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demand for the rule of
law in Hungary**

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Abstract

Nowadays, the 'illiberal democracy' or 'hybrid regime' in Hungary is one of the favourite hot topics of European constitutional lawyers. Hungarian Prime Minister Viktor Orbán has been receiving well-deserved criticism for centralising the power of his government and eliminating checks and balances. However, little has been said about Hungarian citizens' role in all what has been happened. Authors sometimes seem to forget about the fact that Orbán does not reign over Hungarians against their will, but he is getting re-elected again and again – last time in April 2022. I argue that behind this series of electoral victories, there is a lack of public demand for limiting state power amongst Hungarians. In this paper I will outline why this is a heritage of state socialism and how the EU should take this social background into account when trying to enforce the rule of law in Hungary.

Keywords: rule of law, democracy, post-socialism, Hungary, EU, V4

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National Democracy vs European Rule of Law? The lack of public demand for the rule of law in Hungary

Beáta Bakó¹

Introduction: A victory seen from the Moon

“We’ve won a victory that’s big enough to be seen from the Moon – and certainly from Brussels.” These are the words of Hungarian Prime Minister Viktor Orbán² after winning a two-thirds majority in parliament with his national-conservative Fidesz-party for the fourth time in April 2022. The reason why he made a reference to ‘Brussels’ was clear. Despite his government having long been criticised by the EU for undermining the rule of law, Fidesz obtained a record number of votes in the last elections.³ It seems that even after experiencing 12 years of gradual concentration of power by Fidesz-governments, the decisive majority of the Hungarian electorate consequently does not prioritise checks and balances and the rule of law.⁴

In this paper, I will examine the possible reasons for this indifference, and attempt to discover to what extent social stances towards the rule of law are determined by the socialist past and the experience of the democratic transition. The paper is structured as follows. In Section 1, I briefly outline, how the Fidesz-governments were able to undermine the rule of law and democracy in Hungary in a formally legal way thanks to their two-thirds majority in parliament. In Section 2, I identify some reasons why they were so successful in doing so: the lack of public interest in functioning counter-majoritarian institutions played a crucial role at this point. This is also related to the concern over national sovereignty against foreign influence, which is partly a heritage from socialist times. The concluding Section 3 contains a brief outlook to the other Visegrad countries and raises some questions about the possibilities of fostering public demand for the rule of law in light of recent empirical research.

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² The whole speech is available at the official website of the Prime Minister: <https://miniszterelnok.hu/speech-by-prime-minister-viktor-orban-following-the-election-victory-of-fidesz-kdnp/>. All online sources referred in this paper were last accessed on 30 December 2022.

³ Fidesz received 3 million votes, exceeding its results in 2018 (2.8 million), 2014 (2.3 million), and 2010 (2.7 million). All data are available at the website of the National Electoral Office: www.valasztas.hu.

⁴ Similarly: Joseph H. H. *Weiler*: Orbán and the self-asphyxiation of democracy. *International Journal of Constitutional Law*, 2020/2, <http://www.iconnectblog.com/2020/08/icon-volume-18-issue-2-editorial/>.

1. Granite-rigid illiberalism

Prime Minister Orbán provoked a big outcry in 2014, when he labelled the system that he was building as an ‘illiberal’ democracy.⁵ Liberal intellectuals countered with the argumentation that there is no such thing as an illiberal democracy,⁶ because a democracy must necessarily be liberal in the sense that it provides some counter-majoritarian institutional guarantees against the ‘tyranny of the majority’.⁷ It might sound strange but what is happening in Hungary is neither tyranny nor that of the majority. It is not tyranny because despite the use of every cynical trick of the government to concentrate its power, and make its propaganda the loudest, the opposition and independent media are not oppressed. Their business has certainly been made very difficult, but they operate legally, and they do not need to fear prosecution or being forced to emigrate – as it would be the case in a tyrannical state. Whatever the Hungarian system is, it is not of the majority either, in the strict sense of the word. Orbán certainly bears the support of a massive part of the active electorate, but this is far less than the absolute majority of all citizens.⁸ With this, I do not say that his government is illegitimate: elections are decided by the active citizens, and this is still a good thing. The problem in Hungary is the intensified polarisation and the disengagement of centrist voters: there is no tyranny of the majority but a reign of apathy.

The reasons of this phenomenon are manifold, but the election of 2010 was certainly a significant moment. Then, Fidesz gained a two-thirds majority in the parliament alone, which was an unprecedented victory. Still, the outcome of the election was not entirely surprising. After eight years in power, the Socialist Party had been morally and politically discredited. But the two-thirds majority in the hands of one single party has proven to be a dangerous weapon.⁹ As Hungary’s National Assembly is a unicameral parliament, matters requiring a wider compromise have always been subject to a two-thirds majority requirement. When this criterion was introduced after the democratic transition as a guarantee for compromise, probably no one thought that a single party¹⁰ could gain this threshold alone, but this happened in 2010. Since then, the requirement of this special parliamentary majority makes no further sense in practice. If Fidesz wanted to substantially keep the guarantee for a

⁵ ‘What is happening in Hungary today can accordingly be interpreted by stating that the prevailing political leadership has today attempted to ensure that people’s personal work and interests, which must be acknowledged, are closely linked to the life of the community and the nation, and that this relationship is preserved and reinforced. In other words, the Hungarian nation is not simply a group of individuals but a community that must be organised, reinforced, and in fact constructed. And so, in this sense the new state that we are constructing in Hungary is an illiberal state, a non-liberal state.’ Viktor Orbán’s speech at the Tusnádfürdő / Băile Tușnad Summer University, 26 July 2014. Full text in English: <https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

⁶ See e.g., János Kis: Illiberális demokrácia nem létezik (There is no such thing as illiberal democracy), HVG, 24 November 2014: https://hvg.hu/velemeney/20141124_Kis_Janos_illiberalis_demokracia_nem, András László Pap: Az illiberális demokrácia közjogi szemfényvesztés (Illiberal democracy is just dust in the eyes, interview by Szilárd Teczár), Magyar Narancs, 8 October 2017: <https://magyarnarancs.hu/belpol/az-illiberalis-demokracia-kozjogi-szemfenyvesztes-106280>.

⁷ Alexis de Tocqueville: Democracy in America (Vol 2., Liberty Fund, Indianapolis, 2010 [1840]), p. 410.

⁸ There are 8.2 million Hungarian citizens eligible to vote, so the majority of all voters would mean more than 4 million votes. Fidesz received 3 million votes at its best in 2022.

⁹ A large part of the remaining part of this subsection is taken from my article: Beáta Bakó: Governing without being in power? Controversial Promises for a New Transition to the Rule of Law in Hungary (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law, 2022/1), pp. 227, 230-233.

¹⁰ Fidesz formally frames a union with the Christian Democrat KDNP, but it is not a real coalition, rather a gesture: without Fidesz, KDNP would not have existed for years; their own political support is extremely low.

compromise on the most important subjects, they should have raised the two-thirds requirement higher in order to uphold the need for such.¹¹ Moreover, this would have logically implied raising the voting requirements of constitutional amendments, too. Of course, it did not happen, but the new constitutional majority restructured the legal (and personal) environment to their benefit, while disadvantaging the opposition.

