusted with the power to negotiate customs only.<sup>48</sup> This was still the case in a draft for the chapter on a common commercial policy tabled by the conference secretariat on 3 January 1957. This draft stated that there would be a common commercial policy and that the conclusion of trade agreements should be based on common principles.

A few days later, the Common Market group formulated a new draft for the same chapter. This version included a draft Article 62 (later to become Article 113) that granted the Commission the authority to negotiate agreements pertaining to the common commercial policy:

*En vue de l'élaboration de la politique commerciale commune, la Commission soumet des propositions au Conseil. Les négociations sont conduites par la Commission en consultation avec un Comité désigné par le Conseil pour l'assister dans cette tâche, et dans le cadre des directives que le Conseil peut lui adresser. Les résultats des*

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<sup>43</sup> On the EDC failure, see K. Ruane, *The Rise and Fall of the European Defense Community Anglo-American Relations and the Crisis of European Defense, 1950-55*, Basingstoke (Palgrave Macmillan) 2000.

<sup>44</sup> Pescatore, 2003.

<sup>45</sup> Note du Secrétariat. 11.10.56. HAEU CM3/NEGO 185.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Groupe du Marché commun. 20.11.1056. HAEU, CM3/NEGO 244.

*négociations sont soumis à l'approbation du Conseil, qui statue à la majorité qualifiée.*<sup>49</sup>

The archives consulted for this paper show that the new draft was the result of a meeting in the committee for heads of delegation at the end of December. In this meeting, Von der Groeben, the chair of the Common Market group, asked that Article 62 should go back to his group for a new examination. When re-examining it, the group should take into consideration the situation that would emerge if the member states, at the end of the transition period, had not succeeded in harmonizing their liberalization vis-à-vis third countries. The group should further act in consideration of the fact that negotiations occurring within the framework of the Common Commercial Policy should follow the same procedure as the one provided for in tariff negotiations, on the understanding that this procedure should apply not only in tariff negotiations but in all other negotiations that the member states would conduct after the end of the transition period.<sup>50</sup>

Shortly after the decision to authorize the Commission in trade, the ECSC countries rejected a proposal for direct elections to the common assembly. The proposal was tabled by Italy. When the foreign ministers of the ECSC countries met to settle outstanding issues in January/February 1957, Gaetano Martino reminded his colleagues of the fundamentally political nature of their endeavor. For the purpose of the political unification of Europe, the introduction of direct elections to the common assembly would, he argued, constitute a first step 'dont l'effet psychologique sur l'opinion publique serait certain'.<sup>51</sup> The proposal did not succeed. As the minutes of this meeting makes clear, the other ministers expressed the opinion that this would be premature: '(...) il leur paraît prématuré de prévoir dès à présent l'élection des membres de l'Assemblée au suffrage universel direct (...)'.<sup>52</sup>

Historical research links the decreasing public support for the EU in the early 1990s to the approach that marked the formulation of the founding treaties of the 1950s. It was the legacy of Monnet's technocracy and elitism, the argument goes, to leave the Commission with a relatively weak democratic legitimacy. And, so long as attempts to rectify the democratic deficit concentrated on the relationship between the Council and the European Parliament, an important part of the problem remained. The EU policy-making machinery broke down, John Gillingham writes, 'at the very time that regulations and directives implementing the Single European Act began to register in the lives of ordinary people'.<sup>53</sup> The end of permissive consensus in the EU coincided with the fall of the iron curtain, the dissolution of the Soviet empire and the subsequent claim from Eastern European states for a

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<sup>49</sup> Groupe du Marché Commun. Document de travail concernant la politique commerciale commune. 8 janvier 1957 (p 7), HAEU, CM3/NEGO 244.

<sup>50</sup> Comité des Chefs de délégation. Projet de procès-verbal de la réunion du Comité des Chefs de Délégation tenue à Bruxelles les 19 et 20 décembre 1956. Bruxelles, le 27 décembre. HAEU, CM3/NEGO 119.

<sup>51</sup> Projet de procès-verbal de la conférence des Ministres des Affaires Etrangères des Etats membres de la CECA. Bruxelles, 26, 27, 28 janvier et 4 février 1957. HAEU, CM3/NEGO 96.

<sup>52</sup> Projet de procès-verbal de la conférence des Ministres des Affaires Etrangères des Etats membres de la CECA. Bruxelles, 26, 27, 28 janvier et 4 février 1957. HAEU, CM3/NEGO 96.

<sup>53</sup> Gillingham, 2003:305.

‘return to Europe’. In Poland, to which this paper will now turn, the legitimacy deficit at the EU level spilled over onto the national level, which already had a representation deficit of its own.

### 3. Understanding Poland: On the regime trajectories, unconsolidated democracy and the rule of law in disarray

This section offers a research-based interpretation of what went wrong in the grand narrative of liberalism and democracy that reigned supreme in Poland after 1989 and well into the 2000s. The argument put forward is that in order to understand what is commonly referred to as the rule of law crisis in Poland,<sup>54</sup> one has to go back to, and critically rethink, the processes that defined mainstream politics in Poland after 1989. The novelty of such an approach is that it traces the roots of the current rule of law crisis and the democratic backsliding in Poland back to 1989, and to the imperfect and incomplete democratisation process that followed 1989. In Poland, liberal elites did what the architects of the EU founding treaties had done before them: They focused on legal technocracy and institutional rule of law, while neglecting the civic aspect of democracy-building.<sup>55</sup>

#### 3.1. The legacy of the past

While the 2004 EU accession by new member states from Central and Eastern Europe (henceforth CEE) changed the constitutional matrix in the new member states, it had been conditioned by the events of 1989.<sup>56</sup> The accession must be seen in the historical context of 1989 and the choice made by the people back then. The negotiated transformation that took place in 1989 put emphasis on legal continuity and adaptation rather than on drawing a sharp line between what ‘used to be then’ and ‘what is now’. While some argue that 1989 was a pre-constitutional or quasi constitutional stage, rather than the constitutional moment, this paper argues in favor of 1989 as a constitutional moment, albeit with special region-specific characteristics. This constitutional moment should be seen through the prism of the historical context, memories and national temperament. The combination of these elements was conducive to bringing about a constitutional moment which would never have come about in a different context. 1989 saw massive mobilization of society. Popular mobilization as a result of constitutional moment that creates ‘certain kind of enthusiasm’ which should be retained after the constitutional moment passes<sup>57</sup>.

The Accession was founding for the process that we call ‘clash in constitutional narratives’<sup>58</sup>. It is only with the benefit of hindsight that we are able to discover its full ramifications and scope. The founding moment of 2004 was a challenge to both the West and the East. The West is characterized by the post-national constitution and the exposure of national constitutions to

<sup>54</sup> For a recent example, see T. Konstadinides, *The Rule of Law in the European Union. The Internal Dimension*, London (Hart Publishing) 2017.

<sup>55</sup> B. Puchalska, ‘Polish Democracy in Transition’, *Political Studies*, 2005, 53(4), 816-832.

<sup>56</sup> See T. T. Koncewicz, ‘Understanding Polish pact(ed) (r)evolution(s) of 1989 and the politics of resentment of 2015–2018 and beyond’, *International Journal of Constitutional Law*, 2019, 17(2): 695.

<sup>57</sup> Also consult B. Puchalska, *Limits to Democratic Constitutionalism in Central and Eastern Europe*, London (Routledge), 2011.

<sup>58</sup> In this part we draw on, and develop, T. T. Koncewicz, <https://verfassungsblog.de/2004-eu-accession-as-a-founding-moment-of-lost-opportunities-alienating-constitutionalism-and-vigilant-courts/>.

the external dimension of the constitutionalism. This external dimension goes well beyond local adoption of external European norms (pre-accession conditionality and post-accession regulatory compliance) and spreads to the building of constitutional democracies and constitutional cultures of justification in terms of proportionality, rights and standards. The shift is away from the 'unitary sovereignty' of a nation state to cosmopolitan and plural 'sovereignty in participation'. On the other hand, the *East* settled on the Westphalian constitutionalism with the unitary concept of sovereignty as a model to follow. The regained sovereignty was to be traded easily to another (European) empire<sup>59</sup>.

For the CEE countries, the additional challenge was to reconcile its European aspirations with a strong attachment to self-government and political autonomy. The question was how to create a constitutional culture that would underpin and entrench the change at the level of a constitutional text. With hindsight one might argue that a top-down approach and extreme legalism which excluded popular participation, is one of the reasons for weak popular attachment to constitutional structures, procedures and mechanisms. The constitutional moment and the resultant enthusiasm of 1989 was largely lost by the process that followed. The founding moment was one-dimensional and limited in scope to the sphere of legal constitutionalism as defined by the institutions, technocratic legalese, fundamental rights and the rule of law. A culture of constitutionalism never had a chance to spring from these transformative institutional and systemic changes. The constitutional moment was never translated into 'we the people' and the long-lasting societal mobilization never followed. The ever-present imitation as the price to (re)join Europe soon brought about resentment and an urge for distinctiveness.<sup>60</sup> It was only a question of time when the simmering tensions between two opposing sentiments would come to the surface and redraw the lines of mainstream politics.

### 3.2. A promise of the rule of law post-1989

The rule of law featured prominently in 1989 as one of the organisational paradigms of the reborn Poland. Poles looked at the rule of law as a gentle civilizer of the lawlessness and as a check on the unlimited state power, both hallmarks of communist rule. Yet, given the lack of liberal foundations in this country, the process of absorbing the rule of law standards was anything but straightforward.

The Polish Constitutional Court (henceforth the Court) played a special role in bringing the rule of law standards to the surface and in holding the state authorities accountable. The 30-year old jurisprudence of the Polish Constitutional Court has helped build the Court into one of the most respected Constitutional Courts in Europe and made it a living example of the successful democratic transformation.<sup>61</sup> In the words of Wojciech Shapiro, it has acted prudently and has

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<sup>59</sup> W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford (Oxford University Press) 2012.

<sup>60</sup> On the same subject, see I. Krastev, *After Europe*, Philadelphia (University of Pennsylvania Press) 2017.

<sup>61</sup> L. Garlicki, 'The experience of the Polish Constitutional Court', in W. Sadurski, (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, New York (Kluwer Law International) 2002, 265 - 282.

built credibility and legitimacy incomparably greater than that of other Polish public institutions<sup>62</sup>.

According to Article 2 of the 1997 Polish Constitution, 'Poland is a democratic state ruled by law and realising the principles of social justice'. According to the leading treatise on Polish Constitutional law, the rule of law is essentially equivalent to the sum of the principles of a modern democratic state. Among these principles one can find the separation of powers, the supremacy of the constitution, and the independence of the judiciary.<sup>63</sup> L. Garlicki points out that the formal aspect of the rule of law is linked to Article 7 of the Constitution that mandates that all state authorities are to act within the bounds of the law. Whereas for the citizens, all is allowed unless it is forbidden, for the state authorities allowed is only what has been entrusted to them as their competence. They can only act on the basis of law and within the competences that have been attributed to them.<sup>64</sup> This joint interpretation of Article 2 and 7 has met with the approval of the pre-2015 Polish Constitutional Court. It held that the competence of a state organ must never be presumed. If such a competence cannot be found in a valid legal norm, it does not exist.<sup>65</sup>

This formal aspect of the rule of law has never been questioned and came to be understood as one of the paradigmatic foundations of the Third Republic. What became more controversial was the substantive content of the clause 'state governed by the rule of law'. The period of 1989-1997 is rightly considered as the most activist in the history of the Polish Constitutional Court, as it embarked on giving flesh to a vague and imprecise declaration, while at the same time expressing the new axiology of the state. Faced with the normative silence, the Court accepted that the rule of law is the source of, and foundation for, human rights to be protected. Among those rights were right to a court,<sup>66</sup> right to life,<sup>67</sup> and the right to privacy.<sup>68</sup> Then with the adoption of the long-awaited 1997 Constitution, Article 2 was to serve as the axiological basis for the catalogue of fundamental rights and freedoms guaranteed by the Constitution. The 1997 Constitution incorporated this case law and the Court has accepted that pre-1997 jurisprudence must continue after 1997 and that the rule of law clause will be interpreted in the same way<sup>69</sup>.

Importantly, Article 2 continued to serve after 1997 as the measuring stick for the action by the legislative branch. Several principles of good legislation have been found to be reflected in Article 2. Article 2 thus build legal standards to be respected by the legislative process. The majoritarian Parliament must not act in such a way as to undermine citizens' trust in the state and its laws by arbitrary changes to the legislation or by setting legal traps. The good law must contribute to the legal security felt across the board by all citizens and as such engine their trust in the state<sup>70</sup>. As a result, good legislation must obey a catalogue of legal principles like the

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<sup>62</sup> Ibid.

<sup>63</sup> L. Garlicki, *Polskie prawo konstytucyjne*, (Wydawnictwo Sejmowe), 2009, 58.

<sup>64</sup> Ibid.

<sup>65</sup> Resolution of 10 May 1994, Case W 7/94.

<sup>66</sup> K 8/91

<sup>67</sup> K 26/96

<sup>68</sup> K 21/97

<sup>69</sup> Judgment of 25 November 1997, Case K 26/97.

<sup>70</sup> See for example fundamental judgment of 25 June 2002, case K 45/01.



protection of legitimate expectations, citizen's trust in the state, state loyalty toward citizens, legal certainty, prohibition of *lex retro no agit*,<sup>71</sup> *vacatio legis*,<sup>72</sup> protection of legitimate expectations and vested rights.<sup>73</sup> Article 2 thus acts as a reservoir of procedural limits and constraints on the legislative power and the Court through its powers of judicial review ensures that these will be respected before a legislation becomes good law. The Court went on also to define the requirements for the procedural content of legislation: legal provisions must be clear enough for their addressees to foresee the legal consequences of their actions. Adopting provisions that are ambiguous, contradictory and lead to uncertainty in their application flies in the face of the state governed by law as expressed in Article 2 of the Constitution<sup>74</sup>. Of special importance is the impact of the rule of law on the sources of law and their ordaining. Here the Court was instrumental in spelling out some of the most paradigmatic principles that underpin the legal system of Poland after 1989. Three systemic principles play a special role here. First, the principle of the preponderance of the Constitution ('constitution as the supreme law of the land') and the judicial review exercised by the Court as a necessary procedural safeguard of this principle. Second, the exclusivity of the statute in regulating and defining the status of an individual which is a direct response to prevalent practice under the communist regime where citizens' rights and obligations were left to the discretion of the executive decree. Third, all governmental action must remain executive in character and aimed at implementing statutes.

In this way, the foundations have been laid down.

The true challenge boiled down to translating the principles into the daily life of citizens and making the culture of limitations and self-restraint part of their vocabulary and constitutional culture. It is argued that in this matter, the Polish democratic consolidation fell short and paved the way for the current anti-liberal narratives. This critical omission takes on special importance today, when Polish judges are faced with systemic attacks on their independence. What is often overlooked, though, is that the judges themselves contributed to the almost non-existent social legitimacy of the law and their own profession.

### 3.3. A reality of the rule of law

This analysis argues that making a critical connection between the relatively socially uncontroversial capture of the judiciary by the ruling PIS *and* the painful legacy of the Communism and then the weight of omissions by the judges themselves, is crucial for the understanding of why the capture of the judiciary and hijacking the rule of law have been so successful in Poland. The *promise* opened by the bold and imaginative case law of the Court has never been translated into daily *reality*. The Court might have been very successful in enforcing the institutional and procedural constraints against the executive and the legislative branches of the government, but its case fell way short of making a palpable change in daily life of Polish citizens. It is submitted that this dramatic gap explains the easiness and dexterity with which the ruling party first muzzled and then tore apart the independent judiciary in Poland.

<sup>71</sup> Judgment of 19 November 2008, Case Kp 2/08.

<sup>72</sup> Judgment of 8 April 1998, case K 10/97.

<sup>73</sup> Judgment of 20 December 1999, case K 4/99.

<sup>74</sup> Judgment of 14 September 2001, case SK 11/00.

### 3.3.1. *Law: a blunt sword and a punctured shield*<sup>75</sup>

As much as there has been a dramatic shift today from the law understood as a sword to punish (post-communist heritage), towards the law as a shield (new paradigm dictated by the liberal understanding of the rule of law) that protects individual against the state, this process has not been embraced by the judges in the CEE countries, and in Poland in particular. ‘Law as a sword’ still reigns in CEE courts and the minds of their judges, while ‘the law as a shield’ continues to be seen as an aberration. As a result, one finds dramatic gaps between people’s expectations (new rights, new procedures in the wake of EU law) and the quality of performance by the courts in providing effective and adequate legal protection.<sup>76</sup> Citizens are still in the shadow of the state, and the role of the law is seen in being a tool to punish with the courts providing the state with swift and efficient ‘enforcement services’. ‘Living on the frontier’ is painfully verified by a judge who is not up to the challenge of ‘adjudicating on the frontier’ and embracing the new protective rationale of the judiciary and new judicial functions that come with it. As a result, people are relegated to mere case numbers. The courts do not see people with flesh and blood and are taken by surprise when litigants do claim rights and expect judicial protection and constructive interpretation of the law. Formally speaking everything is correct as judges decide cases according to the law in force, but is justice really done? Not necessarily, because justice (as shocking as it might sound!) does not occupy the central place in the vernacular of the judges. It is still seen as more or less nebulous concept, good for philosophical considerations rather than an objective tool for managing the dispute in the court-room.

### 3.3.2. *The weight of the past as the key to understand the present*

The historical baggage of the CEE courts and judges is burdensome and should inform our discussion. The principle of democratic centralism prevalent in the former communist states stood for a system based on centralized authority, in which the Communist Party held all the power and the obligation of lower bodies to obey the directives of the higher ones.<sup>77</sup> For their part, judges were not immune and were looked at as part of this unitary governmental structure, engaged in furthering the cause of building a classless society. Independence was not part of the communist playbook. The ideal judge was to be a subservient, passive enforcer of a statute, unwilling and unable to glean from the text anything beyond literal interpretation,

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<sup>75</sup> We draw here on arguments first presented in T. T. Koncewicz, *In Judges We Trust? A long overdue Paradigm Shift within the Polish Judiciary, (part I)* at <https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i/> and *part II* at <https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-ii/>. The present section systematises and ordains his arguments about the mental challenges facing the CEE judges and the deficiency in the rule of law application on the ground. Importantly the present analysis develops his argument and claims that it is the lack of a conceptual bridge between a promise and a reality that paved the way for what P. Blocker has called ‘legal resentment’. See his *Populist constitutionalism*, available at <https://verfassungsblog.de/populist-constitutionalism/>.

<sup>76</sup> This discrepancy is at the heart of the argument that was presented over the years in a series of publications on the state of the Polish judiciary. See T. T. Koncewicz, ‘Prawo i niesprawiedliwość’, *Gazeta Wyborcza*, 11 September 2012; ‘Sądzie sądzi’, *Polityka*, no. 50, 12 December 2012; ‘Jaka interpretacja w polskim sądzie’, *Rzeczpospolita*, 8 November 2013; ‘Sędziów polskich trzeba uczyć’, *In Gremio*, 2013, Vol.3; ‘Nie(ludzki) polski sąd’, *In Gremio*, 2013, Vol. 4, and more recently T. T. Koncewicz, ‘Konstytucja w sądach jest dokumentem martwym’, at <http://wyborcza.pl/magazyn/7,124059,22378224,tomasz-koncewicz-konstytucja-w-sadach-jest-dokumentem.html>.

