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The Rule of Law and Legitimacy in Emerging Illiberal Democracies

I. Introduction

The current legal changes in Eastern and Central Europe (ECE) leading to illiberal regimes are raising fundamental questions about the nature of the legitimacy of these regimes. While constitutional democracies rely on legitimacy originating from the observance of the rule of law, the rule of law is challenged in countries like Hungary, Poland and progeny. We find similar developments throughout the world, including Western Europe.

Viktor Orbán proclaimed "a revolution at the ballot box" and the expression of will of genuine people. For others, the policies he has pursued have been laying waste to the democratic legitimacy of the political system in Hungary. Similar observations can be made of Poland, Romania and other former communist countries. The purpose of this paper is to investigate the fate of the rule of law, its breaches and the link to legitimacy in the context of the creation of the illiberal regimes we find in ECE and in Hungary and Poland in particular. We argue that the use of law for the purposes of the majoritarian government raises issues concerning the very concept of the rule of law. The conflict about the legitimation of the emerging majoritarian regimes cannot be simply understood within the rule of law paradigm, as is attempted within the EU. The problem is not simply one of the rule of law: it is an issue of constitutionalism.

The rule of law is not an absolute source of legitimacy. The will of the people and national sovereignty, although not antithetical to the rule of law can be held supreme to the rule of law. Justice is equally important and in Hungary, Poland and other countries restoration of justice arguments (e.g. to end foreign yoke and conspiracy against the Nation) are often made even in the legal context.[1] This resembles a revolutionary position. What is the place of the rule of law in a process that considers itself restorative-revolutionary? How much of a revolution is taking place in Eastern Europe that would legitimize the emerging system of domination is an open question: the prevailing rhetoric is conservative and intends to restore corrupted values like the purity of the nation and national traditions and pride. These changes can be radical, but not revolutionary in the sense of creating a blank slate as in the French or Russian revolutions, even if the state is undergoing fundamental changes in its constitutional operations and also in the non-governmental and private sphere. It is indeed at the level of

1 A conflict between justice and the rule of law characterized the transition from 1989 onwards, with a rather strict concept of the rule of law clearly prevailing in Hungary, where the Constitutional Court declared a revolution by the rule of law (meaning carried out by the rule of law). Judgment of Mar. 5, 1991, 1992/11 AB. Hat. pt. III(4). The current developments represent the victory of the non-communist losers of 1989-90.

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the state-private relations that the new political order unfolds behind the scaffold of the constitution and the rule of law. For example, in Hungary the government's media monopoly is based on a network of loyal private broadcasters whose media ownership was made possible by twisting and turning the law. Tailor-made laws with little respect of fairness were used to usher government cronies to control positions. In this legal system the rule of law (in a substantive sense) will have little say or be of limited relevance, even if the interaction is enabled by formally legal institutional setting. Procedural elements of the rule of law are respected where this does not affect fundamental governmental, party and government-friendly private interests. In brief, the rule of law is both used and abused to legitimate a transformation in the transition to an illiberal state. We argue that while the rule of law remains a contested concept and as such it does not always provide clear standards for the actual evaluation of the legal tinkering in the emerging illiberal regimes, the emerging legal system in its totality fails to be conform to any meaningful understanding of the concept of the rule of law. But this does not result in automatic delegitimation of the legal (and political) system; certainly not internally. The main source of legitimacy in political rhetoric is the sovereignty of the people. Nevertheless, the emerging form of government relies to some extent on the rule of law, at least in the form of legalism. While certain violations of the rule of law, especially in the transition to illiberal democracy are relatively easy to identity, a critical analysis of the emerging legal systems runs into difficulties because the hybrid nature of these systems.

What is the role of the rule of law in sustaining and legitimating illiberal democracy?[2] While there are a few manifest violations of the rule of law in former communist countries, the important changes favourable to illiberal democracy occur by being brought outside the traditional law, for example by simply denying judicial review or at least meaningful judicial review in politically sensitive cases, for example by exempting clientelistic networks from criminal responsibility. In fact, these transactions are protected by elements of the rule of law: private network transactions and public law control of the public sphere (e.g. education) are consolidated by institution of privacy, official secret, reputational rules (defamation), contract law, statute of limitations. The rule of law is regularly reduced to legalism, which is sufficient to protect the property of regime supporters, cronies, and the dominant position of the ruling party itself during the next electoral cycle. The semblance of the rule of law is also important in the face of the international community, especially the European Union (EU) and the European Court of Human Rights (ECtHR), which have considerable intellectual difficulties in the identification of a systemic disregard of the rule of law, especially given the commitment of these institutions to the respect of a majoritarian democracy.

The paper focuses primarily on understanding the transformation of the state to an illiberal democracy through the twisting and turning of the rule of law, which at the same time continues to provide some legitimacy to the regime. This legitimation is

2 Many people consider the term "illiberal democracy" an oxymoron, claiming that a genuine democracy cannot be illiberal, or that the populist regimes are not democracies but autocracies. We use the term because this is how the Hungarian Prime Minister called his regime. Moreover, while many populist regimes show an increasing number of autocratic traits, these rely on democratic forms of government.

secondary to democratic and historical legitimation which are often contrary to the rule of law.

The paper begins by investigating the basis of legitimacy in illiberal democracies and the place of the rule of law in legitimation. Then it goes on to look at the transformation of the rule of law, in particular the way the independence of the judiciary is undermined in Hungary and Poland but also with reference to some comparative examples from countries with similar developments. Finally, the paper considers the international dimension and poses questions about why these seem to have misconceived the problems in Hungary and Poland.

II. Legitimacy of illiberal regimes: revolutionary or something else?

The emerging illiberal regimes are certainly detrimental to the rule of law and constitutionalism. The use of the legal system is in some ways reminiscent of revolutionary anti-rule-of-law. When it comes to offering goodies to the electorate, the government is ready to disregard elementary rules of contract law (e.g. to protect debtors against banks and consumers against utilities, especially before elections).[3] Licenses are not respected, and procurement and bankruptcy laws are rewritten to favor government clients. The populist challenge of the legitimacy of previous political arrangements fits into a revolutionary tradition, albeit (to the extent one can talk in ECE of a revolutionary attitude) this one is restorative. Contrary to the French or Russian revolutions (1789 and 1917 respectively) the prevailing rhetoric is conservative and not anti-legalistic: it advocates the protection of the purity of the nation and its traditions and, at the same time, it is quite legalistic, among others because of the needs of a kind of market economy, international dependence, and even national tradition. But the most important element of the current legal transition is that regime legitimacy comes from references to people and national sovereignty. Pseudo-revolutionary arguments of a "fight against foreign conspiracy" and the corruption of past regimes are quite common. Such references resemble revolutionary language. However, national restoration is not the prevailing, and certainly not the exclusive communication strategy.[4] In principle, illiberal regimes rely on popular legitimation, and such popular legitimation often prevails against fundamental cultural conventions of the rule of law. Nevertheless, these regimes describe themselves as rule of law states. The illiberal regimes of ECE are legalistic, partly also because of their international dependency. The appearance of the rule of law and electoral democracy remain a major international consideration for legitimacy and so far, the illiberal states on the stage of a rule of law bound international community. The rule of law has come to play a central feature in defining whether a regime counts as legitimate or acceptable. For example, the Council of Europe evaluates governments against a Rule of Law Checklist. Similarly, in recent debates

3 Formally, this is in line with the consumer ("weaker party") protective approach of EU law. The possibility of a debtor friendly interpretation has been upheld by the CJEU, *Kásler,* ECLI:EU:C:2014:282 (Fourth Chamber) 30 April 2014. In practical terms, beyond the general measures echoed in the media at the level of individual cases a considerable number of individual debtors suffered serious losses.