The Fidesz-supermajority adopted a new constitution in 2011. Although then, the Prime Minister labelled the new Basic Law 'rigid as granite', later it has been amended regularly according to the daily political interests of the ruling party.¹² Further, Fidesz could make good use of its two-thirds majority by rewriting the so-called cardinal laws. These laws shall be adopted with a two-thirds majority of MPs present at the vote, which had been part of the Hungarian constitutional order before 2010 under the name 'two-thirds laws'. The requirement of adopting these laws with a qualified majority was originally rooted in 'mutual distrust'¹³ at the time of the democratic transition. This solution aimed to enforce political compromise on key questions.

The scope of cardinal laws has been changed only partly in the new constitutional system. A significant number of the subjects has remained the same, compared to the period before the Basic Law entered into force:¹⁴ laws regarding the basic organisational structures of the state (Constitutional Court, ordinary judiciary, prosecutors, police) and the most fundamental rules of the democratic state order (parliamentary elections, citizenship, local governments, functioning of parties, media laws). Fidesz, of course, used the opportunity to change most of these laws. In the context of this paper, the most relevant amongst them is the electoral law, which was amended in some technical, but crucial, points (e.g., gerrymandering, calculation of compensation votes, procedural rules of the campaign).¹⁵ Having said that, the basic, mixed structure of the electoral system is the same as earlier. There are 106 Members of Parliament (MPs) are elected in individual constituencies in 'first past the post' system, while another 93 MPs come into parliament from party lists according to the principles of proportionality. Besides the electoral law, there are subjects, mostly related to certain fundamental rights, that used to be regulated through two-thirds laws and now belong to the scope of simple legislation.

Since 2012, the new cardinal subjects concern rather practical policy issues like the protection of families, the basic rules of taxation, pensions and matters related to finances. The protection of 'national assets', the functioning of the Central Bank and of the Budget Council. The latter body supports the legislative activity of parliament by examining the feasibility of the central budget. The Council may veto the budget under certain circumstances,¹⁶ which is delicate for more reasons. First, the parliament may be dissolved by the President of the Republic if it fails to adopt the budget in the

¹¹ Similarly: Herbert *Küpper*: A kétharmados/sarkalatos törvények jelensége a magyar jogrendben [The phenomena of two-thirds/cardinal laws in the Hungarian legal system], MTA Law Working Paper 2014/46, p. 7.

¹² For more detail see my book: Beáta *Bakó*: Challenges to EU values in Hungary. How the European Union misunderstood the government of Viktor Orbán (Routledge, London, New York, 2023).

¹³ *Küpper*, supra n. 11, p. 4.

¹⁴ For a detailed comparison see András *Jakab*, Emese *Szilágyi*: Sarkalatos törvények a magyar jogrendben [Cardinal laws in the Hungarian legal system] MTA Law Working Paper 2015/32, pp. 4-7.

¹⁵ In detail *Bakó*, supra n. 12.

¹⁶ See Article 44 of the Basic Law.

first quarter of the current year.¹⁷ Second, two of the Council's members are appointed by the President of the Republic and the third member is elected by a two-thirds majority of parliament.¹⁸

This leads to another aspect of the problem of two-thirds majority in the hands of one party: the officials at the top of many state institutions who have been cemented into their positions by two-thirds majority of parliament for many years, and who are mostly loyal to the governing party. The only elected member of the aforementioned Budget Council is the president of the State Audit Office, who happens to be a former MP of the Fidesz, changing his parliamentary seat for this position in 2010. Before the elections of 2018, the State Audit Office fined the biggest opposition party about 2.5 million EUR, which is noteworthy not only because the decision was based on a controversial legal amendment¹⁹ but also because there are no remedies provided against such decisions.²⁰

This is only one example of how loyalist-led state institutions function. Another, even more telling case is that of the Prosecutor General, who is also elected by the two-thirds parliamentary majority. The incumbent Prosecutor General is also an ex-member of Fidesz. In 2019, he was re-elected for the second term of nine years. Moreover, in November 2021, the rules on the removal from office were changed so that from now on, the dismissal of the Prosecutor General will require a two-thirds majority in parliament, too.²¹ Under his leadership, investigations concerning corruption cases related to circles close to Fidesz have often been terminated.²² As a result, Hungary is now one of the member states that is most affected by OLAF-investigations. Moreover, the financial impact of those investigations is very high.²³ At the same time, the government has refused the idea that Hungary should join the European Public Prosecutor's Office, which would be able to conduct investigations in the Member States concerning cases in which the EU's financial sources are affected.

Former politicians got positions even at the Constitutional Court. Since 2010, former MPs and even an ex-minister²⁴ of the governing parties have been elected as constitutional judges.²⁵ A two-thirds

¹⁷ Article 3(3)b) of the Basic Law.

¹⁸ The Budget Council consists of the president of the Central Bank, the president of the State Audit Office, and its own president. The latter is appointed by the President of the Republic for six years (Article 44(4) of the Basic Law), while the president of the Central Bank is appointed by the President of the Republic on the proposal of the Prime Minister, also for six years. The president of the State Audit Office is elected by a two-thirds majority of parliament for a renewable twelve-year term (Article 43(2) of the Basic Law).

¹⁹ At that time Fidesz temporarily lacked the two-thirds majority due to a defeat at an interim election in a single district. As the rules of campaign and party financing are subject to cardinal legislation pursuant to Article VIII. of the Basic Law and § 354 of Act XXXVI of 2014 on the election procedure, the new rules about listed prices for political advertising (the so-called billboard law) were passed as an amendment of the act on landscape protection. (For details see Bakó n. 1. 42.) The Constitutional Court found no problem about that: AB decision no. 3001/2019. (I. 7.)

²⁰ § 1(6) of Act LXVI of 2011 on the Act on the State Audit Office.

²¹ Bill no. T/17282. § 75. Adopted by parliament on 9 November 2021.

²² The most famous case is linked to the son-in-law of the Prime Minister. His former company modernised the streetlights in several Hungarian towns using EU funds, but the company avoided the rules of the public procurement procedures many times and the projects were also overpriced – this has been explored and proven by the media, with documentation. An OLAF investigation took place in the case, but it cannot do much without the cooperation of the Hungarian authorities. The Hungarian investigation took a long time, and finally, the investigation was cancelled in November 2018.

²³ See the 2019 OLAF report, especially figure 13 and 2020 OLAF report, tables 5-6.

²⁴ However, one of them, former chancellery minister, István Stumpf, was a surprise as he counted as a 'renitent' judge in the court, often taking contrary positions to the government.

