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ARTICLE

From Liberal Democracy to Illiberal Populist Autocracy: Possible Reasons for Hungary's Autocratization

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Abstract

The paper looks for the main reasons of how was the Hungarian government of the Fidesz Party lead by Prime Minister Viktor Orbán able to within 13 years undermine the independent checks on their power so that it could convert what had looked like a stable but imperfect democracy into an autocracy? After listing the most obvious reasons the paper looks particularly at, how much is the way of a mostly elite-driven democratic transition using the tools of ‚legal constitutionalism'and ‚undemocratic liberalism'without real historical traditions of a liberal democratic constitutional culture and with the regionally determined value system is to blame. This also leads to the question, how to allocate the responsibility for the backsliding between the elites and the citizens, influenced and often manipulated by the leaders.

Keywords Hungary · Illiberal democracy · Nondemocratic liberalism · Legal constitutionalism

Hungary has received international attention in recent years for being the first fully consolidated democracy to turn into an autocracy. Both Freedom House and the Varieties of Democracy Project have tracked Hungary as it has passed from a ‚consolidated ' democracy (Freedom House in 2010) through the ‚partially consolidated ' category (Freedom House in 2015) and into the status of 'electoral autocracy',[1] and 'hybrid regime.'[2] The country is no longer a constitutional democracy able to ensure a peaceful rotation of power.[3] By any measure, Hungary's fall from

[1] https://www.v-dem.net/static/website/files/dr/dr_2020.pdf
[2] https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade
[3] In a resolution of 15 September 2022 supported by 433 votes also the European Parliament declared that Hungary can no longer be considered a democracy, but a'hybrid regime of electoral autocracy.' https://www.europarl.europa.eu/news/en/agenda/briefing/2022-09-12/3/hungary-can-no-longer-be-considered-a-full-democracy-meps-set-to-declare

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democratic grace in just 13 years has been one of the most shocking and surprising examples of democratic backsliding.

This paper looks for the main reasons of how was the Hungarian government of the Fidesz Party lead by Prime Minister Viktor Orbán able to so quickly undermine the independent checks on their power without meaningful push-back so that it could convert what had looked like a stable but imperfect democracy into an autocracy? After listing the most obvious reasons I am particularly interested to know, how much is the way of a mostly elite-driven democratic transition using the tools of ‚legal constitutionalism '[4] and ‚undemocratic liberalism '[5] without real historical traditions of a liberal democratic constitutional culture and with the regionally determined value system is to blame. Under non-democratic liberalism, its critics do not necessarily and not exclusively think of certain policies, but rather of the character of the system in general, i.e., that the decision of key questions from the point of view of the moral foundation of the introduced liberal democracy was decided by leaving out public opinion, and often in a way contrary to the value system of the majority.[6] The concept of 'non-democratic' decision-making that I use in this paper—and which slightly differs from the‚undemocratic ' adjective—is independent of the fact that the decision-makers are—in the minority of cases, when it comes to the decisions of the Parliament—representatives directly elected by the people, or—in the majority of cases in relation to constitutional judges—professionals elected by the representatives in a democratic procedure, so their democratic authority is indisputable.[7] The main reason why I use the adjective 'non-democratic' for the discussed decisions is that they were not preceded by any kind of public social discourse or debate. This may have made it difficult for the audience to identify with the new system.

This also leads to the question, how to allocate the responsibility for the backsliding between the elites and the citizens, influenced and often manipulated by the leaders.[8]

[4] Legal as opposed to participatory constitutionalism as one of the possible reasons for democratic backsliding see in Blokker (2014). In a more recent work Paul Blokker also uses the term 'liberal legalism' with a slightly different meaning as "a combination of a neutral scientific approach to the law with a liberal understanding of politics. See Blokker (2022: 261-279, at 279). Also Wojciech Sadurski argued that legal constitutionalism might have a "negative effect" in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See Sadurski (2005: 9-24). In an interview before the 2023 democratic change in Poland Wojciech Sadurski to the question, how the packed Polish Constitutional Tribunal can be repaired during a redemocratisation again blaming legal constitutionalism went back to the idea of a less powerful constitutional review. See https://ruleoflaw.pl/sadurski_constitutional_tribunal_reform/.

[5] Cas Mudde argues that not democratically introduced liberal measures can be structural causes for authoritarian populists, such as Viktor Orbán to deny liberal democracy in the name of 'illiberal democracy' altogether. See Mudde (2021a, 577–597).

[6] In this sense, this non-democratic liberalism is similar to the concept of authoritarian liberalism used by Michael Wilkinson, the defining element of which is governmental economic policies. See Wilkinson (2021).

[7] Based on her personal experiences during the regime change in Hungary, Kim Lane Scheppele argues that the decisions of constitutional judges can sometimes be closer to the will of the democratic community than those of parliamentarians. See Scheppele (2005).

[8] In his new book, Larry Bartels reviewing and analysing public opinion data concludes that the attitudes of the people cannot be attributed for the right-wing populist wave represented by anti-immigrant or anti-European sentiments. See Bartels (2022).

When looking for the main internal reasons of backsliding as decisive causes, one can also ask about the eventual complicity of those transnational or international institutions, particularly the European Union, but to a lesser extent also the Council of Europe, which proved to be unable to intercept the process. Isn't here too the mostly legalistic, constitutional approch to deal with Hungary as a Member State non-compliant with European rules and values also contributed to the failure?[9]

1 Main General Causes of Democratic Backsliding

Before going into the details of 'legal constitutionalism' and 'undemocratic liberalism' jointly called in this paper as non-democratic liberal legal constitutionalism as a reason for the backslash caused both by the national and transnational elite actors, let me shortly mention two important causes discussed by the literature, and not unrelated to the reasons I'll describe later in more details: a) preference of economic development and the speedy increase of living standards, b) the lack of liberal democratic traditions.

The most important of them is that in the beginning of the democratic transitions in these new democracies, preference was given to general economic effectiveness over mass civic and political engagement.[10] Even though the transition to democracy also in Hungary was driven by the fact that a large share of the population gave high priority to freedom itself, people expected the new state to produce speedy economic growth, with which the country could attain the living standards of the West overnight, without painful reforms.[11] In other words, one can argue that the average Hungarian person looked to the West as a model in 1989, not so much in terms of its economic and political systems, but rather in terms of living standards. As Hannah Arendt argued, it is impossible to establish a republic based on freedom without the liberation from poverty and misery.[12] Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, warning that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.[13] This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature were reasons for disappointment.