4 It is remarkable that ideological commitment is replaced by communication strategy.

about Article 7 of the TEU, which acts as the basis of actions against Member States of the European Union the rule of law features prominently. States dependent on foreign investment and other transfers (aid) can afford neither anti rule of law rhetoric nor a direct challenge to the rule of law guarantees needed for investments.[5] This is not what one would expect from revolutionaries.

At this point it may be appropriate to look at the rule of law more closely. What is the rule of law good for? It may have been enough for *Max Weber* to claim in the German Empire that legality was a sufficient criterion of legitimacy but these days the link between legitimacy, the rule of law and other goods is much more complex.

When thinking about the rule of law in general and the role of the rule of law in legitimating the state, a number of interrelated questions arise. The first relates to the very concept of the rule of law: What is the rule of law? The question has attracted a number of vastly different interpretations both among theorists and among legal cultures, in which they are applied in practice.[6] On the most abstract level we may distinguish between substantive and procedural conceptions of the rule of law. The content of the substantive concept does not deny that the rule of law has formal characteristics but goes further, to argue that "certain rights are based on or derive from the rule of law".[7] There are then, several substantive conceptions of the rule of law with differing contents. The first equates the rule of law with good law. Here the rule of law requires that laws that are passed "run the gamut from justice to charity to efficiency".[8] This is very broad as most people would agree that many of these would not be matters to be addressed legally. A second, narrower, but still relatively broad concept conceives of the rule of law as legitimacy.[9] Conceptual, normative and comparative questions may be raised with reference to the precise content and desirability of substantive conceptions of the rule of law, but for our purposes it is simply to keep in mind that such substantive concepts exist, are used and advocated frequently. It can also be argued that a substantive concept of historical justice can be incorporated (coated) in a formal

5 Less than two months after the introduction of debtor saving legislation Hungary quickly signed a Memorandum of Understanding (MoU) with the European Bank of Reconstruction and Development, ensuring "that the conversion of mortgages denominated in foreign currency into Hungarian forints regulated by Act LXXVII published on 15 December 2014 would be completed in such a way as to avoid imposing further costs related to exchange rate risks on the banking sector…".

6 General overviews of the rule of law can be found at: *M. Krygier*, Rule of Law, in: M. Rosenfeld and A. Sajó (eds.), Handbook of Comparative Constitutional Law (2012); *J. Tasioulas,* Rule of Law, in: J. Tasioulas,The Cambridge Companion to the Philosophy of Law, Cambridge, Cambridge University Press, 2009; *S. Holmes*, Lineages of the Rule of Law, in: J. M. Maravall/Q. Przeworski, (eds.), Democracy and the Rule of Law*,* Cambridge, Cambridge University Press, 2003. A prominent substantive theory of the rule of law has been put forward in *T. Bingham*, The Rule of Law, 2010. Formal theories are put forward by *A. V. Dicey*, Introduction to the Study of the Law of Constitution*,* 8th ed., London and New York, Macmillan, 1959; *J. Raz*, The Rule of Law and its Virtue', 1977, 93 Law Quarterly Review 195, 220.

7 *P. Craig*, Formal and substantive conceptions of the rule of law: an analytical framework, 1997, Public Law, 467.

8 *Tasioulas*, fn. 6.

9 *Tasioulas*, fn. 6.

concept, but has the potential to destroy it. *Weber* was of the view that material justice can destroy formal, rational law.

The second set of questions relates to the value of the rule of law. Depending on the conception of the rule of law that is followed, the values served by the rule of law vary. And it is an especially vexing issue as regards the thinner, more persuasive conceptions of the rule of law.

Even within the narrower definitions of the rule of law, we find, yet again, a plurality of conceptions with differing substantive and procedural contents. For *A.V. Dicey* the central elements were rather straight-forward and consisted of the supremacy of regular law as opposed to 1) power, 2) equality of all persons before the law, and 3) the fact that constitutional law be considered part of the ordinary law of the land. Most contemporary accounts contain a number of desiderata, although the lists are far from settled. Common elements include requirements that laws: 1) be prospective rather than retroactive, 2) that compliance with them be possible, 3) that laws be promulgated in advance, 4) that the meaning of laws be clear, 5) that laws be consistent with one another, 6) that laws be sufficiently stable, 7) that laws be general, and additionally 8) that officials adjudicating legal matters do so within the meaning of the laws and the laws governing their activities. Distinguishing these characteristics of a formal conception of the rule of law not only helps us see the rule of law in a richer light in general but also shows the breadth of the competing conceptions.

The natural follow up question is, of course, what value the rule of law if formulated in terms as this has. The rule of law conceived narrowly may be satisfied even where the system has various other defaults. For example, the above criteria can be satisfied by a system that would in other ways denigrate other ideals such as democracy and human rights. *Joseph Raz* has described the rule of law as a sharp knife that can be used for various purposes, good and bad. The defense of the illiberal democratic regimes would be that they use the rule of law only to the extent it serves good purposes but where the rule of law dictates measures that do not serve such good purposes one shall not be bound by it. But does the rule of law serve any values of its own? Here a number of arguments can be made: in the first place, the rule of law, even if narrower, does serve certain instrumental interest such as predictability. It has also been argued that the thinner version also pays respect to the rational autonomy of the individual by giving her reasons for action. We claim that comprehensible (intelligible) justification of legal measures is a necessary element of the recognition of the citizen as person with reason. The mockery of arbitrary laws denies this respect, notwithstanding the continuous propaganda that the law serves people, the members of the Nation.

The rule of law, then, does serve certain goods but they are only part and parcel of what makes a political system legitimate. Democracy and human rights also have their part to play in legitimating the political system. Thus, while it seems likely that the rule of law has a direct role in legitimating the political system, it is only one part of it. Illiberal regimes may rely on alternative, non-legalistic legitimation (nationalism, divine power, people's will) but in the ECE region the political powers are keen to sustain a legalistic legitimation too.