²⁵ It must be added that this also happens in countries that are considered to be proper liberal democracies. For example, the current president of the German Federal Constitutional Court used to be deputy chairman of the parliamentary group of CDU/CSU just before being elected as a constitutional judge.

majority in parliament had also been a requirement earlier but the Fidesz-supermajority introduced further rules to cement their people in the Court. They not only raised the number of judges from eleven to fifteen and defined a longer, twelve-year term in office,²⁶ but the nomination procedure was also changed. Nominations are made by a distinct ad hoc parliamentary committee. Formerly, this committee used to be parity based: each parliamentary party group could delegate 1-1 members. Now its composition reflects the power relations in the parliament.²⁷ This means that Fidesz already dominates the nominations, opposition candidates do not even have the chance of being considered by parliament's plenary. As a result, by September 2014, 'one party judges', who have been nominated and elected exclusively with the votes of Fidesz, became the majority at the Court.²⁸

Running in parallel, while filling it up with loyalist judges, the Court's competences have also been changed. Before the Court was dominated by Fidesz-appointed judges, constitutional amendments incorporated provisions that had been formerly invalidated by the Constitutional Court.²⁹ In order to secure this practice of over-constitutionalisation, it has been made forbidden for the Court by a constitutional amendment to substantially review constitutional amendments: such a review must be limited to formal, procedural aspects.³⁰ Further, the Constitutional Court can only review the Act on the State Budget and other acts on public finances if they violate human dignity or other enumerated fundamental rights.³¹

After the experiences of overriding decisions through constitutional amendments and especially after the Fidesz-appointed judges became the majority, the stance and strategies of the Court have adapted to the changed situation. Mostly, the Court has been trying quietly to avoid conflict with parliament by extremely delaying substantial review of politically delicate cases or not making a decision at all.³² Even if it goes into a substantial review, it often establishes constitutional requirements as *erga omnes* interpretations rather than annulling the challenged legislation. As an alternative to the latter, the Court tends to use the (previously also existing) possibility of declaring unconstitutional omission of

²⁶ Article 24(8) of the Basic Law.

²⁷ First, the old constitution was amended with this rule in July 2010. For the procedure of nomination see § 7 of Act CLI of 2011 on the Constitutional Court.

²⁸ Zoltán Sente empirically analysed the activity of the constitutional judges in the light of the political side they were appointed by and found a surprising extent of political adaptation between 2010 and 2014, especially after 2013. In details see: Zoltán Sente: 'Die politische Orientierung der Mitglieder des ungarischen Verfassungsgerichts zwischen 2010 und 2014' Jahrbuch für Ostrecht, 2016/1. pp. 45-67.

²⁹ For more detail see Beáta Bakó: Hungary's Latest Experiences with Article 2 TEU. The Need for 'Informed' EU Sanctions (In: Armin von Bogdandy *et al.* eds.: *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Springer, 2021) pp. 45-48.

³⁰ Article 24(5) of the Basic Law stipulates: 'The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for making and promulgating it.' It is worth adding that according to its established case law, the Constitutional Court generally considered itself not competent for such a review also earlier. For more detail see: Beáta Bakó: Láthatatlan után inkohérens alkotmány. A korlátlan alkotmánymódosító hatalomról [First invisible, then incoherent constitution. On the unlimited constitution-amending power], Magyar Jog 2017/2, pp. 105, 108).

³¹ Article 37(4) of the Basic Law.

³² Postponing was the Court's tactic with the laws that chased away CEU from Budapest and that listed NGOs funded from abroad. In both cases, the Constitutional Court suspended the constitutional review with reference to the respective infringement actions being in progress: decisions no. 3198/2018. (VI. 21.), 3199/2018. (VI. 21.), 3200/2018. (VI. 21.). But in fact, infringement procedures and constitutional reviews function with completely different standards, moreover, the Constitutional Court has not decided about the laws after the dismissing judgments of the ECJ (C-66/18, C-78/18), moreover, the Court officially closed the cases regarding the 'lex CEU' without a substantial decision in July 2021: decisions no. 3318/2021 (VII. 23) and 3319/2021 (VII. 23). For more detail see Bakó, *supra* n. 29.

the legislative assembly.³³ In this case, the Court gives a deadline to parliament for correction, but it cannot be enforced. As it was openly explained by the president of the Constitutional Court: the focus of the court's case law has been shifted away from the control of the legislative towards the control of the judicative.³⁴ He claimed that the reason for this tendency was the introduction of constitutional complaints with the new Basic Law in 2012. Namely, instead of the former *actio popularis*, which enabled anyone to challenge laws before the Constitutional Court, constitutional complaints can only be filed by complainants who are directly affected by the challenged law or judgment.³⁵ However, neither the constitution, nor the act on the Constitutional Court prioritises any of its procedures.³⁶ As such, there is no legally justified reason for neglecting politically delicate cases, especially norm controls. Moreover, a very high percentage of constitutional complaints are refused without a substantial review,³⁷ so it seems that the Constitutional Court's alleged claim to control the constitutionality of the application of law is not very strong.

Having said that, the Constitutional Court's control over the judiciary was strengthened by a legislative package adopted at the end of 2019. The amendment introduced the possibility for public authorities to file a constitutional complaint if their competences were unconstitutionally limited.³⁸ This turns the logic of constitutional complaint on its head, as normally, the aim of such complaints is to protect individuals' fundamental rights against the state and not to provide extra remedies for state authorities (mostly against the citizens in front of another state organ) in their disputes.

This anomaly was perfectly illustrated shortly before the 2022 elections, when the government issued a newsletter accusing the opposition planning to send weapons and soldiers to the war in Ukraine. The applicant received that newsletter in a way that apparently violated the most basic data protection standards. Earlier, he had provided his e-mail address in order to register for a COVID-vaccination, so he was very surprised to get messages from the government during the campaign. He turned to the National Electoral Commission, but his complaint was refused without a substantial examination with the reasoning that the National Electoral Commission had no competence for reviewing data protection complaints. The complainant challenged the decision before the Curia (the supreme court of Hungary) which agreed with the National Electoral Commission about the refusal on data protection grounds, but it found that the government violated the rules of the election procedure with the newsletter as it should be neutral in the campaign.³⁹ Then, the ruling of the Curia was challenged via a constitutional complaint before the Constitutional Court. But the complaint was not lodged by the

³³ Constitutional judge Balázs Schanda defended the changed approach as a method of seeking compromises. He argues that even if formally, establishing a constitutional requirement and declaring the omission of the legislative power count to be as a refusal of the complaint or motion, they can in fact be seen as partial annulment of the contested norms. Balázs Schanda: *Az alkotmánybíráskodás új szerepe az Alaptörvény első évtizedében. Kompromisszumok, identitás és jogfejlesztés* [The role of constitutional adjudication in the first decade of the Basic Law. Compromises identity and legal development], (Acta Humana, 2021/2), p. 120.

³⁴ Conference recording available at the Facebook-page of the Constitutional Court: <https://www.facebook.com/706883626001952/videos/674672246815495>.

³⁵ §§ 26-27 of Act CLI. of 2011 on the Constitutional Court.

³⁶ Article 24(2) of the Basic Law, Section II. of Act CLI. of 2011 on the Constitutional Court.

³⁷ In detail: Fruzsina Gárdos-Orosz, Viktor Lőrincz, Zsolt Zódi: *Egy új alkotmányjogi panaszjelzés (Abtv. 27.) jelentőségének mérhetősége a bírósági és az alkotmánybírói alapjogvédelem rendszerében* [How the significance of a new constitutional complaint could be measured in the system of fundamental rights protection before the Constitutional Court] MTA Law Working Papers 2017/23, Dániel Karsai: *Néhány gondolat az alkotmányjogi panasz hatékonyságáról – még viccnek is rossz?* [Some thoughts on the efficiency of constitutional complaints – a bad joke?] *Fundamentum*, 2020/1. 68.

³⁸ § 27 of Act CLI. of 2011 on the Constitutional Court as amended (in effect since 20 December 2019).

