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# The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary

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## Abstract

This paper argues that in the illiberal constitutionalism accommodated in Hungary, the approach towards, and theory of, the Rule of Law is conceptually different from the notion of that concept which has emerged in Europe as a common value and principle with a shared heritage. A concept of the European Rule of Law is offered to conceptualise the contested notion of the Rule of Law in a supranational constitutionalism and used to emphasise its distinct nature as compared to the Rule of Law concept that demands universal application. Member States are supposed to accommodate their Rule of Law understanding to the European Rule of Law, which binds them through their constitutional provisions, and their own domestic Rule of Law concept, which is also provided for in their respective constitutions. The Hungarian Rule of Law concept, which has existed since 2010, shows significant and visible unorthodoxy. This paper claims that the term illiberal legality can be used to describe the hollowed-out meaning of the European Rule of Law in Hungary. Illiberal legality accentuates the instrumental use of domestic law in both legislation and law application. Another characteristic is the weak constraint that the European Rule of Law poses on the domestic public power as it requires the implementation and application of EU law, i.e., both the values and the *acquis*. This latter phenomenon, among others, keeps the Hungarian constitutional system within the frames of constitutionalism and supports the claim for an illiberal adjective.

## I. Introduction

This paper argues that in the illiberal constitutionalism<sup>1</sup> which exists in Hungary, the approach towards, and theory of, the Rule of Law is conceptually different from the one that has emerged as a common European value and principle with a shared heritage. This latter will be termed here the European Rule of Law. It describes how the Rule of Law can be conceptualised in a supranational constitutionalism and emphasises its distinct nature from the Rule of Law concept that demands universal application<sup>2</sup> or to be viewed as a global common principle.<sup>3</sup> Member States are supposed to accommodate their domestic understanding of the Rule of Law to the European Rule of Law, which binds them through their constitutional provisions, and their own domestic Rule of Law concept, which is also provided for by their respective constitutions. The Hungarian Rule of Law concept has, since 2010, shown significant and visible unorthodoxy. This paper claims that the term illiberal legality can be used to describe the hollowed-out meaning of the European Rule of Law in Hungary. Illiberal legality accentuates the instrumental use of domestic law in both legislation and the application of law. Another characteristic is the weak constraint that the European Rule of Law poses on the domestic public power, because it requires the implementation and application of the EU law, i.e., both the values and the *acquis*. This latter phenomenon, among others, keeps the Hungarian constitutional system within the frames of constitutionalism and supports the claim for an illiberal adjective.

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<sup>1</sup> T Drinóczi and A Bień-Kacała, 'Illiberal constitutionalism – the case of Hungary and Poland', 3 *German Law Journal* (2019) 171-208. We usually study Poland and Hungary together but his paper is now dedicated to put the Hungarian Rule of Law situation into the context of illiberal constitutionalism and conceptualize the Rule of Law understanding specifically in this country.

<sup>2</sup> J Raz, 'The rule of law and its virtue' in J Raz, ed, *The authority of law: essays on law and morality* (Oxford University Press 1979) 221. Ronan Cormacain, among others, challenges this view in R Cormacain, *Legislative drafting and the Rule of Law* (PhD Thesis, IALS School of Advanced Study, University of London 2017), <https://pdfs.semanticscholar.org/8573/69dd2203b40f77f3c65afdd9de9210fa3098.pdf> 20-23.

<sup>3</sup> C May and A Winchester, 'Introduction to the Handbook of the Rule of Law, in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar, 2018) 1.

There are many theories and opinions in the literature concerning the Rule of Law. It is viewed as a national, supranational, and transnational concept,<sup>4</sup> as well as an ideal or an applicable and, thus, enforceable legal principle or value.<sup>5</sup> There is disagreement about its definition or constituent elements, which range from a ‘thin’ to a ‘thick’ version in a continuum,<sup>6</sup> and on its measurability and its methods.<sup>7</sup> Notions such as constitutionalism,<sup>8</sup> to which many adjectives can be added, and constitutional democracy similarly attract various approaches.<sup>9</sup> The Rule of Law is often associated with constitutionalism and constitutional democracy, but it is also claimed that its thin version, focusing on the formal characteristics of the law, exists in authoritarian systems.<sup>10</sup>

All these concepts are contested in the literature.<sup>11</sup> The term of illiberal constitutionalism, which we offer to describe the contemporary Hungarian (and Polish)<sup>12</sup> constitutional arrangement, is not accepted in the literature. The main argument of those who oppose the term<sup>13</sup> of illiberal constitutionalism is that constitutionalism cannot be anything but liberal. Consequently, according to Gábor Halmai and Gábor Attila Tóth, Hungary is described as a (modern) authoritarian regime.<sup>14</sup> Hungary cannot nurture constitutionalism anymore because there are no effective constraints on public power. Nevertheless, others, like Mark Tushnet, Tom Ginsburg and Aziz Z Huq, and Helena Alviar and Günter Frankenberg in their articles, co-authored and edited books, use either other adjectives to describe constitutionalism (authoritarian), studying the possibility of illiberal constitutionalism, or claim that constitutionalism is feasible in the absence of liberal entitlements and democratic processes.<sup>15</sup> To describe the Hungarian legal and political system – and to avoid using the oxymoron of illiberal constitutionalism – Paul Blokker refers to ‘populist constitutionalism’,<sup>16</sup> Kim Lane Scheppele proposes ‘autocratic legalism’,<sup>17</sup> David Landau uses the term of ‘abusive

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<sup>4</sup> M Adams et al., eds, *Constitutionalism and the Rule of Law* (Cambridge, 2017).

<sup>5</sup> J Waldron, ‘The concept of the rule of law’, *University of Georgia Law* (2008) 59-60; D Kochenov and A Jakab, eds, *The Enforcement of EU law and values edited by* (Oxford, 2017); C Closa and D Kochenov, eds, *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge, 2016).

<sup>6</sup> C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar, 2018).

<sup>7</sup> See, eg, M Versteeg and T Ginsburg, ‘Measuring the rule of law: a comparison of indicators’, 1 *Law and Social Inquiry* 100.

<sup>8</sup> See, eg, BP Frohnen, ‘Is constitutionalism liberal?’, 33 *Campbell L. Rev.* (2011); JM Farinucci-Fernós, ‘Post-liberal constitutionalism’, 1 *Tulsa L Review* (2018); A von Bogdandy et al., eds, *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press, 2017); H Alviar and G Frankenberg, eds, *Authoritarian constitutionalism* (Edward Elgar 2019); M Tushnet, ‘The possibility of illiberal constitutionalism’, 69 *Fla L. Rev.* (2017).

<sup>9</sup> See eg, M Loughlin, ‘The Contemporary Crisis of Constitutional Democracy’, 2 *Oxford Journal of Legal Studies* (2019) 446.

<sup>10</sup> Raz, n. 2.

<sup>11</sup> See n 2-10 and eg, Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ 21 *Law & Phil.* (2002) 137

<sup>12</sup> Drinóczi and Bień-Kacała, n. 1.

<sup>13</sup> For a collection of terms used to describe democratic decay and backsliding, see <https://www.democratic-decay.org/>.

<sup>14</sup> G Halmai, ‘Populism, authoritarianism, and constitutionalism’, 20 *German Law Journal* (2019); GA Tóth, ‘Illiberal rule of law? Changing features of Hungarian constitutionalism’, In M Adams et al., eds, *Constitutionalism and the Rule of Law* (Cambridge, 2017).

<sup>15</sup> See M Tushnet, ‘Authoritarian constitutionalism’, 100 *Cornell L Rev.* (2015); H Alviar and G Frankenberg, eds, n 5; M Tushnet, n 8; T Ginsburg and AZ Huq, *How to save constitutional democracy?* (The University of Chicago Press, Chicago and London, 2018), respectively. Another alternative views can be seen in e.g., Frohnen, n 8; Farinucci-Fernós, n 8.

<sup>16</sup> P Blokker, ‘Populist constitutionalism’, <https://verfassungsblog.de/populist-constitutionalism/>

<sup>17</sup> KL Scheppele, ‘Autocratic legalism’, 85 *The University of Chicago Law Review* (2018) 545-583;

constitutionalism’,<sup>18</sup> while András Bozóki and Dániel Hegedűs call the Hungarian political system hybrid.<sup>19</sup>

This diverse background makes it particularly challenging to conceptualise the Rule of Law in contemporary Hungary. To bring some clarity, and in order to justify the claim of this paper, the paper starts by reviewing how we have already conceptualised illiberal constitutionalism. Furthermore, it adds a more detailed account of the distinct features of illiberal constitutionalism by separating it from the other concepts mentioned above (point II.). Part III explores how European law and the European Rule of Law can be viewed as an implicit and internal constraint on the domestic public power. Part IV explains the concept of the European Rule of Law and illiberal legality in the Hungarian context. This is followed by a conclusion.

## II. Illiberal constitutionalism in Hungary ...

Illiberal constitutionalism is a particular state in the process of democratic decay or the backsliding from (liberal) constitutionalism, i.e., constitutional democracy,<sup>20</sup> towards an authoritarian regime. In illiberal constitutionalism, each element of a constitutional democracy, such as a written constitution, constitutional review, the rule of law, democracy, and human rights, is observable – they exist in a *de jure* sense – but none of the elements prevail in their entirety. Instead, some flaws may be remedied, removed, or even smuggled back in and proudly announced that they are national traditions and, as such, belong to the identity of Hungarians and that of Hungary.<sup>21</sup> Here, I will focus only<sup>22</sup> on how illiberal constitutionalism can be differentiated from other regime descriptions. (Figure 1).

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<sup>18</sup> D Landau, ‘Abusive constitutionalism’, 3 *UC Davis Law Review* (2013).

<sup>19</sup> A Bozóki and D Hegedűs, ‘An externally constrained hybrid regime: Hungary in the European Union’, 7 *Democratization* (2018)

<sup>20</sup> Constitutional democracy refers to a constitutionalized form of democracy but also a constitutional regime in which the Rule of Law and the respect ad protection and promotion of human rights prevail. Constitutional democracy embodies constitutionalism (in which no power can be exercised without constraints) and democracy (rule of the people) at the same time; they cannot be mutually exclusive or competing factors neither at constitutional design level nor in the constitutional interpretation. [See similarly in T Humphrey, ‘Democracy and the rule of law: founding liberal democracy in post-communist Europe’, 2 *Colum. J. E. Eur. L* (2008) 127.] The reason is that constitutional democracies that were established after the transition in the CEE region used other European constitutional systems as models. For instance, Hungary was inspired by Germany, while Romania by France. Due to this constitutional borrowing, which undoubtedly had its historical, legal and emotional reasons, these new democracies required a written constitution, in a legal sense, that encompassed all of the essential principles for being called constitutionalist. These principles included the Rule of Law, human rights, and democracy – in their form in which they have been consolidated in the course of the (Western European) constitutional development as the core values of modern societies and political systems (eg., free elections, universal suffrage, rights and liberties, constitutional review, other methods of protection of the constitution, etc). Consequently, it can be claimed that if states are constitutional democracies in today’s Europe (and all of them are such a state), theoretically, they does not need any adjective to express their commitment towards the Rule of Law, human rights (not only civil and political) and democracy. For a more detailed definition, see Drinóczi and Bień-Kacała, n 1 and Ginsburg and Huq, n 15, 224.

<sup>21</sup> See eg, the treatment of churches and the changing constitutional content of family and marriage, the constitutionalized constitutional identity.

