Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks

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Limitations on the independence of constitutional courts are among the main pointers of constitutional regression. Taking a cue from the best-known cases in Europe and Latin America (Hungary, Poland, Russia, Turkey and Venezuela) the paper considers how the 'normalization' or 'neutralization' of the courts has triggered and then maintained illiberal degeneration (since these institutions are the major counter-balance to the political majority). The paper explores the role played by the 'reformed' courts in the new political reality, and also takes into account the dialogue with international courts. The latter aspect is very sensitive, considering the tough implementation of the judgements of supranational courts in cases of constitutional 'sovereignism'. The analysis will be performed using the method of comparative law.

1. The involvement of constitutional courts in constitutional regression, and the end of the 'transition paradigm'

The aim of the present paper is to make some comparative remarks on the role and destiny of constitutional courts in countries that, although they belong in different cultural and geopolitical contexts, have all experienced a constitutional deterioration in the last few years. This deterioration has occurred in cases of the apparent consolidation of democracy or the further decline of an already existing semi-authoritarian regime. In both cases, the courts were heavily implicated in the authoritarian degeneration and the maintenance of the status quo, being either 'assaulted' or manipulated. In examining the way in which constitutional regression has affected constitutional courts, we will try to underline their role and responsibility during regression (since they were either victims or protagonists) and after regression. Hungary, Poland, Russia, Turkey and Venezuela[1] are the countries dealt with in this paper.

Formally, the system in the countries under examination is not a fully authoritarian one, since these countries have constitutions that provide for the separation of powers and the guarantee of rights (as well as being members of supranational organizations that are based on liberal-democratic values). These countries are uncritically linked under the labels of 'populism' and 'sovereignism', although it would be preferable to talk about 'constitutional regression' or 'involution', meaning a modification (amendment or replacement) of the constitution, or the constitution being emptied or derogated from, in order to neutralize its system of checks and balances.

The involvement of constitutional courts in constitutional regression has several causes, particularly the will of the dominant political majority at a given moment in history, to which one

[1] In the case of Venezuela, we are referring to constitutional review provided for by the *sala constitucional* of the Supreme Court of Justice. Constitutional review can also be performed by other judges, according to Article 334 of the Constitution.

can add mistakes by previous legislators or framers of the constitution, as was the case in Hungary and Poland.[2] This path has been influenced by the procedures for appointing judges and the possibility of their confirmation. The replacement of judges has been justified on the grounds of their alleged inefficiency, corruption or compromise with the previous regime. However, even politically appointed or 'loyalist' judges can maintain a certain independence (as emerges from some dissenting opinions).[3] One should also consider the 'natural' deference of constitutional judges towards the executive power and especially towards the head of state (as seen, for example, in Russia and Turkey). In some of the cases examined, constitutional courts that had played a prominent role in the past and that had turned against ruling majorities suffered a drastic reduction of their role, through both the supply of 'loyalists' and the constitutional limitation of competences (Hungary, Turkey). Consequently, we can distinguish between countries in which illiberal rulers had a penalising attitude towards the constitutional courts (Hungary, Poland, Turkey) and countries where the rulers tried to subdue the courts regardless of their previous behaviour (Russia, Venezuela).

The political capture of the constitutional courts (and of other checks and balances) has been reached in different ways, depending on constitutional and political peculiarities. In Hungary and Poland the 'majoritarian principle' of the ruling party prevails, assisted by the charismatic approach of the leader (more evident in the case of Orbán, while Kaczyński is a 'shadow' leader). In other cases a 'personalized' and 'extra-party' culture predominates, where the constitutional framework and party system are modelled after the dominant leader.

The main aspects on which attention should be focused are the ways in which degeneration occurred (through the modification of or derogation from the constitution), the role of the constitutional courts in this regression (as victims or co-protagonists) and after it, the responsibility and failure of supranational actors.

The role that constitutional courts play in contexts of illiberal degeneration, where the constitutional system becomes hybrid (semi-autocratic) or almost autocratic, is particularly relevant as it is in cases of transition to democracy. In some respects the 'degeneration' and 'transition' paradigms seem to overlap. Until a few years ago the paradigm of transition or democratization was dominant, especially with reference to the former communist countries. Today the paradigm has been replaced with that of constitutional regression or involution, which concerns not only these

[2] See A. Di Gregorio, 'Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?', *DPCE on-line*, 4/2016.

[3] See the comment by V. Partlett, 'Russia's contested constitutional review', *Int'l J. Const. L. Blog*, 13 February 2018, in which some dissenting opinions are used to address the possibility of a positive evolution of the Russian Constitutional Court, more in line with a liberal-democratic vision of constitutionalism. Nevertheless, at present, such a prediction is dubious.

countries but also so-called 'consolidated' democracies. The change of reconstructive setting, despite being necessary as events develop, is likely to merge situations that are different without distinction. It would be preferable to have a short-term goal of describing what is happening. This could avoid the application of quantitative indices of democracy and authoritarianism: at the moment, in fact, there is a struggle to consolidate broader hypotheses that are aimed at identifying new hermeneutical categories, despite the crisis of the traditional pattern of classification.

2. The political and constitutional environment in the countries concerned

Constitutional regression in the countries examined presents common trends and many differences, depending on the political environment and the historical heritage. Some of the countries analysed experienced important democratic phases (Hungary and Poland from 1989 to 2010-2015;[4] Venezuela was considered among the most stable Latin American countries after 1958 and until the political crises of the 1980s), while others (Russia, Turkey) include in their genetic code authoritarian elements that periodically surface or become stable for a long time.[5]

In Hungary and Poland, democracy appeared stable up to the parliamentary elections in 2010 and 2015, respectively, and Russia's democratic performance has worsened since 2004. In Turkey, which in its history has experienced several phases of 'confusion' between civil and military power and the dominance of the latter, the authoritarian degeneration, with the concentration of powers in the hands of the President, increased after the coup attempt of July 2016 (although the decline started with the constitutional amendments of 2007),[6] as evidenced by the 2017 constitutional amendments. As for Venezuela, which, like almost all the Latin American countries, has alternated over history between military regimes and more democratic phases, the populist degeneration began in the last part of the Chavez presidency[7] and the country has become openly authoritarian with Maduro, especially since 2016. The 1999 Bolivarian constitution (with a post-liberal content and a strong emphasis on social rights and popular participation) gradually came to be disregarded.[8]