<sup>77</sup> M. Brzeziński, *The Struggle for Constitutionalism in Poland*, Basingstoke (Palgrave Macmillan) 1998, 64.

no matter how unreasonable and unjust results such interpretation yielded. Heavy indoctrination and simplistic vision of the judicial function and legal system simply left no space in which an independent and critical judiciary could have blossomed and matured. Judging was a purely mechanical exercise in syllogism, free of value choices and critical thinking.

The ideology of bound judicial decision-making as developed by the leading Eastern legal theoretician and philosopher of law, Jerzy Wróblewski, has kept CEE judges captives for decades.<sup>78</sup> This ideology rests on textual positivism and formalism and stands for limited law and limited sources of law, with the role of the judges limited to mechanical application of the legal text. The judges reply exclusively on the plain meaning of a statutory text and frame their decisions as the inevitable and the only correct deduction from the text in any case. As a result, CEE judges are perfect examples of judges of the text, and lost in the context in which the text operates. Their interpretation is invariably code-bound which means that the judge's role consists in simply reconstructing the pre-existing standards enacted and changed when necessary by the legislator<sup>79</sup>. The so-called presumption of 'rationality of the legislator' assumed that the legislator can do no wrong and provides ex ante for all possible circumstances in which written law in codes and other legislation will be applied in the future. Should the existing law prove to be insufficient, it was not the business of the judge to override clear textual meaning of the text, but to the legislator to amend it accordingly.

25 years after transformation, the approach marked by a mechanical approach to law and textual positivism continues to be one of the most long-standing legacies of the communism, or as put by Z. Kuhn it 'became an impractical obstacle to legal development and to the proper functioning of the law'.<sup>80</sup> Writing new laws and creating a new environment of the judiciary was only half a success. Judges' minds and hearts appeared impenetrable and old habits were difficult to get rid of. What is striking though is that the younger generation of judges fare no better in this regard. The fear of being creative and critical is omnipresent, while belief in the rationality of the legislator continues to be the main theme. Every attempt by a judge to interpret the statute beyond the text is seen as judicial overreaching and dismissed with scorn as inadmissible judicial imperialism and countered as an interpretation *contra legem*. In this way the true debate of a proper role of a judge in a democratic state governed by the rule of law has no chance of getting off the ground<sup>81</sup>.

The bureaucratic model of the judiciary in the CEE countries sees judges as well-paid civil servants. Whereas in Western Europe, the model evolved towards more independence of the judiciary, in the CEE the trend was the opposite as judges post-1945 were expected to be the vanguard of the socialist change and functioned as part of the unitary state machinery. They

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<sup>78</sup> See the English version of his most famous treatise, *The Judicial Application of Law*, (1991), translated by Zenon Bankowski and Neil MacCormick.

<sup>79</sup> For a detailed exposition of the argument, see Z. Kühn, *The Judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*, Leiden (Brill) 2011, particularly pp. 67-77.

<sup>80</sup> Kühn, 2011: 79. Kühn contrasts the bound judicial decision-making prevalent in the Eastern Europe with the development in the Western Law. His analysis offers good insights into the subject. See, however, also the criticisms raised by J. Komarek in 'The Struggle for Legal Reform after Communism. A review of Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*', LSE Law, Society and Economy Working Papers 10/2014, available at [www.lse.ac.uk/collections/law/wps/WPS2014-10\\_Komarek.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2014-10_Komarek.pdf).

<sup>81</sup> T. T. Koncewicz, 2017.

were to apply ‘the law’ (understood as written sources of law) as it was without even a hint of constructive criticism. What follows is the self-imposed image of a CEE judge who, in the words of one commentator, resembles ‘an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world ...’, who is not used to ‘stand by his opinion and defend them in the public’ which then results in the structural judicial independence, but no mentally independent judges<sup>82</sup>. The working assumption guiding this paper is that major problems faced by the judges in the post-Communist countries stem from their unwavering belief that any case can be decided by relying on textual arguments. As one leading textbook on the subject succinctly put it: ‘the courts (of CEE) try to follow the letter of the law, however problematic and absurd the results may be which this course produces’.<sup>83</sup> The judicial interpretation is seen as a mechanical activity, limited to reciting the provisions of the codes and slavishly following the commands of the legal syllogism. The legal world of an average CEE judge is dominated by Montesquieu, formalism and unflinching faith in the rationality of the law-maker. S/he is a true believer in what Lord Reid ridiculed 40 years ago as a fairy tale. Indeed, for a CEE judge, bad decisions are to be given, when s/he muddle the password, and as a rule simply uttering ‘Sesame open up’ should do the trick. As a result, when a case breaks the mold and calls for more than just textual reconstruction, a judge is awe-stricken and defenseless and turns his/her eyes towards the legislator pleading for ... more text. The legislator acquiesces and enacts new text which is only good until new controversy arises and a judge come knocking on the door yet again.

### *3.3.3. Responding to the rule of law crisis and framing the debate around ‘the rule of law on the ground’*

The lack of judicial philosophy going beyond the mere textual positivism provoke important discussion as to the possible justificatory and argumentative frameworks for Polish judges that would help to bridge the gap between a reality and a promise of the rule of law. This analysis offers a road map that could, arguably, provide a stepping-stone for the much-needed discussion. A few systemic signposts must be mentioned.

First, the right to a court (aspect of an *access*) must be complemented by the right to a good judge (aspect of the *procedural quality* of the right)<sup>84</sup>. Second, we must move beyond independence and impartiality paradigm and towards the aspect of good judging. The latter denotes much more than these two basic features. We need a new ‘turn to judicial virtues’ like discursiveness, openness, rationality, criticism, responsiveness, art of listening, wisdom of deferral, acceptance of my limits as a judge, courage to reject opportunism and pressure to fall in line with judicial mainstream. ‘Just right’ is no longer an option. They make up our right to a good judge today and determine methodology of deciding cases, and yet they are absent from the discourse on the state of CEE judiciary. Thirdly, ‘new public management’ approach to judging puts emphasis on presenting courts as user-friendly institutions with judicial know-how necessary to balance arguments and wielding power of choice within the judicial zone of discretion. Participatory justice underlines that courts can as well claim democratic legitimacy

<sup>82</sup> M. Bobek, ‘The Fortress of judicial independence and the mental transitions of the Central European Judiciaries’, *European Public Law*, 2008, 14(1), 99-123: 9-10.

<sup>83</sup> Kühn, 2011: 201.

<sup>84</sup> See also the terminology in S. Guinchard, (ed.), *Droit processuel*, Paris (Daloz) 2011: 415.

based not on representativeness, but on accessibility and participation. Judicial proceedings need to be transparent, speedy and well-managed, user-friendly, ensuring full and fair participation for all interested (proverbial ‘have one’s day at court’). Fourthly, judicial temperament<sup>85</sup> needs drastic reconsideration. A CEE judge must be ready to make justice and not simply decide cases. Fifthly, moving beyond result-based justice, towards procedural thinking and satisfaction: the correct question is not *why* people go to courts in the first place but rather why people *are ready to go back to courts*? It is to be noted here that this lack of appreciation for the procedural dimension of rights is a more general phenomenon that characterizes ‘the post-communist mind’ to approach procedures from two extremes as either having to be ‘followed to a T’ irrespective of consequences *or* being neglected completely since procedures are said to limit judges’ ‘freedom’ and discretion.<sup>86</sup> Sixthly, there is a need for a move away from formalism and a new understanding of division of powers. Courts should be seen as actors with their own promises and expectations. They are courts of law, not only ‘courts of statutes’. Seventhly, building a culture of justification where what counts is the *power of arguments*, not mere *arguments of power*.<sup>87</sup> Judicial legitimacy is derived from transparency and from weight of arguments and not only from ‘who says’, (dominant approach ‘I, Supreme Court rule hereby ...’) but also ‘how it is said’. Last but not least, constructive interpretation must take place of the reigning infatuation with the literal interpretation. The latter overpowers and incapacitates the CEE judges. Mere attempts to consider the text in the light of the general scheme or the law’s *ratio legis* are treated as inadmissible judicial activism. It is good (constructive, holistic) legal interpretation that builds discursive legitimacy of the courts today. Literal interpretation might end up being an evil and the CEE judges should learn how and where to draw the line.

### 3.3.4. Quo vadis?

If we want to understand, and possibly counteract, the rule of law crisis in Poland, one should be very clear that the promise of the rule of law was never realised in any meaningful way. Consequently, the societal internalisation never followed the systemic changes of 1989. As a result, the entire discussion about the rule of law on the ground must be now reframed and refocused.

This discussion should be centered around, and informed by, *an empowered individual*, who is going to the court in full consciousness of his dignity and rights. The rule of law has a special role to play in making sure that the law will also have a human face and will help build civic fidelity to the law-applying institutions. Crucially, though, there s/he meets a judge, but not any judge but the one who is a ‘good’ one. It is important though to stress that the problem runs much deeper than occasional gaffes by the judges or random decisions making headlines for

<sup>85</sup> Term borrowed from A. Barak, *The Judge in a democracy*, Princeton (Princeton University Press) 2006.

<sup>86</sup> This was already signaled above. For CEE judges there is no middle ground here. For a plea to abandon this procedural misconception see T.T. Koncewicz, ‘Po co ludziom procedury? Powściągnąć nasze ukochanie ‘ułańskiej Somosierry’’, *Gazeta Wyborcza*, 23 August 2014, p. 7. See also M. Brzezinski, 2011. Brzezinski points out that the demise of once powerful Polish state in the XVII century was precipitated among other things by the lack of effective enforcement methods and procedures.

<sup>87</sup> See the powerful plea by E. Łętowska in ‘Transformations in Law Interpretation: Towards a Universal Approach – The Phenomenon, Causes and Symptoms’, in J. Jemielniak and P. Miłkaszewicz, (eds.), *Interpretation of Law in the Global World: From Particularism to a Universal Approach*, New York (Springer) 2010: 39.

all the wrong reasons (formalistic reading of the text with no regard to its consequences and the system). Neither is the source of the problem(s), as suggested by the judges themselves, accurate. Exonerating logic of ‘everyone is guilty but me’ is all we get from the judges on a daily basis. This is not helpful for the image of judiciary. Bad management by the Ministry of Justice of the day, poor infrastructure etc. are all important issues to tackle but they are only part of the problem. Issues facing CEE judges are more existential and systemic in nature. They call for radical actions and new language which would remind the judges the wisdom of an old adage ‘as you sit on trial, you stand on trial’. It is time to accept that with great power comes great responsibility and expectations, that constructive criticism must not be equated with the attack. The courts of today are much more than ‘la bouche qui prononce les paroles de la loi’.<sup>88</sup> They are ambassadors of their legal orders, bearers of ever-growing expectations of those who come to the court, institutions required to act as just mediators of divergent claims. Judges who deny it are liars.<sup>89</sup> Speaking of Polish courts and judges, Professor Ewa Łętowska, first democratically elected Ombudsman and former judge of the Constitutional Court, perfectly captured the challenge(s):

*I do not know how to reform Polish judiciary. I see potential for change in reasonable, calm, decisive, steady, rather than playing-to-the-gallery, building of the authority of courts by courts themselves (...) What is most disturbing in the practice of Polish courts is the acceptance of methodological nihilism and interpretative reductionism together with denying the right to a court on the pretense of allegedly commendable judicial restraint. While judicial restraint is one thing, interpretive deficit is quite the other’.*<sup>90</sup>

The challenge of mental change must be confronted head-on. Otherwise, the slow destruction of the judiciary in Poland accompanied by the civic passivism will continue. In the last four years, the judges themselves has started to understand and feel that the ‘business as usual’ approach and maintaining *status quo* are no longer a tenable alternative. Unfortunately, the majority of the judges still love to keep on lying about their true function and vocation and believe fervently in the myth of ‘la bouche’. In 2019, this debate is at least ten years overdue. The new narratives, plots and characters are desperately needed. The rethinking of the judicial ethos must be centered on the rejection of the excessive formalism, simplistic legal positivism and unshaken belief in the rationality of the legislator and underscore instead the judicial empowerment which flows from the European integration and breaking-down of the legal frontiers. The courts are no longer passive enforcers of whatever the parliaments enact. The judges have their own will and do make value choices within their own sphere of judicial ethos.

We must never forget that at the end of the day, institutions are about people sitting on them, not the other way around. It is worth repeating here after O. Kirchheimer who in his classic

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<sup>88</sup> M. Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa*, (*Summa iniuria. On the formalism vice in the application of law*), (2007).

<sup>89</sup> M. Shapiro, ‘Judges as liars’, *Harvard Journal of Law and Public Policy*, 1994, 17(1), 155-156.

<sup>90</sup> E. Łętowska, *Rzeźbienie państwa prawa. 20 lat później*, Alphen (Wolters Kluwer) 2012, p. 149, 165. This book is a must-read for anyone who takes an interest in what went wrong with Polish courts as well as in how to move forward. See also Dziennik Gazeta, ‘Orzekł jak orzekł a nikomu nic do tego’, *Prawna Prawnik*, 29-31 August 2014.



1961 book *Political Justice* argued that ‘As long as the institution persists, the judicial space’, though it may be reduced, cannot be completely abolished’.<sup>91</sup>

How does it all matter today? The persistent and unapologetic belief in the ‘Open Sesame’ paved the way for the relatively swift and unnoticed capture of the judiciary in Poland. The resentment against the courts have been building up for years and now PIS has used it to bring the judiciary to heel. Instead of much-needed reforms, we got incremental incapacitation of the independent judiciary and enlisting it at the service of the political. What has dramatically changed today, in comparison with the pre-2015 period, is the *context* dominated by the existential threats to the continuing existence of the independent judiciary and the stakes for the judges. Polish judges might not even fully realise that right now they face the most fundamental challenge post-1989. These stake are no less dramatic choice offered by ‘change and do justice or perish’. While the difficult debate (this time going beyond mere structural aspects) on the state of Polish rule of law and never really arrived, 2015 has happened and things were changed forever. The chasms between the *reality* and the unfulfilled *promise* of the rule of law paved the way to what this paper terms the ‘politics of resentment’.

### 3.4. Poland 2015-2019 and beyond

The politics of resentment are felt differently in the main axes of divergence on the European continent between ‘the West’ and ‘the East’<sup>92</sup>. In the former case, EU law and Europeanization provoke well-known criticisms of the remoteness of Brussels with resultant civic indifference, a turn against mainstream politics and a nostalgic return to the nation state. In the homogenous societies of the East, on the other hand the politics of resentment did not have ‘the Other’ to turn against and, as a result, the politics of resentment fed off the phenomenon of ‘alienating constitutionalism’.<sup>93</sup> The latter provided fertile ground for a sweeping politics of resentment understood here as a distinct constitutional doctrine with its own constitutional themes, plots and variables.<sup>94</sup>

#### 3.4.1. Limits of law and institutions

As argued by J. Rupnik, ‘the new elites ... thrived by consolidating the democracy without participation and forming a policy consensus at the expense of politics.’. Civil society’s short-lived constitutional moment was soon replaced by the mundane reality of institutional and economic catching-up. Absence of the social acts and the social passivity favored the transition to market economy. The latter enjoyed the strong social legitimacy of the freedom-starved citizenry, with democracy being reduced to an electoral ritual on the election day with relentless pressure for more in-between the electoral cycles. Democratic rules of the game going beyond the ballot-box were never truly internalized. Again, Rupnik is right when he says

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<sup>91</sup> Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton (Princeton University Press, 1961).

<sup>92</sup> On this matter, see also T. T. Koncewicz, ‘The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux’, *Review of Central and East European Law*, 2018, 43(2).

<sup>93</sup> The term ‘alienating constitutionalism’ is coined by T.T. Koncewicz, and has previously been accounted for on [Verfassungsblog.de](http://Verfassungsblog.de) (Koncewicz, 28.01.2016).

<sup>94</sup> On this concept, see T. T. Koncewicz, ‘Understanding the politics of resentment’ at <https://verfassungsblog.de/understanding-the-politics-of-resentment/>.

that ‘people became used to markets much more readily than they came to embrace democracy.’<sup>95</sup>

As has been argued by Dawson and Hanley, ‘The liberalism of the liberal consensus [...] was an elite project driven by small groups at the apex of politics, business, academia and officialdom [...] this narrow economic, technocratic variant of liberalism merged with existing illiberal narratives and interests which pro-European elites generally opted to accommodate rather than oppose’.<sup>96</sup> As a result of the elitist project, liberal, progressive and rule-of-law-perfect institutions sailed in the sea of illiberal narratives and were only superficially embedded in the public consciousness. Dawson and Hanley got it right when they argued that:

*Despite appearances in East-Central Europe there is an absence of genuinely liberal platforms - by which we mean a range of mainstream ideologies of both the left and right, based on shared commitments to the norms of political equality, individual liberty, civic tolerance, and the rule of law. As a result, citizens were left unexposed to the philosophical rationales behind liberal-democratic institutions.*<sup>97</sup>

Catching-up with the superior European standard was driven by imitation (constitutional, economic, social). However, this one-way movement and ‘take it or leave it’ logic produced at some point fatigue and resentment. We call it ‘resentment threshold’ - a point when emotions override rationality and dictate our choices. Resentment is so strong that even those who in the best of circumstances should be wary of it, feel compelled to follow the call of resentment. Once the urge for distinctiveness is activated after years of imitating politics, a demand side is created and provides fertile ground for those who resent and those who channel the resentment and turn it into politics of resentment. With the distinctiveness comes the opposition against the other, world, elites, in general everyone that is not just like us.

The politics of resentment feed on differences (real or imaginary) as difference is what sets apart from the rest of the world. Its adherents have had enough of the flattening across-the-board narrative. It rejects following others or striving for commonalities. Instead, it builds on identity, on uniqueness, on history and myths that set apart from dangerous others. Difference (diversity) is important as well, but it is not constructed as an obstacle to internal consensus-building. This is a crucial point of discord between the resisters and others. Their claim to diversity does not imply accommodating the other, but rather becomes weaponised and turns into an antagonistic and identity-building tool. It is no longer ‘us distinct and diversified’ and ‘them’ with both parties willing to seek accommodation and common ground. Rather it is ‘our differences and diversity’ against ‘them’. This is a democracy of rejection.

When the liberal institutions finally came against the illiberal narratives, they fell like a house of cards and the accession proved to be no obstacle.<sup>98</sup> The limits of law were painfully

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<sup>95</sup> All quotations are from J. Rupnik, ‘From democracy fatigue to populist backlash’, *Journal of Democracy*, 2007, 18(4), 17-25.

<sup>96</sup> J. Dawson and S. Hanley, ‘The Fading Mirage of the ‘Liberal Consensus’’, *Journal of Democracy*, 2016, 27(1), 20-34: 21.

<sup>97</sup> Ibid.

<sup>98</sup> H. Grabbe, ‘Six Lessons of Enlargement Ten Years On: The EU’S Transformative Power in Retrospect and Prospect’, *Journal of Common Market Studies* (2014) 52(S1), 40-56: 46.

exposed.<sup>99</sup> With the dismantling of the Polish Constitutional Court (and earlier court-packing in Hungary and Romania),<sup>100</sup> civil society in Poland is suddenly being asked, and expected, to rise up in arms and show its more engaged face. However, the name of the game is not engagement, but cynicism: ‘As long as the economy is fine, why should we care for the Constitutional Court’. The Polish example is reflective of the dramatic disconnect between the people and the elites<sup>101</sup>. As much as the liberal elites are appalled by the ruthlessness of the attack on the Court and Polish rule of law, they are the ones to be blamed for a civic passivity that continues to define post-transition societies in general.