<sup>22</sup> All the other issues are discussed in Drinóczi and Bień-Kacała, n 1; T Drinóczi and A Bień-Kacała, ‘Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland’, 4 *Acta Iuridica* (2018); T Drinóczi and A Bień-Kacała, ‘Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics’, in A Bień-Kacała, et al, eds, *Liberal constitutionalism - between individual and collective interests* (Wydział Prawa i Administracji/Faculty of Law and Administration Uniwersytetu Mikołaja Kopernika w Toruniu/ Nicolaus Copernicus University in Toruń Toruń 2017) 73-108.

As has been argued elsewhere,<sup>23</sup> the use of the term of illiberal constitutionalism is intentional: it describes the Hungarian (and Polish) constitutional system as it has existed between 2010 and 2019, and stresses the paradox these countries create within the European Union. The palpable oxymoron in the term intends to highlight the paradox in which Hungary and the EU find themselves. First, the EU, which is built on certain principles, still includes a Member State that keeps disrespecting those very same principles. Second, it seems that both the EU and Hungary are comfortable with the regime sustaining and legitimising role the EU plays.<sup>24</sup> Third, the Hungarian prime minister acts like a child who tries to find where the boundaries of his actions are, and keep pushing in so far as he can.

Hungary has indeed been slowly sliding from its previous constitutional democracy status to authoritarianism but has not reached it yet. In this degradation, the matter of degree becomes a matter of kind, as it is argued below in point 1-3.

## **1. ... is neither a (modern) authoritarianism nor authoritarian constitutionalism**

### **1.1. (Modern) authoritarianism and authoritarian constitutionalism**

Ginsburg and Huq, when discussing the differences between liberal constitutional democracy and competitive authoritarianism, describes pure authoritarian regimes as countries in which there is a complete absence of effective political competition and in which power cannot be lost in elections. In these states, however, written constitutions, courts or other rule-of-law accouterments exist.<sup>25</sup> Attila Gábor Tóth contrasts authoritarian constitutional systems with illiberal democracies and liberal autocracies and admits that there are no conceptual criteria for distinguishing these systems from one another. Nevertheless, he lists five defining elements of authoritarianism (ruler, façade constitution, hegemonic voting practices, shortfall of institutional check, and restricted individual and collective rights),<sup>26</sup> which partly coincide with the description of Arch Puddington. Puddington defines modern authoritarianism as the 21<sup>st</sup> century, more enlightened version of authoritarianism of the previous century, in terms of pretending to be something else (especially less authoritarian). He also admits that the modern authoritarian system sometimes reverts to the methods applied by their former counterparts.<sup>27</sup> Both of them thus provide quite a broad conceptual framework for theorising the constitutionalism Hungary (and Poland) is nurturing, and seem to include these countries under the label of (modern) authoritarianism. The Encyclopedia Britannica describes authoritarianism similarly, in terms of concentrated power, arbitrary exercise of power without regard to existing laws, irreplaceable leaders, limited or non-existing freedom to create opposition parties, and the existence of some pluralism. It adds another approach: the term means a blind submission to authority as opposed to individual freedom of thought and action.<sup>28</sup> Günter Frankenberg views authoritarianism as a wide range of autocratic practices that add up to regimes of governance and marks the distinguishing elements of authoritarian constitutionalism. These include authoritarian political technology and constitutional

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<sup>23</sup> Drinóczi and Bień-Kacala, n. 1.

<sup>24</sup> The mentioned functions borrowed from Bozóki and Hegedűs, n. 19, 1174.

<sup>25</sup> Ginsburg and Huq, n. 15, 22-23.

<sup>26</sup> GA Tóth, 'Authoritarianism', Max Planck Encyclopedia of Comparative Constitutional Law, February 2017.

<sup>27</sup> There is for instance economic openness, and to a certain extent: pluralist media, political competition, civil society and rule of law. But, there is also a retained or direct control on the economy or the media outlets, a co-opted political opposition; the legal harassment of politicians and the employment of instruments for keeping civil society closely watched is an (almost) daily practice. A Puddington, 'Breaking down democracy: global strategies, and methods of modern authoritarians', [https://freedomhouse.org/sites/default/files/June2017\\_FH\\_Report\\_Breaking\\_Down\\_Democracy.pdf](https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf) June 2017.

<sup>28</sup> <https://www.britannica.com/topic/authoritarianism>

opportunism, power as private property, participation as complicity, and culture of immediacy. Hungary's regime, Orbánism, for him, is to be seen only as a 'temptation of authoritarianism'.<sup>29</sup>

As mentioned, there are many contested concepts, and their categorization sometimes leaves us with more confusion than clarity. Despite these classifications, and even though Hungary has recently been labeled as partly free by the Freedom House, the democratic degeneration of the system has not reached the extent of that of Turkey or Russia, the two countries commonly mentioned together with Hungary as examples of modern authoritarianism.<sup>30</sup>

It is undeniable that the systemic changes in Hungary are pointing towards that direction.<sup>31</sup> The political system could even be called a hybrid regime, which stands between democracy and authoritarianism, from a political science perspective.<sup>32</sup> When we try to understand the democratic decay in Hungary, we should not forget, however, that sometimes the matter of degree (what different types of indexes indicate) is a matter of kind. Not to mention the fact that Hungary is still a member of a regional community built on democracy, the Rule of Law, and human rights. Insofar as this membership is maintained by both the parties, i.e., the EU and Hungary, Hungary should be considered as having a constitutionalist structure. Moreover, this state remains a constitutional democracy, even if it is flawed or can momentarily only provide for a thin or formal version of the term.

## 1.2. Quantitative distinction

Quantitatively, according to different indexes, Hungary is not in as bad shape as Turkey or Russia but, admittedly, it is doing worse than its European counterparts. As said earlier, all concepts used here are contested, so does the measurement of the Rule of Law. There is some agreement among scholars relating to this issue, though. The first is that there is no definite way of interrogating the Rule of Law, and before measuring anything, we have to define what is to be measured. The second is that the Rule of Law measurement is far less developed than that of democracy, but the WJP Rule of Law Index, notwithstanding its imperfection, produces a more definitive and authoritative measure of the Rule of Law outcome across the globe.<sup>33</sup> Having a look at the WJP Rule of Law Index, we can detect some distinctive differences between Hungary, on the one hand, and Russia and Turkey on the other.

According to the WJP Rule of Law indexes (Table 1),<sup>34</sup> the overall score of Hungary has, since 2015, been decreasing,<sup>35</sup> but never reaches a score which is below 0.5, while that of

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<sup>29</sup> G Frankenberg, 'Authoritarian constitutionalism: coming to terms with modernity's nightmares', in H Alviar and G Frankenberg, eds, *Authoritarian constitutionalism* (Edward Elgar 2019) 3, 18-24, 36.

<sup>30</sup> Frankenberg, n. 29; Puddington, n. 27.

<sup>31</sup> Authoritarianisation is a gradual erosion of democratic norm and practices by democratic leaders, elected at the ballot box through reasonably free and fair elections. E Frantz and A Kendall-Taylor, 'The evolution of autocracy: why authoritarianism is becoming more formidable?', 59 *Survival: Global Politics and Strategy* (2017) 57.

<sup>32</sup> Bozóki and Hegedűs, n. 19, 1175.

<sup>33</sup> J Moller, 'The advantages of a thin version', in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar 2018) 2-24; A Bedner, 'The promise of a thick view', in C May and A Winchester, eds, *Handbook of the Rule of Law* (Edward Elgar, 2018) 41; May and Winchester, n. 3, 11, 15; Versteeg and Ginsburg, n. 7, 101.

<sup>34</sup> See directly at <https://worldjusticeproject.org/our-work>.

<sup>35</sup> I have chosen 2015 as a baseline because the reports are more comparable from 2015 despite the fact that they include more and more countries to be measured: it increased from 102 (2015) to 126 (2019) while in the years of 2016-2018 the number of the studied countries was 113.

Russia and Turkey have stably stayed within the range of 0.42 and 0.47. The overall score for Hungary is firmly decreasing from 0.58 to 0.53. The WJP measures the Rule of Law in eight categories, but for now, I focus only on the subcategory of constraints on government power. A steady decrease can be seen in the case of Hungary, while Russia is scoring around 0.4 and reaches 0.45 in 2019. Turkey produced a backsliding from 0.37 (2015) to 0.32 (2019). In the region, Hungary, with its score changes from 0.49 (2015) to 0.41 (2019), was ranked 23 out of 24 for three years (2015-2018), and fell back to the last position in 2019. It is to be noted that it scored 0.63 in 2012-2013.

**Table 1 WJP Rule of Law Index Summary table<sup>36</sup>**

	2015		2016		2017-2018		2019	
	Overall score	Constraints						
Hungary	0.58	0.49	0.57	0.46	0.55	0.44	0.53	0.41
Russia	0.47	0.39	0.45	0.4	0.47	0.39	0.47	0.45
Turkey	0.46	0.37	0.43	0.32	0.42	0.3	0.42	0.32
Singapore	0.81	0.76	0.82	0.75	0.8	0.7	0.8	0.69

*The rating ranges from 0 (weaker adherence to the Rule of Law) to 1 (stronger adherence to the Rule of Law)*

*Source: author based on the website of the WJP*

### **1.3. When the matter of degree becomes the matter of kind**

On the other hand, Singapore, which features aspects of authoritarian constitutionalism, obviously performs better than Hungary at the WJP Rule of Law Indexes. According to the EIU Democracy Index and the reports of Freedom House (Table 2), however, it does not do the same in other fields. The reason is that in authoritarian constitutionalism, liberal freedoms are protected at an intermediate level, elections are reasonably free and fair, and there is a normative commitment to constraints on public power. Against this background, Tushnet differentiates between the abusive constitutionalism of Hungary and authoritarian constitutionalism in Singapore. He speculates that the ‘normative commitment to constraints on public power’, which he extracted from the ‘description of how constitutionalism operates in Singapore, might be a truly distinguishing characteristic of authoritarian constitutionalism’.<sup>37</sup> This claim is supported by the WJP Rule of Law Index as well: Singapore’s overall score is around 0.8, and it scores in the subcategory of constraints on government power between around 0.7 (with a range of 0.77 and 0.69), which makes it a better performer than Hungary (Table 1). If we have a look at the other indexes, measuring democracy and human rights, on the other hand, Hungary still performs better. According to the EIU Democracy Index (2006-2016), which designates countries as full democracies if they score between 8 and 10, Hungary has been a flawed democracy,<sup>38</sup> Turkey has been a hybrid state,<sup>39</sup> while Russia transformed from hybrid to authoritarian (2011), and Singapore has gradually upgraded from hybrid to flawed democracy (2014). In the analysis by Freedom House, Hungary scores 70, while the aggregate scores of the other countries are: 20 (Russia),

<sup>36</sup> Venezuela is not indicated as it finds itself at the bottom of the lists with its overall score of 0.32 from 2015 and 0.28 from 2019. Javier Corrales argues that Venezuela’s shifting from competitive authoritarianism towards authoritarianism has been facilitated by of authoritarian legalism. J Corrales, ‘The authoritarian resurgence: autocratic legalism in Venezuela’, 26 *Journal of Democracy* (2015) 38.

<sup>37</sup> M Tushnet, ‘Authoritarian constitutionalism’, *Harvard Public Law Working Papers No 13-47* (2013) 72.

<sup>38</sup> A flawed democracy respects civil liberties, free and fair elections but has significant weaknesses in other aspects, such as media freedom, low participation, and problems in governance.