Despite having different constitutional systems (in terms of their system of government), both Russia and Turkey, where a charismatic leader has held power for many years, have experienced a

[4] Poland also had liberal and democratic traditions even in its pre-socialist history.
[5] See the opinion of B. Mathieu, '25 ans d'élections démocratiques à l'Est. Propos conclusifs', *Est Europa*, 2016-2017, pp. 265-269, regarding the imperial perspective of some countries that have a natural inclination to deny liberal values.
[6] Constitutional reforms over the last 30 years have had mixed results: until 2007 there was progressive liberalization (especially through the amendments of 1995, 2001 and 2004) but since 2007 there has been a centralization of power in the hands of the President and the reduction of counterweights and the role of parliament.
[7] According to A. R. Brewer-Carías, *Los jueces constitucionales controlando al poder o controlados por el poter. Algunos cases notorios y recentes*, San José Costa Rica, Editorial Investigaciones Jurídicas, 2017, this began with the consultative referendum for the election of the Constituent Assembly in 1999.
[8] A. R. Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment*, New York, Cambridge University Press, 2010; J. Couso, 'Venezuela's recent constitutional crisis: Lessons to be learned from a failed judicial coup d'etat', *Int'l J. Const. L. Blog*, 12 April 2017.

further consolidation of the executive power, and, in particular, the power of the President, in recent years: in Turkey through specific constitutional amendments and in Russia through political practice and legislation (plus the increase in the length of the presidential term that was introduced in 2008). The constitutional crises in Hungary and Poland take different forms, since they are based on the dominance of a majoritarian power that does not formally affect the constitutional competences of the leader of the executive (the real leader is not the President of the Republic but the premier in Hungary and the leader of the majority party in Poland).

All these countries have been subjected to the democratic conditionality of (regional) organizations for the protection of human rights and, in the case of Hungary and Poland, also to the complex path of democratic conditionality that precedes entry into the European Union.[9] Because of this membership, the violation of rule of law principles and of a set of fundamental rights inherent in a liberal democracy appears in all its seriousness. In fact, the violation of such rules appears more serious in the context of the Council of Europe, of which four out of the five countries under consideration are members, and the European Convention on Human Rights (ECHR).[10] However, the lack of effective sanctioning mechanisms within the Council of Europe has concentrated punitive efforts within the European Union.[11] Regarding Venezuela, its relationship with the Organization of American States (OAS) and with the Inter-American Court of Human Rights has been marked by a growing distance, leading to the adoption of an OAS resolution in June 2018 that declared the re-election of Maduro in May 2018 as illegitimate (and therefore initiated the procedure for the suspension of Venezuela). In April 2017, Venezuela had itself submitted a request to leave the organization, and this will be finalized in 2019. Declarations have been made by Russian and Hungarian politicians about the possibility of exiting the ECHR system in order not to have to comply with unwelcome judgements of the Strasbourg Court.

Although this conditionality could be considered unsuccessful, if we take a long-term view the situation appears to be more nuanced. Pressure by the Council of Europe made important reforms

[9] Turkey has also been subjected to a long-standing democratic EU conditionality – with results in terms of significant reforms until the beginning of the 2000s – and formally this is still the case.

[10] This Convention, together with a court system and numerous additional protocols, was written to protect fundamental rights in a democratic society.

[11] Different tools are used, with different practical impacts and involving different institutions: an infringement procedure (EU Commission, CJEU: specific violations of EU law), a rule of law framework (Commission: systemic approach), a rule of law dialogue (Council of the EU: limited impact), Article 7 (activated against Poland in December 2017 at the initiative of the Commission), European Parliament reports (see, among the most recent, the Sargentini report on Hungary which also called for the activation of Article 7), etc. The literature on this topic is huge. For some aspects please refer to A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017. For the list of the tools please refer to the study commissioned by the European Parliament, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Annex 1, Brussels, 2016.

possible in both Russia and Turkey, and during some periods the dialogue with the Strasbourg Court has been fruitful in both countries.

3. The role of constitutional courts in constitutional regression

Despite the peculiarities of each case, there are many similarities in the efforts of political leaders or ruling parties to 'atrophy' their judicial counterweights (Poland, Hungary, Turkey) or, vice versa, to make the courts support them more strongly in their nationalist projects to re-build society (Russia, Venezuela). In the long term, after their neutralization the courts have become submissive and therefore supportive of the political leadership, although in Poland and Hungary there are still glimmers of a positive evolution, at least with reference to the ordinary courts. The political involvement of the constitutional courts also depends on their competences (in Turkey and Hungary, they were very large and with a potential political impact). Venezuela demonstrates the risk of granting broad powers of constitutional control to judicial institutions in weakly institutionalized democracies.[12] In fact, without strong democratic institutions and a strong sense of judicial virtue, constitutional courts can favour authoritarian constitutionalism.[13]

As far as Venezuela is concerned, significant judicial decisions were adopted before the Chavist 'colonization' of the top court; these had an ambiguous content that favoured constitutional transformation. In two judgements of 19 January 1999 (Consultative Referendum I and II), the Supreme Court allowed the holding of a consultative referendum for the convocation of a national Constituent Assembly (Articles 245-246 of the 1961 Constitution provided for a confirmatory referendum on a new Constitution only after parliamentary approval of the text). This Supreme Court was replaced in the 1999 Constitution by the Supreme Court of Justice (SCJ) as a new supreme court to be elected by the new political majority,[14] which suddenly became a reliable instrument of the regime. A series of decisions, starting in 2003, have denied the superiority of international treaties on human rights despite the provisions of the Constitution (see *infra*). Subsequently, since the end of 2015, numerous decisions have been adopted to support the President and to challenge the authority of the newly elected National Assembly, for which the united opposition parties received the majority of the votes. With the decisions of 27 and 29 March 2017, the SCJ allowed a new Constituent Assembly to be convened and the National Assembly that