[9] For instance Stefan Auer in his book 'European Disunion, Democracy, Sovereignty, and the Politics of Emergency' (Hurts and Company, 2022.) criticises the EU for its non-political approach to solve to problems of democratic and rule of law backsliding. Similarly, Oleart and Theuns (2022, 1–18).

[10] Dorothee Bohle and Béla Greskovits state that East Central European democracies had a "hollow core" at their inception. See Bohle and Greskokovits (2012).

[11] As Ulrich Preuss argues, the satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that constitutions did not really make a difference. See Preuss (1993, 3).

[12] Arendt quotes Sain-Just: "if you wish to found a republic, you first must pull the people out of a condition of misery, which corrupts them." Arendt (2017).

[13] Cf. Offe (1994).

This disappointment also overshadowed the lack of consensus about liberal democratic values at the time of the regime change. The pursuit of satisfaction of basic economic needs was so important for both ordinary people and the new political elites that constitutions did not really make a difference.[14] Between 1989 and 2004 all political forces accepted a certain minimalistic version of a 'liberal consensus' understood as a set of rules and laws rather than values, according to which NATO and EU accession was the main political goal. But as soon as the main political goals were achieved, the liberal consensus died,[15] and full democratic consolidation was never achieved.[16]

Trying to explain the attitudes of voters who support authoritarian populist leaders such as Orbán, Ronald Inglehart and Pippa Norris suggests that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia agendas, reject outsiders, and uphold old-fashioned gender roles.[17] In the case of Hungary a historical leaning towards a 'political hysteria' described by István Bibó already in the 1940s,[18] is one of the tools used by Viktor Orbán ever since 2010.

Historically, in Hungary, as in almost all of East-Central European countries, there were only some unexpected moments—quick flourishes of liberal democracy—followed by equally quick acts to delegitimize them. Examples include the short period after 1945, until the communist parties took over, and after 1989, when liberal democracy again seemed to be the "end of history."[19] Otherwise, in the national histories of the Central and Eastern European countries, authoritarianism, such as the pre-1939 authoritarian Hungarian state, has played a much more important role.[20]

As surveys on the links between modernization and democracy show, a society's historic and religious heritage leaves a lasting imprint.[21] According to these surveys, the publics of formerly agrarian societies, including Hungary, emphasize religion, national pride, obedience, and respect for authority, whereas the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality.[22] Even modernization's changes are not irreversible: economic collapse can reverse them,

[14] See Preuss (1993, 3).

[15] Krastev (2007, 56–63).

[16] Dawson and Hanley (2016, 20–34).

[17] Inglehart and Norris (2016).

[18] See Bibó (2015).

[19] See Trencsényi et al. (2016).

[20] Avineri (2009).

[21] Inglehart and Welzel (2010, 551–567).

[22] Ibid., 553. Christian Welzel in his recent book argues that fading existential pressures open people's minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against outgroups. On the other hand, persistent existential pressures keep people's minds closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Cf. Welzel (2013).

as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers at Jacobs University in Bremen and published by the German Bertelsmann Foundation.[23] The study on social cohesion examined thirty-four countries in the EU and the OECD. Social cohesion is defined as the special quality with which members of a community live and work together. Hungary was ranked twenty-seventh, between Poland and Slovakia.

It isn't a surprise that the values preferences of the Hungarian population are still almost the same as they used to be before the 'counter-revolution' by Fidesz in 2010. Maybe with the exceptions of the abortion issue on the one hand and economic redistribution and anti-market sentiments on the other, in which there is a progressive and left-leaning attitude respectively ever since the Communist times, the majority is rather conservative regarding the traditional family model, and dismissive towards certain minorities. According the values surveys conducted in 2022 79% of the respondents considers the education of law and order as the most important task of public education, 72% does not believe in the integration of the Roma population, and 56% does not accept immigration of people with different culture, 50% favors the reestablishment of the death penalty, and 47% would be ashamed with a gay family member.

Therefore, before discussing the liberal nature of the elite-driven legal transition to liberal democracy, it's worth to consider, how liberal the population was in the time of the change. According to some opinion polls conducted in 1991 not even the majority of voters of the bigger liberal party, the Alliance of Free Democrats (SZDSZ) could be considered as true liberals, but rather radicals.[24] Political philosopher, János Kis, one of the founders, and at that time president of the party rejects this claim by stating that liberal moral principles, such as the separation of state and church, or the right to abortion enjoyed broad societal support during the transition, but he also admits that on the death penalty, or the tolerance towards the Roma population the liberal viewpoints were rather weak, and there was a general rejection of any neo-liberal economic policy.[25] He also made it clear that although the leading economists of his party were not free market fundamentalists, but they supported widespread privatization, smaller state redistribution and pruning back of market regulation.[26]

2 Non-democratic Liberal Legalism

For many the failure of traditional Western liberal democratic constitutionalism in a number of post-communist countries, the 'new Member States' of the European Union, particularly in Hungary and in Poland (in the latter at least till 2023) can

[23] Schiefer et al. (2013).

[24] The survey results of Median indicate that both regarding moral and political as well as economic issues only a minority of the SZDSZ party members expressed liberal views. See Csizmadia (2000).

[25] See Kis (2014).

[26] See Kis (2021).

be explained by the characteristics of the democratic transition, being led by a liberal elite, which used non-democratic tools of legal constitutionalism. These critics claim that the non-democratic character of resolving the most important economic and political issues of the transition, which were also subject of the constitution-making process have become legal issues (legalization), and were taken out of the political arena, with no serious public debates and popular control (depoliticization).[27] The liberal nature of this process is due to the fact that the anti-communist elite wanted to copy the Western idea of both economic and political liberalism, without being sure that the population was aware of the social costs of economic liberalism, and the institutional consequences of political liberalism, and if being aware, how many of them would have opted for economic and political liberalism.[28]

According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism. Adherents to this viewpoint argue that the legalistic form of constitutionalism, while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.[29] In other words, legalistic constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.[30]

The concept of civic or participatory constitutionalism is based on "democratic constitutionalism" (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to "counterdemocracy" (Pierre Rosenvallon), as well as a robust institutional linkage between civic associations and citizens and formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.[31] The Hungarian population seemed not to be receptive not only towards legal constitutionalism in general, but also not towards the very formalistic approach of rule of

[27] See Mudde (2021b, 577-597, at 585). The democratic critique of constitutionalism isn't limited to the region, and not even only to Europe, but is part of the broader theory of deliberative constitutionalism challenging traditional constitutionalism in the name of democracy. See Levy et al. (2018). Loughlin (2022), and Gargarella (2022). Arguing for constitutionalism by reviewing by the books of Loughlin and Gargarella see Tushnet (2022).