The role of the rule of law in legitimating a political regime is further complicated by two related considerations. In the first place it can only ever be attained to a de-

gree. In the second place, it is often difficult to see exactly when a sufficient degree of it is present and when a line has been crossed at which it no longer is justified to talk about it. Moreover, there is no real standard model of the political system that would satisfy the rule of law. That means that there can be even great variance in the institutional set up that is built in any particular country, while satisfying the rule of law. These two caveats make determining whether the rule of law has been violated or not very difficult.

The illiberal regime may use to its benefits the lack of clear standards, especially where the cultural traits that underlie and animate the rule of law, in particular fairness, are not part of the "folklore".

III. Transformation of the judiciary in an illiberal state

The most often discussed phenomenon of the reshaping of the rule of law concerns the new rules on the judiciary in the ECE countries.

When *Alexander Hamilton* wrote in the Federalist 78 that the judiciary was the least dangerous branch of government having control neither over the sword or the purse but merely its judgment, he may have underestimated just how dangerous courts could be for those who wish to stay in power and appear legitimate. In many constitutional systems the judiciary, and the constitutional courts in particular, were designed or bootstrapped themselves to be powerful checks and balances of the political branches. The political branches were taken over in a democratic process but that did not affect the judiciary, and some other independent sources of government (the media and international organizations with transferred powers, in particular the EU.) In view of the effective control exercised in modern constitutional review, a great number of governments, which desire to impose their illiberal power on the state and society were compelled to undermine the judiciary as a potential impediment to impose centralized rule that is coated in ordinary legislation and even constitutional amendment. Remarkably, no country transiting to illiberal democracy with a constitutionally entrenched constitutional adjudication system declared constitutional review anti-democratic, as it would follow from a revolutionary logic, and continued to observe on paper this key element of the rule of law (which, however, is not indispensable, as the example of the United Kingdom indicates). It is true, on the other hand that the power of the constitutional court was limited, for example because of economic emergency as in Hungary, or for the sake of efficiency and equality as in Poland.

The populist governments of the EU Member States are trying to bend the judiciary to their will, while wanting to be seen as following the rules. The most spectacular attempts in the ECE were registered in Hungary and Poland. In other post-communist countries, where the populist forces do not have the majority in parliament, the shift is less visible, also, sometimes, because the judiciary is not always a bastion of the rule of law. Ten years after their accession, Bulgaria and Romania are still subject to the Cooperation and Verification Mechanism (CVM) that was set up to address shortcomings in the judicial reform and the fight against corruption and organised crime, and

the changes in the administration of justice in Romania trigger mass demonstrations and constitutional crisis time and again.[10]

Put into a global perspective we see a similar pattern emerging among regimes that ultimately turn illiberal: where there is constitutional judicial review this is the first obstacle to be eliminated for the majoritarian rule. After all constitutional courts are the par excellence anti-majoritarian tools. Many of the techniques to eliminate the independent judiciary and effective constitutional control in particular were developed in Latin America. The muzzling of the judiciary is probably inevitable for regime change in formerly constitutional regimes.[11]

Of course, the attack on the judiciary depends of the available legal possibilities.[12] After winning a two-thirds majority allowing it amend the constitution lawfully, the *Orbán* government has been changing virtually every political institution in the country, effectively eliminating all checks and balances, while in Turkey the process was first slow and non-decisive, until the emergency provided the opportunity for a very harsh change with dubious legal means.[13] The Polish case begins with the double electoral victory, first in the presidential election and then by the Law and Justice party (*PiS*) itself winning an absolute majority in the parliamentary elections. Like in other populist takeovers, the new government set to work rapidly, explicitly aiming to copy *Viktor Orbán*'s style of government in Poland.[14] If for *Lenin* the principal objects of the revolutionary takeover were the telegraph bureaus, in the radical restructuring of the constitutional order the government (the executive branch), supported by its docile or dedicated parliamentary majority has turned first thing against the Constitutional Tribunal and after that – the ordinary judiciary. The substantive legislation af-

10 In view of its Annual Reports, the Commission is reluctant to take a strong position in these matters, most likely for political reasons. See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en.

11 We do not deal with those emerging democracies where the judges at the highest echelon were simply not able to resist governmental pressure or never were committed to the rule of law in a deeper sense. In these circumstances there was no need for formal changes. This is the scenario in most post-Soviet Republics.

12 On Turkey's political developments, see: *Murat Somer*, Understanding Turkey's democratic breakdown: old vs. new and indigenous vs. global authoritarianism, Southeast European and Black Sea Studies 16.4, 2016, pp. 481-503; *Cemal Burak Tansel*, Authoritarian neoliberalism and democratic backsliding in Turkey: beyond the narratives of progress, 2018, pp. 1-21.

13 For Hungary, see *Miklós Bánkuti*/*Gábor Halmai*/*Kim Lane Scheppele*, Disabling the constitution, Journal of Democracy 23.3, 2012, pp. 138-146.

14 "Budapest in Warsaw" has been a slogan of the "Kaczynski movement" for a while and the proximity, personal and ideological, between the two men has been noted in the international press, too. https://www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2 f. The Polish government has argued that its reforms, in fact, enhance the rule of law and independence of the judiciary. It has set out its position comprehensively in the 'White Book' that the government drew up in response to the EU's https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html. See, also: *Wojciech Sadurski*, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, Sidney Law School Working Paper 19/01, 2018.

fecting the rule of law was secondary to this; it was the constitutional control that had to be eliminated first and foremost.

The undoing of the rule of law (and constitutional checks and balances, intimately related to this) seems to follow a particular pattern: change the personnel and/or limit institutional powers of control and even the scope of the judicial control institutions (by limiting, at a later stage of the illiberal development, access to courts and judicial review even in ordinary litigation). There are differences in the transformation depending on the target of the government reform: the demise of the constitutional court differs technically from the Gleichschaltung of the ordinary judiciary. It must be added that the dynamics of the process depend on the political and professional commitment of the judiciary and the acts of resistance.

1. Changing the composition of the apex court

Given the personalistic nature of the rule in illiberal democracies it fits into the logic of the new system that instead of erasing courts as institutions of control the principal strategy is to make them docile through changes in the personnel composition, relying on the personal loyalty of the new appointees. Only where this cannot be achieved (at least in the short run) as with the Polish Constitutional Tribunal, the government moves to the institutional incapacitation, making the court irrelevant. Within the prevailing self-understanding of the populist ECE regimes, however, there is no intention to eliminate such institutions. Sustaining important constitutional actors after the replacement of judges (and domestication of the reminders) is how the court can also be turned into an ally by using it to give a legalistic imprimatur on the government's activities.

a) Increasing the number of judges on a court

Increasing the number of judges on the court allows for a quick change of the composition of the bench and it can be less controversial than dismissal. *Fidesz* increased the membership from eleven to fifteen in the new Fundamental Law in force from 2012.[15] Similarly, *Maduro* increased the number of justices on the Supreme Court allowing him to pack the court with loyalists.[16] Of course, court packing is a well-known instrument, notorious because of President *Roosevelt's* attempts to suppress the resistance of the US Supreme Court to the New Deal reforms.[17] An early successful example of court packing occurred during the establishment of the apartheid regime in the

15 *Bánkuti/Halmai/Scheppele*. fn. 13, p. 140; *Nóra Chronowski/Fruzsina Gárdos-Orosz*, The Hungarian Constitutional Court and the financial crisis, Hungarian Journal of Legal Studies. 58(2), 2017, pp. 139–154; *Nóra Chronowski/Márton Varju*, The Hungarian rule of law crisis and its European context, in: Andreas Kellerhals/Tobias Baumgartner (eds.), Rule of Law in Europe – Current Challenges, Zurich, Schulthess Juristische Medien AG, 2017, pp. 149–68.