[12] C. García-Soto, 'Venezuela', *2017 Global Review of Constitutional Law, p.* 314.
[13] M. Tushnet, 'Authoritarian constitutionalism', *Cornell Law Review*, Vol. 100, 2015, p. 391. Please see also T. Ginsburg & T. Moustafa (Eds.), *Rule by Law. The Politics of Courts in Authoritarian Regimes*, New York, Cambridge University Press, 2008; M. Hailbronner & D. Landau, '*Introduction: Constitutional courts and populism', Int'l J. Const. L. Blog*, 22 April 2017.
[14] The 32 *magistrados* are appointed by the National Assembly and serve non-renewable 12-year terms. Appointments are made by a two-thirds majority or by a simple majority if efforts to appoint a judge fail three times in a row.

had been elected on 6 December 2015 to be delegitimized. In particular, in its judgement no. 156 of 29 March, claiming to react to the refusal of the National Assembly to respect some of its previous decisions, the Supreme Court of Justice stated that 'in order to preserve the country's rule of law' it was forced to transfer all the powers of the parliament to itself ('or to the entity that the Court decides'). The judgement no. 378 of 7 June 2017 established that the President had the power to convene a Constituent Assembly without a prior consultative referendum since he acted in the name of popular sovereignty.[15]

In Turkey, the Constitutional Court (TCC) has played an important role in terms of secularization, democratization and Europeanization since the 1960s, after its introduction in the Constitution of 1961. The Court was inspired by European models and, despite the heavy influences of the military on the Turkish legal system, it managed to gain credibility both nationally and internationally as an important barrier, especially in the secularist direction, as evidenced by the numerous judgements for the dissolution of Islamic-inspired political parties. This is a strong example of militant democracy, in which the Constitutional Court, along with other institutions, was built to protect the core values of the secular Kemalist Republic.[16]

Over time the TCC compromised the interests of the ruling majority, which at different moments reduced the autonomy and competences of the Court. In particular, some judgements of 2007-2008 affected important political interests of the Justice and Development Party (AKP). One of them threatened even to dissolve the party.[17] Another case concerned the constitutional amendment that would have allowed the legislator to remove the ban on wearing the headscarf in universities; the Court considered this to be unconstitutional.[18] The decision about the majority required for the parliamentary election of the President was also a clear signal to the party to stop.[19] The arguments used to settle these cases with a high constitutional profile have been weak, and this has further undermined the Court's credibility.[20] After the constitutional reform of 2010, the number of

[15] For an accurate description of the judicial degeneration please refer to ICJ (International Commission of Jurists), *The Supreme Court of Justice of Venezuela: An Instrument of the Executive Branch*, August 2017.

[16] The guiding principles of Kemalist ideology, reaffirmed in all Turkish constitutions, were outlined in the famous speech held in 1927 and defined precisely the six arrows of Atatürk: nationalism (Turkish ethno-cultural identity), republicanism, populism (intended as the unitary concept of the people as opposed to the status and the social divisions of the previous legal order), statism (especially in the economic field), laicism, and reformism (social and political transformations had to continue to modernize the state). Please refer to C. Camposilvan, 'La Costituzione della Turchia', *in* L. Mezzetti (Ed.), *Codice delle Costituzioni*, Vol. VI.1, Padova, Cedam-Wolters Kluwer Italia, 2016, pp. 510-511.

[17] E. 2008/1, K. 2008/2 of 30 July 2008.

[18] E. 2008/16, K.2008/116 of 5 June 2008.

[19] E. 2007/45, K. 2007/54 of 1 May 2007.

[20] See M.C. Uzun, 'The protection of laicism in Turkey and the Turkish Constitutional Court: The example of the prohibition on the use of the Islamic veil in higher education', *Penn. St. Int'l L. Rew*., Vol. 28, no. 3, 2010; Y. Roznai, 'An unconstitutional constitutional amendment—The Turkish perspective: A comment on the Turkish Constitutional Court's headscarf decision', *International Journal of Constitutional Law*, Vol. 10, no. 1, 2012; O.O.Varol & L. Dalla

constitutional judges[21] and the role of the head of state in their appointment[22] increased. A limit of 12 years was also imposed on the term that the judges could serve. Although the reform was presented as being one step closer to the requirements of European conditionality, and although it has indeed reduced the influence of the military, it actually exposed the institutions to more political influence.[23] Further minor changes have taken place as a result of the constitutional Act of 16 April 2017 (the number of judges has been reduced from 17 to 15),[24] and, although the competences of the Court remain the same, it has indirectly lost some of them, especially as a result of the strengthening of executive power.[25] The Court endorsed the regression with a series of decisions in sharp contrast to its earlier and settled case law.

The Russian Constitutional Court (RCC) has never been powerful or authoritative since its creation in 1990-1991. However, as a result of the Court's political involvement at a moment of institutional crisis (1991-1993), the 1993 Constitution reduced its responsibilities (for instance, it no longer checks political parties). There have been no major changes in the composition and competences of the Constitutional Court after the entry into force of the Constitution, although the change in the method of appointment of the Court's president and vice presidents in 2009 represented an evident reduction of its autonomy.[26] This Court, however, unlike others examined here, had not given evidence of insubordination to the executive. It stated that the war in Chechnya and the incorporation of the Crimea were legal, and disagreed with the Strasbourg Court on politically sensitive issues that touched on important public interests, such as in the Yukos case. A similar tendency is found in the jurisprudence concerning fundamental political rights, with the Court having substantially supported the restrictions on freedom of assembly and association. The most politicized decisions are those challenging the Strasbourg Court's authority (especially from

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Pellegrina & N. Garoupa, 'An Empirical Analysis of Judicial Transformation in Turkey', *The American Journal of Comparative Law*, Vol. 65, 2017.

[21] From 11 permanent and four substitute judges to 17 permanent and no substitute judges.