³⁹ Curia decision no. Kvk.II.39.260/2022/5.

concerned citizen but the government, arguing that its right to fair trial was violated as the Curia applied the law *contra legem*. The Constitutional Court, which is generally very strict about the admissibility criteria of constitutional complaints, made a substantial review and found that the ruling of the Curia was unconstitutional. Under the relevant laws, the government was actually obliged to inform citizens especially when there was a war in a neighbouring country and the Curia did not take this into consideration, the Constitutional Court concluded.⁴⁰

The above case shows how the Constitutional Court can be used as the last resort for the government if it seems that the two-thirds majority in parliament is still not 100 percent sufficient to ensure the government's will. However, the Hungarian electorate does not seem to be bothered by the fact that their government is so petty. The question of why is a very complex one, which dates back at least to the time of the democratic transition in 1989-90.

2. The missing citizens

As mentioned in the above section, the political apathy stems largely (but not exclusively) from the experience of the 'system of national cooperation', as Fidesz labels its regime. The existing divisions between politically active citizens have been deepened extremely,⁴¹ while centrist voters mostly abandoned the political arena and escaped into passivity. This political environment, especially the enormously simplified public discourse is something that prevents the development of a mature political culture. However, such a culture has an important prerequisite: the presence of masses of *citizens*, engaging in public life beyond voting in elections every four years, and in particular, exercising conscious control over state power by consequently validating their fundamental rights. Hungary is very far from that as it is proven by a recent empirical study: in case of a legal conflict, Hungarians are willing to bring a lawsuit against each-other, but they are reluctant to do so if the counterpart is a state institution.⁴² They are good at peaching but bad at asserting their rights against the state.

Obviously, desirable civic attitudes could not develop in the society during the four decades of socialist dictatorship. The chance for establishing a self-conscious, well-rooted citizenry was also missed after the democratic transition, which was 'much more given to *emulation, adoption, and installation*, than to *institutionalisation*.'⁴³ Hungary, like other countries in the Central-East-European region was expected to copy the Western institutional model of liberal democracy without providing the chance

⁴⁰ AB decision no. 3130/2022. (IV. 1), ABH 2022, 798. Although the data protection concerns were not addressed in that dispute, it is worth mentioning the opinion of the Data Protection Authority on the matter. The opinion was published just one day before the election, and not surprisingly, the authority (whose president is even de jure a political appointee, nominated by the Prime Minister) did not find any problems with sending campaign messages to people who registered for vaccination, arguing that the privacy policy clearly stated that the purpose of providing contact data was 'further contact and information from the government'. See 'Állásfoglalás a vakcinainfo.gov.hu oldalon történő regisztrációhoz kötődő hírlevelek adatvédelmi kérdései kapcsán' [Opinion about the newsletters related to the registration at vakcinainfo.gov.hu], 2 April 2022, <https://www.naih.hu/adatvedelmi-allasfoglalasok>.

⁴¹ For details see András *Bíró-Nagy*, Áron *Szászi*, Attila *Varga*: Széttartó világok. Polarizáció a magyar társadalomban a 2022-es választások után [Diverging worlds. Polarisation in the Hungarian society after the elections of 2022], Friedrich Ebert Stiftung, Policy Solutions, 2022.

⁴² Balázs *Fekete et al.*: Rights Consciousness in Hungary and Some Comparative Remarks. Could an Increasing Level of Rights Consciousness Challenge the Autocratic Tradition? (Review of Central and East European Law, 2022), p. 229.

⁴³ Martin *Krygier*: The challenge of institutionalisation: Post-Communist 'transitions', populism and the rule of law (European Constitutional Law Review), 2019/3, p. 559. Italics in the original.

for society to internalise those values. This ‘no-alternative approach’ is not only reminiscent of the old state socialism,⁴⁴ but it also had a high price. Today’s ‘constitutional capture’, which is the legacy of the unfulfilled promises of post-1989 and of the demise of the liberal consensus.⁴⁵

In 1989, the 1949 communist constitution was rewritten to comply with liberal democratic requirements both in terms of institutional design and fundamental rights protection. The constitutional change was a result of the so-called National Roundtable Talks, a peaceful negotiation process between the old communist and emerging opposition elites.⁴⁶ Although practically every single sentence was changed, the name of the constitution remained Act XX. of 1949 which did not sound good, and also its structure still reflected the old state socialist logic. No wonder that the making of a new constitution was constantly on the agenda in the 1990’s and 2000’s – but none of the political forces could reach a compromise for the required two-thirds majority in parliament for adopting a new constitution.

So, there was a constitution which had been rewritten by the elites and its legal loopholes, deficiencies were plugged also by the same elites. For example, by the Constitutional Court which was founded after the regime change, and which established a dubious reputation through its activism in the early years of its operation. In its case law, the Court relied on Western models, especially on the jurisdiction of the German Federal Constitutional Court to a large extent in order to structure the new system of liberal democracy importing ideas such as checks and balances that undoubtedly complied with the requirements of the EU to which the country planned to accede. The Court’s activist approach was visible not only in procedural terms (namely, the extensive interpretation of own competences) but also in a number of substantial fields, like the hierarchy of fundamental rights⁴⁷ or the interpretation of the rule of law. The latter has had quite far-reaching effects as it prevented some socially and politically crucial issues from getting implemented, for instance, the criminal responsibility for politically motivated crimes during socialism.⁴⁸

The Court’s activism was justified with the historical situation of the democratic transition⁴⁹ and with the theory of an ‘invisible constitution’. The concept first appeared in the parallel reasoning of Court’s President László Sólyom to the decision on the unconstitutionality of the death penalty⁵⁰ and later it

⁴⁴ Ivan Krastev, Stephen Holmes: *The Light that Failed. A Reckoning* (Penguin, 2019), p. 14.

⁴⁵ Tomasz Tadeusz *Konieczny*: *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities, and the Rule of Law in Flux* (Review of Central and East European Law, 2018/2), pp. 126-127. For empirical evidence see e.g., the field research by Gábor Scheiring in Hungary’s rust belt, where the main losers of the democratic transition mostly became right-wing-voters by the 2010’s. Gábor *Scheiring*: *The retreat of liberal democracy. Authoritarian capitalism and the accumulative state in Hungary* (Palgrave Macmillan, 2020), pp. 188-212.

⁴⁶ For more detail see: András *Bozóki*, Eszter *Simon*: *Hungary since 1989* (In: Sabrina P. Ramet ed.: *Central and Southeast European Politics since 1989*, Cambridge University Press, 2010), p. 208 *et seq.*

⁴⁷ László *Sólyom*: *Die Verfassungsgerichtsbarkeit in Ungarn* (In: Otto Luchterhandt, Christian Starck, Albrecht Weber eds.: *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Vol. 1, Nomos, Baden-Baden, 2007), p. 275.

⁴⁸ Technically, the law in question would have retrospectively prolonged the limitation of those crimes, but the Constitutional Court annulled it with the reasoning that the formal rule of law and legal certainty is more important than material justice. See decision no. 11/1992 (III. 5.), ABH 1992, 77.

⁴⁹ László *Sólyom*: *Az Alkotmánybíróság önértelmezése [The self-interpretation of the Constitutional Court]* (In: László *Sólyom*: *Az alkotmánybíráskodás kezdetei Magyarországon [The beginning of the constitutional jurisdiction in Hungary]*, Osiris, Budapest, 2001), p. 117.