[28] See this critique first right after the transition by Szacki (1995), and after the start of the backsliding again by Krastev and Holmes (2020).

[29] See Albert (2008, 4).

[30] See Sadurski (2005), 23.

[31] See the reviews on Blokker (2014), by Priban and Puchalska (2013).

law in particular, which treated the legal order of the communist regime as valid. This made it possible for the populist authoritarian government of Viktor Orbán after 2010 to change this approach, and seek for 'bad' political justice and revenge without any guarantees of the rule of law.

In Hungary (as well as in Poland) the new constitutional order has been generated within by the illegitimate legislatures, which after the peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition enacted comprehensive modifications of the old constitution(s). Similar 'post-sovereign'[32] or 'pacted constitution-making'[33] process happened in Spain in the end of the 70 s and in South Africa from the beginning through the middle of the 90 s. While in Poland the constitution-making process was closed in 1997 by a final constitution, in Hungary this second phase of the post-sovereign constitution-making process failed in 1996, when a new constitution was rejected by parts of the governing Socialist party fraction, because of the demand of the constitutional entrenchment of social partnership arrangements disagreed by the majority of the governing coalition.

This non-democratic legalism or legal constitutionalism after the democratic transition not by chance called ‚rule of law revolution ' by the first Constitutional Court[34] was used against the explicit or assumed public opinion either referring to provisions of the new comprehensively amended constitution of 1989, or even in the absence of constitutional rules for institutional approaches allegedly more coherent with the Constitution. The first happed in the case of the abolishment of the capital punishment in 1990,[35] the second when the Parliament decided on the indirect election of the President of the Republic. Declaring the death penalty unconstitutional the Constitutional Court referred to the liberal provisions of the Constitution on right to life and on human dignity, while in the second case they did not use any liberal, but rather constitutional coherency argument. In this section I'll discuss cases of non-democratic legalism both for liberal and other causes. As we will see, the ignorance of majority public opinion and the lack of willingness for deliberation in these cases does not necessarily mean that the measure does not suit better the real interest of the public, like in the case of of the statutory introduction of a mininal (equal to one Euro) visit fee in hospitals, rejected by Fidesz's populist referendum in 2008, it poorly refers to the non-democratic way of the unpopular decision. The list of questions, which could not be subject of national referendum mirror this non-democratic legal approach of the ‚democratic ' transition. This list originally contained the ban on referendum regarding the „obligations set forth in valid international treaties and on the contents of laws prescribing such obligations ".[36] In its decision 2/1993. (I. 22.) AB

[32] The term'post-sovereign' constitution making is used by Andrew Arato, refering to countries, where the first, interim constitution is enacted by a not democratically elected body, ideally followed by a final constitution of the legitimate pouvoir constituant. See Arato (2010, 19).

[33] The term referring to a deal between the representatives of the old regime and its opposition movements is used by Michel Rosenfeld. See Rosenfeld (2009).

[34] See 11/1992. (III. 5.) AB decision.

[35] 23/1990. (X. 31.) AB decision.

[36] Article 28/C (5) point b) of the Act XX of 1949 as amended by the Act XXXI of 1989.

the Constitutional Court with a binding interepretation of the constitutional provisions on referendum the judges prohibited all referendum subjected to amend any provision of the Constitution. The fundamental theoretical question regarding referendum the judges had to interpret here was how it, as manifestations of popular sovereignty, relate to representative democracy, the other form of popular power. The text of the Constitution, which was comprehensively amended in 1989, established that "in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives." The Constitutional Court first interpreted this passage as follows: "In the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is representation." This approach essentially reflects the liberal position that in a democratic state governed by rule of law the power derived from the people is exercised through constitutional organs, primarily representative bodies. This approach represents an entrenchment of prior policy choices against current ones, which according to the deliberative constitutionalism literature is considered as a deprivation of the ability of the today's people to govern themselves.[37]

In the following first I shortly discuss the possible impacts of economic liberalism followed by the most important liberal constitutional issues decided without public participation partly by the Hungarian Parliament but mostly by the Constitutional Court.

2.1 Economic Neoliberalism

Neo-liberal ' economic policies from the very beginning of the democratic transition contributed the Fidesz's populist authoritarian take over in 2010, even though this did not bring an end of such policies.[38] The reponsibility of National Roundtable negotiations preparing the transition lies in the lack of any serious discussion of economic issues,[39] which did not force the first democratically elected conservative government lead by József Antall to correct Hungary's inherited fiscal imbalance. This was exacerbated by further spendings of the Socialist-Liberal government of Gyula Horn causing a situation close to state bankruptcy, and the refusal of the IMF to grant a structural loan to Hungary. This lead to the so called Bokros package, an austerity program, named after the that time finance minister of the Horn government, which aside from measures aiming at hoping to improve the fiscal balance also included measures attacking the real income of the population and reducing the social expenditures in areas of child and family support, medical care and university tuition. Even though the measures attacking social welfare—most likely instituted as part of what has been called 'competitive signaling' to the 'structural changes' recommended by the IMF[40]—had relatively slight budgetary effect they were very unpopular. The

[37] As Mark Tushnet interprets Loughlin's and Gargarella's theory of constitutional democracy in his review both authors say no to this deprivation. See Mark Tushnet, *ibidem,* note 27.

[38] See an overview of the role ‚neo-liberalism ' played in economic constitutionalism in Hungary from 1989 onwards: Arato and Halmai (2023).

[39] See Stark and Bruszt (1998).

[40] Cf. Appel and Orenstein (2017). This has also been admitted by Tamás Bauer, lead economist, of SZDSZ, junior partner in the governing coalition. See Bauer (1995).

Constitutional Court with its decision 45/1995 AB invalidated the latter part of the measures in the name of the defense of acquired rights under Article 70/E of the 1989 Constitution, along with the argument on legal certainty and the property rights inherent in some entitlements, and this made the Court among the population certainly more popular than some politically liberal decisions to be discussed later.