[22] The proportion of judges selected from the judicial system was reduced, while the President selects 14 out of the 17 judges (drawn from the high courts, the Council of Higher Education, etc.).

[23] Varol & Dalla Pellegrina & Garoupa, 2017, p. 197. See also L. De Grazia, 'Constitutional coup e democrazie illiberali: l'esperienza della Turchia', *Rivista AIC*, 4/2018 and V.R. Scotti, 'L'indipendenza della Corte costituzionale turca fra legittimità delle leggi e tutela dei diritti. Quali segnali per la tenuta della democrazia in Turchia', *Rivista di diritti comparati*, 1/2019.

[24] This is a result of the abolition of two military courts that had the authority to nominate candidates.

[25] Following M. Haimerl, *'The Turkish Constitutional Court under the amended Turkish Constitution', VerfBlog,* 2017/1/27, other amendments risk having indirect consequences for the Court's autonomy. For example, there are amendments that make it easier to adopt emergency decrees: the President can now issue decrees in matters of competence of the executive without an authorization law, and consequently it is no longer possible for the Court to limit the executive power by checking whether the law itself meets the requirements of the Constitution.

[26] While until 2009 the individuals appointed to these positions were selected by the same constitutional judges, the 2 June 2009 amendment of the constitutional Act on the Constitutional Court requires that the president and the two vice presidents are elected from among the constitutional judges by the Federation Council on a proposal from the head of state.

2015 to 2017, to be read through the prism of the speeches of RCC chairman Zorkin),[27] while others are more protective of social rights.

As far as Hungary and Poland are concerned, political pressure on constitutional judges is particularly unbearable because these countries have undergone a long and difficult process of constitutional transition from the communist system. In both cases, but especially in Hungary, these institutions played a relevant role in dismantling the remnants of the previous political regime and in the democratization process. The Polish Constitutional Tribunal (CT) started operating in the terminal phase of the regime (it was introduced by the 1982 constitutional amendment and began functioning in 1986), while the Hungarian Constitutional Court (HCC) was introduced in 1989 and soon became an important counterweight on the political scene, adopting many anti-majority decisions. On this path of democratization and the approach to European standards, the constitutional courts enjoyed high prestige and authority. Furthermore, the initial composition of these courts (former dissidents or protagonists of regime change, especially in the Hungarian case, were appointed as judges) also reinforced their credibility at the international level.

In these two countries, the ruling parties, Fidesz (from spring 2010) and PiS (from November 2015) respectively, have influenced the appointment of constitutional judges[28] to paralyse the constitutional courts or to make them submissive, introducing judges who can be manipulated and are close to the ruling majority. Subsequently, they changed the rules to make the way the court functioned, and the quorums required,[29] more complex. In Hungary, the transformation of the Court began before the adoption of the new 2011 Fundamental Law, in relation both to the methods of election of judges and to their number and competences.[30] The Court tried to 'resist', but the parliament constitutionalized the legislative provisions that it had declared unconstitutional. Although the reduction of the jurisdiction of the Constitutional Court is not significant (before 2010 it was super-equipped), the new methods for the selection of the judges and the president, the repealing of the jurisprudence preceding the entry into force of the 2011 Fundamental Law (IV

[27] In a long interview given to the government newspaper *Rossijskaya Gazeta* on 9 October 2018, Zorkin made a number of philosophical observations on the concept of constitutional identity and the values underlying the Russian Constitution, which in his mind counterbalance the 'moral degeneration' being brought about by globalization. This is a trend that has been emerging from his speeches in the last few years, one which urges a 'nationalist' and conservative stance against western criticism of Russia. It should also be remembered that Zorkin is holding his sixth non-consecutive term as chairman of the RCC.

[28] However, in Poland everything started through a tactical error of the previous parliamentary majority (the Civic Platform), which, on 8 October 2015 at the end of parliamentary session, elected more constitutional judges than were allowed.

[29] See, for example, the new Polish Act on the CT criticized by the Venice Commission: Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, Venice, 14-15 October 2016.

[30] Since June 2010, in the parliamentary committee that selects the candidates for constitutional judges, political forces have been represented in proportion to the number of seats they have in parliament (previously, every parliamentary party had a member). From September 2011 the number of judges increased from 11 to 15 and in the new Fundamental Law the judges' term of office increased from 9 to 12 years.

constitutional amendment) and some other negative innovations have led to its subjugation. Particularly relevant are the decisions of the HCC on constitutional identity and the superiority of the Fundamental Law over international treaties (see, for instance, the judgements of 30 November 2016, 9 July 2018 and 25 February 2019). Poland appeared to follow the same path as Hungary, but in the absence of a political constitutional majority the conservative party acted differently by violating the CT's judgements, and therefore the Constitution, several times.[31] The CT tried to resist, with the help of ordinary and administrative judges, but after the replacement of the constitutional judges there was a paralysis or neutralization of this institution, both quantitatively and qualitatively. There has been an 'emptying' of the Constitution that can be compared to what happened during the communist system.

4. The constitutional identity doctrine and the new role of courts after constitutional regression

One of the common features of the cases examined lies in the contrast with regional courts for the protection of human rights (and in the case of Hungary and Poland with the European Court of Justice too). In fact, to legitimate constitutional regression a constitutional court must elaborate its own theory of 'constitutional identity'. This is especially the case in Russia, Hungary and Venezuela, even though in the first two of these countries the content of this identity has not been clarified except with reference to generic principles, whereas in Venezuela this identity has an ideological content with a clear populist nature. It should also be stressed that the constitutional identity doctrine, although being a new label for very old narratives on the protection of the core content of a constitution against the penetration of European law, means different things depending on the legal system that is taken into consideration, be it the EU or the ECHR one.

