Democratic Backsliding and Comparative Constitutional Soul-Searching in Europe

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Abstract

After more than a decade of sustained interest in the topic of democratic backsliding, the time is ripe to take stock of how this work reflects on comparative constitutional scholarship. The article focuses on developments in several Central and Eastern European constitutional orders and identifies two broad scholarly camps, which it terms 'legalistic reinforcement' and 'material critique.' The first frames the contemporary backsliding problem as one of abuse of established norms and practices and, indeed, of constitutionalism itself. The second identifies the roots of the backsliding in the elitist and neoliberal foundations of constitutional projects nationally and at the European level, in the persistent inequalities they support, and in the lack of a redistributive answer to the backsliding challenge. The article argues that methodological and normative assumptions and blind spots persist in both camps. Whether extrapolating from limited case studies, insufficient contextualism, poor interdisciplinary engagement, and a purported value neutrality which ignores central categories of analysis such as gender, these shortcomings risk being reproduced in the so-called "transition 2.0" scholarship on restoring constitutional democracy in the region. The enduring pathologizing view of the 'backwards East,' the return of the transitology paradigm, and the false choice between defense and critique of the liberal constitutional project demand reflection, not elision. They are all topics for comparative constitutional law soul-searching in Europe today.

Keywords: democratic backsliding, democratic resilience, rule of law crisis, populism, transition 2.0, emotions in comparative constitutional law, civic education, Hungary, Poland, Romania, Europe.

1 Introduction

Democratic backsliding is a global phenomenon, and Europe has not been spared. Indeed, judging by the prominence of countries such as Hungary and Poland in comparative constitutional studies of democratic backsliding, Europe—and Central and Eastern Europe in particular—would appear to have been at the forefront of the rise of autocratic legalism[2] and authoritarian populism.[3] Piercing national borders, the phenomenon is said to now target the very content of international norms,[4] as well as to undermine, through misappropriation, international human rights.[5] Moreover, despite the apparent contradiction between sovereigntist arguments and cosmopolitan engagement, we are faced with well-documented transnational networks of disparate actors sharing legal expertise, strategies, and aims.[6] Delayed and ineffective defenses against constitutional replacement, attempted and successful constitutional amendments, legislative and judicial overhauls, and the breakdown of political conventions, all undermining democracy and the rule of law, have been followed by scholarly and political introspection.

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[2]Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545.

[3]Gabor Halmai, "Populism, Authoritarianism and Constitutionalism," *German Law Journal* 20, no. 3 (2019): 296.

[4]Tom Ginsburg, *Democracies and International Law* (Cambridge University Press, 2021).

[5]Grainne de Burca and Katie Young, "The (Mis)appropriation of Human Rights by the New Global Right," *International Journal of Constitutional Law* 23, no. 1 (2023): 205.

[6]Philip M. Ayoub and Kristina Stoeckl, *The Global Fight Against LGBTI Rights: How Transnational Conservative Networks Target Sexual and Gender Minorities* (NYU University Press, 2024).

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Comparative constitutional scholarship in Europe has responded to democratic backsliding in two broad ways, which I will characterize as 'legalistic reinforcement' and 'material critique.' The first camp frames the contemporary backsliding problem as one of abuse of established norms and practices and, indeed, of constitutionalism itself. It searches for conceptual and doctrinal tools to resist this abuse while retaining and reinforcing the liberal democratic foundations of European constitutional orders. Tools of choice include constitutional identity review, unconstitutional constitutional amendment doctrines, European Union (EU) rule of law and budget conditionality, and the embrace of a militant conception of the rule of law.[7] The second camp is differently oriented and seeks to identify the roots of the backsliding in the elitist and neoliberal foundations of constitutional projects nationally and at European level, in the persistent inequalities they support, and in the lack of a redistributive answer to the backsliding challenge.[8] This division is of course not airtight, though it does provide the contours of by-now solidified axes of research.

The time seems right for comparative constitutional soul-searching in Europe, and mine will thus be an addition to this work, approached from the perspective of the seemingly perennial periphery that is Central and Eastern Europe.[9] Despite this European focus, however, my hope is that the article's insights will prove of wider comparative value. I will argue that, after more than a decade of sustained interest in the topic, the time is ripe to take stock of how this work on democratic backsliding reflects on comparative constitutional scholarship in Europe more broadly. The prism I adopt is that of developments in several Central and Eastern European constitutional orders. They will allow me to illustrate persistent methodological and normative assumptions and blind spots. Deriving from insufficient contextualism and attention to *longue durée* analysis, and premised on a purported value neutrality which ignores central categories of analysis such as gender, these shortcomings risk being reproduced in the so-called "transition 2.0" body of work on restoring constitutional democracy in the region.[10] The enduring pathologizing view of the 'backward' East, the return of the transitology paradigm, and the false choice between defense and critique of the liberal constitutional project demand reflection, not elision.

Finally, I will seek to move beyond a mere invocation of the constitutional culture argument, for who would disagree, especially after the experience of the past decade, that without a culture of respect for the rule of law and democracy, even seemingly embedded institutions and practices stand to crumble? Instead, I will show that this argument requires of constitutional scholars a more sophisticated, interdisciplinary orientation, as well as a widening of the intended audience for our efforts. Ultimately, we need a reorientation toward longitudinal analysis as opposed to the short-termism that has characterized much of the output on democratic backsliding. Thus, I will discuss the educational role of law and legal institutions, the affective nature of constitutional

[7]Tímea Drinóczi and Pietro Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States," in *European Yearbook of Constitutional Law*, ed. Jurgen de Poorter et al. (Springer Nature, 2022): 57; Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press, 2023); Kim Lane Scheppele and John Morijn, "Money for Nothing? EU Institutions' Uneven Record of Freezing EU Funds to Enforce EU Values," *Journal of European Public Policy* 32, no. 2 (2024): 474; András Sajó, "Militant Rule of Law and Not-so-Bad Law," *Hague Journal on the Rule of Law* 16 (2024): 525.

[8]Mike Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021); Mark Tushnet and Bojan Bugarič, *Power to the People: Constitutionalism in the Age of Populism* (Oxford University Press, 2021); Adam Czarnota, "Sources of Constitutional Populism – Democracy, Identity and Constitutional Exclusion," in *Anti-Constitutional Populism*, ed. Martin Krygier et al. (Cambridge University Press, 2022), 495; Bojan Bugarič, "The Neo-liberal Bias of the EU Constitutional Order: A Critical Analysis," in *Research Handbook on the Politics of Constitutional Law*, ed. Mark Tushnet and Dimitry Kochenov (Edward Elgar, 2023), 386.

[9]For other examples of work taking stock of the field and seeking to identify new directions of research, see Antonia Baraggia, "Current Trends and Challenges in Comparative Constitutional Law: In Search of a New Equilibrium," *Maastricht Journal of European and Comparative Law* 30, no. 6 (2024): 705; Renáta Uitz and András Sajó, "A Compass for Future Research," in *Routledge Handbook of Illiberalism*, ed. András Sajó et al. (Routledge, 2021), 975. For an earlier call for soul-searching in European scholarship in light of the accession of post-communist countries, see Jan Komarek, "Waiting for the Existential Revolution in Europe," *International Journal of Constitutional Law* 12, no. 1 (2014): 190. I thank Jacob Van De Beeten for this last reference.

[10]Michal Bobek et al., eds., *Transition 2.0: Re-Establishing Constitutional Democracy in EU Member States* (Nomos, 2023).

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commitments, as well as the institutional continuities at play in the beleaguered constitutional democracies in Central and Eastern Europe and beyond.

I will illustrate my analysis with examples that draw on the gendered nature of the democratic backsliding affecting constitutional democracies not just in Europe, but globally. I have elsewhere argued in more detail that without understanding the centrality of gender as a category of analysis in the rule of law crisis in Europe, we risk missing one of its central normative pillars.[11] Where political scientists and sociologists have made significant advances in unpacking the affinities between gender and illiberal political projects,[12] comparative constitutional law still has more work to do.[13] In this article, I will zero in on questions of gender justice as the test case for many of the diagnoses and solutions proposed by comparative constitutional scholarship. Some of the developments I discuss, such as the rollback of abortion rights in Poland by its captured Constitutional Tribunal, are well known and prominent in the democratic backsliding literature.[14] Others, however, such as pronatalist policies are not only less prominent but also sometimes appraised positively as welfare measures,[15] without realizing their centrality to projects of demographic control. The focus on gender justice will also allow us to test the desirability of the status quo ante, the ability of the supranational standards to provide the baseline for rule of law restoration, and it will show the multifaceted nature of constitutional cultural 'engineering' that is now part of the restoration project.[16]

My focus on gender justice should not be taken as an invitation to see gender as simply yet another site of backsliding, added to the long list of rights regressions we have witnessed.[17] Instead, it is directly tied to an understanding of constitutional democracy itself as a gendered construct, both in how it views its individual subject and in terms of the fundamental structures needed to sustain it.[18] Deriving from this are basic tenets of constitutionalism themselves imbued with gendered norms, including concepts such as the rule of law, judicial interpretation, judicial

[11]Silvia Suteu, "The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe," *European Constitutional Law Review* 21, no. 1 (2025): 58.

[12]Mieke Verloo, ed., *Varieties of Opposition to Gender Equality in Europe* (Routledge, 2018); Andrea Kriszan and Conny Roggeband, eds., *Gendering Democratic Backsliding in Central and Eastern Europe: A Comparative Agenda* (Central European University (CEU) Center for Policy Studies, 2019); Feminism and Populist Politics Symposium, *International Political Science Review* 42, no. 5 (2021): 561; Andrea Kriszan and Conny Roggeband, eds., *Politicizing Gender and Democracy in the Context of the Istanbul Convention* (Palgrave Macmillan, 2021); Andrea Peto, "Gender and Illiberalism," in *Routledge Handbook of Illiberalism*, ed. András Sajó et al. (Routledge, 2021), 313; Agnieszka Graff and Elzbieta Korolczuk, *Anti-Gender Politics in the Populist Moment* (Routledge, 2022); Ov Cristian Norocel and David Paternotte, "The Dis/Articulation of Anti-Gender Politics in Eastern Europe," in "Anti-Gender Politics in Eastern Europe" special issue, *Problems of Post-Communism* 70, no. 2 (2023): 123.

[13]This work has already begun, with valuable contributions including: Gila Stopler, "The Personal is Political: The Feminist Critique of Liberalism and the Challenge of Right-Wing Populism," *International Journal of Constitutional Law* 19, no. 2 (2021): 393; Anna Śledzińska-Simon, "Populists, Gender, and National Identity," *International Journal of Constitutional Law* 18, no. 2 (2020): 447; Susanne Baer, "Gendered Normativities: The Role and Rule of Law," in *Global Contestations of Gender Rights*, ed. Alexandra Scheele et al. (Bielefeld University Press, 2022), 117; Ruth Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion* (Cambridge University Press, 2022), 309; and Mara Malagodi and Elettra Stradella, "Conceptualising the Link between Constitutional Degradation and Gender Populism," *European Constitutional Law Review* 21, no. 1 (2025): 8-36.