The truly reformatory potential of the 1989 democratic revolution, and then Poland’s accession to the EU in 2004, was lost when the elites neglected the importance of connecting with the ‘real’ people beyond the magic of these big-bang moments of 1989 and 2004. The recurring question expressing this popular sentiment of disengagement asks: ‘Why should we die for ‘their’ (our emphasis) constitutional court?’. This ‘alienating constitutionalism’ is one of the dark sides of 2004. Poland was a disaster waiting to happen, with institutions enjoying very weak popular support and no understanding as to why and how these institutions matter for an average citizen. When portrayed as corrupt and alien, no counter-narrative was available to debunk this one-sided vision, nor was there any citizen-driven defense of institutions. Weak and disengaged citizenry simply did not care and let the right-wing government act without question in the name of allegedly curing a rotten system. For most people the system built from the top was not good enough to fight for and, as a result, people were ready to listen to a resentment-driven narrative and to experiment. The process of capturing the state with the avowed objective of winning back the true state for the people was met with acceptance as democratic and liberal consensus proved to be extremely weak and fragile<sup>102</sup>. The chasm between a bold promise and a mundane reality of the rule of law (analysis *supra*) becomes evident.

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<sup>99</sup> B. Bugarcic, ‘A crisis of constitutional democracy in post-Communist Europe: ‘Lands in-between’ democracy and authoritarianism’, *International Journal of Constitutional Law*, 2015,13(1), 219-245: 219, and also his *Populist at the gates* (manuscript on file with the authors). See also I. T. Berend, ‘What is Central and Eastern Europe?’, *European Journal of Social Theory*, 2005, 8(4), 401-416.

<sup>100</sup> A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Oxford/Portland (Hart Publishing, Oxford/Portland) 2015; M. Bankuti, G. Halmai, K. L. Scheppele, ‘Hungary’s Illiberal Turn: Disabling the Constitution’, *Journal of Democracy*, 2012, 23(3), 138-146; I. Pogany, *The Crisis of Democracy in East Central Europe: The ‘New Constitutionalism’ in Europe*, 2013, 19(2),341-367.

<sup>101</sup> On this disconnect, see also L. Koczanowicz, ‘The Polish Case’, *New Left Review*, 2016, (102), 77-96: 79.

<sup>102</sup> For an in-depth analysis, see L. Koczanowicz, 2016.

### 3.4.2. Meet the new constitutional doctrine: The demise of the post-1989 liberal order and of the constitutional paradigms

The Polish case shows that there is a trajectory and interdependence between resentment,<sup>103</sup> populism, and the politics of resentment.<sup>104</sup> While resentment fuels populism, the politics of resentment translate populism into a constitutional doctrine. While populism uses the resentment as a rhetoric and might even (begrudgingly) tolerate the system, the transformation of resentment into a mode of governance doctrine signals a break from a passive acceptance of the *status quo* and turns into revolutionary mode. Crucially, we are observing a process of transitioning from ‘resentment’ as a vague emotion of rejection and critique of the unsatisfactory liberal *status quo* to the more formalized and institutionalized ‘politics of resentment’. It is crucial because with such transitioning resentment becomes anchored within mainstream politics and is articulated in the public sphere. Just like Nietzsche’s *ressentiment* was crucial in the slaves’ revolt against their masters, resentment today needs a constitutional code of morality and legality, a constitutional channel to give voice to the emotion and to turn into a constitutional and political variable. The resentment alone is an emotion in need of a constitutional doctrine,<sup>105</sup> the politics of resentment adds this crucial dimension of translation: a constitutional doctrine that competes with the dominant liberal constitutionalism and delivers on the promise of populist and emotion-driven narratives.

The present analysis adds to our understanding of the politics of resentment by framing it in terms of a constitutional doctrine. It is no longer emotion-driven politics about principles, rules and commandments. The new doctrine goes beyond constitutional bad faith.<sup>106</sup> It adopts a relentless abuse of constitutional arrangements and engages in a rampant legal instrumentalism. The law becomes one of many instruments left at the disposal of the political. It has no fixed meaning. Rather it changes in response to the demands of the politics. What truly differentiates the politics of resentment from mere contestation and dissatisfaction with the *status quo* is the *constitutional break* with hitherto prevalent constitutional principles and wholesale rejection of the existing constitutional order. The doctrine does not stop at the rejection, though. It advocates total *capture* of the old and allegedly corrupt institutions, and in their place brings to life a new institutional order. The constitutional capture connotes a systemic weakening of checks and balances and the entrenchment of power by making future

<sup>103</sup> For the analysis of resentment as an emotion, consult among others M. Ure, ‘Resentment/Ressentiment’, *Constellations* (2015) 22(4): 509; Y. Oudai Celso, *Nietzsche: The ‘First Psychologist’ and Genealogist of Ressentiment*, in D. Martin Moruno and J. Moscoso, (eds.), *On Resentment: Past and Present*, Cambridge (Cambridge Scholars’ Publishing) 2013, 37-54. D. Fassin, ‘On Resentment and Ressentiment. The Politics and Ethics of Moral Emotions’, *Current Anthropology*, 2013, 54(3): 249.

<sup>104</sup> We acknowledge that this inter-relational aspect is the most challenging aspect from a conceptual perspective. As such, it still calls for more in-depth analysis.

<sup>105</sup> T. T. Koncewicz and L. Strother, ‘The Role of Citizen Emotions in Constitutional Backsliding – Mapping Out Frontiers of New Research’ at <https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/> and the literature cited therein.

<sup>106</sup> While the contours of the doctrine clearly come into full view now, its final shape is still work in progress. The reconstruction of the politics of resentment in terms of the constitutional doctrine is based on T. T. Koncewicz, ‘Ten Anti-constitutional commandments’, at <https://verfassungsblog.de/10-anti-constitutional-commandments/> For the analysis in Polish, consult T. T. Koncewicz and J. Zajądło, ‘Po co PiS-owi konstytucja? Po nic. Woli państwo bez prawdziwej Konstytucji’ at <https://oko.press/koncewicz-zajadlo-po-co-pis-owi-konstytucja-po-nic-woli-panstwo-bez-prawdziwej-konstytucji/>.

changes to control difficult. Constitutional capture has an inherent spill-over effect, and as such, seemingly isolated constitutional captures in Poland and elsewhere risks the potential of adverse consequences throughout the entire continent. It travels in time and space, and just like the politics of resentment, it has its own trajectory. Most importantly it needs its own justificatory framework and tool-kit.

The politics of resentment as an emerging constitutional doctrine in Poland would tentatively include the following elements.<sup>107</sup> A constitution is no longer understood as a higher law of universal principles. Rather it is yet another instrument to protect the existence and uniqueness of the state. A constitution becomes an outlet for political expressions of the rules adopted by the majority of the day. While liberal constitutions put premium on the conflict management, inclusion, evolutionary (incremental) change that would be both open to diversity, and accommodate it as a social and normative fact, a trust that is built over time among different components of the polity, a constitution of fear thrives on dis-engagement and distrust and revolutionary tradition that builds on the avowed objective of clean slate and starting from zero and the drive to settle fundamental questions once and for all. A constitution petrifies the partisan vision and credo of the powers that be, right here, right now. As such, a constitution is an extension of the ever-present legal instrumentalism and drive to settle the score for the past wrongs, exclude the traitors, bring to light their misdeeds and vindicate the long-suppressed vision of the Polish nation and state. A constitution is a political manifesto of power, not a safeguard against the arbitrary power. A constitution of fear is given a new place and role to play. From protecting an individual against the state to repositioning an individual against a community.<sup>108</sup>

The law has no independent standing: It is understood as the outcome of political action, used and abused for achieving whatever objectives the current majority wants to pursue. The law becomes a blunt political instrument. It no longer tames politics, rather it serves the political. For populists, liberal constitutions with their openness and inclusion are unnecessary inventions of elitist minorities that only distort the communication between the representatives of the people and the people themselves. As such it must be remodelled and harnessed so as to enable and protect the decision making that at long last reflects the purified rule of the people. With this, one of the post-1945 paradigms according to which ‘politics must adapt to laws, not the law to politics’ (*‘Politia legibus, non leges politiae adaptandae’*) becomes obsolete.<sup>109</sup>

The judicial review of the great achievements of 1989 (r)evolution(s) is discarded with dramatic consequences.<sup>110</sup> A constitutional court’s role as one of the linchpins of a new liberal

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<sup>107</sup> For a fuller account, see T. T. Koncewicz, ‘Ten Anti-constitutional commandments’, at <https://verfassungsblog.de/10-anti-constitutional-commandments/>.

<sup>108</sup> Consult also F. Schauer, ‘The Constitution of Fear’, *Constitutional Commentary*, 1995, 12(2), 203-206. On the conceptualization of a constitution of fear, see the analysis at <https://verfassungsblog.de/a-constitution-of-fear/>.

<sup>109</sup> In this context compare T. T. Koncewicz, ‘The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?’ at <https://verfassungsblog.de/the-democratic-backsliding-and-the-european-constitutional-design-in-error-when-how-meets-why/>.

<sup>110</sup> This helps us understand why the Polish Constitutional Court was the first institution to fall, and that it never had a chance. Yet, while remembering the fallen institution and thinking about the possible recapture of the rule of law, one must never forget one thing: While the Court might have been but one element in laying down the

democratic order is transformed from a counter-majoritarian institution to an ally of the majority and a government enabler. One of the truths of ‘new constitutionalism’ has it that ‘it is the will of the people, not the law that counts’. When the law does not serve the interests of the people, it is always the latter that will prevail. Politics dominate the law, with the latter harnessed to serve the former and ‘the people’ is being treated as a legal subject in its own right and with its own voice. It is the mono-ethic and mono-cultural purified people first, collectivity rather than individualism. Such understanding leads to important tweak to the established narrative: institutions that have been channeling (for populists distorting) the rule of law must be dealt with as expeditiously as possible. It is beyond clear then why independent Polish Constitutional Court never had a chance and its destruction was first on the to-do list of the polish authoritarians.

What is then the place of the rule of law in all this? The Polish constitutional crisis provides an unfortunate example of how the European consensus built around the rule of law is being eroded from within.<sup>111</sup> The rule of law no longer frames the decision-making process, *but rather*, it facilitates the expression of the will of the people (or their representatives). Rule of law is seen as an obstacle in protecting the collectivity and the common good. First, the Polish government has been insisting that the rule of law should be interpreted differently from what was hitherto accepted. Second, there is no agreement on what the rule of law entails in practice (application). Those two new elements transform the rule of law - one of the paradigms of the post 1989 transition. This argument brings to mind what Cass Sunstein called ‘incompletely theorized arguments’.<sup>112</sup> He has argued that under the conditions of serious disagreements, constitution-making can only become possible if people agree on certain practices rather than on abstract principles or grounds justifying these practices. Alternatively, incompletely theorized agreements might as well obtain when people agree on abstract principles, but not necessarily on what these principles entail in practice. Poland has been steadily moving away from *the rule of law* and embracing instead *the rule by law of the majority*. Mere legality of the majority suffices to legitimise the law. The holistic analysis of all the elements of the new doctrine<sup>113</sup> allows us to reconstruct a new constitutional design centred around the resentful counter-constitution that redraws constitutional boundaries by sheer politics of force.<sup>114</sup> The

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foundations for a new doctrine (the politics of resentment), its capture was the *sine qua non* condition for ensuring the long lasting success in the paradigmatic shift in the constitutional narrative in Poland. On this matter, see T. T. Konciewicz, ‘Of institutions, democracy, constitutional self-defense and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond’, *Common Market Law Review*, 2016, 53:6, 1753-1792.

<sup>111</sup> On the rule of law, see D. Kochenov and C. Closa, (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge (Cambridge University Press) 2016.

<sup>112</sup> C. R. Sunstein, *Designing democracy: What constitutions do*, Oxford (Oxford University Press) 2001, at pp. 50-56.

<sup>113</sup> T. T. Konciewicz, *10 anti-constitutional commandments*, op.cit.

<sup>114</sup> For a comparative analysis of similar processes and dynamics, consult D. Landau, ‘Abusive Constitutionalism’ FSU College of Law, Public Law Research Paper No. 646, 2013; O. Varol, ‘Stealth authoritarianism’, *Iowa Law Review* 1673, 2015; M. Tushnet, ‘Authoritarian Constitutionalism’, *Cornell Law Review* 391, 2015. For the United States’ flirt with creeping authoritarianism, see C. Sunstein, (ed.) *Can It Happen Here? Authoritarianism in America*, New York (HarperCollins) 2018; A. Huq and T. Ginsburg, ‘How to Lose a Constitutional Democracy’, *UCLA Law Review*, Vol. 65, (forthcoming) and the shorter version ‘How We Lost Constitutional Democracy’ in Sunstein, 2018, 135-156; T. Daly, Enough Complacency: Fighting Democratic Decay’, at



force creates the facts on the ground and does not pay much attention to the constitutional constraints.<sup>115</sup> The qualification ‘counter’ emphasises that this new constitutional setting is built in direct opposition to the liberal understanding(s) that prevailed post-1989 and inspired the drafters of the Polish 1997 Constitution.<sup>116</sup>

### 3.5. On regime trajectories: From the Politics of Resentment to a ‘Democracy on the periphery’

The politics of resentment and the peripheral democracy remain in a symbiotic relationship. Crucially though, the former must be looked at as a constitutional doctrine on the rise, not mere emotional politics of identity.

‘Democracy on the periphery’ is a novel term.<sup>117</sup> It responds to, and crowns, the politics of resentment as a constitutional doctrine driven by out-right rejection of the status quo and the mainstream constitutional narrative. It looks to the ‘politics of resentment-doctrine’ for guidelines and contours for a new constitutional design. The politics of resentment is inherently revolutionary in that it attempts to institutionalise and entrench a political revolution. The element of periphery not only adds important insights into understanding how democratic regimes are captured, but also enables the very capture. Periphery is an enabling and explicatory for the capture. As such ‘democracy on the periphery’ is an important rupture in the hitherto dominant narrative of the three-step linearity of democratic transition (democratization), liberalization, and democratic consolidation (Europeanisation), with each step determining the next one. The linearity is predicated on the assumption that once you go on to another stage, there is no coming back. You can only progress, never regress. At the same time, though, the retrogression itself is not a one-dimensional phenomenon. Rather it is a result of convergence of various factors: institutional, societal, economic and, last but not least historical. The democracy on the periphery puts forward a new narrative that competes with the prevailing narrative of liberalism and constitutionalism. It undermines this linearity and questions critically the assumption of irreversibility of democratic consolidation.

The ascent of a peripheral democracy as both the new state regime and constitutional narrative, marks the end of the post-1989 politics of transformation as the paradigms of peripheral democracy are deviating from the constitutional democracy that reigned in the post-1989 world. The paradigm of Europeanization no longer serves as an effective deterrent against illiberal tendencies. The consolidation through Europeanization works best with the would-be candidates who are expected to share the commitment to the same values (value-community perspective) and exhibit readiness to be part of a viable internal market (market-effectiveness perspective). Once in the club, pressure to stay up to the task is gone, and the ugly face of unfinished transformation comes to the fore. The Peripheral democracy represents a new

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<http://www.i-connectblog.com/2017/01/enough-complacency-fighting-democratic-decay-in-2017-i-connect-column/>.

<sup>115</sup> K. L. Scheppele in P. Blokker and Ch. Thornhill, (eds.), *Sociological constitutionalism*, Cambridge (Cambridge University Press) 2018.

<sup>116</sup> M. Brzezinski, *The Struggle for Constitutionalism in Poland*, op.cit.

<sup>117</sup> This section draws on, and adds to, the analysis presented in T. T. Konciewicz, ‘The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux’, *Review of Central and East European Law*, 2018. 43(2).

incarnation of democracy. It is based on five major claims and themes:<sup>118</sup> (1) that transformation was not only politically, but also morally flawed; (2) that the system as conceived in 1989 with the overarching rationale of rule of law served only the few, while leaving behind the many and, interconnected; (3) that the institutional design favored the powerful ('Wall street') while disadvantaging the 'Main Street'; (4) the dominance of the political over the legal, and finally and crucially; (5) that a new system of governance and a novel constitutional design is needed, thus the concept of capture of the 'bad' state in order to create a new one with the constitution of fear crowning the project. The end-result of this constitutional capture is a new state – 'a captured state' with the 'captive citizenry', all underpinned by 'democracy on the periphery'.<sup>119</sup>

## 4. The Italian 'version' of the rule of law: the Stato di diritto under pressure

### 4.1. The Italian democratic Constitution

Moving from the Polish case to the Italian one – Italy being one of the founding Member States – requires a shift of context as the Italian democratic rule of law was not only consolidated in parallel with the start of the European integration process, but was also spurred on by it.<sup>120</sup> The entrenchment of liberal constitutionalism in Italy and the construction of the European Communities were coeval and, thus, one needs to go back at least to the moment in which the democratic Constitution entered into force, on 1 January 1948, following a constitution-making process certainly affected by the start of the Cold War but also shaped by people's engagement and civic participation unlike what happened in Poland after 1989.<sup>121</sup>

Indeed, the new Constitution represented a turning point in the way the notion of the rule of law, *Stato di diritto*, has been conceptualized in Italy.<sup>122</sup> First, the new Constitution broke with the authoritarian and fascist past, namely with the experience of a former 'liberal State' ruled under a flexible and *octroyée* constitutional document<sup>123</sup> – the *Statuto Albertino* of 1848 – which had proved unable to prevent the rise of an autocratic and, according to some, totalitarian regime.<sup>124</sup> The *Statuto Albertino*, however, similar to other Constitutions granted in European continental countries in that period, endorsed a very 'thin' notion of the rule of law.<sup>125</sup> Indeed, it was mainly focused on ensuring the principle of separation of powers against

<sup>118</sup> Ibid.

<sup>119</sup> Ibid. For another important voice dissecting the Polish case along the lines of peripherality, see E. Łętowska, *Państwo prawa na peryferiach Europy*, at <https://publica.pl/teksty/letowska-panstwo-prawa-na-peryferiach-europy-61676.html>.

<sup>120</sup> On the idea of 'democratic rule of law', see L. Morlino, 'The Two 'Rules of Law' Between Transition to and Quality of Democracy', in L. Morlino and G. Palombella (eds), *Rule of Law and Democracy. Inquiries into Internal and External Issues*, Leiden (Brill) 2010, 39-63.

<sup>121</sup> See also section 3 on Poland.

<sup>122</sup> See S. Fois, *La 'riserva di legge': lineamenti storici e problemi attuali*, Milano (Giuffrè) 1963 and A. Di Giovine, *Introduzione allo studio della riserva di legge nell'ordinamento costituzionale italiano*, Torino (Giappichelli) 1969.

<sup>123</sup> See V. E. Orlando, *Principii di diritto costituzionale*, 4th edition, Firenze (Barbera) 1912.

<sup>124</sup> The Italian fascist experience has been described as a form of 'imperfect totalitarianism' (*totalitarismo imperfetto*), totalitarian in its ambitions, but not in the final achievements: see G. Sabbatucci, V. Vidotto, *Storia contemporanea. Il Novecento*, Bari (Laterza), 2008: 142.