<sup>39</sup> In hybrid regimes, there is a certain degree of pluralism but with an often harassment of journalists, a non-independent judiciary, and there are substantial electoral irregularities, including government pressure on opposition parties.

31 (Turkey), 51 (Singapore); Hungary and Singapore are labeled as partly free, while the other two states are not considered to be free.<sup>40</sup>

**Table 2 Indexes – Summary table**

	<b>EIU Democracy Index</b>	<b>Freedom House 2019</b>			
	2006-2016 (from-to)	Aggregate score (.../100)	Political rights 1-7 (1=most Free, 7=least Free)	Civil liberties 1-7 (1=most Free, 7=least Free)	Freedom rating 1-7 (1=most Free, 7=least Free)
Hungary	7.53-6.72	70	3	3	3
Russia	5.02-3.24	28	7	6	6,5
Turkey	5.7-5.04	41	5	6	5,5
Singapore	5.89-6.38	85	4	4	4

*Source: author*

#### **1.4. Adding some qualitative distinction**

Qualitatively, Hungary accommodated (liberal) constitutionalism for a while, unlike, for instance, Singapore or Venezuela – other countries with which they are usually mentioned together. It seems to be difficult to dismantle a substantive constitutional democracy completely: it must take time.

Without going into details about how the party system looks (e.g., in Singapore and Russia), how elections are manipulated not only by regulatory means (Russia and Turkey), how free speech is infringed by harassment and bringing criminal charges based on bogus allegations, and using violence (Singapore, Russia and Turkey),<sup>41</sup> it seems to be evident that there is not only a quantitative, but also a qualitative difference between Hungary, on the one hand, and Russia, Turkey, and even Singapore, on the other. Nevertheless, it is also true that the Singaporean type of ‘normative commitment to constraints on public power’ is, to a certain extent, absent in Hungary.

Nevertheless, there is a weak but tacitly existing constitutional constraint on public power, which exists because of EU law, even though it has partly failed: its value defense mechanisms have not worked so far. The mere existence of EU law and its admittedly flawed implementation at the legislative level by the everyday application by adjudication bodies, may have influenced and kept away the illiberal politicians from leading their countries into authoritarianism even faster. Illiberal constitutionalism must respect EU law to a certain extent, which apparently functions as an internal and implied constraint. This type of constraint only exists within the EU. Thus, it follows that the new system in Hungary could be labeled neither a (modern) authoritarian regime nor authoritarian constitutionalism.

#### **2. ... neither populist constitutionalism**

Populist constitutionalism, which seems to be advocated by, for example, Paul Blokker and Jan Werner Müller,<sup>42</sup> is not considered to be a legal concept, but mainly a sociological

<sup>40</sup> <https://freedomhouse.org/report/countries-world-freedom-2019>

<sup>41</sup> <https://freedomhouse.org/report/freedom-world/2019/singapore>, <https://freedomhouse.org/report/freedom-world/2019/turkey>, <https://freedomhouse.org/report/freedom-world/2019/russia>

<sup>42</sup> See e.g., Blokker, n 16; JW Müller, ‘Populism and constitutionalism’, in C Rovira Kaltwasser et al, eds, *The Oxford Handbook on Populism* (Oxford 2017); P Blokker, ‘Populist Constitutionalism, Popular Engagement,

phenomenon. As such, it is a sociological characteristic of the constitutional system, and it forms the sociological basis for either an illiberal or an authoritarian regime. Populism is a political program, movement, ideology or worldview, or a governing style. It is also viewed as a form of extreme majoritarianism, being democratic but not liberal democratic, a critique of elites and a claim to be the sole, authentic representative of a single, homogenous, authentic people.<sup>43</sup> It could lead to authoritarianism,<sup>44</sup> but ‘bad’ populism, a demand for popular hegemony, should be distinguished from ‘good’ populism, a critique of the under-inclusiveness and underrepresentation.<sup>45</sup> It just follows that ‘populist constitutionalism’ is, again, a contested concept, which, instead of describing a distinct form of constitutionalism, indicates a ‘populist approach to constitutionalism’<sup>46</sup> and constitutions.<sup>47</sup> The ideology and governing style of the leader are at the core of ‘populist constitutionalism’ – this makes it more of a sociological than a legal phenomenon. The populist attitude of rulers is a tool to gain popular support in order for them to govern effectively and so achieve their policy goals, whether ‘bad’ or ‘good’. Nevertheless, they still need to peacefully, and with the support of the people, transform the system through legal measures, such as by adopting a new constitution, and by introducing, e.g., retrograde abusive amendments, as was the case in Hungary. It leads us to the investigation of other terms, such as abusive constitutionalism, abusive legalism, and autocratic legalism.

### 3. Differentiation from other terms of constitutionalism having various adjectives

Abusive constitutionalism cannot be regarded as a separate type of constitutionalism for two reasons. First, it simply means the use of mechanisms of constitutional change to erode the democratic order<sup>48</sup> (as happened in Hungary<sup>49</sup>), and seems to be contrary to ‘the orthodox view of constitutionalism’ which, besides being a complex of liberal ideology and practice, requires effective constraints on public power.<sup>50</sup> Second, abusive constitutionalism is, among other things, about the successful use of unconstitutional constitutional amendments – the constitution thus does not bear any constraint on the public power. If it is combined with a populist leader, the term ‘populist constitutionalism’ can also be criticised on this very account.

Both abusive legalism and autocratic legalism, similarly to abusive constitutionalism, refer to the use of law by autocratic leaders in a particular constitutional system. Abusive legalism, as Cheung describes it, has been made use of in Singapore and Hong Kong, where the ordinary

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and Constitutional Resistance’, <https://reconnect-europe.eu/blog/blokker-populist-constitutionalism/>, 7 February 2019.

<sup>43</sup> See <https://www.britannica.com/topic/populism>; Dem Dec Concept Index, Populism, <https://www.democratic-decay.org/index>; P Norris, ‘Is Western democracy backsliding? Diagnosing the risk’, 28(2) *Journal of Democracy* (2017) 14-15; C Mudde and C Rovira Kaltwasser, *Populism: a very short introduction* (Oxford University Press 2017) 34; JW Müller, *What is populism?* (University of Pennsylvania Press, 2016) 3, respectively.

<sup>44</sup> Mudde and Kaltwasser, n. 44, 34; Norris, n. 44, 15.

<sup>45</sup> R Howse, ‘Populism and its enemies’, *Workshop on Public Law and the New Populism*, Jean Monnet Center, NYU Law School (15-16 September 2017).

<sup>46</sup> It seems to be evident from scholarly works, even if authors do not explicitly admit it. See e.g., Blokker, n 16, n. 43 and Müller, n 43.

<sup>47</sup> D Landau, ‘Populist constitutions’, 85 *The University of Chicago Law Review* (2018) 521.

<sup>48</sup> Landau, n 18.

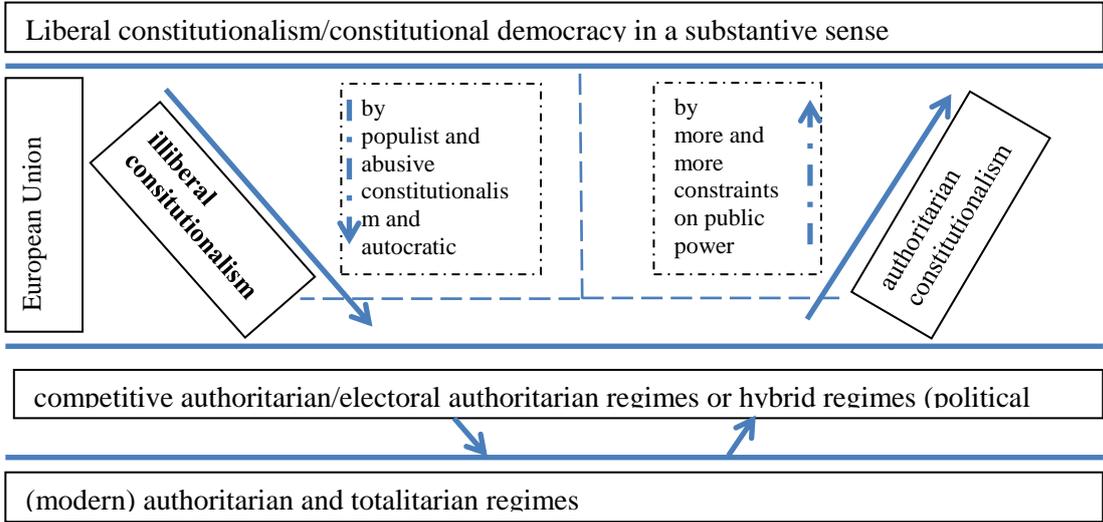
<sup>49</sup> T Drinóczi, ‘Constitutional politics in contemporary Hungary’, 1 *ICL Journal* (2016) 63-98.

<sup>50</sup> Frankenberg, n. 25, 7; W Waluchow, ‘Constitutionalism’, in EN Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>; R Bellamy, ‘Constitutionalism’, <https://www.britannica.com/topic/constitutionalism>

law is used in a way that seems to be consistent with the formal and procedural aspects of the rule of law to frustrate the rule of law and consolidate power.<sup>51</sup> Autocratic legalism in Venezuela, according to Corrales, embodies the use (enacting laws empowering the executive), abuse (inconsistent and biased implementation of laws) and non-use of the law in service of the executive branch.<sup>52</sup> Scheppelle uses the term to describe how consolidated democracies are transforming into ‘autocratic constitutionalism’, i.e., how ‘legalistic autocrats’ use mainly constitutional law to hollow out the democratic system, not only in Hungary but in Turkey as well. She also depicts the methods and tactics they borrow from one another.<sup>53</sup>

All of these terms and their conceptualisation offer a valuable contribution to the description of how illiberal constitutionalism or degradation to an authoritarian system (Venezuela) has been achieved, but say little about what the created systems are.

**Figure 1 Illiberal constitutionalism in comparison**



Source: author

Hungary stands out from the states that find themselves in a state of democratic decay and is noticeably different from the existing authoritarian regimes. Again, it is not claimed at all that there are not increasing authoritarian tendencies in Hungary. What is asserted here is that this country is not there yet, mainly because it is still a member of the European Union which, notwithstanding its failures, imposes a particular political, and rather weak legal, constraint on the Hungarian political leadership. The following points elaborate on this.