[14]Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20," *European Constitutional Law Review* 17, no. 1 (2021): 130.

[15]Tushnet and Bugarič, *Power to the People*.

[16]I refer to 'engineering' reluctantly, for I do not believe any constitutional culture can be engineered as such, certainly not entirely. There is a much broader argument here about the limits of the constitutional engineering or design frameworks, so prominent during the post-1989 transitions and in part responsible for the exaggerated expectations placed on the constitution-making afoot then. It was also a body of work that lacked a much-needed gendered lens. Helen Irving, "Where Have All the Women Gone? Gender and the Literature on Constitutional Design," *Contemporary Readings in Law and Social Justice* 4, no. 2 (2012): 89.

[17]This, of course, is not to deny either the seriousness of rights retrogression in the context of democratic backsliding, or the centrality of attacks on rights, and rights defenders, in this backsliding.

[18]Anne Phillips, *Engendering Democracy* (Penn State University Press, 1991); Maro Pantelidou Maloutas, *The Gender of Democracy: Citizenship and Gendered Subjectivity* (Routledge, 2007). The understanding of gender justice adopted throughout this article is inclusive and covers gender, sexual orientation, and gender identity as intertwined markers of identity and systemic oppression.

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remedies, multilevel government, legal pluralism, and more.[19] Feminist legal scholars have long called for the recognition of constitutional foundations, adjudication, and change to be recognized as inherently gendered.[20] Feminist political scientists have similarly argued that democratic transitions require careful gender analysis.[21] And feminist political theorists, already around the time of the post-1989 transitions, had laid out the shortcomings of liberal democracy in both theory and practice and were working through ways to rescue its promise without perpetuating its exclusions.[22] Unheeded, these calls to take gender seriously will shortchange any new attempt at restoring constitutional democracy.

One final preliminary observation is needed here: this will not be a paper on populism. While I will make references to populists in power, the focus on democratic backsliding here will primarily be on its institutional and legal manifestations and how it has been understood in the comparative constitutional law scholarship. There is much debate in this same scholarship on how to define and categorize populism, which I do not wish to revisit. It follows in the footsteps of an even richer and longer-standing scholarly engagement with this category of analysis in political science and sociology. Where this rich scholarly engagement has left us is unclear, though we certainly have a more sophisticated conceptual apparatus today than we did previously, one that differentiates between different strands of populism, authoritarianism, and illiberalism.[23]

2 Democratic Backsliding Diagnoses and Cures

2.1 Democratic Backsliding Diagnoses

Diagnoses of the causes and catalysts for the democratic backsliding in Europe abound. They follow the no less rich literature that had initially reacted to the erosion of constitutional guarantees in the region by mapping it, classifying the different techniques used and identifying a backsliding playbook, as well as seeking to warn comparative constitutionalists so that they may recognize similar dangers at home.[24] Already a decade ago, reflecting on what had occurred in Hungary, Renáta Uitz warned against allowing superficial comparison of formal constitutional structures to distract from the de facto capture of accountability institutions and politicization entrenched well beyond temporary electoral mandates.[25] Her call to the field of comparative constitutional

[19]See, *inter alia*, Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives* (Palgrave Macmillan, 2003); Beverley Baines and Ruth Rubio-Marín, eds., *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005); Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008); Susan Williams, ed., *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009); Kim Rubenstein and Katharina A. Young, eds., *The Public Law of Gender: From the Local to the Global* (Cambridge University Press, 2016); Beverley Baines et al., eds., *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012); Helen Irving, ed., *Constitutions and Gender* (Edward Elgar, 2017); Priscilla A. Lambert and Druscilla L. Scribner, *Gender, Constitutions, and Equality: A Global Comparison* (Routledge, 2023); Wen-Chen Chang et al., eds., *Gender, Sexuality and Constitutionalism in Asia* (Hart, 2023); Francisca Pou Giménez et al., eds., *Women, Gender, and Constitutionalism in Latin America* (Routledge, 2024).

[20]See, *inter alia*, Tracy E. Higgins, "Democracy and Feminism," *Harvard Law Review* 110, no. 8 (1997): 1657 and infra 125.

[21]Georgina Waylen, *Engendering Transitions: Women's Mobilization, Institutions and Gender Outcomes* (Oxford University Press, 2007); Jocelyn Viterna and Kathleen M. Fallon, "Democratization, Women's Movements, and Gender-Equitable States: A Framework for Comparison," *American Sociological Review* 73, no. 4 (2008): 668.

[22]See, *inter alia*, Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, 1989); Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford University Press, 1990); Anne Phillips, "Must Feminists Give Up on Liberal Democracy?," *Political Studies* 40, no. 1 (1992): 68.

[23]See, in particular, Halmai, "Populism, Authoritarianism and Constitutionalism"; Paul Blokker, "Populism as a Constitutional Project," *International Journal of Constitutional Law* 17, no. 2 (2019): 536.

[24]Miklós Bánkuti et al., "Hungary's Illiberal Turn: Disabling the Constitution," *Journal of Democracy* 23, no. 3 (2012): 138; Gabor Attila Toth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press, 2012); Tomasz Tadeusz 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* 43, no. 2 (2018): 116; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

[25]Renáta Uitz, "Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary," *International Journal of Constitutional Law* 13, no. 1 (2015): 279.

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law to overcome its tendency toward abstraction, generalization, and the search for commonalities was prescient, as was her insistence to not overlook gradual as opposed to big bang descents into illiberalism.[26] It was also a call for methodological contextualism that has echoes well beyond Europe.[27]

Also drawing on the Hungarian case, Kim Lane Scheppele had early on offered a novel conceptual category of the 'Frankenstate,' by which she meant a state "composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together."[28] Because of the checklist approach to the rule of law predominant among European monitoring bodies, they failed to spot the danger until the monstrosity was far along. The invocation of comparative examples was here weaponized in service of the dismantling of constitutional democracy, with dubious constitutional amendments being justified on the grounds that the institutional arrangements they introduced were present in other European democracies. The perversity, of course, lay in the cumulative effects of these changes, as well as in how they interacted with the political capture of the institutions newly reformed. This highlights another danger comparative constitutionalists have become acutely aware of, termed "abusive constitutional borrowing" by Rosalind Dixon and David Landau.[29] It has also sparked a renewed search for ways to draw the line between abusive and non-abusive constitutional practice and for defining the normative benchmarks against which we do so.[30]

No less insightful was Wojciech Sadurski's dissection of the undermining of the rule of law in Poland under the Law and Justice (Prawo i Sprawiedliwość (PiS)) government, from the systematic packing of the Constitutional Tribunal and judiciary to the legislative reforms in breach of the Constitution.[31] A question he raised about the Polish experience resonates well beyond it: "one may speculate that constitutional amendments via statutes along with simple breaches of the Constitution, Polish-style, are more destructive of the principles of constitutionalism and the rule of law."[32] It is thus not the cumulative effect of constitutional amendments, possibly leading to what Richard Albert has called "constitutional dismemberment,"[33] that may be more pernicious, but the low simmering, sub-constitutional moves that erode constitutional principles with potentially lasting effects. These attacks are more subtle and harder to detect than frontal attacks on elections and rights, Sadurski has argued, and should therefore lead comparative constitutionalists to revisit some long-held beliefs.[34] One such belief is that constitutional design matters, whereas faced with frontal and concerted attacks, it has seemed impotent to stave off backsliding.[35] For another, the transition framework itself, applied to the Central and Eastern European context and building on the belief that constitutional democracies can be engineered. One cannot fail to observe that skepticism about constitutional design predates the democratic backsliding scholarship and has long been voiced by critical constitutional scholars, whether those challenging the neocolonial overtones of the endeavor[36] or those noticing the persistent exclusion of women and certain groups from the preoccupations of constitutional design scholars.[37]

[26]Ibid.

[27]David S. Law, ed., *Constitutionalism in Context* (Cambridge University Press, 2022).

[28]Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," *Governance* 26, no. 4 (2013): 559.

[29]Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Democracy* (Oxford University Press, 2021).

[30]Jan Petrov, "How to Detect Abusive Constitutional Practices," *European Constitutional Law Review* 20 (2024): 191. In the EU law context, see Scholtes, Abuse of Constitutional Identity.

[31]Sadurski, *Poland's Constitutional Breakdown.*

[32]Ibid., 18.

[33]Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019), 84.

[34]Wojciech Sadurski, "Constitutional Democracy in the Time of Elected Authoritarians," *International Journal of Constitutional Law* 18, no. 2 (2020): 324.

[35]Or at best a speed bump. See Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, "The Coming Demise of Liberal Constitutionalism," *University of Chicago Law Review* 85, no. 2 (2018): 239, 253.

[36]Zoran Oklopcic, "The South of Western Constitutionalism: A Map Ahead of a Journey," *Third World Quarterly* 37, no. 11 (2016): 2080.

[37]Irving, "Where Have All the Women Gone?," 89.

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Enriching this body of work, focused as it is on the legal principles breached and the legal institutions captured, is another strand of scholarship, sociologically informed and taking a *longue durée* perspective on the democratic backsliding afoot in the region. This *longue durée* lens has allowed Martin Krygier, for example, to revisit the presuppositions of the early years of democratic transitions in Central and Eastern Europe such as the assumption of a blank slate of values and institutional practices, upon which the new constitutional democratic ones could simply be superimposed.[38] Instead, he has argued, these transitions always involved bricolage "of existing, often heavily institutionalised, practices, attachments, loyalties and ways of being and behaving."[39] The presence of these "always already-existing institutionalised practices and structures"[40] is obvious in sociological terms, but seems to have taken constitutionalists by surprise, especially those who believed the transition to constitutional democracy, once set in motion, was merely a matter of design tinkering, of technocratic constitutional know-how in a value and institutional void. Little surprise, then, that technical solutions could not address or arrest abusive constitutionalism, given that the battle was one over values and not just over institutional arrangements.

In a different vein, Paul Blokker has also unpacked the constitutive dimensions of populism as a constitutional project, focusing on its invocation of popular sovereignty as a justificatory claim, majority rule, instrumentalization of the law, and legal resentment as the dominant attitude.[41] Importantly, Blokker places his analysis against the background of the modernist and revolutionary constitutional imaginaries underpinning the populist project, revealing their core assumptions about the role of law and constitutions as, alternatively, devices of order and stability or emancipation and empowerment. Blokker's intervention explains the competing imaginary presented by populism, as well as its points of resonance with the democratic imaginary even while it is not itself a democratic project.[42] This allows us, then, to differentiate between the democratic backsliding witnessed in many European countries—and seek remedies—and the critique of liberal constitutionalism, especially in its legalistic guise, that has emerged in reaction to the rise of populists in power. The former is no less blameworthy if we accept that the latter may have merit.[43]

Building on his comparative research drawing on multiple Central and Eastern European countries,[44] Blokker is also able to distinguish between different ideological leanings in the populist agendas present in each.[45] His differentiated analysis is welcome in a body of work that has too often tended to extrapolate from limited case studies: the cases of Poland and Hungary have gone from standing in for the success of the transition to constitutional democracy to standing in for its failures, while all along the Central and Eastern European map remained much more diverse. To this day, the different trajectories of other countries in the region having experienced democratic erosion, such as Slovakia, Romania, and Bulgaria, for instance, remain understudied.[46] This is the case despite the fact that these constitutional democracies had been looked at as potentially backsliding, or having failed to consolidate, long before Hungary and Poland.[47] The

[38]Martin Krygier, "The Challenge of Institutionalisation: Post-Communist 'Transitions,' Populism, and the Rule of Law," *European Constitutional Law Review* 15 (2019): 544.