16 *Lauren Castaldi*, Judicial Independence threatened in Venezuela: The Removal of Venezuelan Judges and the complications of rule of law reform, Geo. J. Int'l L. 37, 2005, p. 477.

17 In that case, it of course, did not work out: *William E. Leuchtenburg*, The Origins of Franklin D. Roosevelt's "Court-Packing" Plan, The Supreme Court Review 1966, 1966, pp. 347-400.

(then) Union of South Africa in the early 1950 s when the Appellate Division of the Supreme Court declared an apartheid electoral law to be unconstitutional. The government enacted a number of institutional changes to carry through the voting rights reform, including court-packing.[18]

Court packing is sometimes difficult, especially where the number of the judges is entrenched in the constitution but such plans, even if not materializing in an actual change, may exercise considerable pressure on the sitting judges. Without sufficient legislative majority this solution is not available, and the government has to take more radical actions to change the personnel, primarily by disciplinary action or general reform that does not require supermajorities. Obviously, the choice depends on the pre-existing legal system: where there is no entrenchment that would require supermajorities to change the relevant provision the change is simpler; where there is no supermajority the departure from the rule of law is inevitably more visible.

b) Vacating seats: the retirement age

Tinkering with the retirement age may be used both for the upper echelon (the constitutional courts)[19] and the ordinary judiciary. By lowering the retirement age, it is possible to hasten the departure of a number of judges so that more suitable judges can be installed. *Fidesz* did this in Hungary by lowering the retirement age of judges from 70 to 62, forcing almost 300 judges into retirement. Poland applied the same approach. The CJEU found the Hungarian solution contrary to European anti-discrimination law. By turning this dismissal into an individual age discrimination issue the CJEU ultimately side-stepped the central rule of law issue of the case (judicial independence).[20] To give another example, changes in the mandatory retirement age and mass purges on grounds of corruption were an important issue in Turkey way before the 2016 coup.[21] The judicial qualification approach has the advantage in that it is based on an apparently objective criterion that is generally accepted outside the judiciary

18 Appellate Division Quorum Act, 1955 (The Coloured Cases). The Act expanded the size of the Appellate Division to 11 judges. The Act is a sequel to the constitutional crisis that emerged from the deprivation of coloured voters in the Cape Colony of their franchise and a judicial challenge to it.

19 In Hungary, being sure that the constitutional court is loyal and to guarantee that the loyal justices stay long enough, the retirement age for constitutional judges was *increased.*

20 ECJ, 6 November 2012, Case C—286/12. See, also *Gábor Halmai*, The early retirement age of the Hungarian judges, in: Fernanda, Davis, EU Law Stories: Contextual and Critical Histories of European Jurisprudence (eds.), Cambridge University Press, 2017. As to Poland, after this manuscript has been completed, the Polish Government, in response to an interim measure ordered by the CJEU, backtracked and the judges of the Supreme Court were able to continue in their previous position.

21 See *Ergun Özbudun*, Turkey's judiciary and the drift toward competitive authoritarianism. The International Spectator 50.2, 2015, pp. 42-55; *Asli U. Bali*, The perils of judicial independence: Constitutional transition and the Turkish example, Va. J. Int'l L. 52, 2011, p. 235. There were further changes again, shortly before the 2016 coup: https://www.reuters.com/article/us-turkey-judiciary-idUSKCN0ZH4IZ. For a factual account of the recent crackdown, see: For an overview of the crack down after the failed coup see: https://www.bbc.com/news/world-middle-east-44519112.

and cannot be easily characterized as being ad hominem. It is a mass scale solution that sends an important message to the judiciary: the group can be made the target of a popular dislike as members of a privileged elite group.

c) Dismissal or reassignment

In general, dismissing judges outright is rare as it can easily be seen as a partisan move to get rid of those who do not support the government. However even this technique has been employed. In Turkey the state of emergency after the coup d'état attempt in 2016 led to the government purging the judiciary, dismissing some 4000 judges and prosecutors.[22] To disregard the applicable rules as it happened with the detention of two constitutional court judges in Turkey (in disregard of the rules applicable to immunity) is however atypical: the prevailing maxim is to dismantle the rule of law safeguards within the formalities and means of the rule of law.

d) Appointment procedures

One way of gaining control of the judiciary is to gain control over the process of appointing the judiciary. Once there are vacancies on the bench, the issue is how the replacements are to be made. Appointments to supreme courts are, generally speaking, political, at least in the sense that the appointment is a political process decided by the political branch. With the emerging illiberal majorities it is often not necessary to change the pre-existing rules as these rules already enabled politicization.

Nevertheless, it is also appropriate to consider the so-called October judges in Poland in this context. The facts of the saga surrounding the appointment of new judges to the Constitutional Tribunal are quite complex with a number of overlapping legal and political events running alongside each other and colliding at time.[23] The story begins before the end of the previous Parliament: the outgoing Sejm nominated five new judges to the Constitutional Tribunal. Three of these judges were to take up vacant spaces on the Tribunal and two were nominated in terms of a law that allowed the Sejm to nominate judges for two vacancies arising in December after the end of the Sejm's term. This is the kind of "midnight" appointments that outgoing governments use on occasion to extend their influence on the judiciary beyond their term at the last minute.[24] The subsequent events have been recounted in detail by others else-

22 The facts are set out here *Chris Morris*, Reality Check: The Numbers behind the Crackdown in Turkey, 18 June 2018. https://www.bbc.com/news/world-middle-east-44519112.

23 See, e.g. *E. Łętowska/A. Wiewiórowska-Domagalska*, A "Good" Change in the Polish Constitutional Tribunal?, Osteuropa-Recht, 62 (1/2016), pp. 79-93.