Both the Russian Constitutional Court and the Venezuelan SCJ have treated the unwelcome decisions of international courts for the protection of fundamental rights as inapplicable in their country, using different legal foundations. In the Russian case, the RCC has since 2013 become an instrument of 'sovereign' resistance against the Strasbourg Court, borrowing from some western countries, for example the German Constitutional Tribunal, a narrative of the protection of the national identity that was born in another context and for other purposes.[32] First the Constitutional

[31] Examples are the illegitimate appointment of three judges and the amendment of the Act on the Constitutional Tribunal to limit its competences and complicate its activity. In detail, see: W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper No. 18/01, January 2018; W. Sadurski, 'Polish Constitutional Tribunal under PiS: From an activist court, to a paralysed tribunal, to a governmental enabler', *Hague Journal on the Rule of Law*, 2018.

[32] For critical comments please refer to A. Blankenagel, 'The ghost haunting decisions of European constitutional courts: What to do with constitutional identity?', *Sravnitel'noe konstitutsionnoe obozrenie*, Vol. 27, no. 5, 2018 and A.

Court and then the legislature provided for a specific procedure to check the constitutionality of the judgements of international courts.[33] The legal reasoning of the RCC to justify the non-enforceability of international judgements was rather complex and sophisticated, referring to the doctrine of constitutional identity (the Court stated that the ECHR had been consistent with the Constitution at the time of its ratification but that the later 'evolutionary' case law of the ECtHR was unconstitutional).[34]

The *sala constitucional* of the Venezuelan SCJ was cruder, particularly in three decisions made in 2008, 2011 and 2015.[35] Despite the clarity of the constitutional provision regarding the prevalence of international human rights treaties if they contained provisions more favourable than those of the Venezuelan Constitution and legislation (Article 23), this provision was completely disregarded by the constitutional judge by referring to the prevalence of popular sovereignty. In the judgement no. 1939 of 18 December 2008 (the Gustavo Álvarez Arias case) the *sala constitucional* of the SCJ argued for the subordination of law to politics, expressing the Venezuelan version of constitutional identity and sovereignism: 'law is a normative theory at the service of politics'. The standards to settle the conflict between principles and norms must be compatible with the 'political project of the Constitution' (that is, the 'Estado Democrático y Social de Derecho y de Justicia').[36] The SCJ has even accused the Inter-American Court of abusing its powers and of having itself violated some international treaties.

As for Hungary, the judgement 22/2016 on the interpretation of Article E(2) of the Fundamental Law was a rather vague decision. While stating that the HCC maintains the right to make two types of verification with regard to the joint exercise of powers between the EU and Hungary (sovereignty and identity control), the HCC did not clarify what constitutional identity is, referring to vague principles and to the concept of a 'historical constitution' (the protection of constitutional identity, deriving from the Hungarian historical constitution, cannot be called into question by the requirements of European integration). The petition was based on the constitutional prohibition on

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Dzhagaryan, 'Russian constitutionalism: In search of identity', *Sravnitel'noe konstitutsionnoe obozrenie*, Vol. 27, no. 6, 2018.

[33] The RCC decision of 14 July 2015 and the Constitutional Act of 14 December 2015.

[34] See especially the decisions of 6 December 2013 (Markin), 19 April 2016 (Anchugov and Gladkov), and 17 January 2017 (Yukos). In the Anchugov and Gladkov case, the RCC considered that no subordination existed between the European and Russian legal systems, but emphasized the need for dialogue, since 'the effectiveness of the norms of the ECHR in the legal system of Russia depends on the respect by the European Court of Human Rights of the national constitutional identity'. The same argument was repeated in the Yukos judgement. On this subject, please refer to A. Di Gregorio, 'Russia', *2018 Global Review of Constitutional Law, forthcoming.*

[35] No. 1939 of 18 December 2008, no. 1547 of 17 October 2011, no. 1175 of 10 September 2015.

[36] In the Court's words, 'There cannot exist a system of absolute and ahistorical principles over the Constitution'. Theories that claim to limit sovereignty and national self-determination 'as a pretext of universal values' are unacceptable. If there is a conflict between the Constitution and an international treaty 'the constitutional norms that privilege the general interest and the common good must prevail, since the provisions that privilege the collective interests ... over special interests must be applied'. For further comments, see Brewer-Carías, 2017.

'collective expulsion' from Hungary (Article XIV(1)), but the connection between this provision and the relocation of migrants/asylum seekers from other European countries was not clarified.[37]

Subsequent to constitutional regression, constitutional courts survive with the aim of strengthening political consensus because they enjoy a certain aura of impartiality that can be useful for expanding the power of the regime.[38] This can be seen in Hungary, for example, with the ruling of 30 November 2016, and in Russia in the remarks of president Zorkin. In countries that had previously achieved a stable, even if fragile, democratization, the constitutional jurisprudence following constitutional regression has in fact deleted the guaranteeing role of the constitutional court.

Despite all the limitations observed, however, constitutional courts can still play a non-secondary role in legal systems that have undergone constitutional regression, a role that goes beyond the simple legitimation of the regime. In Russia, for example, the Constitutional Court focuses on specific issues that are relevant to citizens' economic and social rights, while in dealing with the rare cases of the restriction of political rights it protects specific aspects. During the time when the most heated confrontation with the Strasbourg Court took place (2015-2017), the RCC issued a relevant judgement concerning the confiscation of the property from bona fide buyers, in which it accepted the position of the European Court of Strasbourg, favouring an internal adaptation.[39] In some circumstances, therefore, the Russian Constitutional Court continues to refer to, or to align with, the case law of the Strasbourg Court.

Despite the unfavourable political context and the fact that the introduction of individual petitions decreased the number of judgements on systemic violations (as in the Hungarian case, where *actio popularis* previously existed),[40] there still is the 'daily' protection of individual rights and some dissent by a few judges. In Turkey, after the recent reforms and in the changed political climate following the 2016 coup, constitutional judges demonstrate continuing deference to the ruling party, particularly in politically sensitive issues (such as freedom of expression or the detention of members of parliament). The clearest examples of its political deference are found in

[37] T. Drinóczi, '*The Hungarian Constitutional Court on the limits of EU law in the Hungarian legal system'*, *Int'l J. Const. L. Blog*, 29 December 2016; G. Halmai, *'The Hungarian Constitutional Court and constitutional identity' and* R. Uitz, 'National constitutional identity in the European constitutional project: A recipe for exposing cover ups and masquerades', both at http://verfassungsblog.de.