2.2 Retroactivity Justice

Usually in negotiated transitions, such as the Hungarian (or the Polish) the old regime retains sufficient power to avoid punishment of members of the former regime, even though other ways of dealing with the past are not excluded. Following this pattern, the preamble of the constitutional amendment of 1989 called for „a peaceful transition to the rule of law state based upon a multi-party system, parliamentary democracy and social market economy."[41] Despite this constitutionalized commitment to transition, the constitution did not provide expressly for settling accounts with the past. The main reason for this was an unspoken agreements between the participants of the National Roundtable that there will be no prosecution of the communist leaders. After the first free election in spring 1990 some members of the democratically elected Parliament by terminating this agreement submitted a draft law on retroactive justice measures against the previous communist leaders and collaborators.

This law concerned the prosecution of criminal offenses committed between December 21, 1944 and May 2, 1990. The law provided that the statute of limitations starts over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death—but only in those cases where the "state's failure to prosecute said offenses was based on political reasons." The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court in its unanimous decision, 11/1992 (III. 5.) AB, struck down the parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves had changed definition during that time as well). The basic principles of criminal law—that there shall be no punishment without a crime and no crime without a law—were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of the defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional.[42]

[41] Act No. 20 of 1949, as amended by Act No. 31 of 1989.

[42] The English language translation of the decision has been published in Sólyom and Brunner (2000, 214-228). (Hereafter, this book will be abreviated as Sólyom/Brunner.).

To circumvent the concern of the Constitutional Court on retroactive effect, in early 1993 the Parliament opting to rely on crimes under international law enacted another law, which penalized a mixture of international and common crimes, including violation of personal freedom and terrorist acts, as common crimes, whose retroactive application had already been found unconstitutional by the Constitutional Court. Therefore, the Court responding to the President of the Republic's repeated request for preliminary review found again that regarding the effect of statutory limitations on common crimes the statute of limitation had run out, but the judges developed a possible line of argument that would enable the prosecution of international crimes. The decision relied on Article 7(1) of the Constitution, which stated that "the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law". According to this interpretation, customary law, jus cogens, and general principles of law become part of the Hungarian legal system automatically, without any implementing legislation. The Court declared that crimes against humanity and war crimes are "undoubtedly part of customary international law; they are general principles recognized by the community of nations".[43] As a result, the problem of statutory limitation is resolved, since: „International law applies the guarantee of nullum crimen sine lege to itself, and not to the domestic law".[44] As Hungary has ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, perpetrators of crimes concerning the 1956 revolution falling within the purview of the Convention could be prosecuted constitutionally.

The Parliament re-enacted the law, and the Court found the new text still contrary to the language of the Convention, hence quashed it, but declared that: „with the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by international law…It is international law itself which defines the crimes to be persecuted and be punished as well as all the conditions of their punishability".[45]

2.3 Lustration

The *Hungarian lustration law* was adopted also after a long hesitation early in 1994, toward the end of the first elected government's term of office, and similarly to the Polish case included a compromise solution to the issue of the secret agents of the previous regime's police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in state universities or state-owned companies, as well as a specified list of other high government officials[46]). Each of these people would have to

[43] Decision 53/1993, section V.
[44] *Ibid.*
[45] Decision 56/1996, section II. (1).
[46] Altogether about 10.000–12.000 posts. See Fowler, Williams and Szczerbiak (2003, 6–7).

undergo background checks in which their files would be scrutinized to see whether they had a lustratable role[47] in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgement in the specific case. If the person accepted a judgement against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of parliament was already underway, the law was challenged by a petition to the Hungarian Constitutional Court. The Court handed down its decision in December 1994,[48] in which parts of the 1994 law requiring "background checks on individuals who hold key offices" were declared unconstitutional. In its decision the Court outlined key principles of the rights of privacy of the individuals whose pasts are revealed in the files as well as the rights of publicity for information of public interest. The most important declaration of principle in the decision of the Constitutional Court is the following: "The court declares that data and records on individuals in positions of public authority and those who participate in political life—including those responsible for developing public opinion as part of their job—count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same." Article 61 of the Hungarian Constituiton provides an explicit right to access and disseminate information of public interest.

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the state-party regime),[49] but also constitutionally, because it represented the clash of two constitutional principles: the rights of informational self-determination of individuals (in this case, the spies) and the rights of public access to legitimately public data by everyone (including those who were spied on). Before the lustration case, both principles had been upheld in strong form. The lustration case, however, pitted the two principles against each other.

Taking the whole range of issues, from the constitutionality of the lustration process to the continued secrecy of the security apparatus files, the Constitutional Court attempted to balance a range of interests. First, the Court held that the maintenance

[47] The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.

[48] 60/1994 (XII. 24) AB. See the English translation of the decision in Sólyom/Brunner, 306-315.

[49] For example, the Prime Minister and the Speaker of the Parliament in the term between 1994-98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly got informational briefings from the secret police.

of this vast store of secret records was incompatible with the maintenance of a state under the rule of law, since such records would never have been constitutionally compiled in the first place in a rule-of-law state. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as the agents. Disclosing the files to an interested public also would mean disclosing information of great personal importance to the individuals mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state. As a result, more information about such public persons may be disclosed from the security files than would be permitted in the case of persons not holding influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of persons. With this, the Court placed the problem back in the hands of the Parliament as a "political issue," with the instructions that the Parliament is free neither to destroy all the records nor to maintain the absolute secrecy of them, since much of what they contain is information of public interest.

The Court also found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional muster. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionaly arbitrary. In particular, the Court found that the category of journalists who were lustratable was both too broad—by including those who produced music and entertainment programs—and also too narrow—by excluding some clearly influential journalists who worked for the private electronic media. Either all journalists, and other public figures who have as part of their job influencing public opinion must be lustrated or none may be, the Court held. Parliament could choose either course. The Court did not, however, find the extention of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, "participate in the shaping of the public will" are acceptable candidates for lustration, as long as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority state-owned businesses was declared unconstitutional, however, since these persons "neither exercise authority nor participate in public affairs," according to the Court. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons because the procedures to be applied to the clergy did not include as many safeguards as those applied to others.

The decision of the Constitutional Court shows correctly that a lustration law can have two goals, depending on the historical moment. At the beginning of the transition, full lustration might have served to mark the irreversability of the change and the ritual cleaning of the society. But more than five years after the'rule-of-law revolution,' the better constitutional goal at least for the Constitutional Court may be found in specifying the circle of freedom of information through a rule-of-law

lustration. The behavior and the past of those people who are now prominent in political public life are appropriate for the public community to know. The lustration of the prominent representatives of the state is constitutionally reasonable, but the publicity of the full agent's list is not, the Constitutional Court argued.