24 The facts of the saga are detailed here: *Anna Śledzińska-Simon*, Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts, VerfBlog, 2015/11/23, https://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/; *Sadurski*, fn. 12, pp. 18-30; The reasoned proposal of the European Commission also sets out the facts in some detail: Reasoned Proposal in Accordance with Article 7(1) of the Treaty on the European Union Regarding the Rule of Law in Poland COM(2017) 835 2017/0360.

where, but for our purposes the relevant facts are that with the appointment of the two judges for the December vacancies, the previous Parliament deprived the next Parliament of its right to appoint judges for the two seats vacating in December after the end of the previous Parliamentary term. While this was permitted in law specifically written for this purpose, the constitutionality of this law was drawn into question. Then a series of complicated events began to unfold. First, the President refused to swear the five new judges in. The *PiS* party, at that point in opposition, brought a challenge to the Constitutional Tribunal, which it later withdrew. Then PiS won the election, enacted changes to the Constitutional mechanism for electing judges, including annulling the provision in terms of which the five judges had been appointed, passed a resolution stating that the appointment of the five judges had no legal force and appointed five more judges who were sworn in by the President. Two more cases to the Constitutional Tribunal followed; in one which held that three of the October judges were lawfully appointed and should take up their position (this is the judgment subject to the well-publicised governmental non-publication of the judgment) and another in which the court did not address the issue of the constitutionality of the appointment of the second lot of five judges. But ultimately these did not change the situation that a growing number of constitutionali judges who have now been appointed to the Constitutional Tribunal are PiS choices. The Polish case is extreme in the degree of legalistic detail that it displays, and the competing political parties may well rely on competing conceptions of the correct procedure, but nevertheless it shows a government claiming to act lawfully while appointing judges at its will.

Although some of the above described measuares appear radical – the appointment of judges past the Sejm's term, the president's refusal to swear them in, etc. – in this case but there is nothing overtly authoritarian about it either. Even the Polish case, where the law seems to have been broken, the process bears many of the characteristics of a legitimate process.

2. Institutional reform[25]

a) Removing the powers of the court

As mentioned before, after winning the two-thirds majority allowing the government to amend the Hungarian constitution lawfully, the *Orbán* government has been changing virtually every political institution in the country, effectively eliminating all checks and balances. The most significant of these was to remove the power of the Constitutional Court to judicially review acts of the Parliament for their compliance with the Constitution where the subject matter concerns the budget. (The Constitutional Court resisted with an original theory claiming to have jurisdiction in such cases where it affects human dignity.) Additionally, a constitutional amendment annulled the precedential value of those judgments of the Constitutional Court, which were ta-

25 Changes in the organization of the prosecutorial services are nearly as important as judicial reforms and would require extended separate discussion.

ken under the previous Constitution[26] This measure (irrespective of its practical consequences) was again countered by a theory that this amendment applies only where the text of the new Fundamental Law differs from the previous Constitution. Time solved the problem as the term of this slim resisting majority members has expired.

Wherever it is constitutionally possible (where there is sufficient majority to such change) the administration of the justice system can be remodeled, allowing also changes in the personnel composition of the judiciary.

In the Hungarian case the name change of the Supreme Court in the constitution was sufficient to terminate the appointment of the President of the Supreme Court who became ineligible because the eligibility conditions were changed by introducing an ad hominem provision. (This is one of the few instances where traditional specific rules of the rule of law were blatantly disregarded; however, the matter was discussed as one of freedom of expression and procedural fairness in the ECtHR, because that court has jurisdiction only in matters of named individual human rights).

The typical institutional reform results in a reallocation of competences and making different rules and standards applicable. With such setting up loyalists can be appointed. It can be argued that the new administrative court system to be introduced in Hungary that will not be subordinated to the Supreme Court and will deal with politically sensitive issues (among others freedom of information cases and electoral disputes) is a textbook example of such systemic change. The prior jurisprudence of the ordinary courts could have been embarrassing to the government which lost some sensitive access to information cases, allowing the disclosure of self-dealing and and favouritism.[27] Once again, such a reform is perfectly compatible with the rule of law. The solution is similar to the German one and follows, with important exceptions, the Hungarian liberal traditions. It can be objected that civil servants are allowed to become judges, but after all members of the Conseil d'Etat are not judges at all (within the traditional definition).

Both in Poland and Hungary, the appointment procedures and terms of reference for court presidents were amended as a part of the institutional reform. These are administratively important functions as presidents may play a role in case assignment and judges depend of the president in too many ways. This is an inherent weakness of many contemporary rule of law systems, were the weak spot is not abused systematically by the governmental pressure. Decency and fairness keep the rule of law together and not just rules. Placing a number of "properly minded" individuals serves the governments' interests.

The personal dependence of judges can be increased by institutional reform. The judicial self-government bodies were replaced with new institutions in both illiberal regimes. In Hungary court management (including appointments to administrative positions) is now centralized and is in the hand of the President of the National Judicial Council, elected by supermajority in the Parliament. In other words, this autonomous position is filled by political choice. The Polish solution fits into this model, and the

26 *Bánkuti/Halmai/Scheppele*, fn. 13, pp. 138-146; *Gábor Halmai*, Second-grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope with Illiberal Member State, Working Paper, EUI Law Department, Faculty Seminar, 2016.

27 Even in electoral litigation there were important rulings against the incumbent government party.

reform is in conformity with the Constitution which provides that there should be no less than 17 judges in a 25-strong council (i.e. over 2/3 majority).

b) Changing the functioning of the courts

There are other ways in which the function of the judiciary can be altered to the detriment of the rule of law by changing certain procedural rules of the court system. In Hungary the rules on access to the Constitutional Court were amended and actio popularis was abolished (very much in line with a long-standing position of the Court that found such applications cumbersome).[28] Hence it became very difficult to rely on the ex ante control of the legislation and civil society was deprived of an important instrument that serves to protect democracy. In Poland the rules of agenda setting were determined by law (and not the Tribunal) and the complaints have to be dealt with in the order of receipt of the complaint. The justification of the measure relied on the equality among applicants. As the Tribunal could not, as a rule, grant priority to urgent or important cases, until the backlog of less meritorious or pressing applications is not cleared.[29] Upon criticism by the Venice Commission the amended law has granted exceptions: among others, the President of the Tribunal may advance hearings in certain important circumstances (to safeguard the rights or freedoms of citizens, national security or the constitutional order) and the a priori review of bills and other important issues have priority.[30]

The Hungarian and Polish processes are not unique. In view of the Turkish and Latin-American examples, the logic of control results in similar steps and follows a similar logic of reform. In all of these cases, it is not the rule by law, the strictly legalistic interpretation of the rule of law, that is directly attacked. On the contrary, the measures taken are very often diligently placed within the existing frames of the legal system and satisfy the formal requirements of the rule of law, even the individual measures intended to maintain the integrity of the judge. The judge forced into retirement will enjoy all the privileges granted to the retired judges, or perhaps even more.