[38] Couso, 2017.

[39] This is the decision of 22 June 2017, in which the RCC tried to make up for the delays of the legislator in implementing a series of decisions of the European Court of Human Rights on the protection of the right to housing when placed in competition with the right to property. This was a very sensitive social issue, with hundreds of petitions.

[40] Since the 'packing', the HCC has avoided politically sensitive cases (using various ploys, including deferring the decision for as long as possible) or has supported the government. In general, the Court adopts a minimalist, non-activist attitude. See B. Eszter & F. Gárdos-Orosz, 'Hungary', *2017 Global Review of Constitutional Law*, p. 130. Also Z. Szende, 'The political orientation of the members of the Hungarian Constitutional Court between 2010 and 2014', *Constitutional Studies*, Vol. 1, no. 1, 2016; Z. Tóth, 'Changes which occurred in the role of the Hungarian Constitutional Court in protecting the constitutional system', *Acta Univ. Sapientiae, Legal Studies*, Vol. 7, no. 1, 2018.

the decisions that backtrack on the symbols of secularism (in a ruling of 11 December 2018, the ban on wearing the headscarf in universities was abolished), on the control of governmental emergency decrees,[41] on the autonomy of parliament (itself affected by the constitutional reforms from 2007 onwards) and on offences to the head of state. However, in the context of individual petitions, the Court has sought to protect its reputation by deciding, more often than in the past, that there have been violations of constitutional rights and freedoms, especially in relation to the operation of individual petitions.[42] In fact, since 2012, the TCC has in many cases backed individual rights going against the interests of the ruling party (deleting the suspension of YouTube and Twitter, protecting the environment and the freedom of expression of journalists, etc.), although it declined to rule on the fairness of the electoral process, and deferred pronouncements in cases involving the detention of journalists.

5. Some concluding remarks on the courts under examination here, on how to label the 'deteriorated' constitutional systems and on their perspectives

The five cases examined can be grouped into three sub-groups: Poland and Hungary, Russia and Turkey, and Venezuela. In the first two countries, constitutional degeneration seems more serious because it takes place in the 'new' heart of the EU and the Council of Europe, where there is financial support from the EU, and despite protests in various European forums and institutions. The role of international organizations, especially the Council of Europe and the European Union, has been and is ambivalent for these countries. On the one hand, as mentioned, these organizations have for several years made the introduction of relevant institutional reforms possible. On the other hand, their model of integration has partially failed, since countries that had lived in communist solidarity were not ready for a purely liberal model. In the case of Russia and Turkey, the hegemonic ambitions and the cultural and geopolitical characteristics of the two former empires have led to the failure of European (ECHR) democratic conditionality. In Venezuela, the degeneration has been so crude and violent, even from a constitutional point of view, that the Maduro regime is completely isolated, both regionally and internationally.

As a further reflection on the five countries examined, we can distinguish three cases in relation to the impact of the degeneration on the constitution: the adoption of a new constitution (Venezuela

[41] In eight decisions adopted between 12 October 2016 and 2 November 2016, the TCC unanimously rejected applications claiming the unconstitutionality of four emergency decrees brought into force in the aftermath of the failed coup. Applying a literal interpretation of Article 148 of the Constitution, it made its former case law completely meaningless without any further argument.

[42] S. Köybaşı, 'Turkey', *2017 Global Review of Constitutional Law*, p. 296. B. E. Oder, '*Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular'*, *Int'l J. Const. L. Blog*, 2 May 2017. Following Köybaşı, 2017, in 2017 the Court found violations in 917 cases, the highest number since the introduction of individual petitions.

in 1999,[43] and Hungary in 2011), the adoption of amendments to the constitution in force (Hungary both before 2011 and after, and Turkey especially in 2010 and 2017), and the derogation from and emptying of the constitution (Poland, Russia). As far as the constitutional courts are concerned, the degeneration goes through three phases: the replacement of judges (Hungary, Poland, Turkey, and Venezuela), the reduction of competences (Hungary, Turkey indirectly, and Russia in the past), and the imposition of difficulties in taking decisions (Poland). As regards the behaviour of the courts, we can distinguish between those that favoured degeneration (Venezuela), those that supported it with the doctrine of constitutional identity or similar (Russia and Hungary), and those that suffered it (Turkey). After regression, the support given by the courts is in some cases total and brutal (Venezuela) and in others it is almost total since the courts support the rulers in politically sensitive cases (Turkey, Russia and Hungary) while having greater autonomy in individual cases or aspects (dissenting opinions, social rights and other rights). In Poland the CT became quite passive.

Notwithstanding this sad picture, there is still a chance of a positive evolution. For Poland and Hungary, the hope for change lies in the synergy between the internal opposition forces and the pressure from the European Union. In the Polish case particularly, one can speak of a sort of 'parallel' judicial system, and this is true to a lesser extent in Hungary,[44] although this system could be only temporary before a final purge. There is an interesting 'tug of war' in place between the 'loyalist' Constitutional Tribunal (and also the 'renewed' National Judicial Council) on the one hand and the Supreme Court and the ordinary judges on the other. The latter are raising several preliminary questions to the Court of Justice of the EU to challenge the legitimacy of the judicial reforms of the PiS. On the other hand, the Minister of Justice, who is also the Attorney General, is punishing the rebel judges through his controlled National Judicial Council with a series of disciplinary proceedings.[45]

In these countries the courts are resisting also thanks to the European Court of Justice.[46] This has 'softened' some aspects of judicial reforms, like the early retirement of common judges (with

[43] Ignoring the new constitutional process that has been in progress since 2017.
[44] The Hungarian ordinary courts still maintain a certain level of independence. For this reason Fidesz has introduced a new order of administrative judges (the relevant Act was adopted on 12 December 2018), with the possibility of 'loyalists' being appointed, to deal with controversies with a high political content (taxation and public procurement, police misconduct, asylum cases, electoral issues, and freedom of information).
[45] Please refer to J. Sawicki, 'La via giudiziaria come possibile soluzione alle minacce per lo stato di diritto: la Polonia dinanzi alla Corte di giustizia dell'Unione europea', *Osservatorio AIC*, 2019, forthcoming.
[46] And to other courts in EU Member States: note the refusal to grant European arrest warrants for Polish citizens, on the basis that the principle of the rule of law in the judiciary is not guaranteed in Poland.

different consequences in Hungary and Poland: in the first case without practical effects,[47] and in the second pushing the parliament to have a temporary review of the law)[48].