[39]Ibid., 552.

[40]Ibid., 551.

[41]Blokker, "Populism as a Constitutional Project," 535.

[42]Paul Blokker, "Shifting Constitutional Imaginaries: Is the Liberal-Legal Imaginary Unsettled by Populism?" in *Constitutional Traditions and Constitutional Transitions*, ed. Martin Belov and Monika Florczak-Wątor (Edward Elgar, 2024), 35.

[43]Elsewhere, I have referred to this as populists at times asking the right question of constitutional democracies but providing the wrong answer. Silvia Suteu, "The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?," *European Constitutional Law Review* 15 (2019): 488.

[44]Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2013).

[45]See, e.g., Paul Blokker, "Constitutional Politics and Populist Conservatism: The Contrasting Cases of Poland and Romania," *European Politics and Society* 24, no. 1 (2023): 132.

[46]Max Steuer, "The 'Will of the People' as Means for Pressuring the Rule of Law?," *Zeitschrift für Vergleichende Politikwissenschaft* (2025); Bogdan Iancu, "Core, Periphery, and Universals in Rule of Law Promotion: Contextual (Dis)incentives, Conceptual Shifts," *Hague Journal on the Rule of Law* 16 (2024): 465.

[47]Martin Butora, "Is East-Central Europe Backsliding? Nightmares From the Past, Dreams of the Future," *Journal*

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'old face' of populism in the region, such as its xenophobic, nationalist, and anti-Roma expressions, were never fully addressed, pace European integration.[48] In addition, the cases of Bulgaria and Romania, which had remained under the rule of law monitoring of the European Union post-accession through the Cooperation and Verification Mechanism, might have offered valuable lessons to those clamoring for more vigorous EU-level interventions in Hungary and Poland.[49] What this teaches us, as comparative constitutional scholars, is not just to avoid the dangers of selectivity and unrepresentativeness in case study choice.[50] It also reinforces the need to examine and learn from negative case studies, not merely within the backsliding/restoration paradigm, but as a way to reflect on the presuppositions and omissions in our comparative work.[51]

2.2 Democratic Backsliding Solutions

The search for solutions to the current democratic backsliding in Europe is directly correlated to the diagnostic one adopts. To those who believe the main problem was one of weak constitutional and legal tools to fight off the threat, the solutions will include more and stronger law. At the national level, this may be tools of constitutional entrenchment such as unconstitutional constitutional amendment doctrines and a move away from constitutional flexibility; the creation and strengthening of accountability institutions, including so-called fourth branch or guarantor institutions; and a reinforcement of judicial independence and court capacity to better withstand political pressures in the future. At the supranational level, proposed solutions tend to include strengthened EU rule of law oversight and budget conditionality, and more generally a renewed orientation toward the transnational for both standard setting and oversight. At the level of principle, we also find a resurgence of the belief in militant democracy translated into law, be it in the form of the embrace of a militant conception of the rule of law[52] or a reconceptualization of political liberalism to arm it with defensive tools.[53] It would be impossible to do justice to the myriad lessons drawn and solutions proposed to the democratic backsliding experienced globally and in Central and Eastern Europe in particular. I would simply aim to group these proposals by type and link them both to the diagnosis they build on and to the presuppositions—about constitutions, law, and democracy—of their authors. This mapping also helps bring into relief the points of tension between them.

2.2.1 Legalistic Reinforcement

The first category might be termed legalistic reinforcement. It represents, in many ways, the comfort zone of constitutionalists: identifying the failures as ones of legal institutions and practices, they proceed to advocate reform to those same institutions and practices. These reforms would be aimed at strengthening constitutional safeguards, rendering them more entrenched and, it is hoped, thereby more resilient to abuse. An example is seen in unconstitutional constitutional

of Democracy 18, no. 4 (2007): 47; Vladimir Tismaneanu, "Is East-Central Europe Backsliding? Leninist Legacies, Pluralist Dilemmas," *Journal of Democracy* 18, no. 4 (2007): 34; Bojan Bugarič, "Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe," *Communist and Post-Communist Studies* 41 (2008): 191; Philip Levitz and Grigore Pop-Eleches, "Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania," *Europe-Asia Studies* 62, no. 3 (2010): 461.

[48]For an example of how the Roma community has long been the target of populist attack in the region and provides another connecting thread through the different countries' populist projects, see Michael Stewart, ed., *The Gypsy 'Menace': Populism and the New Anti-Gypsy Politics* (Hurst Publishers, 2012).

[49]Ingi Iusmen, "EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania," *Journal of Common Market Studies* 53, no. 3 (2015): 593.

[50]Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014).

[51]A different case for attention to negative examples, emphasizing the potential for both positive and negative influence of constitutional borrowing, was made by Kim Lane Scheppele, "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models," *International Journal of Constitutional Law* 1, no. 2 (2003): 296.

[52]Sajó, "Militant Rule of Law."

[53]Benjamin A. Schupmann, *Democracy Despite Itself: Liberal Constitutionalism and Militant Democracy* (Oxford University Press, 2024).

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amendment doctrines, which were invoked early on in the backsliding saga as a potential aid in defense of constitutional democracy, at least while independent constitutional courts still stood.[54] The belief in substantive limits on constitutional change enforced by courts went hand in hand with a belief in the normative superiority of liberal constitutionalism, whose challenge was automatically relegated to the realm of anti-constitutionalism.[55] A related defensive move was to invoke constitutional identity and judicialize it: transform it for an analytical concept of comparative constitutional analysis into the basis of judicial doctrine in the form of constitutional identity review.[56] Thus, constitutional identity would become more than a descriptive tool, helpful in classifying constitutional systems and tracking their transformation over time, and turn into a judicial sword against abusive constitutionalism instead.[57]

Constitutional developments in Central and Eastern Europe have since poured cold water on such hopes, however. In 2016, the Hungarian Constitutional Court embraced an exclusionary notion of constitutional identity to resist the primacy of EU law and thereby legitimate the government's anti-migrant stance.[58] Elsewhere in the region, too, ethnonationalist understandings of constitutional identity were embraced by courts and political actors, alongside reactionary and sovereigntist ones aimed at defending the domestic constitutional order from threats real or imagined.[59] Subsequently, the embrace of the language of constitutional identity by the very authoritarian populists responsible for democratic backsliding showed precisely the risks of this amorphous concept and why its judicialization was double-edged. Similarly, the failure to deploy unamendability and also its misfire have led to re-evaluations of its defensive potential in backsliding contexts.[60]

Unifying these types of proposals was always a certain skepticism vis-à-vis democracy, often equated with the majoritarianism spouted by populists, and a desire to return to the presumed safety of constitutional law distanced from the constitutional politics surrounding it. Yet to acknowledge the democratic critique that accompanies this period of backsliding in Europe is not the same as confusing critique with attack.[61] I have argued elsewhere that a democratic renewal is acutely necessary in Central and Eastern Europe, not least because a deliberative, reflexive commitment to constitutional democracy did not—indeed, could not—emerge in the rushed transition of the early 1990s.[62] Nor is this search for democratic solutions to democratic backsliding unique to the region, though it carries different emphases depending on context.[63] Examining closely the arc of these proposals can offer a valuable opportunity to revise our expectations and admit that

[54]Gabor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?," *Constellations* 19, no. 2 (2012): 182; Gabor Halmai, "Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective," *Wake Forest Law Review* 50 (2015): 951; Fruzsina Gardos-Orosz, "Unamendability as a Judicial Discovery? Inductive Learning Lessons from Hungary," in *An Unamendable Constitution?: Unamendability in Constitutional Democracies*, ed. Richard Albert and Bertil Emrah Oder (Springer, 2018), 231.

[55]Armin von Bogdandy and Pal Sonnevend, eds., *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015).

[56]Drinóczi and Faraguna, "The Constitutional Identity of the EU"; Tímea Drinóczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," *German Law Journal* 21, no. 2 (2020): 105.

[57]For a critique of this move at the constitutional level, see Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press, 2021).

[58]Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law.

[59]See discussions in Kriszta Kovacs, ed., *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart, 2023); Manuel Gutan, "Constitutional Identity as Competing Historically Driven Narratives: Central and European Perspectives," in *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*, ed. Cosmin Cercel et al. (Routledge, 2024), 137.

[60]Halmai has since recanted his optimism that unamendability could have helped stop Hungary's descent into authoritarianism. See Gabor Halmai, "Transitional Constitutional Unamendability?," *European Journal of Law Reform* 21 (2019): 259. For a broader discussion, see also Silvia Suteu, "Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?," *The Hague Journal on the Rule of Law* 16 (2024): 315.

[61]Cf Susanne Baer, "The Rule of—and Not by Any—Law. On Constitutionalism," *Current Legal Problems* 71, no. 1 (2018): 335, 339.

[62]Suteu, "The Populist Turn in Central and Eastern Europe." See more generally, Ivan Krastev and Stephen Holmes, *The Light That Failed: Why the West Is Losing the Fight for Democracy* (Pegasus, 2020).

[63]See, e.g., Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge University Press, 2021).

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they may have been misplaced.[64]

Whereas such national-level tools have come to be seen with much more ambivalence in light of their ineffectiveness or outright misappropriation by the same political forces they were meant to rein in, other proposals continue to enjoy support. For example, transnational standards are still viewed positively by those who believe them capable of disciplining domestic backsliding. Scheppele, for example, has written positively about the judicial responses to the global rule of law crisis, arguing that:

> this institutional growth in jurisprudence of transnational courts provides a new possibility for anchoring the meaning of the rule of law somewhere between the rule of law as a purely national tradition on one hand and an apolitical gospel of the rule of law spread by international freelancers on the other.[65]

We can test this optimism about the supranational with respect to the gendered aspects of backsliding. I have elsewhere elaborated on why the European Union's track record in responding to attacks on gender equality in its member states is mixed at best.[66] Reasons include the cumulative attacks on the rule of law, the Union's own persistent blind spots and lack of an intersectional approach to gender equality, and a growing gap on gender equality between member states, all underpinned by a gender-uncritical understanding of the rule of law.[67] This has also been argued by scholars such as Ivana Isailovic, who meticulously shows why, in particular in a post-*Dobbs v. Jackson Women's Health Organization* (2022) era, the time is ripe for the EU to move beyond an instrumental, market-oriented approach to gender equality in general, and reproductive freedom in particular.[68]

I will discuss instead the role of the European Court of Human Rights (ECtHR) in responding to gendered backsliding, though here again we must temper our optimism. It is true that it has issued judgments in direct response to backsliding contexts, strongly reinforcing judicial independence protections under the European Convention.[69] Judgments outside of backsliding contexts have also indicated the Court's willingness to examine judicial appointments and possibly find violations of the Article 6 Convention requirement of a lawfully established tribunal.[70] Moreover, the Court's recent line of Article 18 cases, in which the Convention's long-thought dormant clause protecting against abuse of rights has been resurrected, has given rise to optimism that the Court will intervene more forcefully in backsliding contexts.[71] In the context of gender equality, its case law has also inched toward embracing a substantive conception of equality, as well as other doctrinal tools to address discrimination not easily captured under formal equality analysis, such as anti-stereotyping, redressing vulnerabilities, and intersectionality.[72] However, its case law remains underdeveloped when it comes to the application of Article 14 anti-discrimination

[64]To cite Halmai again, he has also revised his early belief in the value of the type of highly legalistic but undemocratic constitutionalism promoted by the Hungarian Constitutional Court from the beginning of the post-1989 transition in light of the backsliding reality since. Gabor Halmai, "From Liberal Democracy to Illiberal Populist Autocracy: Possible Reasons for Hungary's Autocratization," *Hague Journal of the Rule of Law* 16 (2024): 439.