2.4 Reparations

As there were no special provisions in the Constitution neither on transitional criminal justice nor on compensation, the Constitutional Court used the 'ordinary' provisions of the Constitution measures to assess the constitutionality of these legislations. Despite the nationwide expectation of the population that unjust expropriations of the late 1940s and the 1950s would be retroactively undo or that at least the earlier owners would be fully compensated, the restitution or full compensation to all provious owners was not even raised by political actors, mainly because of the lack of economic and financial resources to accomplish this goal. The church was the only property owner eligible for full natural restitution. The Constitutional Court justified this special treatment with the churches' constitutional function as institutions embodying freedom of religion. As the Court argued without getting back their property (church buildings, schools, hospitals) the churches would not be able to fulfil their duties.[50] The Small Holders Party, being in minority within the government coalition, stood up for a full restitution, but only for lands confiscated. But in an early decision upon the the request of the Prime Minister the Constitutional Court argued that it would violate the equal treatment clause of the constitution, if lands would be restituted while other lost proterties not.[51] Otherwise the Constitutional Court in another decision accepted the policy of the government on partial compensation, which did not even require a partial restitution of the property in-kind.[52] The justices identified novatio (renewal), a concept based on Roman law as the title for compensation of harms in property. This means that the property compensation in the form of a voucher was based on the government's gesture of renewing its old obligations on new grounds, as a new title in property. In other words, this compensation takes place ex gratia and not as of right, and it is acceptable because of the extraordinariness of the task, that is, because of the historical circumstencies. But as opposed to the situation in Germany, where the Unification Treaty has put an authorization for exceptions into the Basic Law, in Hungary this exeption was provided by the Constitutional Court itself.

There is another aspect of the legislation on property compensation, namely the rights of the present owners, where the Constitutional Court's decision was also based on the exceptional nature of the situation. Those compensated could receive either the state's own property, or property of agricultural coopearatives. The persons who were entitled to receive agricultural lands were granted an'option of purchase' which could be used to acquire arable land owned by agricultural cooperatives in the amount of compensation received in restitution bonds. The Court argued that it is not an

[50] Decision 4/1993.
[51] Decison 21/1990.
[52] Decison 16/1991.

unconstitutional limitation of the property rights of others, in this case that of the agricultural cooperatives if the state includes their property among the resources distrubuted in the compensation process. The reasoning of the Court's decision referred to the wide discretion of the government in reconstructing the system of ownership, arguing that this is a necessary burden of transforming the Hungarian economy.[53]

Critics rightly conclude that the Court by legitimizing the option of purchase of others' property, which can even consider as taking, reduced the level of constitutional protection of property in an attempt to justify a measure of correcting past wrongs, if not taking revenge for them.[54]

2.5 Access to Secrete Police Files

The constitutional aspect of the access to the secret files of the Communist regime is the right to freedom of information of public interest, which is never an absolut right, because legitimate state secret or right to personal date or privacy in general can always limit this right. As the case of the Hungarian statutory regulation has shown, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. In the other countries thes issues were regulated separately. Concerning the wideness of accessibilty one can detect different models within the countries in Central Europe. The first Hungarian solution (as well the Polish one) provided limited access to the victims. The most important limit is the name of the spy, which in these models is not disclosed for the victims. The unified Germany, which was the very first country in the history opening the state archives of the secret police, provided unlimited access to the victims concerning the data on the agent as well, and to government agencies to request background checks on their employees. The law enected by the Hungarian parliament in 2003 besides following the German way by providing access to victims on their spies also opened the files for the general public concerning the data of public figures. But the widest access is provided by the similar statutory regulation of the Czech Republic and Slovakia, where – with the necessary protection of third persons' personal data – the secret police files are accessable for everyone.

The *Hungarian* Constitutional Court's decision on the constitutionality of the 1994 lustration law also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.[55] The new law enected in 1996 did create a "Historical Office,"

[53] Decision 28/1991.

[54] See Uitz (2005, 252).

[55] Since this is an unusal power of the Hungarian Court, it deserves a bit of explanation. The Court can declare the Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose was to put into effect the prior decisions of the Constitutional Court.

Without having specific survey results it became evident that in the first years of the democratic transition transitional justice measures, as retroactive justice, lustration, compensation and access to the files of the previous secret police, discussed in the previous points were important issues for the general public to face with the Communist past.[56] Therefore, critics of the liberal legalist approach of the Constitutional Court both by party politicians[57] and academics were escorting the process all along. The Historian Ferenc Horkay Hörcher, close to the first democratically elected governing party, MDF has striked a very critical tone towards the attitude of the constitutional justices. He argued that the Constitutional Court interdicted the implementation of the Antall government's first plans for retroactive justice concerning the previous regime, arguing that "legal security based on objective and formal principles enjoys primacy over a sense of substantive justice that is always partial and subjective". By refusing to stray from a strict notion of legal continuity, thus Horkay, the Constitutional Court produced the regime transition's justice deficiency, foregoing the possibility of satisfying popular perceptions and needs of truth and justice from the very start, thereby alienating large masses from the ideal of constitutionalism.[58]

Similarly, after the 2002 scandal of the that time Socialist Prime Minister Péter Medgyessy, when he was forced to admit that he worked for the country's Communist-era secret police intelligence services there were disappointment with both the national approaches of the mild lustration and the limited access to the secret police files. A survey conducted in that very year has shown that around 60% of the responders thought that it would be better not to hide but rather reckon with the past.[59] Fifthteen years later, while the Fidesz government misused the call the demands for transitional justice measures for its own bad political justice purposes, they too rejected the calls for opening the files, in another survey the majority of respondents supported the full publicity of Communist secret police documents.[60]

[56] See Kende (1992).

[57] The larger opposition party, SZDSZ.

[58] See Ferenc (2003, 62–72 at 64). Later, Horkay saw these neglected values and principles manifested in the 2011 Fundamental Laws and especially their chapter entitled National Creed. Cf. Ferenc (2012, 286–309).