**III. The EU law and the European Rule of Law as an internal constraint on domestic public power**

**1. Towards a European Rule of Law concept – two levels and two approaches**

Hungary, one of the two renegade Member States of the EU, cannot be charged with fully respecting the Rule of Law as enshrined in their respective constitutions and the TEU,

<sup>51</sup> A Cheung, “For my enemies, the law”: abusive legalism’, *Candidacy paper, JSD Program, NYU School of Law*, 15 January 2018.  
<sup>52</sup> Corrales, n 36. 38-43.  
<sup>53</sup> Scheppelle, n 17.

especially Article 2. It follows that the Rule of Law in the supranational constitutional system should be viewed as a triangle. The two sides adjoining at the top represent a twin legal obligation that is coming from constitutional rules and the EU law for a Member State to observe. They are based on the foundation which is the shared value and political ideal that derives from the common constitutional traditions of the European states.<sup>54</sup>

Consequently, the twin concept of the Rule of Law is supposed to have a core common and intertwined normative meaning, for both the EU and its Member States. As a political idea or value at both the supranational and national levels of governance, which is the foundation line of the triangle, it requires, at the very least, that no power is exercised arbitrarily with all of its implications touching upon the demand for respect<sup>55</sup> and protection<sup>56</sup> of the individual. Thus, when a Member State's compliance with the Rule of Law is questioned, the term represents the observance of a unique Rule of Law concept in a particular kind of constitutionalism. It is the Western-type of constitutionalism that has been accommodated by the Member States (nation-states), including Hungary (1989/1990) and the European Union (supranational community).<sup>57</sup>

It also translates to an applicable legal concept, which involves that the law binds all, including the state and the people as well. The need to obey the law would demand that the individuals are aware of the law, which is to be facilitated by the regulatory state. In this sense and to achieve these purposes, the Rule of Law calls for the fullest possible compliance by the state power with the rules of 'formal legality'. It presupposes the rule by law (power exercised via the law), the state action is subject to law, equality before and under the law and the adherence to certain core characteristics of the law (generality, publicity, predictability, clarity, etc.<sup>58</sup>).<sup>59</sup> 'Formal legality' needs to be enforced by the judiciary, including the constitutional courts; otherwise, this rather thin version of the Rule of Law loses its constraining power. During this process, it can receive different forms of interpretations and applications, such as respecting the legal hierarchy, giving the necessary time for preparation for a new regulation (congruence) and respect of legitimate expectations (predictability).

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<sup>54</sup> Similarly see G Palombella, 'Beyond legality – before democracy: rule of law in the EU two level system', in C Closa and D Kochenov, eds, *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge, 2016).

<sup>55</sup> Respecting the individual is the underlying idea of limiting the power. See Waldron, n 5, 59-60.

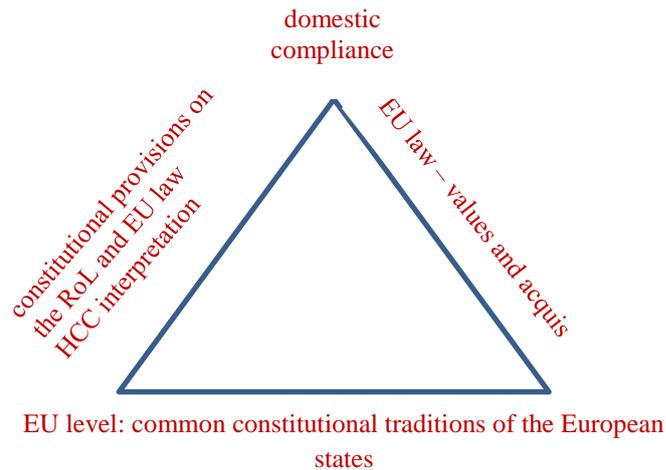
<sup>56</sup> Protection has to be an implied component of the prevention of the exercise of arbitrary power, otherwise the underlying idea itself become questionable.

<sup>57</sup> D Kochenov, 'The EU and the Rule of Law – Naïveté or a grand design?', *University of Groningen Faculty of Law Research Paper Series* No 5/2018. 10.

<sup>58</sup> For this, see L Fuller, *The morality of law* (Yale University Press 1969); Raz, n 2.

<sup>59</sup> With a reference to the theories of Raz, Fuller and Finnis, Moller uses this approach in Moller, n 33. 29.

**Figure 2 The European Rule of Law from the perspective of the national constitutional system**



In the domestic legal system, the national constitutions accommodate the EU law and direct state authorities to participate in the EU decision making process and demand the enforcement of EU law. When there is a suspicion that the Rule of Law is not entirely enforced in a Member State, it amounts to a violation of, first, constitutional norms on the ‘domestic Rule of Law’ and the so-called EU-clauses, and second, Article 2 TEU.<sup>60</sup> Therefore, the enforcement of these rules and compliance with the EU values is the task of national legislative authorities, adjudicative bodies, constitutional courts, and the EU itself. The observance, the maintenance, and the enforcement of the Rule of Law, as a political ideal, rests with the political community.

Implementation and application of EU law (acquis) have over the years become the daily practice of the Member States, including Hungary.<sup>61</sup> Challenges concerning the observance and the enforcement of the value system, including the Rule of Law, democracy, and human rights, on which the European integration project is based, have surfaced in the last decade, and triggered the attention of the EU institutions and scholars as well.<sup>62</sup> It has been informed by the cumulative effects of the rise of populist nationalism over Europe<sup>63</sup> and the very nature of the contemporary EU, which is neither a sheer loose community based on economic interest nor a (supranational) federation that could effectively interfere into the domestic affairs of its member states.

The domestic political community in Hungary could not resist populist nationalism and remains in support of the anti-Rule of Law politics which have successfully remodeled the Hungarian constitutionalism.<sup>64</sup> As a result, constitutional courts, which are supposed to

<sup>60</sup> See the explanation of the two levels concerning the Rule of Law in a supranational community at Palombella, n 54.

<sup>61</sup> M Varju, ‘A magyar jogrendszer és az Európai Unió joga: tíz év tapasztalata [The Hungarian legal system and the law of the European Union: experiences of ten years]’, In Jakab A and Gy Gajduschek, eds, *A magyar jogrendszer állapota* (MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet 2016) 143-171; Annual Reports on monitoring the application of the EU law, [https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law\\_en](https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en).

<sup>62</sup> See among others the books mentioned in n 3-7, the different rule of law mechanisms the EU has been experiencing with, such as the rule of law conditionality, the idea of strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement, and the new EU Framework to strengthen the Rule of Law (COM/2014/0158 final).

<sup>63</sup> It had either a weaker or an overwhelming effect on the population of the Member States

<sup>64</sup> Drinóczi and Bień-Kacała, n. 1.

protect constitutional principles, and other constitutional institutions, assist in implementing the anti-Rule of Law political agenda. Nevertheless, in some cases, the Hungarian Constitutional Court (CC) upholds its former Rule of Law interpretation, and, on other occasions, it expands it.<sup>65</sup> Some other constitutional actors, such as the ombudsman<sup>66</sup> or ordinary judges,<sup>67</sup> are successfully expressing efforts to maintain some core tenets of constitutionalism, including the observance of the Rule of Law.

The enforcement or non-enforcement of the Rule of Law as a value (or political ideal) and as a legal concept is equally complex and confusing at the EU level. Similarly to the national polities, the EU has been so far ineffective in ensuring that some Member States comply with its values and principles. There are many reasons for this: the first is the design of the EU that is based on the doctrine of delegated powers and mutual trust, and the second is that priority has always been given to the enforcement of the *acquis* and not to the values. Once a country becomes a Member State, the principle of mutual trust and the presumption that all the common values and principles are shared, implemented, and enforced by the Member States internally are activated. Therefore, value enforcement has still been looking for its best form and mechanisms,<sup>68</sup> but apparently cannot find the adequate tools to deal with the ideologically induced non-compliance.

The deviation from the EU *acquis* can also have rule-of-law implications, in terms of the applicable and enforceable formal legality, e.g., the rule via the law, legal hierarchy and other characteristics of the law. It includes the careless use of law, or random abuse of political power, which, however, can be corrected with time through the available enforcement mechanisms and the functioning of democracy in the Member State. The same applies to other types of defiance, such as infringing the provisions of the *acquis* by non-compliance through an error in judgement or interpretation and incorrect or non-timely implementation of a directive, and taking advantage of the fact that there are grey areas in, e.g., the economic regulations of the EU. None of these non-compliances is, however, confined to a particular regime.<sup>69</sup> In fact, despite its ‘business-as-usual-non-compliances’ and the systematic Rule of Law value-infringements, EU law still enjoys an everyday application by the ordinary courts in Hungary. Moreover, the annual transposition deficits do not outstandingly deviate from the actions of the other 27 Member States.<sup>70</sup>

## **2. Towards a European Rule of Law concept – the constraint power of the European Rule of Law on domestic decision-maker**

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<sup>65</sup> See eg, the decision 45/2012 (XII. 29) CC [the principle of constitutional legality, which is deduced from the Rule of Law provision, Article B), of the Fundamental Law (FL) binds the constituent power as well].

<sup>66</sup> The Hungarian ombudsman’s petitions to the CC have been considered admissible and the Court concurred with the ombudsman concerning the unconstitutionality of the restrictive use of the concept of marriage and family, and the extent of the critics politicians, among others, have to endure in the interest of the free formation of democratic public opinion. See decisions 14/2014 (V. 13.) and 6/2014 (III. 7.) CC, respectively.

<sup>67</sup> Hungarian judges extensively use the possibility of the preliminary ruling procedure. See eg, Varju, n. 61.

<sup>68</sup> See eg, n 7; Closa and Kochenov, eds, n 3.; L Pech and D Kochenov, ‘Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid’, *Policy Brief* (June 2019), <https://reconnect-europe.eu/news/policy-brief-june-2019/>.

<sup>69</sup> A Jakab and D Kochenov, ‘Introductory remarks’, in Dimitry Kochenov and András Jakab, eds, *The Enforcement of EU law and values edited by* (Oxford, 2017) 2-3., C Closa, D Kochenov and JHH Weiler, ‘Reinforcing rule of law oversight in the European Union’, *EUI Working Paper RSCAS 2014/75 Robert Schuman Centre for Advanced Studies Global Governance Programme*, 4.

<sup>70</sup> Varju, n. 61; Annual Reports, n 61.

Since Hungary's accession to the EU in 2004, the application of the EU law has become a daily practice for the ordinary courts. Regardless of the transformative reforms since 2010, EU law could have slowed down the degradation but, as Bozóki and Hegedűs observe, it is not easy to demonstrate through examples how the constraining function of the EU works in practice.<sup>71</sup> This is primarily because, first, recent research has focused on only the actions that have been made against the EU and international obligations,<sup>72</sup> and second, we might have never known about the original plan of the populist leaders and the reason why they gave them up.<sup>73</sup> What can be noted here is that there are some examples when the Hungarian decision-makers backed off.<sup>74</sup> On the other hand, there are scholarly analyses and Annual Reports of the European Union available which show the constitutional systems have accommodated the EU law in the last fifteen years.

The European Rule of Law, both as a principle and as a legal norm, requires that laws are obeyed, i.e., it demands compliance, implementation, and enforcement. For the Member States, it means that they have to comply with their domestic law as well as the EU law. As the EU institutions make the EU law, no populist leader can hijack the EU law and lawmaking process in the same way as they could do so with their national legislative and lawmaking authorities. Nonetheless, this European Rule of Law does not mean that it is powerful enough to circumvent any misuse of non-EU related domestic law or lawmaking process, or to prevent the populist national decision-maker from trying to avoid compliance with EU law. What it means, instead, is that the European Rule of Law can never be a mere instrument that is misused or abused by a national populist leader. As Palombella explained, the Rule of Law means a limitation of the domestic political decision-maker because there is another positive law (i.e., EU law) that the holder of the domestic rule-making power cannot manipulate and override. Moreover, the individual can report to the EU in order to contrast against domestic decision-making.<sup>75</sup> This makes the European Rule of Law already less thin as it does not only prescribes legal features:<sup>76</sup> it does ask for the domestic law to bear some specific content which would make it a 'good domestic law' informed by the political agenda and decisions reached by the EU Member States, it would demand enforcement mechanisms, such as a preliminary ruling procedure.<sup>77</sup> This latter procedure requires an independent judiciary with judges of anti-authoritarian attitudes,<sup>78</sup> who can make responsible decisions as the judge of the supranational entity.