[65]Kim Lane Scheppele, "The Life of the Rule of Law," *Annual Review of Law and Social Science* 20 (2024): 17, 29

[66]Suteu, "The Rule of Law Crisis Was Always Gendered."

[67]Ibid., 78.

[68]Ivana Isailovic, "Gender in Political Economy and EU Law," *Transnational Legal Theory* 15, no. 4 (2024): 525; Ivana Isailovic, "EU Abortion Law after Dobbs: States, the Market, and Stratified Reproductive Freedom," *Columbia Journal of European Law* 30, no. 1 (2024): 1.

[69]ECtHR 23 June 2016, No. 20261/12, *Baka v. Hungary* [GC]; ECtHR 6 October 2022, No. 35599/20, *Juszczyszyn v. Poland*.

[70]ECtHR1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson v. Iceland* [GC].

[71]Floris Tan, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?," *Göttingen Journal of International Law* 9, no. 1 (2018): 109; Corina Heri, "Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights," *The European Convention on Human Rights Law Review* 1, no. 1 (2020): 25.

[72]Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights," *Human Rights Law Review* 16, no. 2 (2016): 273; Alexadra Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights," *Human Rights Law Review* 11, no. 4 (2011): 707; Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Hart, 2021).

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principles, as well as in recognizing access to abortion specifically as a Convention right. To these doctrinal shortcomings, we may add the observation that the Court has itself become the target of authoritarian populist attacks, which have also affected the implementation of its judgments.[73]

The European Court of Human Rights had the opportunity to rule on Poland's restrictive abortion regime once more in 2023, finding Poland in violation of the Convention's Article 8 (right to respect for private and family life). The case had concerned a woman forced to travel abroad to obtain the termination of her pregnancy upon finding out her fetus suffered from a genetic defect. She had been seventeen weeks pregnant, and her appointment for termination in Poland had been canceled on one day's notice because of the 2020 Polish Constitutional Tribunal judgment striking down the fetal abnormality exception from the accepted exceptions to abortion criminalization. Several women were known to have died in the aftermath of the 2020 Polish Constitutional Tribunal decision on abortion.[74] The European Court's judgment came after the electoral victory of the opposition and was perceiving as bolstering its promised abortion reform. We must note, however, the majority judgment declined to find a violation of Article 3 (prohibition of inhuman and degrading treatment). Thus, despite the woman's severe emotional and psychological distress, her case was found not to reach the threshold of severity of ill-treatment required under Article 3. Instead, the concurring judges in the case found, relying on international human rights standards including a substantive understanding of equality, this evaluation failed to take into account the particular vulnerability of the woman, the intensity of her pain and suffering, or the additional burden placed upon her by travel abroad.[75]

Thus, when it comes to reproductive justice, those suffering under restrictive abortion regimes can find only partial vindication in Strasbourg.[76] The European Court of Human Rights has consistently refused to read a right to abortion into the Convention, opting instead to grant a wide margin of appreciation to member states and invoking the lack of European consensus on the matter.[77] Thus, looking to the transnational proved only partly successful for Polish women who fought back against their country's democratic backsliding, including in its gendered dimension.

2.2.2 Material Critique

The second category centers around a material critique of the shortcomings of the liberal democratic project and its attendant constitutional institutionalization in Central and Eastern Europe. Seeing the root causes of backsliding in the high levels of economic inequality present in the region, not least in the flagbearers of regression, Hungary and Poland, this line of analysis led to solutions proposed in the realm of economic reorientation away from the neoliberal project and toward more redistributive models. In constitutional terms, this would translate into a repoliticization of the constitutional arena, a move away from the highly legalistic and juridified form embraced in Central and Eastern Europe post-1989, and a concentration of energies into what some have termed "positive constitutionalism."[78]

The appeal of populists in Central and Eastern Europe is no doubt at least in part explained by their promise of economic redistribution and welfare policies, though these were always packaged together with ethnonationalism.[79] This tracks with comparative findings—including in the context

[73]Jan Petrov, "The Populist Challenge to the European Court of Human Rights," *International Journal of Constitutional Law* 18, no. 2 (2020): 476.

[74]Tirana Hassan, *Poland: Events of 2023* (Human Rights Watch, 2024).

[75]Concurring opinion of Judges Jelić, Felici and Wennerström, *M.L. v. Poland* 2023.

[76]See also ECtHR 16 December 2010, No. 25579/05, *A., B. and C. v. Ireland.*

[77]For a critique of the Court's consensus-based reasoning, applied to a case against Ireland's former restrictive abortion regime, see Fiona de Londras, "When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of A, B & C v. Ireland and Referendum-Emergent Constitutional Provision," in *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis P. Tzevelekos (Cambridge University Press, 2019), 311. See also Isailovic, "EU Abortion Law after Dobbs."

[78]Anna Śledzińska-Simon, "Lessons from the Populist Defeats: From Negative to Positive Constitutionalism," *Social & Legal Studies* 32, no. 6 (2023): 893.

[79]Bojan Bugarič, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism," *International Journal of Constitutional Law* 17 (2019): 597.

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of the United States—that there is no single, economic resentment explanation for the electoral wins of populists.[80] It has led some scholars of democratic backsliding to caution against misunderstanding the phenomenon as one centered on socioeconomic inequalities, which risks ignoring the reality of a failure to rein in the power of populist elites.[81] Constitutional scholars may not be best placed to identify the socioeconomic causes of democratic backsliding, and indeed others have done the painstaking work of tracking these in different Central and Eastern European contexts.[82] We are, however, well positioned to reflect on the impact of any proposed economic solutions on constitutional rights and principles. Let me return to the gender justice arena for examples.

Poland's experience under PiS is perhaps the one most material critics have in mind when they point to the need for nuance in assessing the rule of law backsliding. Without denying the government's dismantling of judicial independence and capture of the judiciary more generally, such commentators also point to PiS's welfare policies designed to support families and workers as a positive step, filling in a redistributive gap in prior administrations' agendas.[83] In particular, the Family 500+ program, providing a monthly allowance for every second child (and beginning with the first child for families with income below a certain threshold) and covering millions of families, has enjoyed widespread societal support.[84]

Viewed in isolation, the program may well be welcomed. One could even defend its explicit pronatalist intentions as part of legitimate government interventions designed to boost demographic growth (even while this has failed to materialize in Poland's case).[85] However, coupled with the other measures adopted by PiS, as well as its stated desire to promote only a particular, traditional, heterosexual notion of the family, a different picture emerges. First, when looked at in tandem with other measures adopted, such pro-family policies reveal themselves part of a concerted effort to encourage demographic growth through removal of individual autonomy over the choice to bear children. This was achieved not merely through restricting access to abortion, but in Poland also via the abrupt end to government funding of assisted reproductive technologies upon coming to power.[86] Second, the pro-family policies were introduced at the expense of, rather than empowering, women. Their choice to return to work after childbirth was not encouraged, but instead their role as caregivers was assumed and promoted. They received financial incentives per child reared rather than infrastructural support at the societal level.[87] Third, the same perpetuation of the woman's caring role was indirectly promoted through other measures, disguised as equality affirming. Lowering the retirement age of women from 65 to 60 is one such example, the

[80]Ronald F. Inglehart and Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, HKS Faculty Research Working Paper Series RWP16-026 (Harvard Kennedy School, 2016). Of course, the point here is deeper still and echoes Nancy Fraser's caution that recognition and redistribution are intertwined in the search for justice. See Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso, 2003).

[81]Thomas Carothers and Brendan Hartnett, "Misunderstanding Democratic Backsliding," *Journal of Democracy* 53, no. 3 (2024): 24.

[82]Dorothee Bohle, *Capitalist Diversity on Europe's Periphery* (Cornell University Press, 2012); Cornel Ban, *Ruling Ideas: How Global Neoliberalism Goes Local* (Oxford University Press, 2016).

[83]Tushnet and Bugarič, *Power to the People*, 86; Mitchell A. Orenstein and Bojan Bugarič, "Work, Family, Fatherland: The Political Economy of Populism in Central and Eastern Europe," *Journal of European Public Policy* 29, no. 2 (2022): 176.

[84]Seventy-seven percent of survey respondents viewed if favorably in 2017, for example, in particular members of socially disadvantaged groups. See Weronika Grzebalska and Andrea Pető, "The Gendered Modus Operandi of the Illiberal Transformation in Hungary and Poland," *Women's Studies International Forum* 68 (May-June 2018): 164, 167. The authors also note that the Family 500+ program revealed division lines deeper than political party lines. Ibid.

[85]I would argue that such demographic control is always suspect from a feminist point of view. Women's reproductive autonomy is intertwined with demographic policy, and the region has at least one dire cautionary tale on what happens when state authorities pursue demographic growth at all costs. On the high toll of Romania's communist era pronatalist policies, see Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania* (University of California Press, 1998).

[86]Reuters in Warsaw, "Poland to End State Funding for IVF Treatment," *The Guardian*, December 2, 2015.

[87]Marianna Szczygielska, "'Good Change' and Better Activism: Feminist Responses to Backsliding Gender Policies in Poland," in *Gendering Democratic Backsliding in Central and Eastern Europe: A Comparative Agenda*, ed. Andrea Kriszan and Conny Roggeband (CEU Center for Policy Studies, 2019), 120, 129.