<sup>125</sup> As it will be argued in the following, however, it is disputed whether we can really talk about the rule of law in the European continental context and in the Italian one: see P. Costa, 'Lo Stato di diritto: un'introduzione storica',

the risk of an absolutist monarchy, to provide safeguards to the exercise of parliamentary powers, and to acknowledge the protection of basic civil liberties, e.g. the right to habeas corpus, freedom of expression, the right to property, and equality before the law. A corollary of such a configuration of the Italian liberal Constitution was the centrality of the principle of legality as a limit to the discretion of the executive power and of the judiciary, in a two-fold meaning: to define the boundaries for the action of these two branches of government and as a device to protect negative liberties, i.e. freedom from the State's interference, against an arbitrary use of the public powers to the detriment of the citizen.<sup>126</sup>

This *octroyée* Constitution, which was never formally amended – not even following the shift from a diarchic system of government, centered on the King, to fully-fledged parliamentarism<sup>127</sup> or after the unification of the Kingdom of Italy in 1861 – had been *de facto* gradually suspended since 1922 and since 1935 the Parliament, from which the principle of legality gained its legitimacy, ceased to exist. The Senate, appointed by the King, was divested of its (limited) powers, while the elected Chamber of Deputies was abolished and replaced by a Chamber appointed by the regime to represent the interests of social and business organizations. By 1938, with the enactment of the racial laws, even the facade of the liberal State and the associated *Stato di diritto* had gone.

The liberal Parliament, however, was not a democratic one. Next to the appointed Senate of nobles, stood the Chamber of Deputies elected by no more than 9% of the male citizens, given the requirements of census and alphabetization that had been set by the electoral legislation.<sup>128</sup> It was only after WWII, first in the administrative election of 1945 and then, in 1946, with the plebiscite between Monarchy and Republic and with the election of the Constituent Assembly, that the suffrage became eventually universal. The Assembly drafting the Constitution (1946-1947) and the resulting elected Parliament were able to represent the pluralism existing in the Italian society eventually. This paved the way to the consolidation and the strengthening of mass parties, the Christian democrats, the socialist and the communist parties, on whose accord the new constitutional pact was sealed, although the Cold War had become a reality in the meantime. The Christian democrats, the party gaining the relative majority of seats in Parliament, in alliance with some small center-right and center-left parties, ruled the country for almost 40 years, with the socialists (until the 1960s) and the communists (until the 1990s) being excluded from the government (*conventio ad excludendum*)<sup>129</sup> because of their pro-USSR stance in the framework of an internationally divided scenario and the Italian alliance with Western partners. The arrangement could work and be accepted by all parties because there was a tacit agreement, always respected, that any reform or bills touching upon

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in P. Costa and D. Zolo (eds), *Lo Stato di diritto. Storia, teoria, critica*, Milan, 2003, p. 89 ff.; G. Zagrebelsky, *La legge e la sua giustizia*, Bologna, 2008, p. 111 ff.

<sup>126</sup> See F. Modugno, 'Legge in generale', in *Enciclopedia del diritto*, XXIII, Milano (Giuffrè) 1973, p. 873 ff. and G.U. Rescigno, 'Sul principio di legalità', in *Diritto pubblico*, 1995, p. 247 ff.

<sup>127</sup> This shift happened when Cavour was appointed as Prime Minister for the first time and consolidated afterward as a constitutional convention.

<sup>128</sup> Law no. 666 of 1912 and, then, Law no. 1985 of 1918, which eventually granted the suffrage to all male adult citizens. See A. Colombo, 'Zanardelli, la riforma elettorale e la lunga marcia della democrazia italiana', *Il Politico*, 1982, no. 4, 649-659.

<sup>129</sup> An effective formula coined by L. Elia, *Governo (forme di)*, in *Enciclopedia del diritto*, vol. XIX, Milan, 1970, p. 634 ff.

the constitutional compromise would never be passed without the political consent of the three major political parties. Such an arrangement gave particular strength to the Parliament as locus of deliberation and the place where the compromise amongst the three main political actors – two of which were excluded from the government for some time – could be reached. Consequently, parliamentary legislation, i.e. statutory law, enjoyed special consideration.<sup>130</sup>

The new Constitution was a watershed with regard to the status of the principle of legality and the role of the Parliament. As in any system where there is a rigid and entrenched Constitution in force, the principle of legality is no longer absolute, and the Parliament cannot be considered as sovereign. The constitutional legality prevails over the legislation passed by the Parliament, should a conflict arise.<sup>131</sup> In addition to a special and cumbersome procedure to be followed to pass constitutional amendments (Article 138 Const.), a Constitutional Court was foreseen with a view to check the constitutionality of legislation according to a centralised-Kelsenian model of constitutional adjudication.<sup>132</sup> In the presence of a rigid Constitution, the very nature of the rule of law *Stato di diritto* is transformed. The source of the law in which the general will, or better formulated, the will of the majority is enshrined can no longer prevail over the fundamental law that protects pluralism and individual rights, in particular those pertaining to the minorities.

With regard to rights, the 1948 Italian Constitution entailed a shift from a pure *Rechtsstaat* to a *Sozialstaat*, from negative freedoms (right to *habeas corpus*, freedom of expression, freedom of association, etc.) to only an ample catalogue of social rights (right to education, to health care, to social assistance, etc.) and to a substantive understanding of the principle of equality, entailing an active stance of the State in removing the obstacles to the full deployment of one's own personality (Article 3, second section, Const.).<sup>133</sup> The implementation of these constitutional novelties would have never been possible without the Constitutional Court, established only in 1956. Against a certain interpretation of the Constitution, quite widespread at the moment of its enactment, even amongst ordinary judges, according to which the fundamental law was only meant to set a program for the activity of the legislature while many of its provisions were devoid of an immediate legal force – the so-called 'programmatic norms' – the Constitutional Court took a different stance since its first judgment (no. 1/1956). In particular, it claims that: 1) all constitutional provisions can be used as standards for review without *ad hoc* measures of implementation; 2) with regard to individual rights, including social rights, the core and essential element of the right at stake cannot be disregarded by the public authorities even though the Parliament can certainly clarify the reach and the scope of that right afterwards.<sup>134</sup> This case-law of the Constitutional Court was of paramount importance for

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<sup>130</sup> And, indeed, there has been an abundance, if not an abuse, of parliamentary legislation, passed even to regulate hyper-specific issues or single-issue questions which could have been well regulated by administrative measures. See A. Predieri, 'Parlamento 1975', in A. Predieri (ed), *Il Parlamento nel sistema politico italiano*, Milano, 1975, p. 11 ff.

<sup>131</sup> F. Modugno, *Legge in generale*, op. cit., p. 873 ff.

<sup>132</sup> M. Cappelletti, 'Judicial Review in Comparative Perspective', in *California Law Review*, 1970, 58(5), p. 1036 ff. and V. Barsotti, G.C. Carozza, M. Cartabia and A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford (Oxford University Press) 2015, especially ch. 1.

<sup>133</sup> See R. Bin, *Lo Stato di diritto*, Bologna (Il Mulino) 2004, 39-43.

<sup>134</sup> See S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana*, Bologna (Il Mulino) 2004, ch.4 ff.

the proper functioning of the constitutional *Stato di diritto* in Italy.<sup>135</sup> Indeed, it was the Constitutional Court that undertook the task of adapting the existing legislation, including the one of the fascist period, which had remained in force, to the new constitutional principles. And it did so in a context where the Parliament was reluctant to take the lead in repealing the ‘unconstitutional’ legislation while the judiciary and the public administration were used to apply it, as no systematic epuration occurred in the transition to democracy.<sup>136</sup>

A final element of the new Italian *Stato di diritto* emerging from the adoption of the 1948 Constitution has to be pointed out in comparison to the regime set by the *Statuto Albertino*, which lacked any provisions on the international commitments of the country: the strong emphasis on the openness of the Italian legal system to the principles of international law.<sup>137</sup> In particular, the Constitution offers substantive protection to the foreigners in the territory (Article 10 Const.),<sup>138</sup> rejects the war ‘as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes’, and provides for the self-limitation of national sovereignty with a view to promote ‘a world order ensuring peace and justice among the Nations’ and to encourage ‘international organization furthering such ends’ (Article 11 Const.). These constitutional provisions, and in particular the last one, which has provided the ‘legal basis’ for the Italian membership of the European Community,<sup>139</sup> can be seen as tools that have shaped the Italian conception of *Stato di diritto* as a limitation and constraint to the use of public power not just on a domestic level, but also in relation to the outside world.<sup>140</sup> This internationally friendly attitude of the Italian Constitution, despite the different standpoints among the three major political parties, is one of the reasons behind the general and long-standing pro-European attitude of the Italian institutions and citizens, at least until recently.<sup>141</sup>

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<sup>135</sup> See V. Barsotti, G.C. Carozza, M. Cartabia and A. Simoncini, *Italian Constitutional Justice in Global Context*, op. cit., ch. 1.

<sup>136</sup> See G. Melis, *Storia dell'amministrazione pubblica italiana 1861-1993*, Bologna (Il Mulino) 1996, ch. 5. Indeed, until the Constitutional Court was established, Italy provisionally adopted a decentralised system of constitutional adjudication that did not prove to be effective.

<sup>137</sup> Italy has always been, however, a dualist legal system in relation to the treatment of international law domestically.

<sup>138</sup> See the remaining part of Article 10 Const.: ‘The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence.’

<sup>139</sup> The acknowledgment, by the Italian Constitutional Court, of Article 11 of the Constitution as the basis to justify and uphold the primacy of Community law over national law came rather late, at the end of a long series of decisions where the Court had tried to disregard the case law of the Court of Justice letting domestic law prevail over European law in matters covered by Community competence. See P. Barile, ‘Il cammino comunitario della Corte’, in *Giurisprudenza costituzionale*, 1973, 18(1), p. 2406 ff. and G. L. Tosato, *I regolamenti delle Comunità europee*, Milano, 1965, especially p. 300 ff. The turning point can be identified with the *Frontini* case, Italian Constitutional Court’s judgment no. 183 of 1973 and by the subsequent decision no. 170 of 1984 in the *Granital* case. See, in particular, M. Cartabia and J.H.H. Weiler, *L’Italia in Europa. Profili istituzionali e costituzionali*, Bologna (Il Mulino) 2000, p. 186 ff.

<sup>140</sup> See M.P. Iadecicco, *La riserva di legge nelle dinamiche di trasformazione dell'ordinamento interno e comunitario*, Torino (Giappichelli) 2007, 1 ff.

<sup>141</sup> The Eurobarometer Reports show, however, that the traditional pro-European attitude of the Italian citizens has declined, and the turning point can probably be identified in the Eurozone crisis started in 2008-2009. Indeed, while in October 2007 64% of the Italian citizens interviewed declared to be optimistic vis-à-vis the European

## 4.2. The Italian notion of Stato di diritto and its domestic and EU challenges

Italy has embraced the European continental version of the rule of law,<sup>142</sup> the *Stato di diritto*, with a strong emphasis on the role played by parliamentary legislation (statutory law) even though in the post-WWII context this has been somewhat mitigated by the idea of constitutional legality. Despite the commonality between the German *Rechtsstaat*, the French *État de droit* and the Italian *Stato di diritto* on the value assigned to the principle of legality,<sup>143</sup> unlike the other two systems, Italian scholarship and case-law have particularly focused their attention on the legislative activity of the Parliament in relation to the domains reserved to legislation or the legislative reservations.<sup>144</sup> If and how these legislative reservations could be in fact determined by actors different from the Parliament has been the key question in Italy, considering that these demands for parliamentary legislation do fulfil both a democratic ambition – namely to allow the regulation of certain sensitive issues, such as the limitation to fundamental freedoms, by the directly elected representatives of the people – and the ambition to provide a guarantee against the abuse of power, by the other institutions and by the Parliament itself, whose laws can be declared unconstitutional.<sup>145</sup> Moreover, the extent to which an act of the public authority can be considered legislation or not also affects the scope of the jurisdiction of the Italian Constitutional Court,<sup>146</sup> which can only review the constitutionality of laws (*leggi*) ‘and enactments having force of law issued by the State and Regions’ (Article 134 It. Const.).<sup>147</sup>

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integration project, in December 2013 the percentage dropped to 40% (see the respective Eurobarometer national report on Italy, available at: <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/index?p=1&instruments=STANDARD>).

Lately the trend has not improved either: indeed, in fall 2018 only 36% of the Italian citizens interviewed affirmed to trust the EU (see Standard Eurobarometer 90 – Autumn 2018, First results, p. 6). As shown by C. Plescia and J. Wilhelm, *Pessimism – not rejection – of the EU in Italy. Evidence from RECONNECT pre-election survey*, in RECONNECT Blog, 20 May 2019, 66% of the Italian respondents to the survey remain supportive to the Italian continued membership of the EU, but only 33% of the respondents are optimistic toward the future of the EU.

<sup>142</sup> See A. Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo*, Milano, 2018, p. 20 ff.

<sup>143</sup> Unlike the anglo-saxon rule of law, for example: see L.F.M. Besselink, F. Pennings, and S. Prechal, *Introduction: Legality in Multiple Legal Orders*, in L.F.M. Besselink, F. Pennings, and S. Prechal (eds), *The Eclipse of the Legality Principle in the European Union*, Alphen aan den Rijn (Wolters Kluwer) 2011:6. On the strong influence of the German idea of *Rechtsstaat* on the Italian *stato di diritto*, see V. E. Orlando, *Diritto pubblico generale. Scritti vari coordinati in sistema 1881-1940*, Milano (Giuffrè) 1954.

<sup>144</sup> See, amongst many, S. Fois, *La «riserva di legge»*, op. cit.; A. Di Giovine, *Introduzione allo studio della riserva di legge*, op. cit.; F. Sorrentino, *Lezioni sulla riserva di legge*, I (Cooperativa libraria universitaria) 1980; R. Balduzzi and F. Sorrentino, *Riserva di legge*, in *Enciclopedia del diritto*, XL, Milano (Giuffrè) 1989, 1207 ff.; M.R. Donnarumma, *Il principio di legalità nella dinamica dei rapporti costituzionali*, Padova, 1988 and J. Trumeau, *La réserve de la loi. Compétence législative et Constitution*, Aix-en-Provence, 1997.

<sup>145</sup> The debate over the tension between these two ambitions and the prevalence of one over the other, highlighted by scholars like Lorenza Carlassare, Alfonso Di Giovine, Sergio Fois, Franco Modugno, Gino Scaccia, Federico Sorrentino amongst many, is extensively illustrated by G. Piccirilli, *La «riserva di legge». Evoluzioni costituzionali, influenze sovratatuali*, Torino, 2019, p. 24 ff.

<sup>146</sup> Ibid., p. 38 ff.

<sup>147</sup> In fact, ‘laws’ is a much broader notion than the Italian ‘*leggi*’, the latter being referred only to legislation passed by the Parliament or the regional legislative assemblies. As pointed out in the book edited by A. Pizzorusso, *Law in the making. A comparative survey*, Berlin, 1988, indeed, the sources of law are one of the most difficult things to compare across legal systems. There is always the risk of a terminological distortion.



That said, the Italian concept of *Stato di diritto*, as shaped by the democratic Constitution and its interpretation, has been put under pressure in many regards. Some of these pressures are common to most countries in the world, like the challenges brought by the executive dominance to the separation and cooperation amongst constitutional powers or the effects of globalization on the protection of social rights.

Next to these common trends, the country had to face several internal threats to its stability, like terrorism in the 1970s and 1980s and the collapse of the party system due to the combined effect of corruption scandals and trials and the change of the electoral system in the 1990s. Although the constitutional system was deeply shook by these threats – a former President of the Council of Ministers and then President of the Christian Democrats, Aldo Moro, was kidnapped and killed by terrorists in 1978 – it somewhat managed to stick to the principles of the *Stato di diritto*, which was also due to its membership in the European Community. Yet, the implementation of the Italian Constitution has not been easy. Relying on a constitutional compromise among three very different political forces, vetoes and delays in the adoption of reforms and in the enforcement of the Constitution have been inevitable, like in the cases of the creation of ordinary regions and in the approval of the law on referendums, both dating back to 1970.

Perhaps, before the current challenges to the Italian constitutional system occurred, the most tense period the *Stato di diritto* had to cope with started in the 1990s, with significant repercussions still being felt today.<sup>148</sup> It was back then that the relationship between politics and the judiciary in Italy changed, with a negative effect for the legitimacy of the judicial branch.<sup>149</sup> Due to the extensive corruption net between the elites of the major political parties, the public administration and business corporations, the judiciary basically dismantled through criminal proceedings and convictions – and it could hardly be otherwise – an entire political class.<sup>150</sup> Public prosecutors and judges led a sort of political catharsis of the then elites in the name of the principle of legality, this time understood according to a broad conception of the rule of law, including certainty and effectiveness of the law.

In turn, new political actors emerged, amongst whom stood the former entrepreneur Silvio Berlusconi who, thanks to the majority gained in Parliament, controversially managed at the same time to rule the country and to hold a large share of national media.<sup>151</sup> For most of the 20 years during which he remained a prominent political figure, an anti-judicial rhetoric – to which the decision of some public prosecutors and judges to convert themselves into politicians did not help either – orchestrated by his party dominated the public discourse, while he was convicted for several criminal offences. The allegation of a politicized judiciary and of a *fumus persecutionis* against him and politicians in general became obsessive and was further echoed

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<sup>148</sup> See M. Bull and M. Rhodes, 'Between crisis and transition: Italian politics in the 1990s', in *West European Politics*, 1997, 20(1), p. 1 ff. Although the Constitution was not changed, many started to (improperly) talk about the consolidation of a 'Second Republic', after the first was established in 1948: see G. Sartori, *Seconda Repubblica? Sì, ma bene*, Milano, 1992.

<sup>149</sup> C. Guarnieri, 'The judiciary in the Italian political crisis', in *West European Politics*, 1997, 20(1), p. 157 ff.

<sup>150</sup> See D. Della Porta and A. Vannucci, 'Corruption and anti-corruption: The political defeat of 'Clean Hands' in Italy', in *West European Politics*, 2007, 30(4), p. 830 ff.

<sup>151</sup> See M. Hibberd, 'Conflicts of interest and media pluralism in Italian broadcasting', in *West European Politics*, 2007, 30(4), p. 881 ff.



by the media. Laws, subsequently declared invalid by the Constitutional Court, were passed aiming to extend the immunity from criminal prosecutions for the highest public offices so as to waive criminal proceedings for them without clear limitations.<sup>152</sup> The legacy of the Berlusconi era has deeply affected subsequent democratic and rule of law developments in Italy.<sup>153</sup>

Although this anti-judicial discourse, by any means, has led to the subversion of the fundamental rule of law principle of the independence of the judiciary, it has nonetheless discredited the role of courts in the eyes of citizens and has gradually instilled a certain degree of distrust in judges.<sup>154</sup> While the level of confidence in representative institutions was not particularly high either, this rhetoric, fueled by the media, was gradually extended from judges to other non-elected officials, to technocratic and independent bodies, including those of the EU. In other words, the idea conveyed, also by other political parties, like Lega and the 5SM more recently,<sup>155</sup> was that in a democratic system the only source of legitimation for institutional actions are elections and the will of the majority. This idea inevitably clashes with the principles of the constitutional *Stato di diritto* which conceives of the three branches of government as of equal importance under the Constitution and the limits imposed, through independent institutions, to the exercise of political powers (as to prevent potential tyranny of the majority), a value and a safeguard to be carefully protected.