⁵⁰ Decision no. 23/1990. (X. 31.), ABH 1990, 88, 105.

evolved into a system of coherent case law and self-reference.⁵¹ The idea of the invisible constitution and the activism based on it provoked heated discussions in Hungarian legal scholarship: the Court was accused of arbitrariness by deciding questions that it would not be able to answer merely on the ground of the constitution⁵² and President Sólyom himself admitted that their jurisdiction was ‘on the border of constitution writing in difficult cases, in order to keep the coherence’.⁵³

The possibility of challenging laws before the Constitutional Court without being affected (*actio popularis*) was also introduced at the time of the transition. This could have been an effective tool of strengthening civic consciousness, but it demonstrated that Hungarian society had rather plebeian claims, requiring social justice, instead of the classic Anglo-Saxon sense of rule of law or legal certainty.⁵⁴ And, the rule of law, that was so much more strictly acquired by the Constitutional Court after the regime change, promised a calculable and free world to live in, instead of historical and social justice.⁵⁵

No wonder that the society remained indifferent when the Fidesz-government started to restrict the competences of the Constitutional Court after 2010. As mentioned above, the relationship between the parliamentary majority and the Court changed slowly as Fidesz-appointed judges became the majority and the Court developed some peculiar survival strategies to avoid conflicts with the government.⁵⁶ Today, the Court certainly cannot be accused of activism and it created neither more calculability, nor more freedom or justice.

The current ‘illiberal’ problems are clearly rooted in the deficiencies of the democratic transition, even if political actors lack any self-reflection on this matter. This was perfectly illustrated in May 2020, on the 30th anniversary of the formation of the first freely elected parliament after the end of the communist dictatorship. On that occasion, the Hungarian parliament adopted a declaration emphasizing that the new Basic Law in 2012 closed the post-communist period. Post-communism is described in the document as a time, when there was the chance of backsliding and getting under foreign influence again.⁵⁷ This might be a comfortable interpretation of Hungary’s most recent history for the governing party, but in fact, their governance since 2010 has actively contributed to the survival of communist attitude by constantly motivating people not to behave as *citizens* but as obedient and

⁵¹ László Sólyom: *Az Alkotmánybíróság első éve* [The first year of the Constitutional Court], (In: László Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon* [The beginning of the constitutional jurisdiction in Hungary], Osiris, Budapest, 2001), p. 27. See also Sólyom: *Az Alkotmánybíróság önértelmezése*, p. 117.

⁵² Csaba Varga: *Megvalósulatlanul megvalósult jogállam?* [Rule of law coming true unrealised?] (In: Csaba Varga ed.: *Jogfilozófia az ezredfordulón* [Legal philosophy at the millennium], Szent István Társulat, Budapest, 2004), p. 349.

⁵³ László Sólyom: *A „nehéz eseteknél” a bíró erkölcsi felfogása jut szerephez* [The moral perception of the judge has a role in ‘difficult cases’ – an interview with László Sólyom by Attila Gábor Tóth] (*Fundamentum*, 1, 1997/1), p. 37. My translation.

⁵⁴ Péter Tölgyessy: *A magyar parlamentáris hagyomány íve és az újabb alkotmányozás* [The Hungarian parliamentary tradition and the newest constitution making] (In: András Jakab, András Körösenyi eds.: *Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések*, [Constitution making in Hungary and elsewhere. Approaches of political science and constitutional law] MTA Politikatudományi Intézet, Budapest, 2012), pp. 277-279.

⁵⁵ Ferenc Horkay Hörcher argues that the Court’s stubborn affection to the rule of law and legal certainty (which preferred value-neutrality to substantial justice) was a kind of political dead-lock, necessary to the regime change. Ferenc Horkay Hörcher: *A Nemzeti Hitvallásról* [On the National Avoval {Preamble of the new Fundamental Law}] (In: Jakab, Körösenyi eds.: *Alkotmányozás Magyarországon és máshol*), p. 288.

⁵⁶ For more detail see also my book: *Bakó*, supra n. 12.

⁵⁷ Political declaration of the National Assembly, no. 1/2020 (V. 2), MK 2020, 2378.

grateful dependants. Contrary to this political declaration, their governance can precisely be seen as fulfilling and eternalising of the miseries of post-communism.

Still, the declaration's explanation about the meaning of post-communism is something that should be read carefully by those who are regularly concerned about Hungary's 'democratic backsliding'.⁵⁸ The key is the fear of getting under foreign influence again. Even if this foreign influence is coming from the EU in the form of pressure to strengthen counter-majoritarian institutions vis-à-vis the government and parliamentary majority. It is exactly the nearly unlimited majoritarian democracy what can be seen in this context as the fulfilment of freedom, which does not primarily mean freedom from its own elected government (in the form of checks and balances) but from the oppression by foreign powers,⁵⁹ be they either from the East or from the West. This was illustrated by PM Viktor Orbán in the debate of the Sargentini report⁶⁰ at the European Parliament plenary, before launching the Article 7 TEU sanctioning mechanism against Hungary in September 2018: 'Hungary has fought for its freedom and democracy. I stand here now, and I see that Hungary is being arraigned by people who inherited democracy, not needing to assume any personal risk for the pursuit of freedom', he said. The statement is not accurate for several reasons,⁶¹ but the relevance is the message behind: *we Hungarians appreciate what democracy means, because we have struggled for it, and you, spoiled Western Europeans, you have no idea about that*. It is worth recalling another quote on this point from rapporteur Sargentini, who, in an interview a few days earlier said that 'for democracy, elections are like the icing on the cake'.⁶²

The two statements clearly show the extreme absolutisation of democracy (understood as pure majority rule) on the one hand and of the rule of law (which requires effective counterbalances against an elected majority) on the other. In the last ten years, all emphasis was put on arguing why limitless majority rule was harmful. However, prioritising the rule of law over democratic legitimacy at all costs is not a silver bullet for 'illiberal problems' either, especially when the need for stronger checks and balances is not reasoned with the wish of empowering citizenry but with foreign requirements – of the EU.

That was exactly one of the major mistakes of the Hungarian opposition in the campaign ahead of the 2022 election, which they believed to have the chance to win. In the end, they suffered a dramatical fail. At the same time, the EU's rule-of-law-conditionality-mechanism⁶³ and the possibility of

⁵⁸ See e.g., Bojan Bugarič: Protecting Democracy inside the EU. On Article 7 TEU and the Hungarian Turn to Authoritarianism (In: Carlos Closa, Dimitry Kochenov eds.: Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, 2016), p. 82; Tímea Drinóczi, Agnieszka Bień-Kacala: Illiberal constitutionalism in Poland and Hungary. The deterioration of democracy, misuse of human rights and abuse of the rule of law (Routledge, 2022).

⁵⁹ For a detailed theoretical argumentation see Peter J. Verovšek: Caught between 1945 and 1989: collective memory and the rise of illiberal democracy in post-communist Europe (Journal of European Public Policy), 2020, pp. 1-9.

⁶⁰ The protocol of the debate is available here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20180911+ITEM-011+DOC+XML+V0//EN&language=EN>. The English version of Orbán's speech is available at the website of the Prime Minister's Office: <http://www.miniszterelnok.hu/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report/>.

⁶¹ Primarily, because the transition in Hungary in 1989 happened through negotiations, not through revolution.