It leaves us with three implications. First, the European Rule of Law as a value shall be viewed as a thick Rule of Law notion. The Hungarian Rule of Law situation (and admittedly the Polish, too) is a problem for the entire EU and its other Member States because the European Rule of Law as a value has been weakened across Europe due to the lack of successful enforcement. Second, the European Rule of Law in its thinnest legal sense means

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<sup>71</sup> Bozóki and Hegedűs, n. 19, 180.

<sup>72</sup> Admittedly, this paper does the same. For an overview, it is worth to have a look at Jakab A and Gajduscek Gy, eds, *A magyar jogrendszer állapota [The state of the Hungarian legal system]*, [https://jog.tk.mta.hu/uploads/files/A\\_magyar\\_jogrendszer\\_allapota\\_2016.pdf](https://jog.tk.mta.hu/uploads/files/A_magyar_jogrendszer_allapota_2016.pdf)

<sup>73</sup> For instance, there were rumors that the Fidesz when writing the new constitution, wanted to abolish the CC and locate the review function to one of the chambers of the Supreme Court.

<sup>74</sup> See e.g., the postponement of the introduction of the administrative court system in Hungary.

<sup>75</sup> Palombella, n. 54.

<sup>76</sup> Notes 58-59.

<sup>77</sup> Morten Broberg acknowledges that from a Rule of Law perspective the importance of the procedure is high, though it has not been designed to be an enforcement mechanism. M Broberg, 'Preliminary references as a means for enforcing EU law', in D Kochenov and A Jakab, eds, *The Enforcement of EU law and values edited by* (Oxford, 2017) 111.

<sup>78</sup> L Henderson, 'Authoritarianism and the Rule of Law', 66 *Indiana Law Journal* (1991) 396.

the already explained formal legality, which necessarily includes the regulatory and judicial enforcement of the EU law. The fact that a compliance with the value aspect cannot be secured because of distinct ideological differences between the actors (EU versus Member State), does not mean (yet) that the particular Member State does not comply with EU law at all, and thus disregard the compliance aspects of the European Rule of Law. The third is that the Rule of Law Checklist of the Venice Commission from 2016 could be used as a benchmark when assessing the Hungarian approaches to the European Rule of Law as a value.<sup>79</sup> The Rule of law Checklist mentions the criteria of equality, non-discrimination, and an independent judiciary, which maintains the constitutional supremacy and legality, legal certainty, prevention of abuse (misuse) power, and access to justice. The Rule of Law concept of the Checklist seems to embrace a more substantive understanding of the Rule of Law, as it fits the European or Western type of (liberal) constitutionalism the EU and the European states have nurtured.<sup>80</sup>

These features of the European Rule of Law provide a minimum or thin constraint on the public power of Hungary. Exactly this mechanism makes Hungary's system still a constitutionalist one. Thus, in this sense, the European Rule of Law compliance by the Member States should not be restricted to the study of Article 2 TEU (value-level) but to the application of EU law as well.

#### **IV. The European Rule of Law and illiberal legality in Hungary**

This point explores both the value-level and enforceable legal measure-compliance or *acquis-compliance*, *strictu sensu*, of Hungary. The revealing phenomenon is the illiberal legality which is conceptually different from that of the European Rule of Law. Nevertheless, similarly to it, it has two twin sides, i.e., a European and a domestic one. The value-level non-compliance with the European Rule of Law, which also implicates the disagreement of the political idea this concept represents, is summarised below according to the Rule of Law Checklist of the Venice Commission. The *acquis-compliance* is outlined by recalling the jurisprudence of the HCC on the domestic Rule of Law interpretation, and the application of EU law by the legislative and judicial powers in Hungary.

##### **1. Value level and political ideal – hollowing out the European Rule of Law**

In Hungary, having always been influenced by Prussian and German legal traditions, the German understanding of the rule of law has always informed the constitutional jurisprudence and the scholarly literature. Even the Hungarian equivalent of the rule of law [*jogállam*] is a literal translation of the German expression of *Rechtsstaat*. In the first 20 years, after the transition, there were no severe Rule of Law issues or suspicions that there was a systematic threat to the realisation of this principle in Hungary. The transition was a peaceful and smooth

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<sup>79</sup> Rule of Law Checklist (Adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016). Undoubtedly, the role and mission of the Venice Commission and that of the EU are different; but as they profess the same values, including the rule of law, they do cooperate. See e.g., the new EU Framework to strengthen the Rule of Law, n 7; W Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', 2 *EJIL* (2014) 595. It thus makes sense to use the already available Checklist.

<sup>80</sup> Even the ECJ seems to have thickened up judicial independence by the decision on the Polish judicial independence. MA Simonelli, 'Thickening up judicial independence: the ECJ ruling in Commission v. Poland (C-619/18)', <https://europeanlawblog.eu/2019/07/08/thickening-up-judicial-independence-the-ecj-ruling-in-commission-v-poland-c-619-18/>. This indirectly supports the view on the thick (European) understanding of the Rule of Law.

process,<sup>81</sup> assisted by the Constitutional Court. In 2004, Hungary joined the European Union. It meant that Hungary had fulfilled the Copenhagen criteria which, among others, include the adherence to the Rule of Law. As it is well known, difficulties emerged after the 2010 parliamentary election.

### **1.1. Legality and legal certainty – manipulating the constitution and upholding the law regardless of its content and spirit**

When the constitution can be changed according to the daily political interest of the leading political party (seven times in seven years), and when the Constitutional Court is packed, the supremacy of the constitution, as well as legality, is neither a political nor a legal reality. The FL, to a certain extent, has illiberal<sup>82</sup> content: it is divisive, and more ideological than neutral, provides a lower level of protection of some liberties than the previous constitution, it is not participatory and popular in terms of its creation but embraces a strong and exclusive majoritarianism, it provides for a weak constitutional protection due to the packing of the CC and impairing the independence of the prosecution and ordinary judiciary. These imply that both the content of the law and decisions of the courts and the CC that are in conformity with the FL might be ‘illiberal’, too.

The Hungarian law-making process is not inclusive but accelerated, poorly prepared, in terms of consultation and impact assessment, and ad hoc in nature.<sup>83</sup> These phenomena affect legal certainty, as well. Poorly drafted pieces of legislation cannot promote the stability and consistency and foreseeability of the law; frequent amendment of laws are necessary. Legitimate expectations are also frustrated, not to mention the disrespect of the prohibition on detrimental retroactive legislation in 2010 when the possibility of detrimental retroactive legislation became a constitutional rule. In this respect, during 2010-11, not even one of the most crucial, and never contested, components of the thinnest concept of the Rule of Law was observed in Hungary.

It also follows from the concept of illiberal constitutionalism that public authorities do comply with illiberal laws. They do so, eventually, even if the compliance with the particular piece of legislation, which might be a remnant of the previous constitutionalism<sup>84</sup> or has not been profoundly transformed due to the existing constraints on public power, is not in the interest of the regime. For that, they would need a court decision. However, even the right to access to court is used as an instrument to either widen the political playground or delay the enforcement of lawful interests and rights. Therefore, it does not matter if a court would instruct the state to comply with the law, eg in freedom of information cases. This compliance would not entail political harm, but it can proudly be said that the law was upheld, the courts rendered justice, the particular fundamental right could be, eventually, enforced.

The separation of power, in terms of personnel, seems to be missing in Hungary. Key positions are occupied by personal friends of the prime minister (or by their relatives), such as the Prosecutor General, who is supposed to be a *sui generis* independent actor, the President of the Republic, who is *ex lege* supposed to be a neutral head of state and who appoints

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<sup>81</sup> See e.g., M Bánkuti, G Halmai and KL Scheppele, ‘From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitutions’ in GA Tóth, ed, *Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law* (CEU Press 2012) 241-242.

<sup>82</sup> This content is not consistent with that of the teleological constitutions of post-liberal constitutionalism. Farinucci-Fernós, n. 8. 35-47.

<sup>83</sup> T Drinóczi, ‘Legislation in Hungary’, in H Xanthaki and U Karpen, eds, *Legislation in Europe-A Country to Country Guide* (Hart Publishing, forthcoming)

<sup>84</sup> For a concept of this see, Tóth, n. 14.

judges, the President of the National Judicial Office, the Chairperson of the Parliament, who determines and influences parliamentary procedures and how the opposition can exercise its oversight function and rights to participate in the debates.<sup>85</sup>

Exceptions in emergencies are not adequately regulated in Hungary<sup>86</sup> – which is another failure if we think about the Rule of Law Checklist. The scholarly literature has not been concerned about the introduction of the ‘crisis situation caused by mass migration’ in 2015; nonetheless, it raises serious questions. The first is that the ‘crisis situation’ pretends not to be an emergency, because it is not stipulated in the FL under the chapter on Special Legal Order, but it acts like one. It does give extra, and de facto unlimited, power to the government, unnecessarily and unproportionally limiting the liberties and violating the constitutional principles of criminal law. Secondly, it has been continuously extended since it expired for the first time although the extension has never had justifiable grounds as the statutory conditions of extension have never been met.<sup>87</sup>

## 1.2. Access to justice and judicial independence – compromised and centralized

The remodeling of constitutionalism and the Rule of Law in the field of judicial power have two distinct characteristics.

The first is that the remodeling is being made under the guise of reforms which appear to be necessary, and which sometimes meet the expectations of the wider public and professional community. The government addresses constitutional changes (the introduction of the Curia to replace the Supreme Court<sup>88</sup>), real structural matters (nomination of Constitutional Court judges<sup>89</sup> and the workload of ordinary courts<sup>90</sup>), and social issues (retirement age of judges<sup>91</sup>).

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<sup>85</sup> See eg the case of *Karácsony and Others v Hungary*, Application Nos. 42461/13 and 44357/13. The case originated in the imposition of fines on several members of the Hungarian parliament who had chosen to show their opposition to various new laws by ways other than through the traditional parliamentary speeches and submissions.

<sup>86</sup> T Drinóczi, ‘Special legal orders; challenges and solutions’, 4 *OsteuropaRecht* (2016) 420-437; T Drinóczi, ‘Central and Eastern European constitutional formulas: the abuse and observance of constitutions in times of emergency’, THE 10TH IACL-AIDC World Congress, Seoul, 2018 Workshop - Abuse of the Constitution in Times of Emergency, [https://www.researchgate.net/publication/335762469\\_Central\\_and\\_Eastern\\_European\\_constitutional\\_formulas\\_the\\_abuse\\_and\\_observance\\_of\\_constitutions\\_in\\_times\\_of\\_emergency/stats](https://www.researchgate.net/publication/335762469_Central_and_Eastern_European_constitutional_formulas_the_abuse_and_observance_of_constitutions_in_times_of_emergency/stats)

<sup>87</sup> The de facto situation of migration give reason for far less concern than it is communicated in the biased media and by political communication campaigns. Moreover, even though the reasons based on which the Government extends this situation are supposed to be publicly available as per the Freedom of Information Act, those who want to access them, i.e., media, different NGOs, need to bring the case before the court. The court proceedings, however, cannot restore the time wasted which gravely affects the efficiency of civil control mechanisms. More about it in T Drinóczi and Á Mohai, ‘Has the migration crisis challenged the concept of the protection of the human rights of migrants? The case of *Ilias and Ahmed v. Hungary*’, in E Kuźelewska; A Weatherburn, and D Kloza, eds, *Irregular migrations as a challenge for democracy* (Intersentia, Cambridge 2018) 97-112; Drinóczi, n 86 (2016), (2018).

<sup>88</sup> The FL changed the name of the Supreme Court to Curia. It eventuated the premature termination of the mandate of its president. Case *Baka v. Hungary* (application n 20261/12) indicated that Mr. Baka was removed because he, in his capacity as the President of the Supreme Court, publicly expressed professional opinion about the constitutional changes in Hungary.