Turning to the role of the EU, the participation in the European integration process associates the Member States in facing common challenges for their legal systems. An example thereof is the difficulty to combine the alleged supremacy of rigid Constitutions with the primacy of EU law advocated for by the European Court of Justice.<sup>156</sup> In the Italian case, the achievement of such a balance has placed the Italian Constitutional Court in a crucial position in the long path towards integration. At first, the Court disregarded the principle of primacy,<sup>157</sup> then, once it accepted it, it set counter-limits<sup>158</sup> and threatened to use supreme constitutional principles as part of the national identity to resist the penetration of EU law.<sup>159</sup> In this gradual process of adaptation, which overall has seen the Italian Constitutional Court as a collaborative actor towards the EU and its court,<sup>160</sup> the principle of legality and the traditional idea of the domains

<sup>152</sup> See Law no. 140 of 2003 declared unconstitutional by the Constitutional Court in judgment no. 24 of 2004 and Law no. 124 of 2008 declared unconstitutional in judgment no. 262 of 2009.

<sup>153</sup> See G. Orsina, *Il berlusconismo nella storia d'Italia*, Venezia (Marsilio) 2013 and Id., 'Antifascism, anticommunism, antipolitics: delegitimation in Berlusconi's Italy', in *Journal of Modern Italian Studies*, 2017, 22(1), 7-26. On the impact of Berlusconi's legacy on the current populist turn of the Italian political system, see P. Blokker and M. Anselmi, 'Introduction. Multiple Populisms. Italy as a Democracy's Mirror', in P. Blokker, M. Anselmi (eds), *Multiple Populisms. Italy as a Democracy's Mirror* London (Routledge) 2019, 1-14.

<sup>154</sup> See D. Piana, *Uguale per tutti? Giustizia e cittadini in Italia*, Bologna (Il Mulino) 2016, p. 199 ff.

<sup>155</sup> C. Biancalana, 'Four Italian Populisms', in P. Blokker, M. Anselmi (eds), *Multiple Populisms. Italy as a Democracy's Mirror* London (Routledge) 2019, p. 216 ff.

<sup>156</sup> Since the case *Costa v. Enel*, case 6/64, 16 July 1964, ECR 585.

<sup>157</sup> See the judgment no. 14 of 1964 before acknowledging, in judgment no. 170 of 1984, that conflicts between national and Community norms had to be solved based on the criterium of the competence.

<sup>158</sup> See the judgment no. 232 of 1989.

<sup>159</sup> See order no. 24 of 2017, issuing a preliminary reference to the Court of Justice of the European Union on the 'Taricco case'.

<sup>160</sup> Indeed, the Italian Court is one of the Constitutional Courts, after the Austrian and the Belgian ones, that has made the highest number of preliminary referrals to the Court of Justice: 4 in 11 years. See order no. 103 of 2008, order no. 207 of 2013, order no. 24 of 2017, order no. 117 of 2019, to be read also in conjunction with the judgment no. 269 of 2017 and its *obiter dictum* on the Charter. On the latter, see critically, D. Gallo, 'Challenging

reserved to parliamentary legislation have been somehow displaced and transformed in the complex interplay between domestic and supranational law.<sup>161</sup> For example, the Italian Constitutional Court has managed the problematic legal situation emerging from the adoption of EU measures, even self-executing on some occasions, in the fields covered by legislative reservations according to the national Constitution, through a creative interpretation of the already recalled Article 11 Const. The Court has thus derogated from the constitutional provisions setting a domain reserved to (domestic) legislation with a view to ensuring the enforcement of EU law.<sup>162</sup> Such an outcome could not have been taken for granted, given the initial position of the Court on the matter and the diminished centrality of the national parliament that this causes.<sup>163</sup>

At the same time, the attitude of the Italian Constitutional Court vis-à-vis EU law has certainly not been passive, but rather engaged and constructive. While the political class has tended to support every move and further steps in the process of EU integration with an acritical endorsement until recently – it suffices to say that the Treaty of Lisbon was ratified by the two Houses of Parliament in 2008 by unanimity – the Constitutional Court has not hesitated to point to potential frictions between EU law and the national Constitution. The elaboration of the counter-limit doctrine, which in the end has never been fully applied against EU law,<sup>164</sup> aims to display to the EU institutions and especially to the Court of Justice the limits to the implementation of EU measures in light of the supreme principles of the Italian Constitution. It has been used as a tool to favor joint judicial solutions, in mutual respect between the domestic and the supranational level, rather than as a ‘nuclear weapon’ to undermine the EU authority.<sup>165</sup> An outcome of these inter-judicial relationships has been, for instance, an updated

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EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure’, in *European Law Journal*, early view, 8 July 2019. For a positive assessment of the role played by the Italian Constitutional Court in Europe, see N. Lupo, ‘The Advantage of Having the ‘First Word’ in the Composite European Constitution’, in *Italian Journal of Public Law*, 2018, no. 2, p. 186 ff.

<sup>161</sup> As is well known, unlike what happens at the domestic level and in the Italian legal system, in the EU the legislative nature of an act is purely dependent on the procedure followed for its adoption and is not linked to the subject matter or the issues covered, as confirmed by Article 289(3) TFEU. See R. Schütze, ‘The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers’, *Yearbook of European Law*, 2006, 25(1), p. 91 ff.; J. Bast, *New Categories of Act After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, in *Common Market Law Review*, 2012, 49(3), p. 885 ff. And the resort to legislative procedures is not necessarily conducive to enhanced democratic accountability, as argued by D. Curtin, *Legal Acts and the Challenges of Democratic Accountability*, in M. Cremona and C. Kilpatrick (eds), *EU Legal Acts: Challenges and Transformation*, Oxford (Oxford University Press), 2018, p. 9 ff.

<sup>162</sup> See M. Cartabia and L. Chieffi, Art. 11, in R. Bifulco, A. Celotto, M. Olivetti (eds), *Commentario alla Costituzione*, Torino (UTET), 2006, p. 263 ff. and G. Piccirilli, *La ‘riserva di legge’*, op. cit., p. 99 ff. In judgment no. 383 of 1988 the Court argued that legislative reservations under the Italian Constitution can also be fulfilled through Community measures.

<sup>163</sup> Cf., for example, the Italian Constitutional Court’s judgment no. 14 of 1964, where it argued that antinomies between Community law and national law had to be settled according to the chronological principle.

<sup>164</sup> From judgment no. 232 of 1989 to the ‘Taricco saga’, order no. 24 of 2017 and judgment no. 115 of 2018, dealing with the principle of legality in criminal matters. As noted by G. Piccirilli, *La ‘riserva di legge’*, op. cit., p. 110, n. 39, the expression was not coined by the Constitutional Court and never used in relation to EU law. It is drawn from a previous writing of P. Barile, ‘Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane’, in *La Comunità internazionale*, 1966, p. 23 and expressly mentioned by the Court in the only case in which counter-limits have been activated, against international law, in judgment no. 238 of 2014.

<sup>165</sup> On this point, see M. Cartabia, current Vice President of the Italian Constitutional Court, ‘Europe today: Bridges and walls’, in *International Journal of Constitutional Law*, 16(3), 2018, p. 741 ff. and M. Dani, ‘National

and revised vision of the legislative reservation in criminal matters,<sup>166</sup> in particular following the ‘Tarrico saga’ – originated from VAT frauds by Italian tax-payers, the alleged violation of Article 325 TFEU by the Italian rule on the statute of limitation for tax frauds and the national system of prosecution in these cases – in terms of balance between formal and substantive understanding of the principle of legality in this field.<sup>167</sup>

Notably, EU membership has also favored the adoption of a series of important reforms in Italy, not just in the field of public policies but at the constitutional level as well.<sup>168</sup> The Italian participation in the European Community and then in the Union has been able to impress an acceleration of certain dynamics underway in the constitutional system. Just to appreciate how influential the EU has been on the implementation of the Constitution and on its reform, one can cite three examples. The first is the establishment of the 15 Italian ordinary regions – after their setting up had been postponed for more than 20 years – in parallel with the development of the European cohesion policy and the creation of the European Regional Development Fund in 1975.<sup>169</sup> In other words, there has been a veiled connection between the implementation of the constitutional provisions on the Regions and the Community promotion of a redistributive policy at regional level.

Second, in the aftermath of a serious speculative attack in 2011, in line with the reform of the European economic governance that started that year,<sup>170</sup> and upon request by the European Central Bank,<sup>171</sup> Italy amended its Constitution (Const. Law no. 1 of 2012) with a view to introducing the target of the balanced budget for the State (Article 81 Const.), for central public administrations (Article 97 Const.) and for regional and local authorities (Article 119 Const.). Interestingly, this has entailed an important shift in the wording of the Constitution about the EU. Indeed, before 2012, the fundamental document only briefly referred to the EU in Article 117, relying instead on the open clause of Article 11 Const. for EU membership and for any further conferral of powers to EU institutions through Treaty revisions.<sup>172</sup> Following the

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Constitutional Courts in supranational litigation: A contextual analysis’, in *European Law Journal*, 23 (3-4), 2017, p. 207 ff.

<sup>166</sup> See D. Tega, ‘Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds’, *Int’l J. Const. L. Blog*, 14 February 2017 and G. Piccirilli, ‘The ‘Taricco saga’: the Italian Constitutional Court continues its Italian journey’, *European Constitutional Law Review*, 2018, 14(4), 814-833.

<sup>167</sup> A positive reading of the ‘Taricco saga’ is offered by M. Bonelli, ‘The Taricco Saga and the consolidation of judicial dialogue in the European Union’, in *Maastricht Journal of European and Comparative Law*, 2018, 25(3), 357-373. See also I. Pellizzone, *Profili costituzionali della riserva di legge in materia penale*, Milano (Franco Angeli) 2015.

<sup>168</sup> While, by contrast, it has been argued that the Italian influence on the construction of the EU legal system has been much less evident: see A. Sandulli, *Il ruolo del diritto in Europa*, op. cit., p. 144 ff.

<sup>169</sup> On the influence of the EU on the Member States’ regions, see C. Fasone, ‘Secession and the Ambiguous Place of Regions Under EU Law’, in C. Closa (ed), *Secession from a Member States and Withdrawal from the European Union: Troubled Membership*, Cambridge (Cambridge University Press) 2017, p. 48 ff.

<sup>170</sup> See the so-called the Euro-Plus Pact of 25 March 2011 and the ‘six-pack’ (EU Regulations no. 1173, 1174, 1175, 1176 and 1177 of 2011 and EU Directive 2011/85).

<sup>171</sup> See J.-C. Trichet and M. Draghi, ‘Letter of the European Central Bank to the President of the Italian Council of Ministers’, European Central Bank, Frankfurt, 5 August 2011.

<sup>172</sup> The broad formulation of Article 11 Const. had prevented the risk of subjecting the Italian Constitution to amendment at every Treaty revision. Yet, one could also argue that it is precisely the lack of a link between Treaty revision and domestic constitutional momentum that has limited the domestic public debate (and perhaps also contestation) of the EU for decades.

adoption of Const. Law no. 1 of 2012, in the three main articles that have been changed, there is an *ad hoc* reference to EU measures and obligations in fiscal and economic matters. This is particularly important as a change of the latter would entail a modification of the interpretation of constitutional standards on the budget.<sup>173</sup> EU fiscal rules have thus integrated the principles defining the Italian understanding of the rule of law.

The third example is the constitutional reform promoted during the Renzi Government that failed at the referendum of 4 December 2016. In the explanatory report to the constitutional amendment bill (A.S. 1429, XVII parliamentary term), which aimed to change the composition and the functioning of the Italian bicameral Parliament amongst other things, the Government made it clear that such a reform had also been promoted with a view to accommodate the Italian institutional and political system to the demands for a more effective participation in the EU decision-making and implementation of the EU policies. The reform of the EU economic governance, with the European Semester, has particularly been cited as an explanation to streamlining parliamentary procedures – especially to remove the double-confidence requirement between the Government and each House of Parliament – and to improve the level of coordination between the State and the regional and local authorities, also enhancing their representation in the Senate.<sup>174</sup>

It is in this context that the financial crisis, first, and then the migration crisis erupted in Italy. Those crises have been chosen here as case studies since they have triggered an unedited combination of systematic violations of rule of law principles, making the Italian participation in the EU affairs problematic, to an extent that the country has never experienced before. These considerations should be matched with the growing anti-politics and anti-elite sentiments dominating Italian civil society,<sup>175</sup> even though, interestingly, the level of trust of the Italian citizens towards the European Parliament (44%) and the Commission (36%) singularly and combined is much higher than that towards the Italian Parliament (27%) and Government (28%).<sup>176</sup>

#### ***4.2.1. The medium-term effects of the financial crisis***

Italian political parties, with the partial exception of the communist party, had remained strongly pro-European, sometimes even in an acritical manner for more than 50 years since the enactment of the democratic Constitution. The Eurozone crisis, which hit Europe in 2010, entailed a shift in this regard, with an increasing Eurosceptic attitude of political parties – especially the Five Stars Movement (5SM) and Lega – and citizens.<sup>177</sup>

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<sup>173</sup> See V. Lippolis, N. Lupo, G.M. Salerno, G. Scaccia (eds), 'Costituzione e pareggio di bilancio', in *Il Filangieri – Quaderni* 2011, 2012.

<sup>174</sup> On the link between this reform and the Italian membership of the EU, see P. Faraguna, 'How does the European Union challenge bicameralism? Lessons from the Italian case', forthcoming in R. Albert, A. Baraggia and C. Fasone (eds), *Constitutional Reform of National Legislatures. Bicameralism Under Pressure*, Cheltenham (Edvard Elgar Publishing) 2019.

<sup>175</sup> See G. Orsina, *La democrazia del narcisismo. Breve storia dell'antipolitica*, Venezia (Marsilio) 2018, who analyses the deep roots of anti-politics in Italy and considers as a turning point the political crisis and the corruption scandals of the early 1990s.

<sup>176</sup> Source: *Standard Eurobarometer 90* – National Reports, Italy, November 2018, p. 4.

<sup>177</sup> See the latest Eurobarometer figures about the attitude of the Italian citizens to leave the EU (April 2019).

The Italian political and legal system was deeply affected by the crisis since its eruption. In 2011, the country asked for and obtained financial support from the European Central Bank (ECB), through the Securities Market Program, in exchange for putting forward a series of reforms. The most remarkable of them is probably the constitutionalization of the balanced budget clause (Const. law. no. 1/2012) agreed with the ECB before the Fiscal Compact was signed (see section 2.2). The relevant constitutional amendments were passed in an unusually short timeframe and supported by an overwhelming majority of political forces in Parliament (two thirds in both Houses). Parliamentary deliberation was heavily constrained by the external pressure exerted by financial markets and the increase in the spread.<sup>178</sup> All subsequent Euro-crisis measures, the EFSF, ESM, Fiscal Compact, were likewise passed with almost no debate in Parliament. Often the deliberation on very different legal tools was merged together and the work of parliamentary committees, usually setting the ground for the decision of the House, was severely sidelined.<sup>179</sup> The same applied for the approval of the budget bill and bills with significant financial implications. The tension between the democratic nature and commitments to democracy of parliamentary procedures, on the one hand, and the need to react quickly to asymmetric shocks and to a well-constrained design of budgetary decision-making, on the other, confined the Parliament to a very marginal position. Concerns about a lack of transparency, information asymmetry, accountability and separation of powers between the legislature and the executive have since dominated the public and the academic discourse.<sup>180</sup>

This tension is exemplified by the recent attempt of a minority of Italian senators to challenge the compliance of the procedure leading to the adoption of the 2019 Budget Act with the Constitution, claiming in particular the impairment of the prerogatives of this minority group in the process. Due to the deadlock in the negotiation of the draft budgetary plan for 2019 between the Commission and the new Italian Government, appointed in June 2018 when the Stability and the National Reform Programs had already been delivered by the previous executive – the draft presented by the Italian Government to the Commission in October 2018 had to be changed significantly on two occasions to meet the medium-term objective. The Parliament, and the Senate in particular, had only a few days to consider a complex fiscal document like the revised budget. Not only that but, at the very last minute, through a maxi-amendment on which a confidence vote was requested, the Government replaced the entire text of the Budget bill including changes in the text that the Parliament had never examined before and thereby made useless the scrutiny and drafting carried out by the budget committee. The constitutional challenge brought by means of a conflict of attribution, however,

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<sup>178</sup> Italy was indeed in a particularly weak situation given its level of public debt, then equal to 116,5% of the GDP. The ‘spread’ here refers to the difference in the profit between the Italian public bonds (BTP) and the German public bonds (BUND).

<sup>179</sup> C. Fasone ‘National Parliaments under ‘external’ fiscal constraints. The case of Italy, Portugal, and Spain facing the Eurozone crisis’, LUISS Guido Carli School of Government Working Papers 19, June 2014.

<sup>180</sup> See D. Jancic, *National Parliaments and EU Fiscal Integration*, *European Law Journal*, 2016, 22(2), 225-249; I. Cooper, A. Maatsch and J. Smith, (eds.) ‘Governance without Democracy? Analyzing the Role of Parliaments in European Economic Governance after the Crisis’, *Parliamentary Affairs*, 2017, 73(4), Special Issue; C. Fasone, ‘Do Constitutional Courts Care About Parliaments in the Euro-Crisis? One the Precedence of the ‘Constitutional Identity Review’’, *Italian Journal of Public Law*, 2018, 2, 351-389.

was declared inadmissible by the Constitutional Court because of the lack of standing status of parliamentary minorities before the Court (order. no. 17/2019).<sup>181</sup>

These developments highlight a first set of problems triggered by the national reaction to the Eurozone crisis for the Italian democracy and the respect of the *Stato di diritto*, which in the end fueled for the first time a negative perception of the role of the EU in the Italian public debate; a debate which was, however, artificially orchestrated by some political forces.

Indeed, as is well known, in the midst of the most acute phase of the crisis for the country, during the summer and the fall of 2011, following the parliamentary rejection of the annual budgetary report, the Berlusconi Government resigned and a new technical Government led by former European Commissioner Mario Monti was appointed. This government, composed of non-elected officials, mostly university professors, carried out in a very limited time a series of crucial reforms, including the constitutional amendment of the balanced budget clause, a reform of the pension system and of the labor market to respond quickly to the pressure of the financial markets. Given the risk of a national default and the demands coming from the ECB and the European Commission, the adoption of these reforms – that severely undermined the Italian welfare system and the living conditions of the Italian population – was supported by a grand coalition of political forces in Parliament ranging from the left to the right of the political *spectrum*. Indeed, their approval was considered as inevitable, as if there were no further options. Almost no opposition was exerted by the Parliament, which abdicated to fulfill any scrutiny and oversight function on the Government:<sup>182</sup> the myth of the centrality of parliamentary legislation, which for decades had dominated the Italian discourse, had definitely gone and the saga of the approval of the Budget Act for 2019 is further confirmation of this.