⁶² Sargentini: A Fidesz több módosítóját beemeltem a jelentésbe, nem örültek neki [Sargentini: I included more amendments of the Fidesz into the report, but they were not happy about that] Interview at hvg.hu: https://hvg.hu/itthon/20180906_judith_sargentini_jelentes_fidesz_orban_europai_parlament_tanacs_bizottsag_interju.

⁶³ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

suspending EU funds to Hungary was regularly on the agenda. Opposition politicians usually openly spoke with Schadenfreude about the hoped punishment of the Hungarian government without realising that this can be seen as supporting a foreign power against their own country.⁶⁴ The opposition also openly raised obviously unconstitutional ideas for changing the constitutional system without acquiring the required two-thirds majority in parliament in the case they got into power just with simple majority. Controversially, the idea was reasoned with the restoration of the rule of law.⁶⁵ Zoltán Fleck, the official adviser in constitutional matters to PM-candidate Péter Márki-Zay even said that they had the green light for those plans from high-ranking officials of the European Commission.⁶⁶ This again made the impression that the opposition was making a common cause with 'Brussels' against their homeland.

The opposition made statements with similar attitudes about the war in Ukraine in the context of NATO. Oppositional candidate for Prime Minister, Péter Márki-Zay, said in an interview that if he got into power, he would send Hungarian soldiers to the war if the NATO had wished so.⁶⁷ This had proven to be a fatal mistake in a time, when undecided citizens who were worrying about the war in the neighbouring country were easily mobilised by the governing party with the promise of peace and with accusing the opposition of having plans to involve Hungary in the conflict.

Then election day arrived and on the evening of 3 April 2022 it became clear that Fidesz won such a huge victory they did not even expect themselves. Whoever thinks that this was because of 'the opposition's incoherent combination of the promise of the restoration of the rule of law at the price of illegality'⁶⁸ is extremely naïve. The post-socialist Hungarian electorate does not care about the rule of law and about whether it is restored legally or illegally. They care about elementary things like security (both in terms of the war and social security)⁶⁹ and about the sovereignty of their elected government, which is not supposed to allow the EU or NATO to intervene into their business.

This strong concern over national sovereignty against the EU might seem controversial in light of the fact, that the EU's image is particularly positive in Hungary (also among Fidesz-voters) and as a result, an overwhelming majority of Hungarians think that EU membership is beneficial for the country. Still,

⁶⁴ For details about the complexity of this problem see my article on Balkaninsight: Beáta Bakó: Europe's Sanctions Dilemma. How to Punish Hungary Without Hurting Hungarians? 21 October 2020, <https://balkaninsight.com/2020/10/21/europes-sanctions-dilemma-how-to-punish-hungary-without-hurting-hungarians/>.

⁶⁵ For more detail and criticism see Beáta Bakó: Governing without being in power? Controversial Promises for a New Transition to the Rule of Law in Hungary (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law, 2022/1), Beáta Bakó: Why Throw a Constitution out of the Window Instead of Making it Work? Verfassungsblog, 23 December 2021: <https://verfassungsblog.de/why-throw-a-constitution-out-of-the-window-instead-of-making-it-work/>.

⁶⁶ Interview with Zoltán Fleck at 444.hu on 29 November 2021: <https://444.hu/2021/11/29/gyors-minimalista-sebeszi-pontossagu-beavatkozas>. In order to verify the statement, I contacted the competent spokespersons of the Commission more times, but I did not get any substantial answer, neither a confirmation nor a denial.

⁶⁷ Interview at Partizán on 26 February 2022: <https://www.youtube.com/watch?v=cwQcogOA1Zs>.

⁶⁸ Andrew Arato: Why we lost (Verfassungsblog, 4 April 2022), <https://verfassungsblog.de/why-we-lost/>.

⁶⁹ The mistakes of the opposition campaign in this regard are analysed by Dániel Róna: A populizmus hiánya (The lack of populism), 24.hu, 4 April 2022, <https://24.hu/belfold/2022/04/04/valasztas-2022-ellenzek-fidesz-rona-daniel-a-populizmus-hiany/>. This view is also supported by an empirical study which found that elementary needs and the wish for staying out from the war were the main motivations for voting for Fidesz in 2022. Zsolt Enyedi, Andrea Szabó: Rezsicsökkentés, adó-visszatérítés, háború, Orbán szeretete – ezért szavaztak a Fideszre (Decreasing energy costs, tax-refunds, war, love of Orbán – that's why people voted for Fidesz), Telex.hu, 3 June 2022. <https://telex.hu/belfold/2022/06/03/enyedi-zsolt-szabo-andrea-postelection-kutatasi-elemzes-sorozat-harmadik-resz>.

when it comes to Hungarian interests, the majority does not assume that Hungary is able to validate them in the EU effectively.⁷⁰

The governing party knows very well how to make use of these feelings and attitudes – not just during election campaigns but in everyday politics as well. For instance, soon after the 2022 elections, the parliament adopted a decision on the future of the European Union, emphasizing the necessity of leading ‘the European Union out from the impasse where it was governed by the European Parliament’.⁷¹ The National Assembly (more accurately, its Fidesz-supermajority) suggests that instead of the current direct EP-elections, the European Parliament should rather be composed of delegates of national parliaments ‘to ensure real political legitimacy’. This idea is clearly unrealistic to be codified into any future treaty change, and the decision of the National Assembly is not normative either but a mere suggestion for the government about what view it should represent in the negotiations on a possible treaty change. Still, it illustrates that the government is very clever in provoking the EU and in responding to voters’ feelings at the same time. The easiest way to uphold voters’ negligence towards the government’s corruption scandals and towards the obvious concentration of power is to show them a bigger danger: another threat of an oppressing foreign power. This will work until the communist dictatorship is a near and a direct experience for the significant part of society.

Moreover, the EU usually does the government a huge favour by voluntarily playing the role of the wannabe ‘oppressing foreign power’. Beyond suspending 6.3 billion EUR of EU cohesion funds to Hungary based on the conditionality mechanism,⁷² the Commission also withholds the first instalments of the NGEU recovery funds alluding to rule of law concerns: when finally approving Hungary’s recovery plan, the Commission set some ‘super milestones’ (primarily certain judiciary reforms, and some concrete anti-corruption measures, which were offered as remedial measures in the conditionality mechanism) as the requirement for starting the payments in the sum of 5.8 billion EUR.⁷³ The legality of this practice is highly doubtful considering that the conditionality mechanism, which is designed precisely for such suspensions was not launched in the context of the recovery funds, but it was limited to cohesion funds. This is not surprising considering the fact, that a large part of the established super milestones could hardly be interpreted as criteria under the conditionality mechanism. Namely, they are not *sufficiently directly* linked to the use of EU funds⁷⁴ even if enhancing the independence of the judiciary is indeed a relevant factor in the fight against corruption. Beyond risking a U-turn in Hungarians’ supportive stance towards the EU, which is largely due to the received fundings,⁷⁵ it is questionable whether this approach is capable of making Hungarians committed to the rule of law. On the one hand, depending on the exact details, the required judiciary reforms (which have not yet been submitted in the Hungarian parliament) might have positive long-term effects on citizens’ perceptions of the rule of law. The concrete anti-corruption measures are already implemented in legislation, and

⁷⁰ András *Bíró-Nagy*, Gergely *Laki*: ‘15 év után. Az EU és a Magyar társadalom’ [After 15 years. EU and the Hungarian society], (Policy Solutions, 2019), figures 6-7, 27, online available in Hungarian at: https://www.policysolutions.hu/userfiles/Policy_Solutions_15_ev_utan_EU_es_a_magyar_tarsadalom.pdf.