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result of which keeps women in poverty and tied to their caregiving role in the family.[88] Ironically, this represents a return to the status quo during communism, when women were similarly entitled to early retirement under the expectation that they would continue to undertake the bulk of caring in the family.[89] Finally, and no less importantly, we cannot ignore the embeddedness of such policies with a stark anti-LGBTQI agenda. When Polish President Andrzej Duda ran for reelection in 2020, for instance, he presented the electorate with a so-called "Family Charter" which included support for families but also pledged to defend heterosexual marriage, bar same-sex adoption, and protect children from so-called "LGBT ideology."[90]

It was not a pro-family agenda *tout court* that PiS was hence promoting, but an agenda promoting only the 'right' kind of families as per its ideological commitments. The same is true for policies introduced as welfarist under Viktor Orbán's premiership in Hungary. Here again we see women's care work and reproductive function reinforced through state policies ostensibly designed to address a demographic gap.[91] Once more also, we see an exclusionary notion of the family being promoted. Given the supermajority enjoyed by the Hungarian Civic Alliance (Magyar Polgári Szövetség (FIDESZ)) in repeated parliaments, this exclusion could be entrenched constitutionally. Article L(1) in the 2011 Hungarian Fundamental Law now defines marriage as between a man and a woman and declares "the family as the basis of the survival of the nation." Article L(2) targets transgender children, claiming to protect self-identification on the basis of sex at birth as part of Hungarian constitutional identity. Additionally, state benefits for families introduced under FIDESZ have been tied to the employment status of parents and, as such, disadvantage those who do not easily fit the middle class, active workforce ideal of the government. Thus, the only family deserving of state aid under Orbán has been "a family which is based on the marriage of a man and a woman, who raise together their (biological) children, preferably under middle-class socioeconomic conditions."[92]

Similar policies, justified as pro-natalist and pro-family, have been pursued elsewhere in the region as part of political agendas that also led to democratic backsliding. To give only one additional example, Slovakia's illiberal turn also exhibits ample instances of a supposed pro-family turn being constitutionally and legislatively entrenched. Not only was the Slovak Constitution amended to protect heterosexual marriage in 2014, but in 2018, 'family mainstreaming' was adopted as a legal requirement. The latter mandated that all bills would be assessed on the basis of their potential impact on marriage, parenthood, and family. Furthermore, in 2020, state funds aimed at promoting gender equality were halted and funding was instead directed toward supporting the "functionality of the family."[93]

None of this is to deny the very real need for redistributive policies in countries that have experienced a sharp rise in socioeconomic inequalities in recent years. I have gone into this much detail in order to show that it is not any welfarism of populists in power that renders them inimical to constitutional democracy. Importantly, however, it would be equally misguided to consider what is at stake here merely a competition between two visions of constitutionalism, one neoliberal and one welfarist.[94] In Central and Eastern Europe, the populist embrace of the family has come at the cost of both women's rights and the rights of the LGBTQI minority, it has reinforced gendered stereotypes and moved away from individual autonomy and equality and toward state control of procreation and family relations. The gendered lens allows us to see care and the family as another arena for democratic backsliding—what Eva Fodor has called "carefare," adapting the

[88]Ibid.

[89]Tomasz Inglot et al., *Mothers, Families or Children? Family Policy in Poland, Hungary, and Romania, 1945-2020* (University of Pittsburgh Press, 2022).

[90]Shaun Walker, "Polish President Issues Campaign Pledge to Fight 'LGBT Ideology,'" *The Guardian*, June 12, 2020.

[91]Eva Fodor, *The Gender Regime of Anti-Liberal Hungary* (Palgrave Macmillan, 2022), 44

[92]Lídia Balogh et al., "Hungary: The Concept of Family Within the Framework of 'Illiberal Democracy,'" in *Normativity and Diversity in Family Law: Lessons from Comparative Law*, ed. Nadjma Yassari and Marie-Claire Foblets (Springer, 2022), 195.

[93]See discussion in Zuzana Mad'arová and Pavol Hardoš, "In the Name of the Conservative People: Slovakia's Gendered Illiberal Transformation," *Politics and Governance* 10, no. 4 (2022): 95.

[94]Cf Tushnet and Bugarič, *Power to the People*, 96-97.

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lawfare moniker to indicate the anti-liberal and authoritarian legal and economic response to the care crisis.[95]

3 Transition 2.0 and Rule of Law Restoration

3.1 The Rise of the Rule of Law Restoration Paradigm

More recently on the rise has been a new, albeit familiar, frame of analysis of developments in Central and Eastern Europe in particular. Varyingly called "restoration" of the rule of law, "democratic repair," or "transition 2.0," its focus is on the measures—constitutional and legal, but also political and societal—necessary for returning to a status quo ante of constitutional democracy.[96] Even where this line of analysis accepts that a wholesale dialing back of the clock is impossible,[97] it still accepts the broad contours of a transitional framework—now said to be post-illiberal, as opposed to post-authoritarian as was the case in 1989—that requires an embrace of a neutral rule of law principle and a return to constitutional democracy that corrects the backsliding of recent years. Where the lack of societal embeddedness of democratic constitutionalism is addressed, we often find it attached to an amorphous idea of constitutional culture, whose absence is decried, its emergence hoped for, but its constitutive elements rarely unpacked. I will return to this in the final section.

The restoration question was raised in anticipation of electoral victories of political forces committed to undoing the erosion of democracy and the rule of law. Ahead of the 2022 Hungarian elections that seemed to offer some hope for ousting Orbán and his FIDEZS party—though they would end up winning for the fourth consecutive time—Andrew Arato and András Sajó raised the question of how to remove the authoritarian enclaves, understood as the "binding institutional solutions that make it practically impossible to restore a rule of law based democracy," from the Hungarian Fundamental Law adopted in 2011.[98] They specifically queried whether extra-constitutional means would be acceptable in the name of restoring constitutional democracy, and if so, with what additional legitimation tools (such as popular validation at referendum or informal political party negotiations). The problem they raised would be relevant to democratic backsliding reversal beyond Hungary, given how pervasive the entrenchment of political capture of institutions has been as part of the so-called 'populist playbook.'[99] It quickly became the reality the new Polish government had to grapple with following its 2023 victory, as it found itself without the supermajority needed to adopt constitutional amendments yet having secured its electoral victory on a rule of law restoration platform that required possible unconstitutional measures.[100] 'Transition 2.0' has further captured the imagination as an umbrella term to focus the constitutional mind on measures deemed necessary in order for constitutional systems to be returned on the path of constitutional democracy.

The practical questions informing this approach are indeed important. How, lawfully, legitimately, but also efficiently, to restore institutional independence and remove loyalist appointees without simply seeming to engage in cadre replacement is no easy task. Even more so where the political capture extended to the Constitutional Tribunal and around twenty-five percent

[95]Fodor, *The Gender Regime*, 30. The care crisis refers to the widening gap between care demands in society and the scarcity of care provision.

[96]Bobek et al., *Transition 2.0*; Tom Gerald Daly, *Constitutional Repair: A Comparative Theory*, DEM-DEC Constitutional Repair Working Paper Series No. 2-2023 (Democratic Decay and Renewal, 2023).

[97]Jiri Priban, "The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash," in *Transition 2.0: Re-Establishing Constitutional Democracy in EU Member States*, ed. Michal Bobek et al. (Nomos, 2023), 33.

[98]Andrew Arato and András Sajó, "Restoring Constitutionalism: An Open Letter," *Verfassungsblog*, November 17, 2021.

[99]Stephen Gardbaum, "The Counter-Playbook: Resisting the Populist Assault on Separation of Powers," *Columbia Journal of Transnational Law* 59, no. 1 (2020): 1, 49-50. See also Adam Shinar, "Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment," *American Journal of Comparative Law* 69 (2021): 335.

[100]Marcin Szwed, "Rebuilding the Rule of Law: Three Guiding Principles," *Verfassungsblog*, April 29, 2024.

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of the ordinary judiciary, as it did in Poland.[101] Comparative constitutional experience with post-authoritarian transitions cautions against expecting quick fixes. If the experience of Chile, still unable to replace the 1980 Pinochet-era constitution or entirely dislodge its authoritarian locks 45 years later, is any indication, the problem of authoritarian elite entrenchment is not one to which constitutionalists have easy answers.[102] In the specific Polish and Hungarian cases, the conundrum of a captured judiciary has sparked a productive reassessment of comparative constitutional knowledge on court packing and unpacking.[103] While straightforward solutions such as simply extinguishing a captured tribunal may be appealing,[104] this enriched body of scholarship has shown that a wider panoply of potential solutions exists (including phasing out of judges, encouraging rule of law compliant behavior, and more) that can alleviate the serious legitimacy concerns of more blanket measures.

Another central question is whether, faced with such entrenchment as well as political packing of institutions with loyalists to the former regime, newly elected restoration forces can proceed to breach the rule of law in the name of reinstating it. Views on this question differ significantly. Scheppele, for example, has sought to differentiate between what she terms "the rule of law writ large," in the sense of a rule of law compliant with transnational standards, and "the rule of law writ small," in the narrower sense of a domestic legality captured by autocratic legalists.[105] Complying with the former takes precedence over—and justifies—any breach of the latter in her view. The transnational is then invoked, not unprecedently, as the external yardstick against which to measure domestic constitutionality.[106]

3.2 The Limits of the Rule of Law Restoration Paradigm

One of the problems with the restoration view, however, is that the transnational standards may themselves not be clearcut, or their application to the backsliding repair may not be black and white. In the case of Poland, specifically, this soon became apparent when alternatives for remedying judicial capture were discussed, with different pro-rule of law actors disagreeing on whether wholesale removal of improperly appointed judges and invalidation of their rulings had a basis in Polish and European legal standards.[107] The Council of Europe's Venice Commission and Directorate General Human Rights and Rule of Law, in an October 2024 Joint Opinion on European Standards Regulating the Status of Judges issued in response to the Polish Government seeking guidance, attempted to strike a balance: on the one hand, indicating that the wholesale removal of judges and invalidation of their rulings would be contrary to rule of law standards, but on the other, accepting the urgency of the problem in the Polish context.[108] Given that this contradicted the prevailing views in Polish legal discourse,[109] the intervention of the Venice Commission, while not binding, may have complicated searches for a workable solution rather than

[101] Ibid.

[102] Claudia Heiss, "Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism," *Constellations* 24, no. 3 (2017): 470.

[103] David Kosař and Katarína Šipulová, "Comparative Court-Packing," *International Journal of Constitutional Law* 21, no. 1 (2003): 80; Tom Gerald Daly, "'Good' Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay," *German Law Journal* 23, no. 8 (2022): 1071.

[104] Wojciech Sadurski, "Extinguishing the Court: Why There Is No Salvation for the Current Polish Constitutional Tribunal," *Verfassungsblog*, August 14, 2022.

[105] Scheppele, "The Life of the Rule of Law."

[106] A similar argument, but deployed in order to preempt rather than facilitate constitutional breaches, was developed in the context of unconstitutional constitutional amendment doctrines by Dixon and Landau, arguing for a transnational minimum democratic core as the normative basis of unamendability at the national level. See Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment," *International Journal of Constitutional Law* 13, no. 3 (2015): 606.

[107] See different positions adopted by the Association of Judges (Iustitia) and the Helsinki Foundation for Human Rights as discussed in Marcin Szwed, "Restoring the Integrity of Judicial Appointments: The Venice Commission's Opinion on Poland," *ConstitutionNet*, November 7, 2024.

[108] Venice Commission and Directorate General Human Rights and Rule of Law, *Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law, CDL-AD(2024)029* (Council of Europe, 2024).

[109] Szwed, "Restoring the Integrity."