As argued by Issacharoff and as perfectly exemplified by the Italian case, parliamentary passivity and inertia have become one of the four main democracy deficits of contemporary constitutional democracies.<sup>183</sup> The EU has been blamed for such an outcome by the opposition parties who tried to increase their consensus by using an anti-EU discourse, like the former Lega North (reconverted into Lega) and by new political movements, like the 5SM, which for some time even campaigned in favor of leaving the Euro and that eventually entered the Italian Parliament in the 2013 general election.<sup>184</sup> The alliance between the domestic and the supranational technocratic elites to restore sound public accounts in Italy, accused of constraining the ordinary function of national democratic decision-making, has been presented as the enemy of the people.<sup>185</sup>

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<sup>181</sup> See, critically, A. Morrone, 'Lucciole per lanterne. La n. 17/2019 e la terra promessa di quote di potere per il singolo parlamentare', *Federalismi.it*, 2019, no. 4; V. Piergigli, 'La Corte costituzionale e il doppio salto mortale mancato. Alcune osservazioni a margine della ordinanza n. 17/2019', *Nomos*, 2019, no. 1. See also T.F. Giupponi, 'Funzione parlamentare e conflitto di attribuzioni: quale spazio per i ricorsi «intra-potere» dopo l'ordinanza n. 17 del 2019?', *Quaderni costituzionali*, 2019, no. 2, 291-314.

<sup>182</sup> See B. Crum, 'Parliamentary accountability in multilevel governance: What role for parliaments in post-crisis EU economic governance?', *Journal of European Public Policy*, 2018, 25(2), 268-286.

<sup>183</sup> S. Issacharoff, 'Democracy's Deficits', *The University of Chicago Law Review* 485, 2018, 85(2), 497-504.

<sup>184</sup> See C. Fasone, *Taking budgetary powers away from national parliaments? On parliamentary prerogatives in the Eurozone crisis*, EUI Working Paper LAW 2015/37, talking about a Euro-national austerity coalition.

<sup>185</sup> See S. Puntischer Riekman and D. Wydra, 'Representation in the European State of Emergency: Parliaments against Governments?', *Journal of European Integration*, 2013, 35(5), 565-582.



The reading of the new fiscal rules as ‘imposed’ by the EU in a context of limited sovereignty, according to the discourse put forward by the Italian Eurosceptic parties, has largely prevailed in the public debate and has recently been confirmed by the result of the 2018 general elections. By contrast, the competing reading, based on the principle of political responsibility and responsiveness for the long-term sustainability of the Italian deficit and debt and to regain credibility within the Euro area, has fallen short.<sup>186</sup> The rules and the targets of the European economic governance put in place between 2011 and 2013 and to which Italy committed itself were denounced by the coalition government appointed in 2018 and composed of Lega and 5SM representatives (as well as of technical experts)<sup>187</sup> arguing that they impair the national interests. The allegation was that the EU rules prevented the Government from promoting the redistributive policy the Lega and the 5SM had promised to deliver to enhance the living standards of the Italian citizens.<sup>188</sup> Indeed these rules were, at first, disregarded and only when the threat of the start of a new excessive deficit procedure materialized once again, this time for lack of national compliance with the debt criterion,<sup>189</sup> concrete measures were taken to ensure a realignment of Italian public accounts with the medium-term objective.<sup>190</sup>

Such a reaction against the Euro-crisis measures suggests the emergence, if not the consolidation, in the Italian context of two elements that feature the ‘politics of resentment’ (against the EU) as a constitutional doctrine when Eurosceptic forces conquered the government:<sup>191</sup> the dismissal of supranational institutions as enemies of the people and the

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<sup>186</sup> With this regard, L. Morlino and D. Piana, ‘Economic Crisis in a Stalelated Democracy: The Italian Case’, *American Behavioral Scientist*, 2014, 58(12):1657 describe Italy as a ‘stalelated democracy’, where the economic crisis occurred ‘in an unstable political context characterized by low government effectiveness, low efficiency, corruption, decline of electoral participation, fragmented and radicalized party competition, social inequality, high public debt’.

<sup>187</sup> Namely, the President of the Council of Ministers, the Minister of Economics and Finance and the Minister of Foreign Affairs, non-elected MPs appointed in their position because of their technical expertise, also due to the pressure exerted by the Italian President of the Republic. See D. Tega and M. Massa, ‘Why the Italian President’s Decision Was Legitimate’, in *VerfassungsBlog*, 28 May 2018, on the presidential refusal to appoint Paolo Savona, supported by Lega in particular, as Minister of Economics and Finance. On the potential techno-populist nature of the Lega-5SM coalition government, see N. Lupo, ‘«Populismo legislativo?»: continuità e discontinuità nelle tendenze della legislazione italiana’, *Ragion Pratica*, 2019, 1, p. 260 ff.

<sup>188</sup> Disregarding that the main problem was the patent deviation from the medium-term objective, set by the previous government, without clear justifications and that national constitutional rules are in fact more stringent than the EU norms and the Fiscal Compact: see R. Ibrido and N. Lupo, ‘Le deroghe al divieto di indebitamento tra Fiscal Compact e articolo 81 della Costituzione’, in *Rivista Trimestrale di Diritto dell’Economia*, 2017, no. 2, 206-250.

<sup>189</sup> The Italian public debt indeed has gone beyond 132% of the GDP, while criterion initially set was a maximum of 60% of the GDP. The debt/GDP ratio, however, is interpreted country by country based on national figures, the starting economic situation of the state and the economic and fiscal trends, according to the medium-term objective, and is the deviation from it that creates concerns.

<sup>190</sup> In the end, the decision of the European Commission not to propose to the Council the opening of an excessive deficit procedure (Article 126 TFEU) was announced only on 3 April 2019, after the Italian government adopted its med-year budget for 2019 and further corrective measures on 1 July 2019: see European Commission – Press Release, *Commission concludes that an Excessive Deficit Procedure is no longer warranted for Italy at this stage*, Brussels, 3 July 2019, [https://europa.eu/rapid/press-release\\_IP-19-3569\\_en.htm](https://europa.eu/rapid/press-release_IP-19-3569_en.htm).

<sup>191</sup> On the main elements defining the ‘politics of resentment’ as a constitutional doctrine, see T.T. Konciewicz, section 2 of this paper.



treatment of European rules on the budget as obstacles against the fulfillment of the interests of the Italian polity.

The Italian Constitutional Court, however, has firmly remained loyal to the rule of law principles, as set in the new economic governance legal framework, and overall its authority has not been undermined during the hard times of the financial crisis. Also, given the delayed implementation of the constitutional balanced budget clause, which became operational only in 2014, its approach has sometimes been ambiguous.<sup>192</sup> There have been judgments in which the Court has been particularly keen to safeguard the fiscal sustainability of the national decisions,<sup>193</sup> while in others it has offered a very generous protection of social entitlements, and especially of pensions. This came notably with judgment no. 70 of 2015, when the Constitutional Court annulled – at the benefit of the great majority of pensioners – the block of the pension adjustment to the inflation rate in 2012 and 2013 and hence forced the political authorities to give millions of euro back to pensioners in a (judicial) effort to redistribute resources.<sup>194</sup> This notwithstanding, overall the Italian Constitutional Court – alongside the Presidency of the Republic<sup>195</sup> – has taken a very balanced stance in the aftermath of the Eurozone crisis. The Court has tried to accommodate the new fiscal constraints agreed at the EU level with the principles and rights enshrined in the national Constitution, especially in relation to the protection of substantive equality and social rights, which have been affected the most by the crisis, and that instead are an inherent part of the Italian conception of the *Stato di diritto*. In judgment no. 275 of 2016, for example, the Constitutional Court claimed that ‘It is the protection of the inalienable rights that affect the budget, not the balanced budget that conditions the due supply of the service through which the right is guaranteed’ (translation by the author).

The Italian Constitutional Court, instead, has been unable to remedy the other serious threat that the Eurozone crisis has posed to the Italian democratic state, namely the marginalization of the national Parliament as a budgetary authority, further strengthening a trend to sideline the role of the legislature that was already underway.<sup>196</sup> Due especially to the narrow avenues to access the Constitutional Court in Italy and the lack of a judicial construction linking the parliamentary prerogatives to the political rights of the citizens, unlike what some other Courts

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<sup>192</sup> See, for example, the statement by the then President of the Constitutional Court Crisculo, interviewed by an Italian newspaper, who candidly admitted that the Italian Constitutional Court decides without taking the financial and fiscal implications of its rulings into account, as if the new Article 81 Const. was not in force: A. Cazzullo, ‘La difesa dei giudici della Corte’, in *Corriere della Sera*, 21 May 2015.

<sup>193</sup> See, for example, judgments no. 10 and 178 of 2015. See C. Bergonzini, ‘The Italian Constitutional Court and Balancing the Budget: Judgment of 9 February 2015, no. 10 Judgment of 10 March 2015, no. 70’, *European Constitutional Law Review*, 2015, 12(1), p. 177 ff.

<sup>194</sup> See decree-law no. 65 of 2015, converted into Law no. 109 of 2015.

<sup>195</sup> For example, when authorizing the presentation of the Budget bill to the Parliament in 2019, the Head of State sent a letter to the President of the Council of Ministers urging the Executive to engage in a constructive dialogue with the EU institutions. See G. Rivosecchi, ‘Manovra di bilancio 2019: la rientrata procedura di infrazione per debito eccessivo’, *Quaderni costituzionali*, 2019, no. 1, p. 157.

<sup>196</sup> See N. Lupo and G. Piccirilli (eds), *Legge elettorale e riforma costituzionale: procedure parlamentari ‘sotto stress’*, Bologna (Il Mulino) 2016.

did in Europe,<sup>197</sup> the limitation of parliamentary powers by the national executive is hard to be made constitutionally justiciable in Italy.<sup>198</sup> Perhaps this is not necessarily a bad thing after all in the current situation of ‘politics of resentment’ and Eurosceptic rhetoric that dominates the executive branch. A too interventionist court would risk putting this institution at the center of the political struggle with the risk of delegitimizing its role.<sup>199</sup>

#### 4.2.2. The reaction to the migration crisis

In 2015 and 2016, Italy and the EU probably experienced the greatest immigration since their foundation due to the war in Syria and the destabilization of North Africa after the Arab Spring.<sup>200</sup> That was the peak of the migration crisis in Europe. Its repercussions are still very visible today in terms of legal measures taken to react to what then was an emergency situation – but that in the Italian case has now lost the features of an emergency despite the political rhetoric<sup>201</sup> – and of the persistent sense of anxiety cause by a so-called ‘invasion’ of Italy by third country nationals willing to ‘exploit’ domestic resources and threaten national security as portrayed in the public debate.<sup>202</sup>

However, the concerns for the rule of law triggered by the country’s treatment of migrants, in terms of compliance with international and EU norms as well as with the basic protection of human rights – all elements that, according to Lord Bingham,<sup>203</sup> shape the rule of law principles – predate the coalition Government between the 5SM and Lega and can also be referred to the EU itself.

Based on Article 78 TFEU, the EU is able to ‘develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement’ in accordance with the Geneva Convention of 1951 and its Protocol of

<sup>197</sup> See, for example, the German Constitutional Court’s case law on the EMU reforms – e.g. BverfG, 2 BvR 987/10, of 7 September 2011, 2 BvE 8/11, of 28 February 2012, 2BvE 4/11, of 19 June 2012, 2 BvR 2728/12, and many others – and the Supreme Court of Estonia’s judgment no. 3-4-1-6-12 of 12 July 2012.

<sup>198</sup> If not on strictly procedural ground. See C. Fasone, *Do Constitutional Courts Care About Parliaments in the Eurozone Crisis?*, op. cit.

<sup>199</sup> For this argument, see also M. L. Volcansek, ‘Political Power and Judicial Review in Italy’, *Comparative Political Studies*, 1994, 26(4), 492-509.

<sup>200</sup> Indeed, due to wars and failed regimes on the borders of the EU, in 2015 and 2016 in the whole EU more than one million asylum applications were filed per year. The number has now declined again to about 600 000 applications in 2018 and in the same year 37% of the EU first instance decisions had a positive outcome. Source: Eurostat, Asylum Statistics, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics). The main countries of destination are Germany, France and Greece, not Italy.

<sup>201</sup> See O. Urso, *The politicization of immigration in Italy. Who frames the issue, when and how*, in 48(3) *Rivista italiana di scienza politica*, 2018, p. 365 ff. In 2016 the number of arrivals was of 181 436 migrants while in 2018 the number dropped to 16 556 (thus before the measures of the new Government were fully put into force). Source: Dipartimento della Pubblica Sicurezza del Ministero dell’Interno italiano, <http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/sbarchi-e-accoglienza-dei-migranti-tutti-i-dati>.

<sup>202</sup> See C. Bassu, *Flussi migratori e democrazie costituzionali: tra diritti umani e sicurezza pubblica*, in no. 2 *Rivista trimestrale di diritto pubblico*, 2019, p. 479 ff. According to the RECONNECT pre-European election survey in Italy immigration is ranked as the third issue, after unemployment and economic growth, to worry the Italian respondents: see C. Plescia and J. Wilhelm, *Pessimism – not rejection – of the EU in Italy: Evidence from RECONNECT pre-election survey*, cit.

<sup>203</sup> See T. Bingham, *The Rule of Law*, London (Penguin) 2010, p. 66 ff.

1967 on the status of refugees as well as other relevant treaties. The EU has also set the criteria and mechanisms to determine ‘which Member State is responsible for considering an application for asylum or subsidiary protection’ (Article 78(2), lit. e, TFEU) through, amongst others, the so-called Dublin III Regulation, EU Regulation 604/2013, which assigns responsibility for dealing with asylum applications to the country of first arrival, hence the strong burden on border States such as Italy. In case of an emergency situation, with one or more Member States experiencing a sudden inflow of third country nationals, the Council, upon proposal from the Commission, can approve provisional derogatory measures, which indeed happened with the Juncker Plan in 2015 and the famous relocation decision taken for the benefit of Italy and Greece.<sup>204</sup> More significant from the point of view of the challenge to the rule of law is the EU-Turkey Agreement of 18 March 2016.<sup>205</sup> In exchange for financial aid and for legal facilitations, in particular on citizens’ visa requirements to enter the EU, Turkey agreed to take back all migrants not fulfilling the requirements to obtain international protection who had reached Greece coming from Turkey. Even more controversially, the deal included the resettlement to the EU of one Syrian refugee present in Turkey, according to the UN Vulnerability Criteria, for every Irregular Syrian returned to Turkey from the Greek Islands, treating human beings as if they were goods. The agreement has also been severely criticized for violating the principle of *non-refoulement* – thus the Geneva Convention, Article 78 TFEU and Articles 18 and 19 of the EU Charter – as it disputably considers Turkey as a ‘safe third country’ where asylum seekers and refugees are in the position to apply for international protection without troubles.<sup>206</sup>

The EU ‘model’ was followed shortly after at the national level. On 2 February 2017, the Italian Government signed a Memorandum with the Libyan Government,<sup>207</sup> aiming to provide military equipment as well as strategic and technological support through development funds in exchange for the commitment of the Libyan authorities to block migrants departing from the national coast towards Italy. As has been documented on several occasions by the United Nations (UN) High Commissioner for Refugees and by the International Organization for Migration and non-governmental organizations (NGOs),<sup>208</sup> this Memorandum has resulted in

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<sup>204</sup> See Council Decision (EU) 2015/1523 of 14 September 2015 and Council decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, in particular Art 4.

<sup>205</sup> It should be pointed out, however, that, despite the way the agreement was presented (including the reference to the Members of the European Council and to the EU in the text), it was not concluded by the EU but by the Heads of State and Government of the Member States, as stated by the General Court in particular when addressing an action for annulment against the agreement. See Order of the General Court (First Chamber, Extended Composition), Case T-192/16, *NF v European Council*, 28 February 2017 and Order of the Court of Justice, First Chamber, Joined Cases C208/17 P to C210/17 P, 12 September 2018, and the case-note by E. Cannizzaro, ‘Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council’, *European Papers*, 2017, 2(1), p. 251 ff.

<sup>206</sup> See J. Poon, ‘EU-Turkey Deal: Violation of, or Consistency with, International Law?’, *European Papers*, 2016, 1(3), 1195-1203; M. Gatti, ‘The EU-Turkey Statement: A Treaty That Violates Democracy’ (Part 1 and 2), in *EJIL Talk!*, 18 and 19 April 2016, [www.ejiltalk.org](http://www.ejiltalk.org); S. Peers and E. Roman, ‘The EU, Turkey and the Refugee Crisis: What could possibly go wrong?’, *EU Law Analysis Blog*, 5 February 2016, <http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

<sup>207</sup> The English translation of which is available here: [https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf).

<sup>208</sup> See, for example, Joint UNHCR/IOM Press Release, UNHCR, IOM condemn attack on Tajoura, call for an immediate investigation of those responsible, 3 July 2019:

the building in Libya of overcrowded detention centers where migrants suffer inhuman and degrading treatment disregarding the basic rules on international protection and the right to asylum enshrined in the Geneva Convention, in EU primary law and in the Italian Constitution (Article 10), to which Italy should abide. Libya, in contrast, has never ratified even the most fundamental international refugee and human rights instruments. The creation of such detention centers might not be considered, at first at least, a direct responsibility of the Italian Government. In fact, it is Italy that has agreed to cooperate with an arguably ‘failed state’<sup>209</sup> and that continues to finance this policy of arbitrary detention of thousands of migrants and refugees in inhuman conditions and in complete disregard of their vulnerability with a view to preventing them from reaching safer Italian shores (as well as losing their lives at sea).

Furthermore, detention centers have also become a reality on Italian territory, in breach of the fundamental rule of law tenets. In this case, it is the interplay between EU policy and national implementation that has produced such regrettable effects. In May 2015 the European Commission launched in the ‘European Agenda on Migration’ the ‘hotspot approach’ as one of the pillars for managing the refugee crisis.<sup>210</sup> From 2015 to 2018, four hotspots were established in Italy, namely Trapani and Pozzallo in Sicily, Taranto in Puglia and in Lampedusa, mainly regulated by soft law at the domestic level.<sup>211</sup> The hotspot teams are composed of Italian police officials as well as officials from EU agencies like the European Asylum Support Office (EASO), the European Police Office (Europol), and the European Border and Coast Guard Agency (Frontex), who carry out an activity of pre-identification, and the European Dactyloscopie (Eurodac), who look after the registration in addition to photo finger printing and medical screening of migrants.<sup>212</sup> Those activities serve the purpose of dividing the migrants between asylum seekers, those entitled to receive humanitarian protection (now special protection), to be transferred to first reception centers or to be relocated, and the irregular migrants who are likely to be expelled. As a matter of fact, the operation of pre-identification and registration may take several days, if not weeks, especially for vulnerable categories like unaccompanied minors, which *de facto* transforms their stay in the hotspot into informal detention under actual conditions that are difficult to monitor from the outside. The access of

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<https://www.unhcr.org/news/press/2019/7/5d1c836c4/unhcr-iom-condemn-attack-tajoura-call-immediate-investigation-responsible.html>.

<sup>209</sup> See R. Ware, House of Commons Library, *Libya: the consequences of a failed state*, Commons Briefing Papers CPB-8314, 18 May 2018.

<sup>210</sup> A ‘hotspot’ has been subsequently defined as ‘An area in which the host EU Member State, the European Commission, relevant EU agencies and participating EU Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external EU border’ by Article 2(10) of EU Regulation 2016/1624 on European Border and Coast Guard Regulation.

<sup>211</sup> The structure and the functioning are provided for in two governmental documents, *Italy’s Roadmap* of 28 September 2015, <http://www.statewatch.org/news/2015/nov/italian-Roadmap.pdf> (in Italian), and *Standard Operating Procedures Applicable to Italian Hotspots* of March 2016, [http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots\\_sops\\_-\\_english\\_version.pdf](http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf) Subsequently domestic primary law has regulated certain aspects of the detention in the hotspot like the maximum length of the stay.