⁷¹ Decision of the National Assembly no. 32/2022 (VII. 19).

⁷² Procedure no. 2022/0295/NLE.

⁷³ Commission press release ‘Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds’, 30 November 2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273.

⁷⁴ See in this regard ECJ judgment in case C-156/21, paras 111-119, 144-147.

⁷⁵ See e.g., Tamás *Kolosi*, Szilvia *Hudácskó*: Az Európai Unióval kapcsolatos vélemények nemzetközi összehasonlításban (Opinions regarding the European Union in international comparison, In: Tamás Kolosi *et al* eds.: Társadalmi Ríport 2020, TÁRKI), p. 455, *Bíró-Nagy, Laki*, supra n. 70, figure 10.

they do not seem to be very convincing.⁷⁶ On the other hand, the rule of law should not be communicated as a command from outside but as obvious self-interest – of the EU and above all, of its people.

The reason why the EU cares so much about the rule of law in the Member States is clearly not altruism, but a practical necessity: the rule of law is the most essential prerequisite to ‘mutual trust’⁷⁷ and to the common market.⁷⁸ Without mutual trust and a certain level of respect for the rule of law, the recognition of administrative acts, judgments, co-operation in justice, and in many other fields would not work within the EU. Member States’ citizens (especially Hungarians) should be made aware that in order to get their driving licences/university degrees/marriage certificates accepted in other EU Member States, they need to enforce some basic rule of law standards from their government.

Beyond that, it should also be kept on the agenda why counterbalances to the elected majority are useful on the national level, regardless of the EU’s expectations. This would be the task of the Hungarian opposition, however, as mentioned above, their narrative on the rule of law is stuck to the EU. The EU’s motivation strategy of financial blackmailing – or, euphemistically, ‘incentives’ – seem to be promising rather in the short-term. With the suspension of EU funds, the government might be convinced to conduct some required reforms, but this is just a temporary and partial solution. Instead, the demand for the rule of law should be internalised by society. It is to be feared that the reforms enforced this way will be like those in the nineties: imitation on command without conviction⁷⁹, which will again lead to serious problems within 1-2 decades.

3. Western approaches meet reality

Hungary is not the only black sheep in the EU when it comes to the rule of law. It is subject to a sanctioning procedure pursuant to Article 7 TEU along with Poland, which also suffers delays in the payments from the EU’s recovery funds, despite not being subject to the new rule of law conditionality mechanism at all. In contrast to Hungary, where the government’s centralisation of power extends to the entire field of public law and beyond, the controversial reforms in Poland are mostly limited to the constitutional and ordinary judiciary. Packing the Constitutional Tribunal, filling up the judicial council with political appointees, setting up a new, dependent disciplinary chamber at the Supreme Court,

⁷⁶ Beáta Bakó: A Bluff by Orbán the EU Appears Unwilling to Call, *Balkaninsight*, 18 October 2022, <https://balkaninsight.com/2022/10/18/a-bluff-by-orban-the-eu-appears-unwilling-to-call/>, Kim Lane Scheppele, Gábor Mészáros, Petra Bárd: Hungary’s Proposed Judicial Review of Prosecutorial Decisions, *Verfassungsblog*, 26 October 2022, <http://verfassungsblog.de/useless-and-maybe-unconstitutional/>; Sándor Ésik: A Practitioner’s View, *Verfassungsblog*, 31 October 2022, <http://verfassungsblog.de/hungarys-shambolic-anticorruption-proposals/>.

⁷⁷ Carlos Closa: Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations (In: Carlos Closa, Dimitry Kochenov eds.: *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016), p. 16. About the interrelatedness of trust and EU values in a broader sense see also Armin von Bogdandy: Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace (*European Constitutional Law Review*, 4/2018), pp. 692 *et. seq.*

⁷⁸ About EU-values rhetoric and the common market in details see Andrew T. Williams: Taking values seriously: Towards a philosophy of EU Law (*Oxford Journal of Legal Studies*, 29, 2009).

⁷⁹ Krastev, Holmes, *supra* n. 44, pp. 8-9, 20-22.

prohibiting judges to give effect to provisions of EU law about judicial independence were the main elements of the Polish judiciary saga.⁸⁰

The reason of the difference is clear. The governing parties in the two countries bear different strength of democratic legitimacy and through that, their political opportunities also differ. PiS in Poland has a simple parliamentary majority without the ability to amend the constitution. The latter's text is given, whether they like it or not, so they concentrated on preventing the exercise of effective constitutional review; and so, also preventing the practical use of constitutional safeguards.⁸¹ Since this has succeeded (partly also by unconstitutional means), the government has been able to afford any unconstitutional steps, reckoning that the unconstitutionality would not be declared by the captured Constitutional Tribunal. The constitution is still unchanged, but some of its provisions are practically not applied at all. Just to be sure, the ordinary judiciary has also been put under pressure and strict control, so it could be prevented from using unwanted provisions of the constitution that could be applied by ordinary judges. To sum up: the tactic of PiS is the avoidance of the constitution, the tactic of Fidesz is aligning the constitution to its daily political interests.

Slovakia and the Czech Republic undoubtedly perform much better in terms of the rule of law than Hungary and Poland, even if classical liberal-democratic values have been challenged on some occasions.

In Slovakia, Robert Fico was finally forced to step down after the murder of an investigative journalist who revealed how the mafia and Slovak economic and political elites were connected. Even without such a wide-scale undermining of independent institutions that we have seen in Hungary or in Poland, the fact of a politically motivated murder was alarming. However, problematic reforms were also adopted after Fico's party, Smer had been voted out from power and a coalition government was formed with the leadership of OĽaNO. At the end of 2020, a judiciary reform, introduced, *inter alia*,

⁸⁰ In detail see e.g., Arkadiusz *Radwan*: Lange Tradition und kurzes Gedächtnis des polnischen Konstitutionalismus. Ein Beitrag zum Verständnis der Verfassungskrise von 2015-2016 (Bucerius Law Journal, 1/2016), Piotr *Czarny*: Der Streit um den Verfassungsgerichtshof in Polen 2015-2016 (Osteuroparecht, 1/2018), Anna *Młynarska-Sobaczewska*: Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review (European Public Law 3/2017), Beáta *Bakó*: Judges sitting on the Warsaw-Budapest express train. The independence of Polish and Hungarian judges before the CJEU (European Public Law, 2020/3), Michał *Ziółkowski*: Two faces of the Polish Supreme Court after 'reforms' of the judiciary system in Poland: the question of judicial independence and appointments (European Papers 2020/1), Michał *Krajewski*, Michał *Ziółkowski*: EU judicial independence decentralized: A.K. (Common Market Law Review, 2020/4), Katarzyna *Gajda-Roszczyńska*, Krystian *Markiewicz*: Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland (Hague Journal on the Rule of Law, 2020/3), Wojciech *Sadurski*: Poland's Constitutional Breakdown (Oxford University Press, 2019).