In Venezuela, a partially dual or parallel system has been created, which symbolizes the overcoming of the authoritarian system after a long period of stabilization.[49] Another lesson that comes from this case is that strong international pressure can provoke reactions within a country. In other cases, therefore, the only hope for change lies in division within the ruling elites. This applies to countries such as Turkey and Russia, where the regime is virtually monolithic.

As has been rightly observed, when compared to the complete political subjugation of the Venezuelan SCJ even the Polish Constitutional Tribunal seems to be respectable. The Venezuelan supreme judges have behaved in an openly illegitimate manner and should face criminal prosecution. Instead, in less extreme cases, 'if a court restrains itself and tries to maintain a minimum of legal functionality in the face of overpowering politics, they deserve understanding and support from the European Club of Constitutional Courts'.[50] Also, while fully authoritarian regimes generally ignore counterweights established domestically or internationally, semi-authoritarian or hybrid regimes use the judiciary, especially the higher courts, instrumentally to justify their anti-liberal behaviour. This happens because they come from traditions where there is a separation of powers, apparently successful democratic conditionality, the protection of fundamental rights, or secularization, or because they intend to maintain a certain international prestige for economic and political reasons.

The existence of hybrid systems leads us to reflect that the analysis of the ways in which constitutional regression occurs is useless without a few general considerations about the state of health of constitutionalism and the conceptual justifications that political leaders use to explain their behaviour (they contrast the mechanisms of 'democracy', in fact, populist demagogy, and 'liberal constitutionalism', considered as a set of non-democratic, elitist and far from popular needs). It is not surprising that the regression in Poland and Hungary has given rise in recent years to a rich multidisciplinary debate concerning the decay of democracy. The merit of this research is to produce new explanatory formulas that go beyond the traditional categories of public law and political science and avoid the rigid alternative between autocracy and democracy, but are able to

[47] For further details please refer to A. Di Gregorio, 'The Fundamental Law of Hungary in the European context', in Z. Szente & F. Mandák & Z. Fejes (Eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris, L'Harmattan, 2015.
[48] Sawicki, 2019.
[49] Without taking into account the most recent appearance of a counter-president in January 2019, the dualism began after the 2015 National Assembly elections.
[50] M. Steinbeis, 'Piercing the hull', *VerfBlog,* 2019/1/12.

keep genetically different phenomena together.[51] However, some of these studies give rise to reservations because they tend to unite cases in distant geographical areas and in places where democracy has never taken root. Both the terms 'populist regime'[52] and 'illiberal democracy'[53] are inaccurate in the constitutional law discourse, although they have a strong media impact. Moreover, the term 'illiberal democracy' is mainly suitable for the cases of Poland and Hungary. The cases of Turkey and Russia are quite different, as these countries have mostly had imperial size systems marked by a high power concentration.[54] Venezuela, despite being the most problematic country in the current Latin American political landscape (and criticised by most other countries in the region)[55] is an example of the fluctuating trends of Latin American political culture, with recurrent phases of democratic decline reflecting the culture of the leadership (*caudillismo*).

What happens in the contexts of fragile democratization or 'imperfect' authoritarian systems, with the capture and neutralization of the top courts, allows a broader reflection on the new perspectives of constitutional narrative and categorization. Even if efforts to find new formulas, so as not to jeopardize the enormous effort of the last decades aimed at the worldwide exportation of western liberal-democratic models, allow the reference to constitutionalism to be kept, albeit in a deteriorated form ('authoritarian constitutionalism', 'constitutions without constitutionalism', 'constitutional retrogression'),[56] constitutional scholars in fact tend to borrow classifications from political scientists, focusing on the characteristics or regressions of democracy[57] or re-proposing old

[51] Linz draws a distinction between 'authoritarian regimes', which are 'non-democratic regimes that are not totalitarian' (based on a limited political pluralism without extensive political mobilization) and 'authoritarian populist regimes' that are not considered as pluralist since they divide society between 'us' (the people) and 'them' (the elites)'. See J. Linz, *Totalitarian and Authoritarian Regimes*, Boulder, Colorado: Lynne Rienner Publishers, 2000, pp. 159-261.

[52] In the Russian political tradition, the concept of 'populism' refers to a very specific historical heritage, which has nothing in common with the current trend. The reference to 'populism' in the Turkish constitutional tradition is also peculiar, being one of the six arrows of Kemalism, as mentioned above.

[53] Prof. S. Cassese gives a clear picture of this, explaining why democracy dies if it becomes illiberal: 'La democrazia svanisce se diventa illiberale', *Corriere della sera*, 28 August 2018. See also G. A. Tóth, 'Constitutional markers of authoritarianism', *Hague Journal on the Rule of Law*, September 2018.

[54] In Turkey, from a concentration of civilian and military powers the power became centralized in the hands of the leader of an (initially) moderate Islamic party; in Russia there is a horizontal and vertical centralization regardless of the existence of a 'party of power', which is a consequence and not the origin of the strong leadership.

[55] C. de la Torre & F. Finchelstein, '"Democraduras"? Venezuela and National-Populism in Latin America', in A. Martinelli (Ed.), *When Populism meets Nationalism. Reflections on Parties in Power*, Milano, Ledizioni LediPublishing, 2018.