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breaking the deadlock. Thus, expectations that the Venice Commission can act as "pragmatic problem-solver"[110] in contexts of democratic backsliding may be dashed when confronted with the complexity of the problem to be addressed. Attention to more critical appraisals of the standard-setting role of the Venice Commission, not least in Central and Eastern European contexts such as Romania's, could have tempered such optimism about its capacity to act as standard-setter in rule of law restoration.[111]

Romania's example is also instructive in a different way, as it has been at the center of key legal developments on LGBTQI rights in European law. First, in 2018, responding to a preliminary reference sent by the Romanian Constitutional Court, the Court of Justice of the European Union clarified that EU law requires the recognition of residency rights of same-sex spouses of EU nationals whose marriages were registered in another member state.[112] Second, in 2023, the European Court of Human Rights found Romania in violation of the European Convention on Human Rights for failing to provide any form of legal recognition for same-sex couples.[113] Despite these clear pronouncements, as of the time of writing, Romania has not adopted even a minimal legal framework concerning same-sex couples. It took over five years to even legislate for the recognition of same-sex marriages registered in other Member States, making it very clear it was only doing this to avoid financial sanctions from the European Union.[114] Moreover, the Prime Minister repeatedly stated that Romania was simply "not ready" to do more on the issue and adopted a blasé attitude toward the country's repeated failures to enforce its European obligations.[115] The normative pull of the transnational thus appears eroded in a different way in the Romanian case: not through full-frontal attack, for all political actors continue to boast of their pro-Europeanness, but through delays and lack of implementation in the name of cultural difference.

Apart from these goal-oriented questions, we may also query whether this new framework indeed allows for novel solutions for constitutional democracies in Europe or else risks rehashing old, and at least contested if not discredited, models of constitutional and democratic engagement. The conceptual vocabulary employed is nearly identical to that of the early 1990s, making this return to transitology at least superficially seem like recycling stale concepts. Thomas Carothers had declared "the end of the transition paradigm" over two decades before 'transition 2.0' was tabled by its proponents.[116] A more reflexive understanding of the post-1989 dual transitions to democracy and market economy has come to question the assumption of progress and linearity that was assumed to be their hallmark, as well as the rigid binary choice between the democratizing versus the democratized, between the new versus the old, the unconsolidated and the consolidated, the new and the mature democracies. In fact, even the end of the democratic backsliding paradigm has been announced by political scientists who fear that it merely reproduces the simple linearity of the transition paradigm in reverse.[117] At the very least, if there is any lesson to be drawn at the global level in light of the democratic backsliding worldwide, it is that democracy is fragile everywhere, in different ways—that to speak of consolidation may have been to confuse a historically contingent period of stability for an irreversible reality.

Moreover, one cannot help noticing that this same vocabulary had been employed by the same

[110] Angelika Nußberger, "The Venice Commission and Constitutional Dilemmas," in *Transition 2.0: Re-Establishing Constitutional Democracy in EU Member States*, ed. Michal Bobek et al. (Nomos, 2023), 585, 606. For a contrary view, praising the Venice Commission's drawing of red lines in this Opinion, see Francesco Biaggi, "Constitutional Repair in Poland: The Venice Commission's Opinion on the Draft Law Amending the Law on the National Council of the Judiciary," *IACL-AIDC Blog*, October 31, 2024.

[111] Space precludes a full discussion of this point, but I am referring here to critiques of the Venice Commission's role as norm entrepreneur, criticized by some as leading it to promote highly judicialized institutional arrangements, in particular in Central and Eastern Europe. See Bogdan Iancu, "Quod Licet Jovi Non Licet Bovi?: The Venice Commission as Norm Entrepreneur," *Hague Journal of the Rule of Law* 11 (2019): 189.

[112] Case C-673/16 *Coman et al. v. Inspectoratul General pentru Imigrări*, EU:C:2018:385.

[113] *Buhuceanu and Others v. Romania* (Applications nos. 20081/19 and 20 others), Judgment, May 23, 2023.

[114] Mihai Niculescu, "Certificatul de Căsătorie între Persoane de Același Sex Va Fi Recunoscut în România, Dacă Este Încheiat în Alt Stat UE," *Stirile ProTV*, September 26, 2023.

[115] Reuters, "Romania is Not Ready to Uphold Same-Sex Couples' Rights," *Reuters*, November 23, 2023.

[116] Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13 (2002): 5.

[117] Licia Cianetti and Seán Hanley, "The End of the Backsliding Paradigm," *Journal of Democracy* 32, no. 1 (2021): 66.

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populists in power that are to blame for the democratic backsliding to be addressed. The invocation of incomplete or captured revolutions, the idea of restoring an idealized past, the emphasis on a state that delivers for all and not the few have been, in varying iterations, prominent in their political projects. In Viktor Orbán's speeches, the 1989 Revolution was no revolution at all but a case of elite capture, with his coming to power and adoption of the 2011 Fundamental Law as the true anti-communist revolution in Hungary. Jaroslaw Kaczynski referred to PiS's reforms in Poland as a 'counter-revolution.' Romania's populist Alliance for the Union of Romanians (Alianța pentru Unirea Românilor (AUR)) party and its leader consistently refer to the 1989 Revolution as stolen and what came after it as "anti-national."[118] One could view these as misleading or outright abusive deployments of these frames, but the fact remains that, as rallying cries, they do not read as new. Their salience with the electorate also shows them to be "part and parcel of an ongoing struggle over the finalité of post-communist transformation."[119] Even where the rhetoric of counter-revolution does not have political purchase, such as in Czechia and Slovakia, its underlying logic did not fail to gather electoral momentum.[120] The symbolic field is thus crowded, and constitutionalists engaged in restoration work have to contend with the baggage—conceptual and normative, but also rhetorical—of the frames they seek to resurrect.

Asking the gender question of this new-old transitional framework helps tests its capacity to offer answers to thorny questions. We need not look far: one of the hardest tests for the new Polish government installed following the 2023 elections was always going to be how to address the abortion question. They had run on a platform promising abortion liberalization in no uncertain terms. A year prior to the vote, the successful candidate for prime minister, Donald Tusk, had stated that: "We have a bill on legal abortion up to 12 weeks, which would be a decision made by the woman in consultation with a doctor, and not the decision of a priest, prosecutor or PiS politician."[121] The 2023 election would in fact see a record turnout overall (the highest since 1919, at 74 percent) and a high mobilization of women voters (at 75 percent—a 12 percent increase as compared to the previous parliamentary elections).[122] While the gender differences in voting preferences were not stark, women did on the whole opt in higher proportion for the opposition forces.[123] Significantly, many women expressed not just abortion, but reproductive justice and access to healthcare (including IVF) as the issue bringing them to the polls.[124] And as we have already seen, they would also get supranational support in the form of European Court of Human Rights judgments finding the post-2020 abortion regime to constitute a violation of the European Convention.

Yet repeated attempts to pass legislation to deliver on the promised abortion reforms have so far failed. Multiple bills have so far stalled or failed in the Polish Parliament and the governing coalition is itself deeply divided on the matter.[125] Polish women's rights activists were incensed at what they saw as failure to deliver on one of the most straightforward electoral promises of a government they had helped elect.[126] They increasingly feared that the window of opportunity for reform had narrowed to the point of making restoration to the status quo ante, by re-inserting the

[118]See also the party's political program: Alliance for the Union of Romanians, *Programul Politic al Aliantei Pentru Unirea Românilor* (Alliance for the Union of Romanians, 2022).

[119]Paul Blokker, "Conservative Populism in Defiance of Anti-Totalitarian Constitutional Democracy," in *Anti-Constitutional Populism*, ed. Martin Krygier et al. (Cambridge University Press, 2022), 297, 298. Moreover, these rhetorical frames are often enmeshed with broader projects in revisionist history and the politicization of historical memory. See, inter alia, articles in "Memory Laws and the Rule of Law" special issue, *European Constitutional Law Review* 19, no. 4 (2023): 591-689. I thank Letizia Lo Giaco for this last point.

[120]Jan Zielonka and Jacques Rupnik, "From Revolution to 'Counter-Revolution': Democracy in Central and Eastern Europe 30 Years On," *Europe-Asia Studies* 72, no. 6 (2020): 1073, 1078.

[121]Tim Gosling et al., "Democracy Digest: A Putin U-Turn in Czechia; Poland's Pro-Choice Opposition," *BalkanInsight*, June 10, 2022.

[122]Patrice McMahon, "Young, Female Voters Were the Key to Defeating Populists in Poland's Election—Providing. Blueprint to Reverse Democracy's Decline," *The Conversation*, October 31, 2023.

[123]Simona Guerra and Fernando Casal Bértoa, "What We Learned from the 2023 Polish Election," *EUROPP—European Politics and Policy*, October 24, 2023.

[124]Anna Wlodarczak-semczuk, "Role of Women in Society at Stake in Polish Election," *Reuters*, October 10, 2023.

[125]Reuters, "Polish Parliament Rejects Bill Seeking to Ease Strict Abortion Law," *Reuters*, July 12, 2024.

[126]Wojciech Kość, "Poland's Tusk Hits a Wall on Legalizing Abortion," *Politico*, July 24, 2024.

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fetal abnormality exception among the grounds for lawful abortion, the ceiling of what could be hoped for. This would mean accepting that what was already one of the most stringent abortion regimes in Europe was the best that could be achieved. Even more so, for its restoration to be celebrated as a great victory for constitutional democracy and the rule of law. Furthermore, if we look at the opposition to reform in the post-2023 Polish Parliament, we come to understand that political positions on the issue do not neatly align along the pro- and against-rule of law binary. The narrow, 218-215 July 2024 defeat of the abortion bill was facilitated by members of parliament (MPs) of the agrarian conservative Polish People's Party, part of the coalition government, but also by the abstention of three MPs from Prime Minister Tusk's own Civic Coalition (the MPs were later suspended). The coalition parties' stances on how far to go with liberalizing abortion access, separate from simply reinstating the pre-2020 status quo, also differ significantly.[127] In other words, those otherwise committed to the restoration of the rule of law do not necessarily see the liberalization of abortion access—a very constrained form, it should be noted, as abortion would remain criminalized and only available on restricted grounds—as part of their quest. Yet again, the rule of law discourse and gender justice remained divorced.