<sup>89</sup> The new nomination rules for Constitutional Court judges introduced already in 2011 also addressed an existing challenge. Judges had been nominated by a parliamentary committee composed of an equal number of MPs from each parliamentary fraction (parity system) and elected by the two-thirds majority of the Parliament. This mechanism indeed made nominations impossible or degraded them to simple political bargaining, that is why this phenomenon needed to be addressed: the representation in the nominating committee was modified by

It might even come up with an idea of an otherwise supportable institutional change, such as the reform of the administration of justice in Hungary.<sup>92</sup> Nevertheless, the introduction of the criticised<sup>93</sup> administrative judiciary was, probably as a result of political pressure around the time of the European Parliament elections in the spring of 2019,<sup>94</sup> postponed.

The second feature is that by these reforms, on which the political power stubbornly insists until it is not in its interest anymore, the government compromises the primary constituent elements of judicial independence.

The threat of removal (the Baka and retirement case) could lead to chilling effects and self-censorship, which can not only affect the freedom of expression but the freedom of the judge to decide on cases without any undue influence. Transfer of cases can frustrate the right to access to court and the right to the assigned judge. Its temporary existence in the legal system, as it appeared in the FL in 2013 and previously in the Transitory Provisions to the FL (2012) is an example of opportunistic legislation. The reform on the administration of judiciary created a system in which all administrative decision concerning the court system is in one loyal hand, without effective oversight. It undoubtedly makes the administration easier and thus more efficient. In the meantime, however, the judges are helpless and, while some of them stay, others leave the bench. Some judges have chosen to speak out. They had submitted applications to senior management positions and have gone to court when the President of the NJO refused their application without any legal ground. Others have been elected to the NJC and, as members, try to make the President of the NJO accountable. Some of them have been initiating preliminary ruling producers asking the CJEU if a particular piece of Hungarian legislation, including the one jeopardising judicial independence, is compatible with EU law. As a result of these actions, it has become clear that the President of the NJO, apparently, cannot be held accountable for her unlawful appointment decisions in courts,<sup>95</sup> or removed by

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shifting from the parity system to the proportional representation that is the bigger fraction in the Parliament has more MPs in this committee.

<sup>90</sup> The President of the National Judicial Office (NJO) could assign cases on her own discretion. This type of transfer of cases was part of the FL between spring and autumn of 2013 (Fourth and Fifth Amendments). It was apparently used for political purposes under the pretense of structural reforms, i.e., easing the workload of the judiciary. See eg, the Opinion 663/2012 of the Venice Commission, and Drinóczi, n. 49.

<sup>91</sup> It led to the change in senior positions at courts, which is assumed to have been in the interest of the leading political power. This situation has substantially changed after neither the decision of the CJEU nor the subsequent legislation of the Hungarian government to make the laws compatible with EU law. See Decision 33/2012 (VII. 17.) CC and Case C-286/12 in which it was established that Hungary has failed to fulfil its obligations of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. To put it in a comparative perspective, it is curious that the Court in 2018 held that a similar Polish reform (targeting the lowering of the retirement age of judges of the Supreme Court) breaches the principles of the irremovability of judges and judicial independence. *Commission v. Poland* C-619/18.

<sup>92</sup> This reform was truly welcomed and affected the administration of judiciary by the NJO and its supervisory body, the National Judicial Commission (NJC). The reform, however, led to the arbitrary exercise and monopolization of power in the hand of the President of the NJO. The NJC, repeatedly, warned it in its report in February 2019 [11/2019. (II.06.) decision of the Commission] that many of the actions of the President of the NJO, such as decision on appointments, management positions, non-cooperation with the NJC, had been unlawful.

<sup>93</sup> Hungarian Helsinki Committee, 9 December 2018, <https://jogaszvilag.hu/napi/az-alkotmanybirosaghoz-fordul-a-kozigazgatasi-birosagok-miatt-az-ellenzek/>

<sup>94</sup> The Fidesz party's membership in the European People's Party (EPP) was suspended. <https://www.epp.eu/press-releases/fidesz-membership-suspended-after-epp-political-assembly/>.

<sup>95</sup> Even though the lower court held that the decision on a particular appointment to senior managerial position was unlawful, upper court decided that the President of the NJO cannot be sued.

the Parliament.<sup>96</sup> There are other domestic actions as well which intend to support her total impunity. In the summer of 2019, a judge, Csaba Vasvári, asked the CJEU if laws concerning, amongst other things, the position and actions of the President of the NJO who has been already criticised by many fora,<sup>97</sup> are consistent with EU law.<sup>98</sup> As Dániel G Szabó exposed, the Prosecutor General rapidly requested the Curia to review the reference with the possible effect of deterring other judges from asking similar questions.<sup>99</sup>

### 1.3. Equality is questionable and the abused (misused) power

There is always a justification for the Government's or the public administration's action. It is either the abused language of human rights with the claim that they interpret the law differently when they argue that something is just the opposite (e.g., freedom of information cases), or the continuous populist invocation of the popular will which makes the Fidesz party to win the past three elections with an overwhelming majority. When it is needed to speak louder about fundamental rights, in the interest of the regime, i.e., political leaders, the Fundamental Law is amended. The Seventh Amendment is a great example of a pure abuse of the language of human rights. It introduced a new restriction concerning how the right to peaceful assembly can be exercised. The new rules on limitation go way beyond the commonly accepted necessary and proportionality test and the 'peaceful nature' of a protest or any other public event. As a result, 'exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others'. The political goal was obvious: preventing demonstrations at the house of the prime minister, and claiming that the privacy of others enjoys prevalence over a political right that is exercised occasionally and has to be peaceful anyhow, under any circumstances.<sup>100</sup>

## 2. Enforceable legal measure compliance

### 2.1. Jurisprudence of the HCC in the first twenty years

During the first two decades, the HCC continued to develop its doctrine on the Rule of Law, mainly when exercising the constitutional interpretation and the ex-post norm control<sup>101</sup> competence, which later was an *actio popularis* procedure. The HCC, based on Article 2 of the Constitution ('independent and democratic state of the rule of law' [*független és demokratikus jogállam*]), made the following conceptualisation and considered the elements

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<sup>96</sup> In June 2019, the NJC initiated the removal of the President of the NJO at the Parliament due to the continuous abuse of power. The Parliament voted against the notion. [https://birosag.hu/hirek/kategoria/birosagokrol/az-orszaggyules-megerositette-hivatalaban-az-obh-elnoket?\\_ga=2.265817423.1326036992.1568874584-167214665.1568874584](https://birosag.hu/hirek/kategoria/birosagokrol/az-orszaggyules-megerositette-hivatalaban-az-obh-elnoket?_ga=2.265817423.1326036992.1568874584-167214665.1568874584)

<sup>97</sup> See eg, European Association of Judges (Report on the fact-finding mission of the EAJ to Hungary, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>) and the European Council (Recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary.

<sup>98</sup> Dániel G Szabó, 'A Hungarian Judge Seeks Protection from the CJEU – Part I', <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/>.

<sup>99</sup> Ibid.

<sup>100</sup> Article VI(1) FL reads as follows: Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.

<sup>101</sup> The *actio popularis* character of ex post norm control guaranteed that the legislative organs did not merely have to fear annulment in case of unconstitutionality but they also had to consider the fact that virtually anybody might control their activity and set in motion the abstract ex post constitutional review mechanism.

collected below as either the ‘constituent parts of the Rule of Law’ or the ‘requirements that follow from the Rule of Law’.

In 1990, the Court said that the rule of law in the Constitution is to be interpreted in a formal sense; if there is a substantive issue at hand; other constitutional provisions apply except when there is none. Article 2 can be directly applicable only in the absence of other applicable constitutional provisions.<sup>102</sup> In 1991 it added that the principle of the Rule of Law is not a secondary rule but an independent constitutional norm the violation of which, in itself, can amount to the unconstitutionality of laws.<sup>103</sup> The Court also attributed a value-content to the Rule of Law when it defined it as a fundamental value of Hungary<sup>104</sup> which aims at the restriction of state intervention into the private lives of individuals and legal persons.<sup>105</sup> Legal certainty, which was identified as the most crucial component of the Rule of Law,<sup>106</sup> also requires that no arbitrary decision be made during any exercise of power by the state and its organs or representatives.<sup>107</sup> Legal certainty also demands that the whole body of the law, its specific parts, and provisions be clear, unambiguous, their impact predictable and their consequences foreseeable by those to whom the laws are addressed. The prohibition of detrimental retroactive legislation is also a component of legal certainty.<sup>108</sup> Legal certainty embodies the protection of already acquired rights too, which includes some entitlements of the social security system and already granted fixed-termed tax allowances, etc.<sup>109</sup> The provision of an ‘appropriate *vacatio legis*’ is also connected to the rule of law and legal certainty. If it is not observed and its lack is ostensive or heavily jeopardize or violates the Rule of Law the particular piece of legislation is deemed to be unconstitutional.<sup>110</sup> The law is also unconstitutional if it violates the legal hierarchy, which is also viewed as one of the guarantees of legal certainty.<sup>111</sup>

In some cases, the CC was ready to apply a thicker Rule of Law concept and justify its violation by referring to some value contents or neighbouring notions, such as democratic

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<sup>102</sup> Decision 31/1990 (XII. 18.) CC

<sup>103</sup> Decision 11/1992 (III. 5.) CC

<sup>104</sup> Ibid.

<sup>105</sup> Decision 32/1991 (VI. 6.) e CC

<sup>106</sup> E.g., decisions 25/1992 (IV. 30.), 35/1994 (VI. 24.), 43/1995 (VI. 30.) CC

<sup>107</sup> E.g., decision 35/1994 (VI. 24.) CC. An administrative reform is to be deemed unconstitutional if it intends to accomplish the reforms by hollowing-out or deliberately setting aside the guarantee-rules of the Constitution. E.g., decision 131/2008 (XI. 3.) CC

<sup>108</sup> E.g., decisions 25/1992 (IV. 30.), 35/1994 (VI. 24.), 43/1995 (VI. 30.) CC

<sup>109</sup> E.g., decision 43/1995 (VI. 30.) CC. T Drinóczi and G Juhász, ‘Social rights in Hungary’, in Krzysztof Wojtyczek, ed, *Social rights as fundamental rights: XIXth International Congress of Comparative Law/le XIXe Congrès international de droit compare* (The Hague, The Netherlands, Eleven International Publishing, 2016) pp. 171-206.

<sup>110</sup> E.g., decisions 34/1991. (VI. 15.), 25/1992. (IV. 30.), 10/2001. (IV. 12.) CC. In certain cases, the Court was satisfied with a ‘minimum *vacatio legis*’ but it did annul Acts because ‘appropriate *vacatio legis*’ as explained above was not ensured. E.g., decisions 43/1995. (VI. 30.), 44/1995. (VI. 30.) CC. Pap Imre, ‘A jogbiztonság formai eleme: a kellő felkészülési idő követelménye’ [Formal component of the rule of law: The requirement of an appropriate *vacatio legis*], 1 *Kodifikáció* (2013) 14.