Superficially, there is little nefarious about the Hungarian and Polish reforms, or at least all these measures were taken in formal legislative processes or even by constitutional amendment. The measures were presented as reforms necessitated by shortcomings in the administration of justice. However, the new, seemingly neutral rules, were tailor-made by the new legislation to enable change in the personnel. Elements of revolutionary zeal are not absent in the justification, especially in Poland (see also the revolutionary rhetoric of *Chavez* in 1999): it is often said that the generational change is needed because the judges were communist/imperialist collaborators.

This section has displayed some of the techniques that authoritarian governments can use in order to subdue the judiciary and bend it to its will. The subsequent sec-

28 *Bánkuti*/*Halmai*/*Scheppele*. fn. 13, pp. 138-146.

29 *Sadurski*, fn. 14.

30 See Articles 38 (4) and (5). The Venice Commission was not fully satisfied: "While this increased flexibility is welcome, it still seems questionable whether and why such rules are needed at all." See Opinion 860/2016,14 October 2016. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282016%29026-e.

tions will first, put these judicial changes into a broader context, then, look at how the rule of law is affected and finally consider why the international response might have been so weak.

IV. The demise of the rule of law beyond the attack on the judiciary

The attack on courts is just the tip of the iceberg. Together with the elimination of the effective constitutional supervision by the constitutional courts it has far-reaching consequences beyond the rule of law, into the very constitutional system, the economy and other social spheres. It undermines the checks and balances and it is also exemplary in the context of the elimination of independent institutions. The rulers of the emerging illiberal regimes are suspicious of all autonomous social entities like education, including higher education and research. Some churches, NGOs and cultural institutions are ostracized, others are made loyal and dependent with financial sticks and carrots. Public broadcasting is controlled in the name of "national interest first" by personnel cleansing. The private media are domesticated through takeovers and administrative means (threats of license revocation, non-renewal, special tax, carrots of government advertisement). The unmaking of a political and economic level playing field is partly carried out in disrespect of the rule of law, e.g. by dismissal of personnel in disregard of fair procedures and by moving such institutions beyond the reach of ordinary procedure and judicial review.

Transforming institutions and procedures central for the rule of law concept and highly problematic changes in the personnel of the institutions that protect the rule of law are radical but not revolutionary. Still, this bundle of changes can be socially transformative. The socio-political relevance of these measures against the constitutional and social checks and balances can only be understood if one admits that these efforts are just part of the clientelistic corruption and increasing dependency of the society that is developing on a daily basis, at least in the Hungarian model (with strong similarities with Russia and Turkey at the beginning of the current millennium – for Russia see the incorporation of the Higher Arbitration Court into the Supreme Court). At the level of governance the name of the game is unhampered etatism. The Hungarian civil society is absorbed by the populist state; pockets of civil society resistance (e.g. NGOs that provide services to the poor and 'migrants', i.e. asylum seekers) are persecuted with the tools of the law (from fiscal audit to criminalization).[31] Many of these scenarios were already tried out in the "managed democracy" of Putin (see e.g. the restrictions on NGOs as 'foreign agents'). The transformation and corruption of the rule of law is to be placed into this scheme and it is certainly broader than the attack on the apex courts or even against the judiciary. The concern with the demise of the rule of law is justified, but the use of the rule of law standard or language to evaluate the emerging system seems inadequate to capture the social and political

31 The use of blacklist by Polish authorities in August 2018 is the latest allegedly abusive use of a legal tool against government critical NGOs. https://www.euractiv.com/section/justice-home-affairs/news/polands-deportation-of-human-rights-activist-the-back-story/.

problem.[32] Conceptually the concept of the rule of law suffers of its uncertain standards and legalistic narrowness, unable to capture the problems of a captive society of closing minds.[33] Contrary to the legalistic frame provided by the TEU,[34] the process of making democracy illiberal and shallow goes way beyond the disregard, manipulation and abuse of the rule of law. Indeed, what is at stake is constitutionalism, and the rule of law is only one component of it. In this approach it is crucial that democracy is not understood as majority rule.[35] While it is understandable that the EU and the outraged judges form their concerns in terms of the (violation of the) rule of law, this may be too narrow a straitjacket to conceptualize and critically analyse the developments in the illiberal democracies.

One of the crucial presuppositions of the rule by law is that laws will be observed, and judicial decisions will be obeyed by the authorities. It is assumed that this presupposition is realistic, because the system is constitutional and democratic. But if these underlying assumptions are wrong, the formally correct legal norms will not have the presumed effect. Moreover, the observance of the empty forms of legality will not amount to fair legal system.

In the emerging illiberal regimes legal norms are instruments to guide civil servants according to a central, increasingly autocratic will, instead of constraining the arbitrariness of the administration for the common good and citizens. The emerging illiberal regimes need servants and rely on a clientele. Servants and clients have to be constrained by law to serve, when the interest of domination requires so. Elements of the rule of law are hence used for the purposes of regime building, and even to eliminate constitutional limits to autocracy and power perpetuation: Key supervisory positions are filled with reliable cadres with a very long mandate.[36] Bureaucratic discretion is limited for the sake of guaranteeing the success of the governmental arbitrariness.

The disregard of the rules of the market economy and individual autonomy is noticeable. But in the ECE countries, which are economically dependent members of the EU, the disregard of the market economy does not entail a frontal attack on the idea

32 The substantive difficulties of the TEU Article 7 process (violation of the EU rule of law requirements) illustrate the difficulties to evaluate a political regime in terms of isolated events of disregard of the rule of law.

33 *Andras Sajo*, Constitutionalism in Closing Societies, in: Michael Ignatieff/Stefan Roch, Rethinking the Open Society, CEU Press, 2018.

34 The recent debate concerning the *Sargentini Report* at the European Parliament indicates the difficulties of the approach. The Hungarian government's arguments that whatever they do remains within the boundaries of the accepted and are reasonable solutions offered by a democratically legitimated sovereign nation were not without merit as the Report was based on isolated pieces of relatively minor violations; some of them remedied (not is substance but accepted by the EU.) Violation of certain components of the rule of law within rule of law formalities cannot catch the essence of despotism.

35 For a representative and important *judicial* summary of this position see Reference re Secession of Quebec, [1998] 2 SCR 217
Supreme Court (Canada) [1998] 2 S.C.R. 217, para. 49.

36 See further the end of term limits in neo-authoritarian presidential systems outside the ECE, especially in Latin-America.

of the private property or the rule observance, it is only a temporary suspension. Once the property has landed in proper hands it is protected with the full force of the law.

The economy, just as the judiciary, is transformed in accordance with the rules but against the spirit of constitutionalism. Consider for example, how the clientelistic networks operate privatized government services, beyond the reach of the public law control. Through proper legal transactions the private ownership of the commercial media ends in the hands of the government cronies. The private ownership enables government dependent entities to dictate programming. In result, even the private commercial broadcasting acts as a tool of the centralized government propaganda. These private outlets are protected by privacy, reputational rules, contract and property law. The public does not even know who owns the media, as the owners are anonymous and registered in the Bahamas because the rule of law protects the privity of contracts and personality rights defend mysterious owners exercising social control.