Reading the rule of law restoration literature, and indeed the rule of law crisis one before it, this is not surprising. Neither has understood democratic backsliding as gendered, in the sense of there being a distinctive anti-gender equality component to the disestablishment of constitutional democracy. Nor have they reflected on the gendered nature of the rule of law discourse itself, whose presumed neutrality and conservative nature feminist theorists have long pointed to.[128] It is not that feminist constitutionalism does not need the rule of law. Rather, it is that it adopts a critical stance toward the conceptual and discursive apparatus erected around the rule of law, seeking to reveal the anti-emancipatory nature of its status quo-stabilizing goals. In asking "the rule of which and whose law?," feminist constitutionalists of different ideological persuasions are united in a desire to see the rule of law work toward bringing about substantive and not just formal equality.[129]

Returning to the Central and Eastern European debate, we find in the scholarship it has spawned a renewed interest in the competing understandings of the rule of law during the initial transitions these countries embarked on, whose long shadows reemerged once backsliding was afoot.[130] Moreover, we find more sophisticated understandings of the interplay between these conceptions and the specific ways in which the rule of law was under attack. Gabor Halmai has discussed, for example, how a formalistic understanding of the rule of law allowed the Hungarian democratic transition to proceed without constitutional replacement and treating the communist legal order as formally valid.[131] This would later be exploited by Orbán and enabled his trampling of the rule of law in the name of political justice. It has also been observed that a similarly formalistic understanding of the rule of law was prevalent among feminists in the region, who as a consequence paid little attention to any transformative potential it might have had.[132] The

[127]Dominika Tronina and Kaja Kaźmierska, "Abortion Rights and Election Campaigns: The Case of Poland," *Engenderings*, October 11, 2023

[128]E.g., Robin L. West, "Jurisprudence and Gender," *The University of Chicago Law Review* 55, no. 1 (1988): 1, 58 (arguing that gendered values are not reflected in the idea of the rule of law); Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 170 (arguing that the rule of law reflects masculine values); Katherine O'Donnovan, "Engendering Justice: Women's Perspectives and the Rule of Law," *University of Toronto Law Journal* 39 (1989): 127 (looking at equality before the law as a component of the rule of law as a way to make it more receptive to feminist concerns). More generally, see Vanessa Munro, "Feminist Critiques of the Rule of Law," in *The Cambridge Companion to the Rule of Law*, ed. Jens Meierhenrich and Martin Loughlin (Cambridge University Press, 2021), 340; Anna Loretoni, "The Rule of Law and Feminism: The Dilemma of Differences," in *Handbook on the Rule of Law*, ed. Christopher May and Adam Winchester (Edward Elgar, 2018): 333.

[129]Baines et al., *Feminist Constitutionalism*.

[130]Adam Czarnota, "Barbarians Ante Portas or the Post-Communist Rule of Law in Post-Democratic European Union," in *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, ed. Wojciech Sadurski et al. (Springer, 2006): 283; Jiri Priban, "From 'Which Rule of Law?' to 'The Rule of Which Law?': Post-Communist Experiences of European Legal Integration," *Hague Journal on the Rule of Law* 1, no. 2 (2009): 337.

[131]Halmai, "From Liberal Democracy," 444-445.

[132]Nanette Funk, "Feminist Critiques of Liberalism: Can They Travel East? Their Relevance in Eastern and

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Bulgarian Constitutional Court's 2018 decision declaring the country's ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence—also known as the Istanbul Convention—unconstitutional is a stark judicial embodiment of this formalistic understanding of the rule of law.[133] The majority opinion declared the Convention's ratification incompatible with the rule of law, insofar as it would have introduced legal uncertainty and ambiguity by incorporating a dubious and foreign—in the Court's view—notion of gender into the Bulgarian legal system. This formalistic legal reasoning remains widespread in Central and Eastern Europe and indeed accompanied the region's post-1989 democratic transitions.[134] Any 'transition 2.0' framework therefore must address this enduring formalistic understanding of both the concept of the rule of law and its enforcement or else risk repeating past mistakes.

4 Toward Resilient Constitutional Cultures

Much of what I have written about above remains within the boundaries of the well-known apparatus of comparative constitutional law. Whether we keep the focus on the traditional institutions of scholarly interest in the field—captured and liberated courts, parliaments dominated by a single political force or fragmented into inaction, executive power unbound—or we add into the mix the so-called 'fourth branch' ones (independent agencies, ombudsmen, commissions, etc.), the structure of any intervention is familiar. It entails a diagnosis of the lack of independence, ineffectiveness, or overreach of said institution, followed by the administration of a 'cure.' The latter may be at the level of redesign, the introduction of new powers or conversely new limitations on those powers, or simply a change of cadres. Alternatively, following the material critique of backsliding, we may come to think that there is no role for constitutionalism in the search for solutions, or that it should take the backseat to large-scale economic reorientation.

Much less prominent in this panoply of reactions to democratic backsliding and searches for solutions have been investigations stretching beyond the well-established contours of comparative constitutional law. It is not that constitutional scholarship does not acknowledge the complexities of ensuring constitutional embeddedness. However, it often does this and then immediately relegates any question of nurturing constitutional culture to the extra-legal realm. I will instead highlight two areas of research that allow us to bridge the divide between constitutional law and society: the role of political emotions and their interplay with law, and the educational role of law and jurists. These are not new directions in scholarship.[135] However, they do remain in the minority in terms of approaches adopted in response to European democratic backsliding, and comparative constitutionalism more broadly. However, it does not suffice to note that those who seek to undermine constitutional democracy are incredibly successful at affective mobilization. Nor can we simply stop at tracking decreasing levels of public knowledge of and trust in the law and legal institutions. There is a role for constitutional scholarship in addressing these issues, albeit it requires overcoming disciplinary silos as well as in constitutional vigilance and possibly even scholarly activism. But let me take these issues one by one.

Central Europe and the Former Soviet Union," *Signs: Journal of Women in Culture and Society* 29, no. 3 (2004): 695, 715.

[133]Constitutional Court of the Republic of Bulgaria, Judgment No. 13/2018 on constitutional Case No. 3/2018.

[134]I have written elsewhere about the persistent and pernicious endurance of formalistic judicial reasoning by the Romanian Constitutional Court. See Silvia Suteu, "Between Dialogue, Conflict, and Competition: The Limits of Responsive Judicial Review in the Case of the Romanian Constitutional Court," *Review of Central and East European Law* 48, no. 3-4 (2023): 519.

[135]A recent call for more methodological diversity in comparative constitutional law, including in terms of taking human agency and emotions seriously, informed by a Global South perspective, is Dinesha Samararatne, "A Perspective on Methods for Comparative Constitutional Studies (CCS) from and within the Global South," Paper on SSRN, April 17, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5141997.

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4.1 Political Emotions as an Object of Analysis for Comparative Constitutionalists

It has rightly been observed that one thing populists excel at is harnessing political emotions toward their political projects. Regardless of whether one focuses on populism on the right or left, or on whether one sees it as a political strategy or an ideology, thin or thick, their ability to rile, direct, and sustain political emotions is undeniable. It has been repeatedly confirmed by electoral success, but also by psychological experiments showing the affective power of populist messages (and the weak power of dispassionate, myth-busting type responses).[136] This also has a gendered dimension, of course, as populists have been said to skillfully appeal to "'lost' masculinity" and the patriarchal gender order."[137]

There is a wide scholarship on political emotions, with philosophers, political scientists, and psychologists developing sophisticated models to understand the affective side to political mobilization.[138] Emotions have been central to the development of comparative constitutional law as well, even if not or only indirectly so acknowledged. The veneration of the American founding, for example, must in part be explained in affective terms and is responsible for the deep-seated sociological legitimacy enjoyed by the American Constitution (at least until recently). When it comes to post-1989 constitution-building processes, they were said to be about taming passions and opting instead for the cold rationality of the liberal constitutional model presented as seemingly ready-made.[139] This understanding of constitution-making as ideally passionless, an exercise in rationality committed to the public interest persists even while it has been challenged from at least the time of Alexis de Tocqueville. His observations that the "passions and needs of the moment" may override both short- and long-term interests ring as true today as in his time, and the democratic backsliding experience only further reinforces that.[140]

There have also been finer grained explorations of the role of emotions in comparative constitutional law. András Sajó, for example, has long argued for the need to take "constitutional sentiments" seriously in the study of constitutions, that much more so when faced—as in the aftermath of democratic backsliding—with the renewed quest for answers to the question of "what makes the constitution accepted."[141] In his telling, emotions play a role in constitutional law insofar as, by moving from the personal to the interpersonal and the collective, they "contribute to building common social norms" and are then, selectively, reflected in constitution making.[142] Modern liberal constitutionalism, in Sajó's view, is grounded in a particular emotion: that of fear. Rooted in the 18th-century experiences of cruelty and oppression that the American and French Declarations sought to overcome, fear then gets channeled into the liberal constitutional project as a way to ensure neutrality, fairness, and equality.[143] As a project focused on overcoming the passions, liberal constitutionalism then largely avoids employing the law to regulate emotions, except for some such as hatred, or where it adopts a militant democratic stance against those who themselves seek to weaponize emotions.[144]

This fear-based account of the role of emotions in comparative constitutional law offers only a partial window into the role they have played in Central and Eastern European backsliding, and

[136]Dominique Wirz, "Persuasion Through Emotion? An Experimental Test of the Emotion-Eliciting Nature of Populist Communication," *International Journal of Communication* 12 (2018): 1114.

[137]Śledzińska-Simon, "Lessons from the Populist Defeats," 895.

[138]This literature is too vast to capture here. See, *inter alia*, David O. Sears et al., eds., *The Oxford Handbook of Political Psychology* (Oxford University Press, 2023); Helena Flam, ed., *Research Handbook on the Sociology of Emotion: Institutions and Emotional Rule Regimes* (Edward Elgar, 2024).

[139]Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995).

[140]Alexis de Tocqueville, *Democracy in America* (University of Chicago Press, 2012), 201. See also discussion in Jon Elster, *Alexis de Tocqueville: The First Social Scientist* (Cambridge University Press, 2009), 59-78.

[141]András Sajó, "Emotions in Constitutional Law," in *Research Handbook on the Politics of Constitutional Law*, ed. Mark Tushnet and Dimitry Kochenov (Edward Elgar, 2023), 70, 73. See more generally András Sajó, Constitutional Sentiments (Yale University Press, 2011).

[142]Sajó, "Emotions in Constitutional Law," 76.

[143]Ibid.

[144]Ibid., 81.

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certainly when it comes to gender equality regression. Sajó's account views abortion, for example, through the (American) lens of privacy rights, and the emotion attached to its regulation as that of shame—the role of constitutionalism being to overcome the woman's shame in seeking pregnancy termination.[145] Public emotions around abortion are linked to those regarding euthanasia, thus casting the former as an exclusively moral question.[146] When looking at how emotions have been deployed in service of anti-reproductive justice moves on both sides of the Atlantic, the picture emerging is far more complex. The judicialization of the abortion question by the US Supreme Court in *Roe v. Wade* (1973) happened at a time when support for liberalizing access to abortion was on the rise; also post-Dobbs, public opinion nationally remains more liberal than that embraced by the Court. In Poland as well, opinion polls repeatedly show a slim majority in favor of liberalization, and as we have seen, that also translated into the electoral loss of PiS in 2023. Clearly, public opinion and constitutional sentiments do not neatly track and must be conceptually distinct. The emotional salience of an issue such as abortion—we could add others such as LGBTQI rights, which remain polarizing in Central and Eastern Europe—carries with it constitutional salience, even at times going against the preferences of the majority. More study of the mobilization of emotion through constitutional means and for constitutional ends is thus needed.[147] It would allow us to build on the valuable work of sociologists of protest, for example, who have studied the role of emotions in mobilizing Poles and especially Polish women protesting against abortion restrictions,[148] Romanians in their opposition to widespread corruption,[149] and so on.