<sup>212</sup> See C. Caprioglio, F. Ferri and L. Gennari, ‘Detention and Selection: An Overview of the Italian Hotspot System’, in *Border Criminologies Blog*, Oxford University, Faculty of Law, 10 April 2018, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/detention-and>. On the complex management of migration inflows on the Sicilian territory, see F. Alagna, *Shifting Governance. Making policies against migrant smuggling across the EU, Italy and Sicily*, Phd thesis, 2019, pp. 81-105.

NGOs to these hotspots is extremely limited and when allowed they have reported systematic violations of human rights, in particular in Lampedusa,<sup>213</sup> where the asylum applicants sometimes cannot leave the islands for months on end, creating a situation of overcrowding and of deprivation of liberty in breach of Article 13 of the Constitution and of several international (like Article 5 of the ECHR) and EU law norms (Article 6 of the Charter).<sup>214</sup> The risk of transforming the hotspots in detention centers has grown further after Decree Law no. 113 of 2018 has expanded the grounds of detention:<sup>215</sup> in case a third country national is found in an irregular situation in the national territory or has been rescued during search and rescue operations at sea he can be detained in a hotspot for up to 30 days for the authorities to ascertain his/her identity and nationality (Article 3).

Indeed, the anti-migration turn of Italian politics has been strengthened by the appointment of the coalition government between 5SM and Lega in June 2018 and, in particular, by the agenda pursued by the Vice President of the Council of Ministers and Minister of Interior, Matteo Salvini and ultimately endorsed by the whole Cabinet. Two decree-laws, in particular, have been at the very center of constitutional, European and international concerns, once again, for the potential threat to the rule of law they pose in addition to the formal problems they raise due to the abuse of emergency decrees in front of the Parliament, patently lacking extraordinary circumstances of necessity and urgency under Article 77 It. Const.<sup>216</sup> Once adopted by the Council of Ministers, Decree-Law no. 113 of 2018 immediately received criticism from the President of the Republic. President Mattarella issued the Decree, under Article 87 It. Const., but at the same time sent a letter to the President of the Council of Ministers (which is extremely unusual), stating that, even though this is not expressly mentioned in the text, the

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<sup>213</sup> On the unsustainable situation in Lampedusa, even before the creation of the hotspots, and the unacceptable deprivation of liberty and of other rights occurred in the reception centre of Contrada Imbriacola, see European Court of Human Rights, *Khlaifia and Others v. Italy* (no. 16483/12), where the Court condemned Italy for violation of Articles 3 (inhuman and degrading treatments), 5(1) and (2) (limitation of liberty and lack of information provided on the ground of detention), 13 (right to an effective remedy) ECHR, and Article 4 of Protocol 4 (prohibition of collective expulsion of aliens). On the deprivation of migrant's liberties in Italy and in the European context, see M. Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori*, Milano (Giuffrè) 2012, p. 339 ff.

<sup>214</sup> See L.L. Liboni, Italian Coalition for Civil Liberties and Rights, *Severe Human Rights Violations Found at Lampedusa Hotspot*, 12 March 2018, <https://www.liberties.eu/en/news/inhuman-conditions-in-the-lampedusa-hotspot/14526>. The hotspots of Lampedusa and Pozzallo were temporarily closed in 2018. In 2018, 13777 people entered the Italian hotspots. See also Guarantor for the rights of detained persons, *Relazione al Parlamento Italiano* 2019, 26 March 2019.

<sup>215</sup> Decree Law no. 113 of 4 October 2018, converted into Law no. 132 of 1 December 2018. F. Cortese, 'La crisi migratoria e la gestione amministrativa', *Rivista trimestrale di diritto pubblico*, 2019, no. 2, p. 435 ff., highlights that beyond the emergency, the Italian response to migration inflows has lacked a mid-term strategy in terms of administrative management of migrants and refugees.

<sup>216</sup> For a comprehensive overview of the problems raised by Decree-Law no. 113 of 2018, see S. Carta, 'Beyond closed ports: the new Italian Decree-Law on Immigration and Security', in *EU Migration Law Blog*, 31 October 2018, <https://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/>.

Decree-Law has to comply with the constitutional and the international obligations, in particular with Article 10 of the Constitution.<sup>217</sup>

First, Article 1 of the Decree-Law substantially repeals the national provisions on ‘humanitarian protection’, which used to be seen as a fundamental pillar of the right to asylum in Italy, alongside the granting of refugee status and of subsidiary protection.<sup>218</sup> Indeed, humanitarian protection could be granted, with some flexibility, to those who had suffered from deprivation of personal liberty, given the objective conditions in the country of origin and the personal situation of the applicant that forced him to flee said country, even though there was no risk of persecution or serious harm. Moreover, due to the Decree-Law, it becomes almost impossible for asylum seekers who see their application rejected to obtain a residence permit, even for humanitarian reasons. The ‘special protection’ residence permit, which instead is introduced by the Decree-Law, has a very limited scope of application, as it can be claimed just by those who cannot be repatriated due to the principle of *non-refoulement*. The same applies to other types of residence permits, for exceptionally serious medical conditions, for people carrying out extraordinary civil acts and for people affected by exceptional natural disasters in their home country. These special permits are ordinarily valid for only a period comprised between six months to one year compared to the previous permit for humanitarian protection, which are valid for two years. Moreover, those entitled to a humanitarian residence permit at the time of the entry into force of the Decree-Law lose any right to regularly stay in Italy unless they can receive an alternative permit. Relatedly, asylum applicants who receive a temporary residence permit can reside in the Italian territory but can no longer register at the municipal registry office, a pre-condition to exercising rights like the one to education, to be included in the national health care system and to benefit from other social services, from which thus they remain excluded.<sup>219</sup> Serious doubts have been expressed with regard to the detrimental impact of these provisions on the protection of the right of asylum under Article 10 of the Italian Constitution.<sup>220</sup>

Second, several provisions of this Decree-Law appear in contrast with Article 13 of the Constitution and with the Geneva Convention as long as the former justify the detention of migrants for the purpose of checking their identity and nationality. Not only can the detention

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<sup>217</sup> And with Article 117, first section, according to which the legislation must be in compliance with the duties deriving from international obligations. The letter, in Italian, is available here: <https://www.quirinale.it/elementi/18099>.

<sup>218</sup> M. Savino, in ‘Il diritto dell’immigrazione: quattro sfide’, *Rivista trimestrale di diritto pubblico*, no. 2, p. 381 ff. claims, for example, that more attention should be paid to the regulation of the borders and to the effectiveness of migrants’ rights rather than on the impact of the migration inflows on social rights (of migrants and citizens).

<sup>219</sup> To date the Italian Constitutional Court has not had the possibility to judge on the validity of these provisions from the standpoint of fundamental rights’ protection. Indeed, in judgment no. 194 of 2019 the Court decided on constitutional challenges brought by several Regions against the Decree-Law and its Law of conversion for alleged violation of their legislative powers, which the Court dismissed (it only upheld the challenge on the violation of the autonomy of municipalities and provinces due to the new powers granted by the Decree-Law to the prefects). However, on 31 July 2019 the Tribunal of Ancona referred questions of constitutionality to the Constitutional Court on the Decree-Law’s provisions excluding asylum seekers from the registration at municipal offices, which would eventually lead the Court to adjudicate also on the alleged limitation of asylum seekers’ rights triggered by the Decree.

<sup>220</sup> See S. Curreri, ‘La condizione giuridica del richiedente asilo alla luce del c.d. decreto sicurezza’, *Quaderni costituzionali*, 2019, no. 1, 169-171.



in the hotspots be prolonged for up to 30 days, but to facilitate the return of irregular migrants, third country nationals can remain in a return center for up to 180 days (previously, the maximum was 90 days). Linked to this is the circumstance that the Decree-Law dismantles the existing reception mechanisms in Italy. Indeed, only people who have been granted the refugee status and subsidiary protection and unaccompanied minors are hosted now in ordinary reception centers; asylum seekers stay at collective reception centers or at temporary reception centers that only provide basic services, well below the standard traditionally offered by the ordinary reception centers. Such a novelty, coupled with the length of the asylum procedures, can become very problematic from the perspective of the minimum standard to be fulfilled to offer decent living conditions under Article 4 of the EU Charter and Article 3 of the ECHR, interpreted in light of the European Court of Human Rights' case-law.<sup>221</sup>

Third, in case an asylum seeker is subject to an investigation or convicted for one of the serious criminal offences that led to the exclusion or the revocation of international protection (e.g. slavery, robbery, extortion, production, trafficking and possession of drugs) – even if the appeal is still pending and thus there is no final sentence – s/he can be immediately expelled independently of the risk to be killed, tortured or to suffer inhumane and degrading treatment, in breach of Article 3 ECHR and of Article 19 of the EU Charter and of the basic procedural guarantees of trials and of the right of defense.

The provisions of the Decree-Law just described exemplifies a trend toward the degradation of the system of protection of fundamental rights of third country nationals in Italy. This is carried out in the name of the alleged guarantee of the national security and of the rights of the Italian citizens whose impairment by the arrival of migrants is neither proved nor logically sound (given the figures on the decreased number of arrivals). The dismantling of the system of human rights protection takes place neglecting basic principles and norms of the Italian Constitution, of EU primary law and of international agreements ratified by Italy. The limits imposed by the enforcement of the *Stato di diritto* and deriving from constitutional, EU and international obligations were discredited by the coalition Government between the 5SM and Lega as a 'useless', if not dangerous, burden to fulfil the best interest of the Italian citizenry to security and public order.

It is not an overstatement to say that in the 'politics of fear' against the foreigner that has been constantly fueled and in the related bypassing of the Constitution one can detect elements of the 'politics of resentment'. Amongst those elements are the attempt by the politics to prevail on constitutional legality and the presentation of the rule of law principles as obstacles against the attainment of the 'real' interest of the Italians.<sup>222</sup>

The same considerations are applicable to the second Decree, Decree-Law no. 53 of 2019.<sup>223</sup> Amongst other things and in line with previous directives issued by the Minister Matteo Salvini, the new Decree-Law empowers the Minister of Interior, in agreement with the Ministers of Defense and of the Infrastructure and transports, after having informed the President of the

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<sup>221</sup> See case of Tarakehl v. Switzerland, Application no. 29217/12, and Khlaifia and Others v. Italy, Application no. 16483/12. See also, though not referred to Italy, the Court of Justice of the EU's rulings in the cases C-646/16, Jafari c. Bundesamt für Fremdenwesen und Asyl and C-490/16, A.S. c. Slovenia.

<sup>222</sup> On the pillars of the 'politics of resentment', see again, T.T. Koncewicz, section 3.

<sup>223</sup> Converted into Law no. 77 of August 2019.

Council of Ministers, to limit the access to or deny entry in Italian ports, the passage or the stopping and anchoring in the territorial sea of ships for reasons of public order and security or when the ship engages in the 'loading or unloading of any commodity, currency or person, contrary to the customs, fiscal, immigration or sanitary laws and regulation' (Article 19(2), lit. g, UN Convention on the Law of the Sea) of the State.

The politics of closed ports has led the UN High Commissioner for Refugees to claim that this Decree-Law violates the UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue and, indirectly, the Constitution that prescribes the respect of Italian international obligations. To use the words of the UN Refugee Agency (UNHCR), to rescue people at sea or to let them disembark at the closest and safest port is a 'long-standing humanitarian imperative (...) and an obligation under international law'<sup>224</sup> and the Libyan ports are certainly not safe, given the current situation in the country.

The effects of the first implementation of the Decree-Law is probably well-known, with the Italian Government denying at first on 15 June 2019 the permission to the NGO's ship Sea Watch 3 to enter the territorial sea and then the port of Lampedusa, a refusal that went ignored by the Captain of the vessel.<sup>225</sup> Immediately arrested with several criminal charges, including aiding illegal immigration, the Captain was eventually released on 2 July upon an order of the judge for the preliminary investigations. The judge clarified that the Captain had infringed the prohibition of the Italian Government in order to fulfil a duty which was imposed by norms or orders of the public authority in force in the Italian constitutional system, including the international obligations that Italy has incorporated into its legal order.<sup>226</sup> Therefore, such a conduct was exempted from penalty under Article 51 of the criminal code.

Such an epilogue and the political reaction to this judicial order show one last element of concern about the current degradation of the rule of law principles that Italy is facing. This is the belief that the political power is free to act without checks and balances, an idea against which the judiciary is willing to react (together with the President of the Republic and the Constitutional Court). The political management of the migration crisis reinforces the trend of a latent and pernicious conflict between the political power and the judiciary, which undermines the authority of both branches and that probably goes back to the corruption scandals and the collapse of the Italian political system in the 1990s. Yet, the migration crisis has brought to the fore a sort of existential tension between the measures adopted by the Government, often in patent violation of fundamental rights protected under the Constitution, EU law and international law, and the judiciary, which is engaged to protect the rule of law.

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<sup>224</sup> See UNHCR, 'UNHCR urges Italy to reconsider proposed decree affecting rescue at sea in the Central Mediterranean', press release, 12 June 2019.

<sup>225</sup> On the treatment of NGOs in this context, in particular of their alleged relations with smugglers, see F. Alagna, *Shifting Governance*, op. cit., pp. 130-136 and L. Masera, 'La criminalizzazione delle ONG e il valore della solidarietà in uno Stato democratico', *Federalismi.it*, 2019, no. 2 – Special issue.

<sup>226</sup> The Order of the Judge for the Preliminary Investigations of the Tribunal of Agrigento is available, in Italian here: <http://www.giurisprudenzapenale.com/wp-content/uploads/2019/07/Rachete-Carola-Ordinanza-sulla-richiesta-di-convalida-di-arresto.pdf>.

Perhaps the case in which such a tension so far has reached the tone of a constitutional drama has been the *Diciotti* case, by the name of the Italian Coast Guard ship, 'Ugo Diciotti', that was at the center of the controversy. In August 2018, the Minister of Interior Matteo Salvini prohibited the disembarkment of the Coast Guard ship, anchored in the port of Catania, thereby leaving 177 migrants of various nationalities, including minors, trapped in the ship for several days with precarious health and in unhygienic conditions. The Tribunal of Catania – section for ministerial crimes – wanted to prosecute the Minister of Interior for long-term kidnapping (*sequestro di persona pluriaggravato*) given the deprivation of liberty to which the migrants had been subject, as Matteo Salvini acted in his capacity of public official, abusing his powers also against minors, when exercising his functions.<sup>227</sup> However, according to Article 96 Const. and Article 9 of Const. Law no. 1 of 1989, the President of the Council of Ministers and the Ministers enjoy a special constitutional guarantee for alleged crimes committed when exercising their functions and, in such circumstances, their prosecution shall be previously authorized by the Chamber of Deputies or the Senate. In the *Diciotti affaire*, Matteo Salvini being a senator, it was the Senate that voted on the request of the Tribunal of Catania. On 20 March 2019 the Senate denied the authorization to prosecute by absolute majority of its members,<sup>228</sup> as set out by Const. Law no. 1 of 1989, because it considered that the Minister had pursued a preeminent public interest when exercising his governmental function.

From a formal constitutional standpoint, this was a perfectly legitimate decision of the Senate, which blocked the initiation of criminal proceedings against the Minister of Interior. It is not the first time that the special constitutional guarantee of Article 96 Const. and of Const. Law no. 1 of 1989 have been used dealing with alleged crimes committed by a Minister in relation to migrants' rights, which likewise triggered serious concerns at European level.<sup>229</sup> It was not even the first occasion when the Minister of Interior refused to authorize the access of an NGO ship arriving with migrants in Italian ports.<sup>230</sup> However, the rate of constitutional conflict that this case has generated appears symptomatic of a democratic and rule of law *malaise*, of a transfigured idea of what the Italian conception of the *Stato di diritto*, based on the principle of legality, used to be. The *Diciotti* case represents the last example of an 'escalation' of a more tense relationship between the executive and the judiciary and of the attitude of the Minister of Interior to justify its conduct in the name of the 'electoral mandate' conferred upon by the

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<sup>227</sup> The Order of the Tribunal of Catania of 21 January 2019, in Italian, is available here on the website of the Italian Senate:

[http://www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/\\$FILE/Doc.%20IV-bis,%20n.%201.pdf](http://www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf).

<sup>228</sup> 237 senators voted against the authorization, 61 in favour, and there were no abstentions.

<sup>229</sup> Back in 2009, the then Minister of Interior Roberto Maroni had been investigated for abuse of power by the competent Tribunal of Ministers, which eventually dismissed the allegation (so that the Parliament was not involved), for the *refoulement* of 277 migrants rescued at sea in Maltese waters by the Italian Guard Cost and the Finance Guard ships to Libya, against their will, in force of bilateral agreements between Italy and Libya. The case led to a decision of the European Court of Human Rights, *Hirsi Jamaa v. Italy*, 23 February 2012, in which Italy was condemned for violation of Article 3 ECHR and Article 4 of Protocol no. 4, prohibiting collective *refoulement*. See A. Morelli, 'Principio di legalità vs. 'preminente interesse pubblico'? Il caso Diciotti e le sue conseguenze', *Quaderni costituzionali*, 2018, no. 4, p. 900 and G. Romeo, 'Diritti fondamentali e immigrazione', *Federalismi.it*, 2019, no. 2 – Special issue, p. 8.

<sup>230</sup> On the case of the *Aquarius* ship, with 629 people on board, eventually disembarked in Valencia, thanks to the Spanish authorities, see F. Bailo, 'Il 'caso Diciotti' e la prova di forza con l'UE: fare i conti con la legalità', in *www.lacostituzione.info*, 26 agosto 2018.

voters in the 2018 elections in contrast to ‘undemocratic’ bodies like courts.<sup>231</sup> Equally problematic is the scope of the constitutional guarantee foreseen for the Ministers: could the preeminent constitutional interest to safeguard the national security and to combat illegal immigration justify any type of criminal offence committed when exercising the ministerial functions?

In some previous judgments, the Constitutional Court – not involved in this specific case – has tried to set some limitations, in particular emphasizing the role that ordinary judges should play in detecting and qualifying the alleged criminal offence.<sup>232</sup> The risk, however, in the very sensitive field of migration and of asylum law, is that the political nature of certain conducts claimed by the Ministers, also in light of the new Decree-Laws, could be used by them to justify what is *de facto* a systematic violation of basic rights of migrants, in theory protected under the Constitution, EU and international law for the sake of preserving the national collective interest to security and public order.

### 4.3. Lights and shadows

For decades, the Italian participation in the European integration process has represented a source of stability for Italian democratic institutions and the transformation and the consolidation of the *Stato di diritto*. This has not occurred without troubles. For decades political parties, with the exception of the Communist party – which moderated its claims against the European Community – almost uncritically supported the evolution of the European integration, Italy being one of the founding members. By contrast, the Italian Constitutional Court has been much more cautious in accepting certain developments triggered by the Court of Justice and by Treaty revisions. The Court has gradually reshaped its case-law on the principle of legality taking into account the pervasive impact of EU law and detecting certain core principles of the Italian Constitution that could not be displaced by the integration process. Lately, it has also engaged in a constructive and direct dialogue with the Court of Justice through the preliminary reference procedure.