[59] The survey result quoted in László Varga, Gergő és az árnyéka, Beszélő, 2002/9–10, http://beszelo.c3.hu/cikkek/gergo-es-az-o-arnyeka#2002-f09-07_from_1, Fifthteen years later,

[60] Survey of Republicon Institute between April 7–19, 2017: http://republikon.hu/elemzesek,-kutatasok/170430-ugynok.aspx

2.6 The Abolishment of the Death Penalty

With its decision 23/1990.(X.31) AB the Constitutional Court has become the first judicial body in the world abolishing the death penalty. In the judgment the Court called attention to the contradiction between Article 8 (2) of the 1989 Constitution, which provides the basis for the unconstitutionality of the death penalty by the joint application of the constitutional provisions on the right to life and right to human dignity, and Article 54 (1), which failed to unavoidably rule out the most severe penalty. The majority opinion of the Court's judges resolved the contradiction by offering a constitutional interpretation – specifically in favour of Article 8 (2), while the sole dissent argued that the conflict between constitutional provisions can only be resolved by the constituent power. Besides the short majority opinion there were several longer concurring reasonings, among them that of Chief Justice László Sólyom's, which demonstrates the unmistakable signs of activism by elaborating the concept of an 'invisible constitution'. The idea behind it is that the Court's jurisprudence offers a theoretical framework for evaluating the question of constitutionality, thus complementing the text of the Hungarian transitional Constitution of 1989, and in fact, superseding it when the latter is amended in a way that violates crucial constitutional values. In introducing the notion, Sólyom wrote the following in his concurring opinion to the decision on the death penalty: "The Constitutional Court must continue the work of laying down the theoretical foundations of the Constitution and the rights enshrined therein, and to create a coherent system through its decisions. This system may stand above the Constitution – which is still often amended to satisfy current political interests – as an 'invisible constitution,' serving as a stable measure of constitutionality. In so doing, the Constitutional Court enjoys a latitude as long as it remains within the conceptual confines of constitutionality."[61] While it is true that the comments irritating politicians were not repeated by Sólyom, the content has never been negated. In an interview he said: "I have never denied that our constitutional jurisdiction, especially in the 'hard cases'…. is at the borderline of constitution writing." This was underlined in another interview that he gave in 1998, before his end of term. He was elaborating on the misinterpretation of the term 'invisible constitution' when the journalist confronted him with the question whether the metaphor should be unsaid altogether, the response was: "No, what I have written, is there. In those days the constitution was amended month by month, depending on the political climate. For this reason I wanted to point out that the Constitution is of a higher nature: a firm system based not only on technical rules but on values too. Our decisions were meant to express this value system; to clarify, to expose, to use; because from a one line paragraphs and brief sentences one cannot see it. Some focus purely on the letter in their constitutional adjudication, I have seen it both in Europe and Asia."[62]

Indeed, the Constitutional Court led by La´szlo´ So´lyom expressly followed an activist approach in the interpretation of the 1989 transitional Constitution.

[61] Op.cit. Sólyom/Brunner, at 125.
[62] Mihalicz (1998).

Therefore Sólyom, along with many academics, including the author of these lines at that time argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court make a new constitution unnecessary. In Sólyom's view the idea of 'invisible constitution' is divorced from the actual constitutional text, but at the same time it may serve as a basis for enforcing constitutional principles in the context of constitutional amendments, too. In his quoted concurring opinion to the decision he unequivocally displays the unmistakable signs of interpretive activism by arguing with the finality of the Court's decision: "Parliament may maintain, abolish or restore capital punishment at its discretion until the Constitutional Court renders a final decision on the constitutionality of this punishment". With this interpretation Sólyom obviates the possibility of subsequent reinstatement of the death penalty by the Parliament, even by way of constitutional amendment, thus empowering the Constitutional Court with the right to declare a Constitutional Amendment unconstitutional without such explicit authorization in text of the Constitution. Later, in its decision 11/1999 (V. 7.) AB, the Constitutional Court also declared that it is unconstitutional to arrange a referendum regarding the capital punishment. These claims of an exclusive constitutional autority the decide on the issue of the death penalty not only denies the constitutional amendment power of the Parliament, but also ignores the that time two-third majority of the population was in favor of the capital punishment.[63]

2.7 Limits of Hate Speech

The other main area of the use of liberal rights approach was freedom of expression, especially hate speech, where the Hungarian Constitutional in many respects adopted an absolutist theory of speech going beyond the U.S. Supreme Court's position. The free speech practice of the Court can be rather characterized by the divide in the standards applied in American jurisprudence, which rejects all limitations, and those of a (Western) Europe inclined towards more resolute limitation based on the ‚concept of militant democracy '. The Hungarian Constitutional Court first encountered the problem in examining the constitutionality of the provision in the nation's Criminal Code concerning public incitement. In Decision 30/1992, the Constitutional Court found the facts of the crime of incitement of hatred to be constitutional and annulled the form of defamation. Its reasoning was based on the notion that the freedom of expression has a distinguished role among other fundamental

[63] Eleven years later, in 2001 still 68% supported this arbitrary and cruel punishment. The survey also indicated that younger and higher-educated people were more critical, while religious people were more ready to accept. See TÁRKI, Közép-európai közvélemény: Lakossági vélemények a közbiztonságról és a halálbüntetésről a közép-kelet-európai országokban, 2001. június, https://www.tarki.hu/adatbank-h/kutjel/pdf/a556.pdf. A survey conducted in 2015 has shown a slight decrease, when 58% of the respondents believed that the death penalty would be necessary to use against murderers. Cf. Iránytű Intézet: 2015. júniusi közvélemény-kutatásának eredményi a halálbüntetés társadalmi támogatottságának kérdésében, 2015. június, http://iranytuintezet.hu/elemzesek-kutatasok/kutatasok/88-a-halalbuntetes-tarsadalmi-tamogatottsaga-2015-juniusaban/

rights guaranteed by the Constitution; that in fact it is a sort of a ‚mother right ' of the so-called rights to ‚communication '.