While negative emotions can indeed help mobilize and drive calls for change, there is also a strand of scholarship seeking to overcome this emphasis on primarily negative emotions in law generally and constitutional law specifically. Martha Nussbaum, for example, has written about fear as a primordial emotion that is often misguided in many ways and needs to be complemented by sympathy:

> In order to be the ally of law, however, fear needs to be combined with general concern. By thinking about what we fear for ourselves, we see the sort of thing that ought to be warded off from all. But it takes sympathy to extend that concern to others, and fear is not always combined with sympathy. Indeed, it can often distract us from general sympathy.[150]

She has long advocated, drawing on anthropological research, for viewing emotions as socially constructed and not in antithesis to judgment.[151] In the case of women's rights specifically, she views emotions as "acknowledgements of neediness and dependence, acknowledgements of the importance of things outside the self that the person does not control."[152] Translated to the reproductive justice context, this would help us move beyond a focus on negative emotions only and become part of a broader reorientation of constitutionalism, including to the constitutionalism of care that others have advocated.[153] Thus, the positive corrective to constitutionalism in the

[145]Sajó, *Constitutional Sentiments*, 273.
[146]Ibid., 79.
[147]For a discussion of the role of emotions in rights mobilization, see Kathryn Abrams, "Emotions in the Mobilization of Rights," *Harvard Civil Rights-Civil Liberties Law Review* 46, no. 2 (2011): 551.
[148]Elzbieta Korolczuk, "Explaining Mass Protests against Abortion Ban in Poland: The Power of Connective Action," *Zoon Politikon* 7, no. 7 (2016): 91; Courtney Blackington, "Angry and Afraid: Emotional Drivers of Protest for Abortion Rights in Poland," *East European Politics* 40, no. 1 (2024): 1.
[149]Diana Margarit, "Civic Disenchantment and Political Distress: The Case of the Romanian Autumn," *East European Politics* 32, no. 1 (2016): 46.
[150]Martha C. Nussbaum, *Political Emotions: Why Love Matters for Justice* (Harvard University Press, 2015), 320.
[151]Martha C. Nussbaum, "Emotions and Women's Capabilities," in *Women, Culture, and Development: A Study of Human Capabilities*, ed. Martha C. Nussbaum and Jonathan Glover (Oxford University Press, 1995) 360.
[152]Ibid., 368.
[153]Sandra Fredman, "Care as a Constitutional Value," *International Journal of Constitutional Law* 22, no. 3 (2024): 741. See also Nussbaum's co-authored work linking her capabilities approach to abortion. Rosalind Dixon and Martha C. Nussbaum, "Abortion, Dignity, and a Capabilities Approach," in *Feminist Constitutionalism: Global Perspectives*, ed. Beverley Baines et al. (Cambridge University Press, 2012), 64.

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aftermath of the democratic backsliding is not merely about better socioeconomic protections and redistributive policies. It should also include a positive reorientation on the affective plane, recasting the tools of the constitutionalist's trade accordingly. These will include empathy and hope in matters of constitutional interpretation,[154] as well as in the public communication of constitutional activity, to which I now turn.

4.2 The Educational Role of Comparative Constitutional Law

Emotional attachment to constitutional values and mobilization for their defense is only one aspect of the structures needed to support constitutional democracy. Education concerning the key pillars of one's constitutional system is another, and it is integral to engendering civic ownership and vigilance. In the case of Central and Eastern Europe, we should avoid the temptation to decry the absence of a democratic constitutional culture to support the edifice of constitutional democracy without also noting the neglect of this culture-building in the early days of the democratic transitions in these countries.[155] Few were the voices back then that cautioned against expectations of easy embeddedness of the liberal constitutional project without significant effort. Even fewer were those who understood that some constitutional design choices, such as in favor of courts and the juridification of political conflict, would preclude the emergence of a political culture of deliberation and negotiation.[156] This inattention is in part understandable, not only because the path ahead seemed unambiguous and the model set, but also because attention and energies were quickly redeployed toward ensuring Euro-Atlantic integration.[157]

As Martin Kryigier has noted, the fact that populists today have used the law abusively, for their own purposes, rather than disregarding or discarding it, makes the role of lawyers paradoxically that much more central.[158] Not just abusive constitutionalism as seen in Hungary, but also the illegalities PiS committed in Poland in light of the fact that they did not have the parliamentary majority needed to constitutionalize their attacks, "makes so important *legal* and *lawyers'* opposition to the government's grabs for more power, lawyers' public explanations of what matters about the law, why tempering power is so crucial, so important."[159] He notes that the extraordinary efforts Polish lawyers engaged in to defend and explain the role of the courts once they were under fire "might have been more useful when they were not."[160] In other words, it is not just under extreme conditions that law and jurists should engage in this effort of translating their work for the wider public.

We have further examples from both the region and beyond it that demonstrate just how central the legal profession can be in defending its own independence, as well as in educating the public regarding the necessity of that independence. While I include here the role judges themselves can play in speaking up against constitutional abuse, whether on the bench or off it, comparative experience has shown that their space for maneuver is often restricted not just by intense political pressures but also by professional standards of conduct.[161] We can also consider what Israeli scholars directly involved in organizing resistance against backsliding in their country have referred to as "collective activism through the publishing of position papers, giving community

[154]Lucia Corso, "Should Empathy Play Any Role in the Interpretation of Constitutional Rights?," *Ratio Juris* 27, no. 1 (2014): 94.

[155]Zoltan Fleck, "Backsliding Democracy and the Slippery Slope of Conceptual Weakness," *International Journal of Law in Context* 20 (2024): 152.

[156]Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd edition (Springer, 2014), 419.

[157]We can briefly note here that the centrality of legal education was discussed in the context of South Africa's transition to democracy, and as an explicit element of its commitment to transformative constitutionalism. See, e.g., Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 146. I thank Arnulf Becker Lorca for bringing this point to my attention.

[158]Krygier, "The Challenge of Institutionalisation," 572.

[159]Ibid., 573.

[160]Ibid., 562.

[161]See discussion in Federica Casarosa et al., eds., *Freedom of Expression of Judges European and National Perspectives* (Routledge, 2024).

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talks, collaborating with other parts of the protest movement, providing media commentary, writing op-eds, taking part in political negotiations, and engaging in outreach to the international legal community and international institutions."[162] It is not a coincidence that Hungarian scholars still hoping for their country's return to democracy and the rule of law also view scholars' role in resisting an illiberal constitutional system as crucial.[163] Rather than departing from the supposed dispassionate, distant role of the scholar, these authors argue that such activities become necessary in the context of counter-populism. Echoing Krygier above, they note that the use by populists of legal tool requires the legal scholar to enter the counter-populist arena: "when constitutional law is the modus operandi of populist leaders, legal scholars have a unique role in identifying manipulations and threats and explaining them to the public."[164]

There is a congruence here with the type of activist scholarship feminist constitutionalists have long been accused of. Feminist theorists have critiqued expectations of objectivity and dispassionate reading of the law as well of the lawyer's role as somehow detached from the society she studies. But as Kerri Froc has recently argued, feminist insights should not be overlooked when considering scholarly roles, not least during populist times. In her account, feminist scholarly activism is a way to ensure "feminist accountability" as well, by which she means "recognizing that there is no neutral position outside relations of power, and that we are implicated in hierarchical systems including white supremacy, colonization, patriarchy, and others."[165] It also entails taking responsibility for checking the impact of one's research on those one studies, with a view to avoiding perpetuating injustice and exploitation. Applying these insights to the democratic backsliding context allows us to avoid producing scholarship that distances itself from the impact of this backsliding on real people—be they (primarily poor and rural) women no longer having access to abortion services, or lower-class families being left out of tax incentives, or victims of gender-based violence being instrumentalized in the name of a political agenda.

5 Conclusion

I have sought to take stock of developments in European constitutionalism through the prism of the literature on democratic backsliding. Given the widespread experience with democratic regression across the continent, as well as the scholarly fervor in response to it, it seemed like an appropriate lens through which to reflect on lines of inquiry old and new. Adopting a special focus on Central and Eastern Europe has been not just a choice tied to the centrality of countries in the region in this backsliding, but also a conscious effort to move what some still perceive as peripheral to the center of scholarly attention. Moreover, by discussing a variety of countries in the region, we can highlight the plurality of experiences that risk being flattened without sufficient comparative attention to context.

I have sought to map, however roughly, the scholarly camps that have developed alongside different diagnoses and attendant cures to democratic backsliding. These I referred to as legalistic reinforcement and material critique and represent different orientations toward the type of constitutional, democratic, and indeed societal renewal we should embark on in response to our populist times. I have also discussed the dangers of not learning the right lessons from the backsliding experience and potentially replicating mistakes of the past, including if engaging in a 'transition 2.0' effort unreflectively.

[162]Ittai Bar-Siman-Tov et al., "Scholactivism in the Service of Counter-Populism: The Case of Constitutional Overhaul in Israel," *International Journal of Constitutional Law* 22, no. 4 (2024): 1059.

[163]Gabor Halmai, "Illiberal Constitutionalization and Scholarly Resistance: The Cases of Israel and Hungary," *Journal of Illiberalism Studies* 4, no. 1 (2024): 33.

[164]Bar-Siman-Tov et al., "Scholactivism," 1059.

[165]Kerri Froc, "How Should a Person Be (in Academia)? Engaging with the World's Disparities through Scholarly Activism," Paper presented at "Law as a Terrain for Advancing Social Justice: Colloquium on the Occasion of Martha Jackman's Retirement," University of Ottawa, May 23, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5035155, 16. See also Ann Russo, *Feminist Accountability: Disrupting Violence and Transforming Power* (New York University Press, 2018).

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Additionally, I have opted to use as test case gender equality and its own regression as part of democratic backsliding in these various countries. Here is, again, an effort at recentering the hitherto marginal. It is not that comparative constitutional scholarship has ignored the topic, in particular the prominent cases of restrictions of reproductive freedoms or anti-LGBTQI measures. However, with the exception of feminist constitutionalists, the backsliding scholarship has not devoted nearly as much attention to this regression and backlash as it has to attacks on courts and judicial independence. To an extent, this reflects long-standing priorities in the field, which have led to skepticism among feminists such as Catharine MacKinnon that constitutions can, indeed, do much to deliver on gender equality.[166] Yet I believe they can and should, and the democratic backsliding experience has reinforced the case for taking constitutionalism seriously as an object of feminist study just as much as it has reinforced the need for constitutionalists to dust off their feminism.

Finally, I briefly sketched additional avenues for study and soul-searching for constitutional scholars eager to sharpen their defensive tools against constitutional erosion. By focusing on the constitutional study of emotions and the activist role of the scholar, I sought to recall the limits but also the promise of (constitutional) law in dark times. Rather than sit on the sidelines and watch populist or authoritarian takeover of legal institutions in the name of fear, hatred, and exclusion, comparative constitutional scholarship can work toward coming up with a positive, hopeful, and empathetic message for the societies it seeks to protect.

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[166] Catharine MacKinnon, "Gender in Constitutions," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012) 397.

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