What about other components of the rule of law and ordered liberty beyond the formal rule observance? Of course, it is likely that the discretionary secret surveillance has increased in the illiberal regimes but that is not a major concern for the population that is terrorism panicked anyway. Like in many other countries, which are so far less affected by the populist illiberalism, the majority does not care about the niceties of the rule of law when it comes to security. Sometimes influential interest groups have a vested interest in the protection of their professional privileges, and stand up against unlimited and discretionary interception. Even in illiberal regimes they can enjoy privileged exceptions that resemble the rule of law. For example, lawyers do not like such surveillance, and they may get special guarantees: lawyer-client privileges are observed in most surveillance regimes. The regime can be proud: the rule of law is respected.

V. The effect on the rule of law – what is the use of legality in an illiberal state?

There can be no doubt that the changes described in the two previous sections are profound. There are, however, questions about how to understand them. It was argued in the first part that the rule of law is a matter of degree and will, and perhaps should not, be satisfied to a degree rather than completely. Moreover, the rule of law is made up of a number of components, so it is completely possible that important elements of the rule of law are satisfied while others are not, or the shortcomings of one element are countered by other factors, and this may either be a problem for the legitimacy of the legal system or not. Furthermore, what matters for the legitimacy, perceived and normative, is which parts of the legal system satisfy which criteria. The picture that emerges reflects this complexity: while there are important, perhaps decisive direct attacks on key constitutional institutions in the ECE populist democracies, many elements are upheld, especially at the stage of quiet regime consolidation (and before the descent to autocracy). The rule of law is abused but not denied, contrary to the standard perception that is common among the critics of the emerging ECE illiberalism. Even where slogans put the interest of the nation and material justice above the constitution, the handling of political issues remains legalistic. It is true, the rule of law is

often replaced by rule by law. The forms of the rule of law are abused in the sense that they are used for purposes contrary to the ideals of the rule of law (foreseeability, respect of the legitimate expectations etc.).

To assume that the emerging illiberal regimes are based on a radical denial of the rule of law is wrong. We are confronted here with a borderline case, a mixture of an abused rule of law and rule by law; it is true that the rule of law is fatally compromised in matters crucial for the political power and related economic domination, but much less in everyday life. We can see how this legalism leads to a pattern where the rule of law is simultaneously followed and breached. There are two parts to the process: the first is a legally compliant change, the second is a replacement by a process that while on its face acceptable, works in the government's favour, or at least does not hinder it, ultimately – step by step – undoing the checks and balances of the constitutional system.

The Hungarian example is probably the starkest one in the ECE. Formally, it is hard to object to the new Fundamental Law (constitution), which was enacted in the easy parliamentary procedure foreseen in the previous Constitution. Formally, it is again within the parameters of the rule of law that the Fundamental Law has been modified seven times in seven years. This is not excessive, at least in comparison with the German Basic Law which was modified with the same frequency in the first fifty years of its existence. In the Hungarian case, however, the amendments were often made to counter the rulings of the Constitutional Court, and were not consensual, contrary to the German case.

The Fundamental Law removed some of the review powers of the Constitutional Court, without making this review completely irrelevant. At least in theory, and with the decisive exception of the court packing, the reform of the Constitutional Court ((e.g. the introduction of individual complaint) is intellectually defensible in certain circumstance.[37] After all in principle, even the actual opposition, if united could have petitioned the Court. Nevertheless, the totality of the reform measures removed an important fetter on the government's powers. In response to the resistance of the Constitutional Court to some governmental measures the previous interpretations of fundamental rights that the previous court had already created under the previous Constitution (that would constrain a future government) were declared not applicable by an amendment to the Fundamental Law. Such discontinuity is not implausible, especially in a revolutionary constitutional refoundation. After all the argument that a new constitution would require a new jurisprudence has some plausibility to it.[38]

These two instances obviously raise issues of the constitutional structure of a liberal democratic state, but they also inspire questions relating to the criteria of the rule of law such as clarity and predictability. In a legal system where the slate is wiped

37 For recent contributions on this ever-green question in constitutional law, see: *Jeremy Waldron*, The core of the case against judicial review, Yale Law Journal 115, 2005, p. 1346; *Richard Bellamy*, Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy, 2007; *Mattias Kumm*, Institutionalising Socratic contestation: The rationalist human rights paradigm, legitimate authority and the point of judicial review, Eur. J. Legal Stud. 1/2007, p. 153.

38 So, for example, *Halmai*, fn. 26, p. 6.

clean regularly and the modes of production of law are constantly subject to significant change, can hardly be considered to satisfy the rule of law.[39]

The laws regarding the changed composition of the courts and the court appointments illustrate the same point. There is no "correct" number of judges for constitutional courts and increasing the number of judges in pursuance of a more efficient court may sound like an improvement. There is also no "correct" way of appointing judges to the bench or a "correct" retirement age. This means that the changes that are being made resemble perfectly acceptable laws. They are facially neutral when it comes to the nature of the regime. It is only in their application in the specific context that the threat to the constitutional system emerges in the form of attacking the judicial independence. The threat to the rule of law comes also in a more pernicious form. Once the seats at the court has been vacated and the government has sufficient control over the appointment procedure, appointments can be made that undermine the judicial independence in a way that satisfies the government.

The illiberal ECE regimes claim that their actions are sovereign and required by the majority and are in conformity with the rule of law. To refer to a recent example, the Polish government issued a vigorous defence of the transformation of the judiciary in its White Paper on the Reform of the Polish Judiciary that it published in response to the EU's Article 7 procedure couched firmly in the language of the rule of law.[40] Undeniably, there is a semblance of lawfulness and rule following, but it is of the kind that in Judith Shklar's well-known criticism is called 'legalism'. She has defined legalism as as a moral attitude and a code of conduct, common to Western countries, and it entails rule following, orderliness, and formalism.[41] The illiberal democracies of ECE are deliberately legalistic, at least as long as the new powers are not seriously endangered. The power grab, the exercise of state power and the constituency of the illiberal government are served by legalism, both during the electoral take over and in the maintenance of power.

There are further benefits to this kind of legalism, from the government's perspective. It gives the supporters an argument to plausibly deny the government's nefarious intentions. It is easy enough to rely on the superficial following of the rules in order to lend some legitimacy to the government's actions: "What the government did was within the letter of law" is a powerful argument. To the average voter legal complexities will not be off-putting as the general public – not incorrectly – thinks of the law as vague and ambiguous.

Beyond the judicial dimension, illiberal legalism can be socially efficient. Middle class and upper middle class legal services have improved in Hungary in the last ten years (see, e.g. passport delivery, land registry, etc.). Legalism enables foreseeability, even if what is to be foreseen is immoral and full of unjust favouritism. Orderly, regularized, institutionalized corruption is appreciated where the previous decade was about disorderly and illegal corruption. Moreover, certain formalistic features, the de-

39 Indeed, for HLA Hart the continuity between Rex I and Rex II was a defining characteristic of the legal system *qua* legal system. *HLA Hart,* The Concept of Law, 1961.