[56] Please refer to, among others, *University of Chicago Law Review*, Vol. 85, no. 2, March 2018 (*Symposium: The limits of constitutionalism – A Global Perspective*); T. Ginsburg & A. Simpser (Eds.), *Constitutions in Authoritarian Regimes, New York,* Cambridge University Press, 2018*;* G. Stopler, 'Semi-liberal constitutionalism', *Global Constitutionalism*, Vol. 8, no. 1, March 2019.

[57] For example V. Baldini, 'Populismo versus democrazia costituzionale. In "dialogo" con Andreas Voßkuhle', *Dirittifondamentali.it,* 2/2018. See also T.G. Daly, 'Democratic decay: Conceptualising an emerging research field', *Hague Journal on the Rule of Law*, 2019.

theories related to the cyclical waves of democratization (and regression).[58] This may be a springboard for further and broader discussions.

References

Baldini V., 'Populismo versus democrazia costituzionale. In "dialogo" con Andreas Voßkuhle', *diritti fondamentali.it,* 2/2018

Blankenagel A., 'The Ghost haunting decisions of European constitutional courts: what to do with constitutional identity?', *Sravnitel'noe konstitutsionnoe obozrenie*, Vol. 27, no. 5, 2018

Brewer-Carías A., *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment*, New York, Cambridge University Press, 2010

Brewer-Carías A., *Los jueces constitucionales controlando al poder o controlados por el poter. Algunos cases notorios y recentes*, San José Costa Rica, Editorial Investigaciones Jurídicas, 2017

Camposilvan C., 'La Costituzione della Turchia', *in* L. Mezzetti (Ed.), *Codice delle Costituzioni*. Vol. VI.1, Padova, Cedam-Wolters Kluwer Italia, 2016

Couso J., 'Venezuela's Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D'etat', *Int. J. Const. L. Blog*, 12 April 2017

De Grazia L., 'Constitutional coup e democrazie illiberali: l'esperienza della Turchia', *Rivista AIC*, 4/2018

Di Gregorio A., 'The Fundamental Law of Hungary in the European context', in Z. Szente & F. Mandák & Z. Fejes (Eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris, L'Harmattan, 2015

Di Gregorio A., 'Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?', *DPCE on-line*, 4/2016

Di Gregorio A., 'Russia', *2018 Global Review of Constitutional Law, forthcoming*

Dzhagaryan, 'Russian constitutionalism: in search of identity', *Sravnitel'noe konstitutsionnoe obozrenie*, Vol. 27, no. 6, 2018

Eszter B., Gárdos-Orosz F., 'Hungary', *2017 Global Review of Constitutional Law*

García-Soto C., 'Venezuela', *2017 Global Review of Constitutional Law*

Ginsburg T. & Moustafa T. (Eds.), *Rule by Law. The Politics of Courts in Authoritarian Regimes*, New York, Cambridge University Press, 2008

Ginsburg T. & Simpser A. (Eds.), *Constitutions in Authoritarian Regimes,* New York, Cambridge University Press, 2018

Haimerl M., *'The Turkish Constitutional Court under the Amended Turkish Constitution', VerfBlog,* 2017/1/27

ICJ (International Commission of Jurists), *The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch*, August 2017

Jakab A. & Kochenov D. (Eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017

Kenenova I., 'Constitutionalism and political leadership in Central and Eastern European countries: challenges and perspectives', *Sravnitelnoe konstitutsionnoe obozrenie*, n. 5 (126), 2018

[58] I. Kenenova, 'Constitutionalism and political leadership in Central and Eastern European countries: challenges and perspectives', *Sravnitelnoe konstitutsionnoe obozrenie*, no. 5, 2018; A. Lürhmann & S.I. Lindberg, 'A third wave of autocratization is here: What is new about it?', *Democratization*, 2019.

Köybaşı S., 'Turkey'*, 2017 Global Review of Constitutional Law*

Martinelli A. (Ed.), *When Populism meets Nationalism. Reflections on parties in power*, Milano, Ledizioni LediPublishing, 2018

Mathieu B., '25 ans d'élections démocratiques à l'Est. Propos conclusifs', *Est Europa*, 2016-2017

Oder E., '*Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular', Int'l J. Const. L. Blog*, 2 May 2017

Partlett V., 'Russia's contested constitutional review', *Int'l J. Const. L. Blog*, 13 February 2019

Roznai Y., 'An unconstitutional constitutional amendment—The Turkish perspective: A comment on the Turkish Constitutional Court's headscarf decision', *International Journal of Constitutional Law*, Vol. 10, no. 1, January 2012

Sadurki W., *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Legal Studies Research Paper no. 18/01, Sidney Law School, January 2018

Sadurski W., 'Polish Constitutional Tribunal under PiS: From An Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', *Hague Journal on the Rule of Law*, 2018

Sawicki W., 'La via giudiziaria come possibile soluzione alle minacce per lo stato di diritto: la Polonia dinanzi alla Corte di giustizia dell'Unione europea', *Osservatorio AIC*, 2019

Scotti V.R., 'L'indipendenza della Corte costituzionale turca fra legittimità delle leggi e tutela dei diritti. Quali segnali per la tenuta della democrazia in Turchia', *Rivista di diritti comparati*, 1/2019

Stopler G., 'Semi-liberal constitutionalism', *Global Constitutionalism*, Vol. 8, no. 1, March 2019

Steinbeis M., 'Piercing the Hull', *verfassungsblog.de,* 12 January 2019

Szende Z., 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014', *Constitutional Studies*, Vol. 1, no. 1, 2016

Tóth Z., 'Changes which Occurred in the Role of the Hungarian Constitutional Court in Protecting the Constitutional System', *Acta Univ. Sapientiae, Legal Studies*, Vol. 7, no. 1, 2018

Tushnet M., 'Authoritarian Constitutionalism', *Cornell Law Review*, Vol. 100, 2015

Varol O.O. & Dalla Pellegrina L. & Garoupa N., 'An Empirical Analysis of Judicial Transformation in Turkey', *The American Journal of Comparative Law*, Vol. 65, 2017

Uzun M.C., 'The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education', *Penn. St. Int'l L. Rew*., no. 28, 2010