<sup>111</sup> Decision 142/2010. (VII. 14.) CC.

legitimacy,<sup>112</sup> effective exercise of constitutional powers and good faith,<sup>113</sup> and the separation of powers.<sup>114</sup>

The Court interpreted Article 2 of the Constitution widely and took the opportunity to deduce other principles and rights from the constitutional principle of the Rule of Law. It could easily do it as, firstly, it viewed itself as a guarantor of the constitutional and Rule of Law revolution. Secondly, based on the competences under the Constitution, it could straightforwardly come up with interpretation and enforcement of the Rule of Law. Even if the term remained the same in Article B) of the FL, circumstances have been changed since 2012.

## 2.2. Narrowed applicability of the Rule of law by the HCC since 2010

Balázs Szalbot<sup>115</sup> gives an overview of how the application of the Rule of Law principle has been changed under the FL and after the considerable restriction of the ex-post norm control power of the CC and the introduction of the new constitutional complaint procedure. Pursuant to these new rules, the Court can, for the first time, review the constitutionality of judicial decisions, and does not have a freedom to consider ex-post norm control initiative from anybody but only those who are entitled to do so, i.e., the Government, by one-quarter of the Members of Parliament, by the ombudsman, by the President of the Curia (supreme court) and by the Prosecutor General.<sup>116</sup> The workload of the CC changed; the vast majority of its cases now are based on a constitutional complaint against a judicial decision.<sup>117</sup> These types of constitutional complaints are admissible if an infringement of ‘a right ensured by the Fundamental Law’ can successfully be claimed. Thus, the CC, under the new regime, has to decide whether petitioners can invoke an infringement of the Rule of Law principle in the constitutional complaint procedure. In other words, the question becomes: whether the constitutional principle of the Rule of Law is enforceable at all in the Hungarian legal system. The possibility for the Court to continue its earlier fertile practice, under which the enforceable ‘rights ensured by the Constitution’ was deducible from the principle of the Rule of Law and appeared in a non-taxative manner,<sup>118</sup> has been narrowed down. In the new jurisprudence, the principle of the Rule of Law [Article B) of the FL] is enforceable only if the legislative power does not observe two criteria. The first is the prohibition of the detrimental retroactive legislation, and the second is the ‘appropriate *vacatio legis*’. Consequently, in a procedure that alleges an infringement of ‘a right ensured by the FL’ by a

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<sup>112</sup> The violation of procedural rules of decision-making, i.e., the disrespect of different majority rules or legally prescribed consultation, may amount to its unconstitutionality. E.g., decisions 16/1998 (V. 8.) and 30/2000. (X. 11.) CC. The Court, however, has rarely annulled an Act based on the failure of consultation. Drinóczi, n. 85.

<sup>113</sup> The requirement of exercising powers of constitutional importance effectively and in a good faith and the cooperation between state organs also stem from the principle of the rule of law. E.g., decisions 8/1992 (I. 30.), 12/2006 (IV. 24) CC.

<sup>114</sup> The Constitution did not have any explicit provision on the separation of powers, therefore the CCT, already in 1993, declared it as a constituent part of the Rule of Law, and one of the most significant criteria of substantive constitutionalism. E.g., decision 38/1993 (VI. 11.) CC.

<sup>115</sup> Balázs Szalbot, ‘Jogállamiság mint Alaptörvényben biztosított jog [The rule of law as a right guaranteed by the Fundamental Law]’, 4 *Arsboni* (2015) 17-25. This below discussion is based on his findings.

<sup>116</sup> Arts 27 and 24 and 24/A of the Act CLI of 2011 on the CC. It seems to be highly unlikely that the Government or the Prosecutor General, who is seen as a loyal public servant of the Fidesz Party, most particularly the prime minister (<https://hungarianspectrum.org/2016/05/16/viktor-orban-and-his-protector-peter-polt-the-prosecutor-general/>) would initiate the process.

<sup>117</sup> As a rough estimation, it can be reported that the ex post norm control cases form around 5-6%, procedures in which the constitutionality of a piece of legislation is examined form around 25% of the number of the constitutional complaint procedures initiated against a judicial decision. See more about statistics at <https://hunconcourt.hu/statistics/>.

<sup>118</sup> Decision 1140/D/2006 CC.

judicial decision, which constitutes the majority of the cases of the CC, the violation of these requirements cannot even be claimed.

### **2.3. Instrumental use of the Rule of Law by the HCC since 2010**

The Constitutional Court in 2012 and 2013 managed to use the Rule of Law in the widest sense imaginable when it decided on the unconstitutionality of the Transitory Provisions,<sup>119</sup> and then completely forgot about it when it declined to review the constitutionality of the Fourth Amendment. Both show a tendency of instrumental use of the concept but with contrary purposes.

Referring to the substantive concept of the Rule of Law which also binds the constitution-making power was a heroic but quite arguable attempt to set aside the Transitory Provisions (adopted 31 December 2011; TP) from the legal system. In the decision 45/2012 (XII. 29), the CC annulled certain provisions of the TP, which later become the subjects of the infamous Fourth Amendment. The Court stressed the uncertain nature of the TP in terms of legal hierarchy. Despite its texts and adoption process, the Court refused to view the TP as an expression of the will of the constituent power. If the CC had done so it would not have been able to review and partially annul it.<sup>120</sup> In its effort to annul the TP, the Court defined some constitutional requirements which even the constituent power has to respect. It deduced these requirements from Article B) of the FL which defines Hungary as an ‘independent and democratic state of the rule of law’ [*független és demokratikus jogállam*]. In this decision, the Rule of Law possesses all its previously deduced components and even much more: it binds the constitution-making power as well as involves the following new requirements. First, a state must have only one constitution so that the constitutional content can easily be detected (rejecting the *de facto* reality of the idea that the TP is a constitution, too). Second, all modifications to a constitution shall be incorporated into its text. Third, provisions to be adopted as a part of the text shall be of constitutional importance and a coherent fit. The new provisions should also not be contradictory to one another. Fourth, extraconstitutional rules that appear at the supranational and international level shall be present in the constitutional texts as it is required by the concept of constitutional legality. The Court warned that in certain situations it would review the realisation of the substantive elements of the ‘democratic state of the rule of law’. It also noted that the level of the realisation of the Rule of Law could not be reduced. All these implied a possibility of a future substantive review of constitutional amendments, even in the absence of the power to do so. To avoid such a review, the Fourth Amendment explicitly allowed the Court to conduct a formal review, which means that its substantive version is constitutionally excluded. Thus, when it was called for examining the Fourth Amendment and applying the understanding of the Rule of Law it developed in its decision from 2012, it declined. The CC claimed that a *de facto* substantial review on the Fourth Amendment was requested and it did not have the power to conduct this type of review on constitutional amendments.<sup>121</sup>

### **2.4. Application of the EU law by legislative and judicial power in Hungary**

Against this background, it seems to be challenging to argue that there still exists a constraint on domestic political power. Two considerations can help in this respect. The first is that the

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<sup>119</sup> Circumstances of the case see in Drinóczi, n 49, 63-98.

<sup>120</sup> The CC at that time did not have any competence to review the act of the constituent power, in any way. T Drinóczi, F Gárdos-Orosz, and Z Pozsár-Szentmiklósy, ‘Formal and informal constitutional amendment in Hungary’, in M Sellers, ed, (Springer, forthcoming).

<sup>121</sup> *Ibid.*

constitution ‘locks in’ European law and international minimum standards.<sup>122</sup> The second is the operation of the European Rule of Law. Therefore, we should be interested in the actual practice of EU law in Hungary, and the way it could be seen as a constraint on public power. This claim needs to be coupled with quantitative figures and qualitative analysis.

Moreover, the ongoing Art 7 TEU procedure cannot be overlooked at all. It itself visibly manifests the undoubtedly changing character of Hungarian constitutionalism, including the Rule of Law concept. It is, however, proposed that it is not only Art 2 TEU that invites the observance of the Rule of Law. Our horizon needs to be more comprehensive and consider the entire EU acquis and its enforcement mechanism which poses an internalised non-national, i.e., supranational constraint, constraints on the power of the Member States. Admittedly, this constraint is weak and might be criticised as non-effective on the ground that it cannot do anything with ‘how’ the power is exercised. It, however, does not alter the fact that it is there. This type of non-compliance of a particular Member State can deteriorate as compared to other Member States, but unless the Member State in question completely refuses to comply with EU law, the constraint on ‘what’ to legislate is there.

#### **2.4.1. Quantitatively...**

From a quantitative perspective, an overview of the Annual Reports of the EU on the monitoring the application of the European Union Law between 2015 and 2018<sup>123</sup> makes us realise that Hungary is not the worst in terms of compliance amongst the EU28. The Annual Reports on the EU28 differentiates between new infringements cases by the Member States on 31 December of a particular year and the number of infringement cases on 31 December of a particular year. This latter is further divided into infringements for incorrect transposition and/or bad application of EU laws and late transposition infringements for the years of 2015 and 2016. Since 2017, the new late transposition infringement cases are shown separately, and in 2018 the total infringement cases are breakdown not only to the incorrect transposition and/or bad application of EU laws and late transposition infringements but infringements for regulations, treaties, and decisions as well. In neither of these categories can one find Hungary at the end of the diagram, i.e., amongst the worst performers. If we divide the EU28 into four quarters in the diagram used by the Annual Reports (running from the least to the most number of cases of non-compliance), Hungary is placed, with some exceptions,<sup>124</sup> either at the end of the second or at the beginning of the third quarter. It is curious that when it is about the new category (infringement for regulations, treaties, and decisions), Hungary is placed at the beginning of the second half of the scale.

#### **2.4.2. Qualitatively...**

When studying the Hungarian EU law compliance up to 2015, Márton Varju<sup>125</sup> found that the degree of compliance is generally appropriate, even if the data concerning the adjudication is scarce. He detected technical problems at both the lawmaking and adjudication area, such as late implementation, or when the details of implementation do not get adequate attention, or

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<sup>122</sup> T. Ginsburg, ‘Locking in Democracy: Constitutions, Commitment, and International Law’, 38 *New York University Journal of International Law & Politics* (2006) 757; A Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organizations* (2000) 243-244.

<sup>123</sup> Annual Report, n 61.

<sup>124</sup> New infringement cases in 2016 (beginning of the last quarter part of the diagram); new late transposition cases in 2017 and 2018 (in the first quarter of the diagram), late transpositions in 2017 (having the second least cases).

<sup>125</sup> Varju, n. 61, 142-164.

when there is an error in the judgments of the courts. The more substantial issues primarily relate to the field of economic regulations, where the opportunities the grey zone of the EU economic policies offer are profoundly taken advantage of. Varju is hesitant as to whether the Hungarian non-compliance situation is a trend or systematic deficiency or still stays in the realm of inadequacy. He acknowledges, however, that there are many examples of Hungarian regulatory opportunism, regulatory bad faith, and obstruction of the compliance with EU obligations. In his view, in many cases, it is not the regulatory goal that is to be criticised but the methods of their achievements, and the further consequences of the enforcement of the particular regulation. There is often a bad faith in how the infringement procedures are handled: the postponement of compliance facilitates the maximisation of the advantages originating from the violation of the EU law for personal gain. He opines that the outstanding performance of the Hungarian judges in the field of the preliminary ruling procedure, especially after 2010, is the consequence of the embeddedness of the EU law in the Hungarian legal system. He suggests that this performance could also be due to the non-compliance of the lawmaker. This latter opinion, however, does not seem to be supported by the statistics provided in the Annual Reports. The number of cases has shown significant variability in none of the categories between 2011 and 2018. The number of infringement cases open at the end of the year varied between 54 (2011) and 50 (2018) with a peak of 57 (2016); the least case number was 37 (2013). The number of new late transposition infringement cases varied between 70 (2011), which was the peak, and 11 (2018), which also means the least case number. A drastic drop happened in 2012 (case number 26). The number of late transposition infringement cases varied between 16 (2013) and 17 (2018), with a peak of 32 (2016); the least number of cases was 13 (2015).