According to the Court 's justices, the right to free expression of opinion protects opinion without regard to its content in terms of value and truth, for this condition alone lives up to the ideological neutrality of the Constitution. In confirming the constitutionality of the facts of the crime of incitement, the justices apparently reasoned on grounds similar to U.S. Supreme Court Chief Justice Oliver Wendell Holmes's famous test of ‚clear and present danger '. At the same time, it must be said that the ‚danger ' attached by the Hungarian Constitutional Court justices as a condition of constitutionality is more distant and contingent than the sort their erstwhile American peers had in mind. Presumably, this is why the Constitutional Court elaborated on its decision by explaining that the ‚unavoidable social tensions of system-change ' (*i.e.* the post-1989 political-economic transition) notably increase the danger of incitement, before large public audiences, to hatred against certain groups. In contrast to U.S. jurisprudence, the Hungarian Constitutional Court did not address the problem of the ‚scope ' of the facts, that is, whether the incitement provision can be applied even in the absence of a real possibility that hatred will develop. In other words, the Hungarian justices did not set a constitutional standard that requires incitement to hatred to actually *cause* ‚clear and present danger '. This approach, along with the citing of the historical circumstances of the change of system, recalls not so much the American concept of justice in this respect, but that of Germany's Federal Constitutional Court, which likewise cites historical reasons in reacting to militant threats to democracy by limiting the freedom of expression – namely, Germany's interest in avoiding a repeat of the scenario that followed the collapse of the Weimar Republic. The main reasons for declaring defamation unconstitutional was, however, that in this case the Hungarian Parliament had in fact made its qualification on the basis of the value content of the opinion expressed, in other words, with the violation of public peace attached to this only on the basis of presumption and statistical probability. Moreover, the Constitutional Court pointed out, not even the public peace is independent of the degree of the freedom of expression that prevails in society. Indeed, in countries where people can encounter numerous different opinions, public opinion becomes more tolerant, whereas in closed societies particular instances in which people express opinions out of the norm have far more potential to disturb the public peace. Further, the needless and disproportionate limitation of the freedom of expression has a detrimental effect on an open society. Indeed, in such a society those who use abusive language only mark themselves as "slanderers" in the arena of public opinion. Criticism is the appropriate response to slander, not criminal prosecution, argued the Constitutional Court justices. At the same time they added that the need to protect the ‚dignity of communities ' might constitute a valid constitutional limitation on the freedom of expression. Thus the Court decision does not rule out the possibility that Hungary's lawmakers might establish such protection under criminal law even beyond the scope of incitement to hatred. In the assessment of the justices, however, the expansion of other legal instruments, *e.g.* non-pecuniary compensation, is also suitable for the effective protection of the ‚dignity of communities '. In other words, in deciding on the constitutionality of this particular element of fact in the statutory provision on incitement, the justices looked to an American standard still being applied in the present day.

As it turned out this liberal approach was not able to deter newly emerged Anti-Roma and Semitic hate speech right after the beginning of the democratic transition, therefore critiques argued that maybe in a former autocratic country, such as Hungary following the more restrictive jurisprudence of the German Federal Contsitutional Court also based on the authoritarian past of the country would have been more appropriate.[64]

2.8 Election of the President of the Republic

Among three other issues, the direct or indirect election of the President of the newly established Republic was one of first subjects in the very beginning of the democratic transition, when the to be political elite attempted to consult with the population through the so-called 'For Times Yes' (Négyigenes) referendum held in November 1989. This question was, whether the President should be elected directly prior to the parliamentary elections, which held out the prospect of certain victory for Imre Pozsgay, a prominent leader of the Hungarian Socialist Workers' Party (MSZMP), the ruling party in the previous single-party regime. This was a proposal besides MSZMP also supported by the Hungarian Democratic Forum (MDF), one of the opposition parties. The second was the option preferred by those who had initiated the referendum, among them the that time two liberal parties: the Alliance of Free Democrats (Szabad Demokraták Szövetsége – SZDSZ) and the Alliance of Young Democrats (Fiatal Demokraták Szövetsége – Fidesz). The electorate ended up opting for the second choice by a margin of a few thousand votes, and resulted in the new Parliament – pursuant to a pact concluded by MDF and SZDSZ – that elected the previously little known Árpád Göncz, a politician of the largest opposition party as the first President of the Republic. This way the voters substantially impacted on the course of the transition process by practically rejecting an ex-Communist President for the Third Hungarian Republic.

In the following history of the way of election of the President of the Republic to voice of the people had no more impact, and this is partly due to the reluctance of the liberals to put the question to referendum. In the Summer of 1990 the Hungarian Socialist Party (MSZP), the successor of MSZMP after the defeat in the previous year initiated another referendum for the direct election of the President. Since all the new democratic parties in the Parliament opposed the notion the parliamentary majority scheduled the vote to the period of Summer holidays, hence the 14% turnout resulted in an invalid referendum. In 1999 during the first Orbán government's term the Socialist Party tried again to initiate a similar referendum to prevent the parliamentary election of the extremely unpopular politician of the Small Holders Party, the smaller coalition partner of Fidesz to become President. The Socialists were unable to collect the necessary number of support signatures even to call for the referendum, because the other main opposition party, SZDSZ opposed to move. János Kis, a well-respencted political philosopher, founding president of SZDSZ argued against the direct election, which would push the basic structure of the Hungarian constitutional system into the direction of a presidential regime discontinuing the historically liberal traditions of Hungarian parliamentarism.[65] Not to speak about the

[64] See Rosenfeld and Sajó (2006, 149).

[65] See Kis (2000).

problematic arguments about the dangers of presidentialism, which are not present in other parliamentary systems, such as that of Austria or Slovakia, with direct presidential elections, and about very limited liberal parliamentary traditions in the Hungarian history, Kis rejects the democratic counter-argument that according to surveys conducted at the time of the initiative, 87% of the respondents supported the direct election of the President.[66]

3 Who or What is to Blame?

As we could see from the example of transitional justice, the Hungarian Constitutional Court in the 1990s interpreted the rule of law to require certainty, as opposed to the German and the Czech courts interpreted it to require substantive justice.[67] These distinct approaches seemed to correspond to the very type of their transition, which reflected the character of the previous regime. Due to the relatively mild character of the communist regime and the negotiated way of the transition, in Hungary there was no need for harsh substantive justice measures, while the hard-core dictatorship in East Germany and in Czechoslovakia after 1968 required a different solution. The two approaches of formal and material (substantive) justice tell nothing about the success of doing justice efforts. Since the Hungarian population seemed not to be receptive towards legal constitutionalism in general,[68] and the very formalistic approach of rule of law in particular, which treated the legal order of the communist regime as valid, the populist government of Viktor Orbán after 2010 was able to change this approach, and seek for 'bad' political justice and revenge.