The membership of the European Union has also accelerated or favored certain important institutional and constitutional reforms in Italy and, while it has undoubtedly triggered an evolution in the way certain tenets of the Italian *Stato di diritto* had been conceived, for instance regarding the place and the declining role of parliamentary legislation, overall it has been perceived as beneficial for the Italian constitutional system.

The Eurozone and the migration crises have put in doubt this assumption. The way in which the financial crisis has been managed in the country, through an alliance of domestic and supranational technocratic elites, has questioned the very essence of the democratic

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<sup>231</sup> See A. Morelli, *Principio di legalità vs. ‘preminente interesse pubblico’?*, cit., p. 900, who also highlights the devaluation by the then Minister of formal legal tools through which the government is expected to act, namely the use of twitter and facebook to take action and give orders when fulfilling institutional functions. On the attempt to criminalize migrants’ conduct and the reaction of courts, see, for example, the judgment of the Tribunal of Trapani, Ufficio del Giudice per le indagini preliminari, GIP Trapani, sent. 23 maggio 2019 (dep. 3 giugno 2019), Giud. Grillo, on which see the comment by L. Masera, ‘La legittima difesa dei migranti e l’illegittimità dei respingimenti verso la Libia (caso Von Thalasa)’, in *Diritto penale contemporaneo*, 24 June 2019.

<sup>232</sup> See the Italian Constitutional Court’s judgments no. 241 of 2009 and nos. 87 and 88 of 2012.

procedures and of the mechanism of parliamentary accountability and has undermined the ability of the welfare system to deliver. The main threats to the traditional ideas of the rule of law and democracy anchored in the Italian constitutional system have consisted of a further marginalization of the Parliament and of parliamentary legislation, with fast-track procedures, lack of debate and tight time constraints, and in the dismissal of supranational institutions as ‘enemies of the people’, pursuing an austerity policy in their own interest or, worse, in the interest of some Member States. Indeed, the European rules of the new economic governance have been treated as barriers to the fulfillment of the interests of the Italian polity.

With the migration and the refugee crisis, the relationship between Italy and the EU has experienced a further break. The initial migratory pressure at the sea borders and the lack of effective and sustainable EU-wide responses have been the excuses in Italy for the steady degradation of migrants’ fundamental rights protection, in particular of asylum rights, in breach of the Constitution, of EU law and international law. EU and international norms have been presented as obstacles to achieve the final objectives of the government to have safe borders, to combat illegal migration and to enhance national security. The pursuing of these objectives, and the overcoming of the rule of law ‘obstacles’, are justified in light of an unspecified electoral mandate that the majority of the voters would have conferred upon the Lega and the 5SM coalition government.

The attempts of the Italian government(s) to act without checks and balances and disregarding the basic protection of fundamental rights has led to an escalation of the conflict between the executive and the judiciary (also with the European Court of Human Rights), which does not appear to stop presently. The roots of this democratic and rule of law *malaise*, however, are also to be traced back to certain critical junctures of Italian constitutional history, in particular to the collapse of the party system in the 1990s, the role the judiciary played back then, the advent and domination of Italian politics by Silvio Berlusconi, and the artificial construction of an anti-elitist discourse.

However, in Italy, the ‘attempt of politics to dominate the law’, as one of the key features of the ‘politics of resentment’,<sup>233</sup> faces the vigorous reaction of the judiciary and of the organs of constitutional guarantee, the Constitutional Court and the President of the Republic, whose independence and autonomy from the political fight is not under threat and which have managed to keep a wise balance between acting as mere watchdogs and active intervention. The final bulwarks of the Italian *Stato di diritto* are safe for the time being. Furthermore, the latest political developments in the country, with the collapse of the coalition government between the 5SM and Lega, replaced by a coalition government between the 5SM, the Democratic Party and other minor parties in September 2019, might disclose a trend reversal as for the compliance with the basic rule of law principles, the protection of fundamental rights and a more friendly position vis-à-vis the EU. For example, with regard to migration issues, following the change of the Minister of Interior in office,<sup>234</sup> although the very disputed Decree-Laws have remained in force, the policy of ‘closed ports’, which relied on a discretionary choice

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<sup>233</sup> See, in detail, T.T. Koncewicz, section 3.

<sup>234</sup> Since 5 September 2019 and at the time of writing, the Minister of Interior is Luciana Lamorgese, former prefect of Milan. The appointment of a technical figure, with no previous experience in politics, marked a significant discontinuity with Matteo Salvini’s (social media) leadership.

of the Minister, has been somewhat abandoned. A different style of political leadership and a narrower interpretation of the contested provisions have emerged thereby also decreasing the rate of institutional conflict with the judiciary.

## 5. Reflections on the European dimension of democratic backsliding

This section reflects on the European dimensions of the developments outlined in section three and four: How should the European Union respond to recalibrations and rethinking of the constitutional essentials from within the community?<sup>235</sup>

The term democratic backsliding is understood as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’.<sup>236</sup> It highlights the errors in the design of the supranational legal order - the European Union.<sup>237</sup>

Although the European Union has faced many crises in recent years, including Brexit and the euro crisis, the democratic backsliding in some of its Member States, is the most serious of all. The backsliders have trampled upon the values of democracy, rule of law, and human rights. In doing so, they have called into question the very foundations of European integration and have undermined the European project from within. As such the ‘democratic backsliding’ undermines the European post-war liberal consensus which has been built around the

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<sup>235</sup> The doctrine is clearly aware of the dangers as attested by the growing number of important voices on the subject. See B. Büller, ‘On the side of democracy’, *Eurozine* (3 May 2013), available at <<http://www.eurozine.com/on-the-side-of-democracy/>>; J.-W. Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’, *European Law Journal*, 2015, 21(2), pp. 141-160 and ‘The failure of European intellectuals?’, *Eurozine* (11 April 2012), available at <<http://www.eurozine.com/the-failure-of-european-intellectuals/>>; ‘What, if anything, is wrong with a Copenhagen Commission?’, Transatlantic Academy Working Paper (July 2013), available at <[http://www.transatlanticacademy.org/sites/default/files/publications/Mueller\\_CopenhagenCommission\\_Jul13.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Mueller_CopenhagenCommission_Jul13.pdf)>; J. Dawson, S. Hanley, ‘What’s Wrong with East-Central Europe?’, *Journal of Democracy*, 2016, 27(1), 20-34; I. Krastev, ‘What’s Wrong with East-Central Europe? Liberalism’s Failure to Deliver’, *Journal of Democracy*, 2016, 27(1), 35-39; Ch. Walker, L. Way, ‘The Authoritarian Threat’, *Journal of Democracy*, 2016, 27(1), 46-63; A. von Bogdandy, P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Oxford/Portland (Hart Publishing) 2015; J. Kornai, ‘Hungary’s U-Turn: Retreating from Democracy’, *The Journal of Democracy*, 2015, 26(3), 34-38; A. Mungiu-Pippidi, ‘The Transformative Power of Europe Revisited’, *The Journal of Democracy*, 2014, 25(1), 20-32. See also the contributions to *Journal of Democracy*, 2007, 18(4): *Is East-Central Europe Backsliding?* (Special edition).

<sup>236</sup> This is the definition adopted by K. L. Scheppele and L. Pech in ‘What is rule of law backsliding?’, at <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>. See also K. L. Scheppele and L. Pech, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, *Cambridge Yearbook of European Legal Studies*, 2017, 19(3). According to N. Bermeo, democratic backsliding means the state-led debilitation or elimination of the political institutions sustaining an existing democracy): N. Bermeo, ‘On Democratic Backsliding’, *Journal of Democracy*, 2016, 27(1), 5-19. Also S. Lindberg, ‘The Nature of Democratic Backsliding in Europe’, at <https://carnegieeurope.eu/2018/07/24/nature-of-democratic-backsliding-in-europe-pub76868%20The%20Nature%20of%20Democratic%20Backsliding%20in%20Europe%20Source:%20Getty%20STAFFAN%20I.%20LINDBERG>.

<sup>237</sup> In more detail consult T. T. Konciewicz, ‘The Democratic backsliding in the European Union and the challenge of constitutional design’, in X. Contiades and A. Fotiadou, (eds.), *Routledge Handbook of Comparative Constitutional Change*, (Routledge), forthcoming. What follows draws on the chapter in the Handbook.



paradigm of ‘never again constitutionalism’ and has been reinforced by the legal commitment of the states to make sure that dictatorships would never again arise out of constitutionalism. Political power at the domestic level was to become subject to new international and supranational checks and balances with the legitimacy of the power depending on the continuous adherence to the core values of liberalism, values that transcend the desires of the moment. The trust has always been built on the convergence between the fundamental values of Member States and their legal orders on the one hand, and the foundations of the Union legal order, on the other. Indeed, as Pierre Pescatore, emphasized, the supranationality was predicated on the idea of ‘an order determined by the existence of common values and interests’.<sup>238</sup> At the heart of the European project there has been a fundamental commitment to a set of First Principles that the Member States, institutions, and civil society actors bound by the Treaties agree to respect and live by in their mutual dealings. The rule of law has been among the most essential of these First Principles essential to the post-war consensus as it started transforming ‘a political power’ into ‘political power constrained by law’<sup>239</sup>.

The democratic backsliding is not just another crisis of governance. Rather it strikes at the very core of the initial bargain that brought states together<sup>240</sup>. The backsliding changes a constitutional profile of component parts of the Union. The states not only fail to respect the First Principles but become ‘different states’ in terms of their constitutional fabric. It comes with the constitutional narrative of capturing the domestic, and rejecting international and supranational, institutions. The constitutional capture stands for a systemic weakening of checks and balances and entrenching power by making future changes in power difficult. It is a power-entrenching mechanism that has a built-in spill-over effect and, as such, the potential of Europe-wide adverse consequences<sup>241</sup>.

This is where the challenge of rethinking the constitutional design of the EU comes to the fore. The rethinking requires revisiting the substance of the EU membership by engaging with the new kind of regimes within the EU and asking what it means to be a member state of the EU in the 21st century. The language, and perspectives through which the EU looks at its Member States, must be challenged, and changed. Member States must be invested in the legal order and the integration project by repeated acknowledgement that they want to respect the understanding of the EU legality and its First Principles that brought them together. The states must speak with one voice that they are ready to defer to the common institutions enforcing these Principles in the name of the community. This commitment would then translate into

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<sup>238</sup> Id.

<sup>239</sup> On this and the concept of First Principles, see T. T. Konciewicz, ‘On the Rule of Law Turn on Kirchberg – What and How has the Court of Justice Been Telling Us About the EU Constitutional Essentials? part I’ at <https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-i/> and ‘On the Rule of Law Turn on Kirchberg – How the Court of Justice is Spelling out the Constitution's Unwritten Understanding(s) part II’ at <https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-ii/> and ‘The Existential Jurisprudence of the Court of Justice’ in *Liber Amicorum Marek Safjan*, (forthcoming).

<sup>240</sup> It should be appreciated that after 4 years of systemic undermining of the post-1989 ideas and paradigms, the tone of, and attention, from the EU, is finally changing. See for example ‘Editorial Comment. 2019 Shaping up as a challenging year for the Union, not least as a community of values’, *Common Market Law Review*, 2019, 56(1), 8-19.

<sup>241</sup> We draw here on T. T. Konciewicz, ‘The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?’ at <https://reconnect-europe.eu/blog/european-constitutional-design-error-konciewicz/>.

more technical aspect of the tools and build a remedial framework for the systemic and holistic response to the democratic backsliding.

The ‘Essential characteristics of the EU law’ (term used by the Court of Justice in its Opinion 2/13), must go beyond traditional ‘First Principles’ of supremacy and direct effect, and embrace now the rule of law, the separation of powers, the independence of the judiciary and the enforceability of these principles as integral parts of the ever-evolving EU legality. Together, these essential characteristics of EU law have given rise to what the Court has imaginatively called: ‘a structured network of principles, rules and mutually interdependent legal relations’ linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.

The rule of law, integrity of the legal system and judicial independence are the core principles of the original consensus that brought member states together. Yet with the politics of resentment, the rule of law as such is called into question not only at the conceptual level (what it is) but at the level of application and interpretation. The novel part of the argument would be to make Article 19 of the Treaty of the European Union (TEU) in conjunction with Article 2 TEU (enumerating the values on which the EU is based) the cornerstone of the EU legality, a path that the Court of Justice has recently appeared to follow, for example in the case *Commission v. Poland* of 24 June 2019 on the retirement age of the Polish Supreme Court’s judges.<sup>242</sup> While the ‘existential jurisprudence’ at the service of the EU legality calls for the imaginative and engaged interpretation from the courts, it would never work in isolation. The courtroom alone might achieve only so much. Its full impact will only be realised when the political institutions exhibit the readiness to complement the existential jurisprudence with their own expertise and enforcement of the First Principles. For the Court to effectively exert its judicialization effect on the EU governance, it must be backed up by the political branches of the EU. As a result, the litigation strategies of the European Commission must now respond to the ongoing shift in the court-room by framing arguments against the background of ‘the law’ (Article 19 TEU) and the existential jurisprudence. However, the recent steps taken by the European Commission in this direction, including its Rule of Law Blueprint for Action of 17 July 2019, while providing a useful toolkit of proposals and concrete actions to strengthen the rule of law in the Union fail to acknowledge and ‘accept the reality of the rule of law backsliding’ in Eastern Europe.<sup>243</sup>

Rather the democratic backsliding must force political leaders and constitutional lawyers alike into asking uneasy questions: Is the EU still a celebration of liberal democracy? Are the values still shared by all parties to the original bargain? Does the authority of law and respect for the law continue to bind the states together? Is the Court of Justice still considered one court for all the member states? To what extent is the mutual trust the backbone of the legal system of

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<sup>242</sup> See *Commission v. Poland*, C-619/18, ECLI:EU:C:2019:531, the case drawing, at least in part, on previous case law: see the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 50.

<sup>243</sup> See L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, ‘The Commission’s Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism’, RECONNECT Blog, 4 September 2019, <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>.

the EU? Is the democratic consolidation in the post-communist states really irrevocable and linear? These questions are as dramatic as the crisis that brought them to the forefront of the European legal discourse. Only by asking them and then by taking the uncomfortable answers seriously, will give the EU constitutional design a new lease of life.

The time has come to recognize that the democratic retrogression and the politics of resentment change the European Union's original consensus in the most profound way. First, not all Member States share the same values. Second, not all Member States are liberal democracies. Third, mutual trust in the Member States' legal systems is a rebuttable presumption. This systemic diversity is a new phenomenon: the European Union is no longer based on the acceptance of only one political system, a liberal democracy. The consensus has been betrayed by the parties to it. Member States are no longer different (with diversity understood in the traditional sense as an asset of internally diversified polity). Rather, the European Union is becoming a union of different Member States in systemic terms; states are unwilling, as opposed to unable, to share the same values and live by them as part of their original consensus for *coming together*.

By rejecting the Court of Justice, capturing the independent judiciary and attacking the preliminary ruling procedure, and rewriting the liberal rule of law, Poland has been turning its back on the community of law and the principles that the generations of Poles yearned for post-1945, and now seem shockingly ambivalent about. The European stakes (and costs) of the domestic constitutional reshuffle and regime trajectories within the Union should be spelt out in so many words: either respect the core rules of the community that you voluntarily accepted on the Accession day *or* leave. With the relentless attack on the Court and the EU judicial system that followed into the footsteps of the emasculation of the constitutional review and incapacitation of the judiciary and calling into question the very paradigms that shaped Polish democratic transformations in 1989, POLEXIT has already started. With this the time of constitutional reckoning and the mega politics have arrived.<sup>244</sup>

## 6. Conclusion

Since its foundation, the European integration project has featured technocratic and elitist elements, with a limited level of democratic participation that has not helped the EU to construct, with the support of the Member States, its own narrative and idea of democracy and to provide enough justification of the importance of compliance with EU rule of law principles. The convergence toward rule of law ideals has not been a significant problem for Member States that have developed their own democratic constitutional system in parallel to the advancement of the process of European integration. An important reason for this is, of course, that these countries participated in the formulation of what the rule of law means in the EU, based on common constitutional traditions. In contrast, citizens in post-communist countries

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<sup>244</sup> The term 'mega-politics' is borrowed from R. Hirschl, 'The Judicialization of Politics', in K. E. Whittington, R.D. Keleman, G.A. Caldeira, (eds.), *The Oxford Handbook of Law and Politics*, Oxford (Oxford University Press) London, 2008: 123. He points out that 'the judicialization of mega-politics includes the very definition—or *raison d'être*—of the polity'. The argument defended here is that the persistent undermining and rejection by one Member States of the constitutional essentials behind the consensus belongs to the category of the *mega-politics*.

have perceived accession as a forced Europeanization and mandatory catching up with what were considered as external and superior Western standards.

This notwithstanding, over the last few years, also due to the several crises the EU has experienced and to which mainly emergently responses were given,<sup>245</sup> the degradation of the rule of law values and democratic principles has appeared also in founding Member States often timed with an anti-EU flavor. Indeed, this politics of resentment that has emerged, for different reasons, in the two case studies, Poland and Italy, was fed in both countries on the perception of the EU as technocratic and elitist, as imposing ‘external’ constraints and hurdles without letting national peoples decide about their own destiny. The politics of resentment is to some extent rooted in the history and in the culture of the two countries but has only recently emerged against the EU.

In Poland, the EU legitimacy deficiencies have not only been used to support critique, but also as an excuse to justify the dismantling of EU values from within. The politics of resentment in this country has paved the way for a constitutional project of peripheral democracy. Grounded on extreme majoritarianism, on electoral authoritarianism and on the prevalence of the political over the legal that the EU accession with its ‘harmonizing force’ toward Western European standards has indirectly and, of course, involuntarily strengthened, the democracy on the periphery represents a new incarnation of democracy. Independent authorities, first courts, and consequently individual freedoms,<sup>246</sup> have been the first targets of the new ‘Constitution of fear’, which rather than taming the political power represents just a political manifesto aiming to exclude dissent and ‘the Other’ from the ethnic-based identity promoted through the Government’s narrative.

In Italy, instead, the politics of resentment is fairly recent and goes back, first, to the legal reaction to the Eurozone crisis through austerity measures and, second, to the management of the migration crisis, even though the roots can be traced back to the dismantling of the political system and the advent of Silvio Berlusconi in politics in the 1990s, following the change of the international landscape. The rhetoric against the EU has been mainly fueled, on the one hand, by the allegation that the EU ‘technocracy’ dismantles the welfare system and, on the other, by the weak support to tackle the migration inflow conveyed through the idea of the lack of representation of the Italian interests within the EU ‘undemocratic’ decision-making. In contrast to this rhetoric, the Italian participation in the European integration process has generally supported the consolidation of democratic institutions and of the rule of law principles and the idea of ‘diktats’ imposed by the EU are used by some national political forces to further sideline the Italian Parliament. Against this backdrop, institutions like the Presidency of the Republic, the judiciary and the Constitutional Court, motivated by a euro-friendly vocation, are acting as bulwarks against this degradation of rule of law and democratic principles and to preserve the position of Italy in the EU framework.

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<sup>245</sup> On this point, see L. van Middelaar, *Alarums and Excursions. Improvising Politics on the European Stage*, Newcastle upon Tyne (Agenda Publishing) 2019.

<sup>246</sup> See W. Sadurski, *Poland’s Constitutional Breakdown*, Oxford (Oxford University Press) 2019, p. 58 ff.

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