**Table 3 Number of infringement cases in Hungary 2011-2018**

	2011	2012	2013	2014	2015	2016	2017	2018
<b>Infringement cases open as of 31 December</b>	54	42	37	44	38	57	48	50
<b>New late transposition infringement cases</b>	70	26	21	26	17	36	13	8
<b>Late transposition infringement cases</b>	-	-	16	18	13	32	15	17

*Source: author, Annual Reports*

It can be concluded that as far as the value-oriented Rule of Law is concerned, that Hungary performs poorly due to its remodeled constitutionalism, but, at the same time, as a Member State, Hungary's compliance rate positions it as an average performer.

## **V. Towards a theory of illiberal legality as a version of the European Rule of Law in illiberal constitutionalism – a conclusion**

The findings of this paper can be summarised and concluded in four points.

### **1. Context – illiberal constitutionalism**

This paper has argued that Hungary had remodeled its constitutional system and which is proposed to be called illiberal constitutionalism, which is viewed as a distinct type of constitutionalism. Illiberal constitutionalism is conceptualised as the functioning of a public power that upholds the main constitutional structure but, while lacks normative domestic constitutional commitment to constraints on public power, it, to a certain extent, still remains within the boundaries set by EU law and politics as well as international minimum requirements.<sup>126</sup> Therefore, illiberal constitutionalism, which is still hosted within the

<sup>126</sup> This paper did not investigate this matter.

European Union, is both qualitatively and quantitatively different from other types of constitutionalism, e.g., authoritarian constitutionalism or the modern authoritarian regimes. This paper also expressed the difference between illiberal constitutionalism and populist, abusive constitutionalism, and autocratic legalism.

In illiberal constitutionalism, each element of a liberal democracy, such as the rule of law, democracy, and human rights, is observable, not one is missing, but no such element prevails in its entirety. This paper interrogated how the Rule of Law can be conceptualised in illiberal constitutionalism, particularly in Hungary.

## **2. Context – the European Rule of Law**

This paper found that a European Rule of Law concept needs to be developed as opposed to and supplementing, but not challenging, the views that the Rule of Law is a common-sense and, as such, its thin version shall be used, mainly because the approach towards and theory of the Rule of Law in contemporary Hungary has lately been deviating from the European understanding of the concept. The European Rule of Law is conceptualized as a unique, more substantive understanding of the Rule of Law that has emerged as a common European heritage, value, and principle. It describes how the Rule of Law can be conceptualised in a supranational constitutionalism and emphasises its distinct nature from other Rule of Law concepts that demands universal applicability.

The European Rule of Law is viewed as a principle and as a legal norm, and it requires that laws are obeyed, i.e., it demands compliance, implementation, and enforcement. For the Member States, it means that it has to comply with its domestic law as well as EU law. Thus, the European Rule of Law, in both at the European and domestic arena, is necessarily a less thin (or a thick) concept as it does not only prescribes formal and legal features.

It does ask for the domestic law to bear some specific content which would make it a ‘good domestic law’ informed by the political agenda and decisions reached by the EU Member States.

It would also demand a kind of enforcement mechanism, such as the preliminary ruling procedure. This latter requires an independent judiciary with judges of anti-authoritarian attitudes who can make responsible decisions as the judge of the supranational entity.

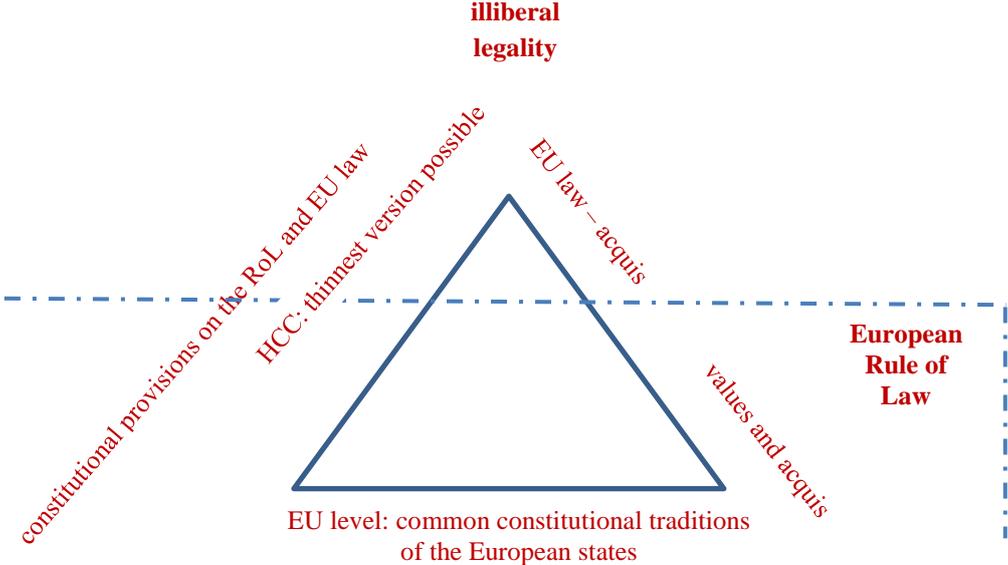
The European Rule of Law expresses a limitation on the domestic political decision-maker because there is another positive law (i.e., EU law) that the holder of the domestic rule-making power cannot manipulate and override. No domestic populist leader can hijack the EU law and lawmaking process in the same way as they could do so with their national legislation and lawmaking authorities. Additionally, the individual can report to the EU in order to contrast against domestic decision-making. Therefore, the European Rule of Law can never be a mere instrument that is misused or abused by a national populist leader.

## **3. Illiberal legality – a rudimentary theory**

The FL does not necessarily observe the principles of constitutionalism and for instance, human rights. If the constitution cannot be considered as a modern constitution and the Constitutional Court is packed, the body of laws that are adopted will be in harmony to the FL but might not satisfy the requirements of modern constitutionalism. Thus, legality may be formally but not substantially observed; consequently, the law would reflect the illiberal

content of the constitution. Nevertheless, Members States of the EU, including Hungary, are constitutionally bound by the European Rule of Law and their own domestic Rule of Law concept. Because the Hungarian Rule of Law concept, since 2010, has shown significant and visible unorthodoxy, this paper developed the notion of illiberal legality. This concept is conceptually different from that of the European Rule of Law, but, similarly to it, it has two twin sides, i.e., a European and a domestic one. The review of the value-level non-compliance with the European Rule of Law and the way how the EU acquis have been complied with and what difficulties have emerged during the years substantiated the theory of illiberal legalism.

**Figure 3 Illiberal legality and the European Rule of Law– Hungary**



Illiberal legality indicates the hollowed-out meaning of the European Rule of Law in Hungary and accentuates the instrumental use of domestic law in both legislation and the application of the law. Another characteristic is the weak constraint that the European Rule of Law poses on the domestic public power because it requires the implementation and application of the EU law, i.e., both the values and the acquis. This latter phenomenon, among others, keeps the Hungarian constitutional system within the frames of constitutionalism and supports the claim for an illiberal adjective. Illiberal legality does not respect the basic tenets of constitutionalism but, due to its membership in the EU (and other international organizations), it is legally – and politically – forced to recognise some constraint over its exercise of public power.

Illiberal legality is the logical consequence and necessary component of a constitutional remodeling that is designed and performed by a populist and authoritarian leader who is leading the country into an authoritarian regime. Therefore, illiberal legality is the antithesis of the European Rule of Law, in terms of values, the role of a constitution, and the substantive components of the European Rule of Law. It can be argued that neither the equality (non-discrimination), or the prevention of abuse (misuse) power nor the other elements of the benchmark of the Checklist of the Venice Commission are realised in Hungary to a sufficient extent. Each segment of the Rule of Law is compromised. The failure to adhere to the European Rule of Law, as a value and political ideal, requirements is systematic, politically induced and supported, and widespread in the legal system.

Illiberal legality retains formal legality, which is part of each thin concept of the Rule of Law and extends to the application and enforcement of the enforceable EU law. This effect shall be viewed as a weak internal constraint on the domestic powers.

These ideological changes towards constitutionalism and the Rule of Law, as well as the consolidation of illiberal constitutionalism, could not leave alone the jurisprudence of the CC, either. The first twenty years shows the application of a thicker/less thin approach to the Rule of Law, as compared to the thin version of the term, or even in the light of the more substantive understanding of the Checklist. The changes introduced after 2010 have three implications: first, the Court can reject applications that invoke a thicker understanding of the Rule of Law already melted from Article 2 of the Constitution. Second, in the constitutional complaint procedure no invocation of the violation of the Rule of Law principle can be admissible; third, the infringement of Article B) of the FL can be claimed only in procedures that allege the unconstitutionality of a pieces of legislation which is only a small fragment of the entire workload of the CC. The Court nowadays takes a thinner approach towards the Rule of Law, as compared to the first twenty years, which is mainly due to the changes in powers, procedures and admissibility criteria, and thus can be viewed as one of the legitimate readings of Article B) of the FL. Nevertheless, the inconsistency of the role the Rule of Law possesses in the current constitutional system indicates an instrumental use of the law and an authoritarian attitude of the majority of CC judges.

Lastly, an additional layer to the concept of illiberal legality and illiberal constitutionalism can be offered. It is a fact that the EU cannot resolve its legal differences with Hungary. There are two alternative implications of a situation in which a legal and cultural community is not able to maintain and enforce its legal regime. It is either the fact that the shared nature of its legal values and political ideals, and principles can be justifiably questioned, or that the country which actions raise doubts about the universality of this principle has already ceased to be the part of that community. In this latter case, the Rule of Law cannot have the same meaning in the in-group, i.e., legal and cultural community (European Rule of Law that determines how the domestic Rule of Law is understood in the Member States) and in the state examined. That is why I suggest that the Rule of Law in Hungary be described using the term illiberal legality.

#### **4. Concluding remarks**

In the most pessimistic assessment of the above, and in the context of the European Rule of Law, as a value and political ideal, Hungary seems to be already outside of the 'group'. The only withdrawal force is the weak constraint power of the remnants of the European Rule of Law can have on the Hungarian public power. The question is when the European legal community, i.e., EU, and Hungary herself, will realise it and what measures they will take. Wielders of political power of Hungary cannot be disciplined by the usual 'in-group' measures, because these are the resolution methods of another 'reality.' The sooner the European political community and leaders realize this, the better can they promote the universality of the principle of the Rule of Law within the European Union, as a European Rule of Law, and productively advance the European project further.

An optimistic version would propose or refer an enforcement mechanism through which the EU could successfully enforce its values. This paper has not been concerned with that, and it shall be noted that the EU is still in the process of finding an adequate mechanism. Regrettably, prevention seems to be more important than dealing with the renegade states –

which, on the other hand, is understandable as the actors do not speak the same language. This approach does not help to resolve the differences at all, but, instead, either brings us back to the most pessimistic scenario or requests a more realistic one.

A more realistically appealing assessment would project a formation of a longer-term game between the EU and Hungary, until the point when the illiberal constitutionalism is overturned, or when the EU membership of Hungary will politically, economically and emotionally be undesirable for both the other Member States and the EU herself. The synergy of the three-factor is, however, improbable to occur at the same time. Neither the overturning of the regime seems feasible. This democratic component of illiberal constitutionalism, however, still needs to be further researched.

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