The sad experience of Hungary's once pioneer democratic transition is that the initial measures of transitional justice did not help to reconcile society and consolidate democracy. This may have been caused by the lack of popular support towards 'non-democratic liberal' concerns of the Constitutional Court, which could lead to the misuse of certain transitional justice measures by the illiberal Orbán government for its political justice pursuits without any guarantees of rule of law. The current Hungarian government's attitude towards public discussion of history, similar to that of the Polish one reflects these illiberal populist regimes' attitude towards the rights

[66] See this argument Halmai (1999).

[67] About the different approaches of the interpretation of rule of law in Central Europe, see Priban (2009, 337-358). The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism see Hart (1958, 593). Fuller rejected Hart's abstact formulation of the problem, and instead focused on postwar Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law. See Fuller (1958, 630).

[68] According to some authors, the potential of democracy in Hungary following the transition in 1989-90, (and also in the other new democracies of Central Europe), was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost.

of its citizens.[69] In Hungary besides the laws the main signs of this 'renationalized' public discourse are creation of government loyal research institutes, museums, newly written school textbooks, constant airing of national history themes on public media, renaming of streets, the construction and deconstruction of monuments.[70] But unfortunately the Hungarian and the Polish examples are not unique, the legal governance of history shapes the public understanding of the past in other parts of the world as well.[71]

This also leads to the question, who is to blame for this politicized memory governance without rule of law guarantees. One possible arguments is that politics has failed 'the people', who were only choosing an option that they were offered, and not the other way around.[72] This applies first and foremost would-be autocrats, such as Viktor Orbán, who always used populist arguments to fulfill his nationalistic, authoritarian aims, but also those benevolent liberal democratic parties and leaders, who imposed their liberal ideas to the people, who were either not interested or ready to accept them. In other words, blaming exclusively the people cannot help to understand the crisis of democracy.[73]

In his latest book, Democracy Rules, Jan-Werner Müller also criticizes the convenient but ultimtely very misleading response to democracy's decline: to blame the people.[74] He argues that ordinary folks, even well-informed but plainly irrational are always ready to be misled by demagogues, but at the end of the day the crutial decisions to empower dictators, such as Hitler was made by parts of the conservative establishment of the day.[75] Regarding the todays right-wing populists he claims that none of them has come to power without the collaboration of established conservative elites.[76]

Müller also asserts that an increasing number of citizens at the lower end of the income spectrum no longer vote or participate in any other form in politics, and political leaders have no reason to care for those'disadvantaged communities', who don't care to vote.[77] In Hungary the situation is even worse, since about 40% of the poorest and less educated part of the society overwhelmingly support Fidesz. Some

[69] About the Hungarian government's memory politics see Gábor Halmai, Rule of Law Backsliding and Memory Politics in Hungary, European Constitutional Law Review, Volume 19, Issue 4, December 2023. 602 – 622 https://doi.org/10.1017/S157401962300024X. On one important aspect of the Polish memory politics towards ethnic minorities see Belavusau (2017).

[70] See several examples in Berend (2022).

[71] See Belavusau and Gliszczynska-Grabias (2017).

[72] See Scheppele (2018).

[73] See Posner ' s book (2020), Similarly, Joseph Weiler blamed the Hungarian people for supporting Orbán. Editorial, ICON Volume 18, Issue 2. http://www.iconnectblog.com/2020/08/icon-volume-18-issue-2-editorial/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A%20I-CONnect%20(I-CONnect%20Blog)&fbclid=IwAR1CJYiPF_6uFalCGgHB9TKlDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw. See a critique by Kazai (2020)

[74] Müller (2021a, IX-XI).

[75] See for instance the novel of Éric Vuillard Ordre du jour. Actes Sud, 2017.

[76] Müller (2021b, 18).

[77] Ibid, 31. Müller refers to the term 'two-third society', coined by Wolfgang Merkel for the bottom third, which has effectively disappeared from political life completely.

of them do not vote, but some vote for the governing party without acknowledging that its policies are against their interest.[78] The phenomena is described by Claus Offe as participatory inequality, which is especially characteristic in states with high income ineqaulity using austerity measures.[79]

On the other hand, the supporters of Fidesz cannot be released from responsibility either. We should not go as far as Daniel Goldhagen in his contoversial book, Hitler's Willing Executioners, on the responsibility of ordinary Germans in the Holocaust,[80] or Sándor Márai, who in 1945, before emigrating from Horthy's Hungary wrote in his diary[81] that the 'Nazi-Friendly' Hungarian Christian middle class will never change, to observe that many voters of the right-wing authoritarian populist parties are aware of those parties' exclusionary, nationalistic, homophobic, autocratic ideas and aims, and they still support them.

4 Conclusion

Of course, it will never be known whether these decisions of the democratic regime change in 1989, with a content different from the value system of the country's citizens, and made without consulting them, really contributed to the fact that the majority of the electorate voted for the party that institutionalized the illiberal autocracy since 2010, even if it did not happen within the framework of free and fair elections. To a certain extent, the success of the new challenger of the Orbán regime, Péter Magyar, reveals a lot about the perception of the democratic 'rule of law revolution' that continues to this day. In his first interview, Magyar said the following: "It doesn't matter whether there is democracy governed by the rule of law, I don't like these words, because they are completely unnecessary…"[82] This indicates that the ideals of 1989 are not to be followed even among those who oppose Orbán's autocracy. Therefore, politicians and legal experts who aim to restore constitutional democracy would do better to consider the experience of post-1989 non-democratic liberal legal constitutionalism.[83]

[78] See the result of the Medián Institute' survey commissioned by the RTL Klub TV station on the relationship between votes and incomes before the April 3 Parliamentary election on 30-31 March with a nation-wide survey of 1531 respondents. https://www.facebook.com/photo/?fbid=10220827131740798&set=a.1030493095277 https://www.facebook.com/median.hu/photos/a.1378324522412809/3275767579335151/

[79] Offe (2013). Also quoted by Müller, ibid, at 193.

[80] Goldhagen (1996).

[81] Márai (1996).

[82] See the interview of Márton Gulyás with Péter Magyar, a former regime insider, the ex-husband of the Orbán government's former Minister of Justice at the Youtube-channel on 11 February 2024. https://www.youtube.com/watch?v=8cJulnczg2E. The sentences are quoted by Szentes Ágota: Kormányváltó? Megváltó?, Élet és Irodalom, 2024. április 5. 12.

[83] After replacing the authoritarian PiS government during the October 2023 elections Poland faces exactly these challenges while trying to restore constitutional democracy. About the constitutional debates see Szwed (2024).

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