⁸¹ The concrete legal reason behind also attacking the ordinary judiciary after the Constitutional Tribunal might be that the decentralized view of constitutional review started to become more widespread among judges and constitutional scholars, after the Constitutional Tribunal ceased to be a real counterbalance to the parliamentary majority. According to this view, the constitution may be applied indirectly by ordinary courts, based on Articles 8 and 178.1 of the Polish Constitution. Beyond the *Drittwirkung* of constitutional rights, Polish courts may transpose constitutional principles in concrete cases and by doing so they may apply the constitution directly. In detail see *Sadurski*: How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding (Sydney Law School Legal Studies Research Paper 18/01), p. 36; Tomasz Tadeusz *Konczewicz*: Polish Judiciary in Times of Constitutional Reckoning. Of Fidelities, Doubts, Boats, and ... a Journey (Gdańskie Studia Prawnicze, 2017), p. 300; Monika *Florczak-Wątor*: Applying the constitution of the Republic of Poland in horizontal relations (Jagellonian University Press, Krakow, 2015), especially pp. 79-122.

the criminal liability of judges for ‘abuse of law’ and excluded the constitutional review by the Constitutional Court over constitutional amendments.⁸²

In the Czech Republic, problems were rather related to the Prime Minister instead of institutions. Andrej Babiš, who built his political career as a Slovak-born businessman, managed to gain significant economic and media influence already before getting into power (contrary to Fidesz in Hungary where the sequence was reverse),⁸³ but he long faced accusations over conflict of interest.⁸⁴ Beyond that, he obviously had plans in mind to eliminate some institutions of checks and balances under the flag of effectiveness⁸⁵ but he did not have the chance to make it happen with a minority government (and later, a coalition government). After one term as PM, he was voted out from power in 2021. In 2023, he is trying to return as state president, but he alone could hardly manage an illiberal turn from that position.

The question arises: why exactly Hungary and Poland are the countries where the rule of law decline is so serious even among post-socialist ones? The complete answer to this certainly requires further in-depth research but what is sure is that it can only partly be explained by the constitutional and institutional structure. For instance, it is reasonable and correct to blame Hungary’s mixed electoral system, which makes it possible for one party to reach a constitution making supermajority. However, the example of Poland shows that a proportional electoral system cannot prevent illiberal tendencies either. The directly elected president is considered to be a counterbalance in Slovakia,⁸⁶ but the recent introduction of the direct election of the head of state gave reason for concerns among commentators in Czechia.⁸⁷ Among the extra-legal reasons of the difference in the rule of law-performance between Central-European countries, brain-drain, EU, funds,⁸⁸ and specific political circumstances can also be mentioned. The authors contend that the factors causing the apparent rule of law-decline in Hungary are not unique by far, so similar tendencies could appear elsewhere, too.⁸⁹

Such pessimistic predictions are also supported by empirical data from the V4 countries. For instance, the vast majority of Slovaks consider a strong leader with enhanced competences (one-fourth even a dictatorship!) to be an alternative to the present, defective democracy.⁹⁰ Interestingly, this is exactly

⁸² 2021 and 2022 Rule of Law Reports by the Commission, Country Chapters on the rule of law situation in Slovakia, SWD (2021) 727 final and SWD (2022) 525 final.

⁸³ Seán Hanley, Milada Anna Vachudova: Understanding the illiberal turn: democratic backsliding in the Czech Republic (East European Politics, 2018/3), pp. 283-284.

⁸⁴ The European Commission fined the Czech Republic because of the management EU funds the PM’s company, Agrofert received. https://www.euractiv.com/section/politics/short_news/commission-fines-czechia-for-ex-mp-babiss-conflict-of-interest/. Czech courts acquitted Babiš in January 2023: <https://www.reuters.com/world/americas/czech-court-acquits-presidential-candidate-babis-subsidy-fraud-case-2023-01-09/>.

⁸⁵ Andrej Babiš: What I dream of when I happen to sleep (2017), pp. 130-131.

⁸⁶ Soňa Szomolányi, Zsolt Gál: Slovakia’s Elite: Between Populism and Compliance with EU Elites (In: Jan Pakulski ed.: The Visegrad Countries in Crisis, Collegium Civitas, Warsaw, 2016), p. 80.

⁸⁷ The concerns were not without reason, as after being elected as president, Miloš Zeman soon (but unsuccessfully) attempted to turn the parliamentary system into a semi-presidential one by appointing a technocratic government with the avoidance of parliament. Hanley, Vachudova, supra n. 83, p. 280.

⁸⁸ András Jakab: Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary (The American Journal of Comparative Law, 2020), pp. 797-798.

⁸⁹ Zsolt Enyedi, Péter Krekó: Explaining Eastern Europe: Orbán’s Laboratory of Illiberalism (Journal of Democracy, 2018/3), p. 48.

⁹⁰ Lucia Husenicova: Disillusionment with liberal democracy in the Visegrad countries (UNISCI Journal, October 2020), p. 60.

the same in Hungary, where different elements of liberal democratic values (e.g., free speech, judicial fairness, free opposition, free civil society) are appreciated the most among V4 countries.⁹¹ But this is also the country where an 'illiberal' government was recently elected with two-thirds majority for the fourth time, which suggests that voters either do not realise that these values are threatened, or they still have other, stronger priorities. A similar peculiarity can also be seen in Poland. Poles are among the most satisfied nations with their democracy in Europe and the obvious priority for them is a fair judiciary⁹² – which has just been abolished.

This obviously seems to be a controversy, at least from the Western point of view. But here it is worth reminding again that post-socialist societies appreciate their recently regained democratic self-determination so strongly that they are willing to excuse the abuse of power by their elected governments. The current Western constitutional tradition roots in the experience of fascism and Nazism. Accordingly, this tradition aims at eliminating internal dangers to democracy and promises to 'save people from themselves'.⁹³ The post-communist approach is different as it identifies the main threats to democracy as external, therefore democracy is understood as national democracy.⁹⁴

Of course, after more than three decades of freedom, post-socialist societies need to realise that inner dangers to democracy and the abuse of power by their own elected governments is a realistic option. But such a recognition will not happen due to external pressure. On the contrary: external pressure will rather cause resistance by reminding people of the time of imperial commands and it will prevent citizens from acknowledging that limiting state power is primarily in their own interest.

The example of Hungary sadly illustrates how the lack of public demand for the rule of law abolishes the trust in democracy. According to a postelection poll, the majority do not believe that Fidesz could democratically be voted out from power anymore, but this is only possible by means of violence. Even one-third of Fidesz-voters agree with that.⁹⁵ This raises a couple of serious questions. Why do those one-third of Fidesz-voters still support the government? Are they happy with a regime which they do not consider a functioning democracy? The outcome may also give some minimal reason for optimism regarding the future: if more than half of the Hungarians believe that the current government cannot be voted out democratically, they probably also see, why the effective counterbalances to an elected majority serve their own interest too (and not just of the EU's). The question is, how and when we can make use of this lesson learnt.

⁹¹ Id. p. 58.

⁹² Id. p. 64.

⁹³ Signe Rehling Larsen: Varieties of Constitutionalism in the European Union (The Modern Law Review, 2021/3), p. 487.

⁹⁴ Id. p. 496.

⁹⁵ *Bíró-Nagy, Szászi, Varga*, supra n. 41, figure 45.

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