40 Polish government's White Book https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html.

41 *Judith N. Shklar*, Legalism: Law, Morals, and Political Trials, Cambridge, MA, Harvard University Press, 1964.

lays due to fairness (see among others the delays of the adversarial system) are not popular. Undoing formalities in the name of speedy justice can be popular: legitimacy comes for the regime from popular endorsement and not so much from legality.

Beyond the formal aspects, the substantive part of the rule of law is affected as well. While substantive notions of the rule of law are necessarily defined in broad terms in the literature, we can see that the illiberal regimes undermine human rights and respect of the individual as autonomous being as understood in the liberal constitutional tradition, in a way that leaves both unachieved. Again, the attack is often subtle; even human rights may be welcome or at least tolerated in illiberal democracies, at least to some extent, that is to say in domesticated versions, accepting only speech that is not offensive, and demonstration that is not troubling to home-owners. Further, the rights shall respect local traditions, culture and popular majorities, and only such rights are granted which aim at guaranteeing security at all price. The accent, the emphasis is changed: there will be local shifts in favour of freedom of religion and dignity to the detriment of freedom of expression, minority religions, women's reproductive rights. There are strong theoretical and principled reasons supporting the moral superiority of the liberal human rights order but what to do where the majority finds dignity in respectful silence (i.e. "no disrespectful criticism, please!" instead of criticism of national champions like collaborationist churches and national idols). Illiberal regimes endorse some kind of a selective rule of law that augments the authority of even illegitimate governments.

Once again, we are confronted here with governments that are not illegitimate in the eyes of large segments of the population. Not only do they rely on the nationalistic credibility and the concentration of social and economic resources that make a large segment of society dependent, they also rely on a set of legitimating rules, even if these do not meet all the standards of constitutionalism as understood by the majority of the legal elite. The rule of law is believed to be sacrosanct in the ideology of the legal elite, an elite whose views may change in a relatively short time. In terms of acculturation there can be a revolutionary speeding up and the legal profession, which seems to resist some of the changes (which undermine their high status and power) can easily accept compromises at the expense of the rule of law. Moreover, practitioners have to realize that their success originates from bending rules, as this is the way to interact with the dominant social and governmental forces. A successful legal "refolution"[42] that leads to the illiberal regime may bring in new legal actors with new ideologies that will give support to the illiberal constitutionalism. New actors, like new court presidents and less successful associate professors turned into university rectors will bend the old constitutional or even private law doctrines to the extent necessary for regime legitimation. That will be enough for the purposes of regime building. It is said that it is impossible to sustain democracy without democrats; it is even more difficult to have the rule of law without people that respect fairness and foreseeability of law.

42 Refolution was the term invented by *Timothy Garton Ash* to describe a mixture of revolution and reform that occurred in 1989-90. Timothy Garton Ash, Revolution in Hungary and Poland, New York Review of Books, 17 August 1989.

The remnants of the rule of law generate a kind of *Gramscian* hegemony that is particularly apparent in the media.[43] The governmental control over public and private media is decisive in the manipulation of public opinion that results in the re-election of the populist leaders. Hegemony is based on the manufacture of consent. This situation, as mentioned above was made possible by twisting the rules of the game, in disregard of the elementary fairness that pertains to substantive rule of law. For example, the board responsible for media fairness is composed of partisans of the government; they sanction selectively anti-governmental media, until such media will lawfully lose its license for too many violations of the law.

What liberals and the judicial elite have to confront is not just the problem of impermissible attacks on certain judges or even independence or integrity of the entire judiciary or the disregard of the rule of law and its equality because the prosecution fails to bring charges against the political elite and uses criminal law selectively. The fundamental problem originates in a more theoretical tenet of illiberal democratic regimes. It is argued that it is the unmediated popular sovereignty that writes into law the (mostly illiberal) measure of social control. It is further argued that because the law expresses sovereign will, it will be the most advantageous to 'people'. In these circumstances the implementation of the legally endorsed bias, in full observance of, and reliance on the rule of law, will only serve the original bias.

VI. International reactions to the demise of the rule of law: the example of the protection of the judiciary by international fora

In most instances the attack on the independence of the judiciary and other instances of the undoing of the rule of law were perceived as isolated instances. The Polish tinkering with the judiciary finally triggered the Article 7 TEU procedure in the Polish case, while a very similar Hungarian set of legislative measures a few years earlier resulted only in infringement processes with very limited consequences. Only with changes in the external political environment, as in the case of the Polish judicial reform or with increasingly aggressive intervention (under President *Maduro*) the issue is understood as central to the rule of law.

In an age that was thought to be one of multi-layered constitutionalism, especially in the Member States of the European Union one could assume that the rule of law would have an important international dimension. After all, foreign investment and the entire EU legal system demands more than elementary legal certainty for the transnational market economy. The shortcomings of the rule of law in one country affect all other countries as it is their common law that is disregarded. Yet the international and supranational elements of the rule of law failed to exercise decisive corrective influence so far, among others for political reasons and complacency.

The challenge to the judicial independence and the rule of law as important components of illiberal regimes must be understood in its international dimension. This is an important practical problem for the EU as the legal system of the EU is based on

43 *Antonio Gramsci*, Selections from the Prison Notebooks of Antonio Gramsci, New York, International Publishers, 1971.

the assumption that all courts can be trusted as being independent and fair: mutual reliance is the fundamental principle of the EU legal system. Once the rule of law is systematically disregarded, and with impunity in one or another country, the entire system is jeopardized. International courts and other instances of the EU that follow their own routines were and are unable to respond in time, and by the time they intervene the damage can be irreversible.[44] Reactions are within a narrow paradigm of the rule of law, which does not recognize that certain anomalies are systemic and even a limited disregard of fairness and equality are regime transforming. Here a combination of a general attitude of deference by international bodies, an emphasis on the procedural aspects of democracy, ill-defined or under theorized concepts such as the constitutional identity and the rule of law have resulted in a system where questions about constitutional backsliding have been effectively side-stepped, or perhaps more accurately, ignored. Even where these issues arise and are dealt with on point, problems about the proper level of intervention remain.[45]

The international judicial and legal reaction became captive of the traditional concept of the rule of law. Law serves the reduction of complexity, which means for judges that the case in front of the judge has to be determined on the narrow ground that is foreseen in the legal code. The way the ECtHR dealt with the dismissal of the President of the Supreme Court of Hungary is telling of the inherent limits of international judicial reaction. In the cases of Baka v. Hungary[46] and Erényi v. Hungary[47] the dismissal of the President was construed as a freedom of expression case and the dismissal of his deputy as one of privacy. Both cases were decided with a considerable delay. International courts insist that all states within the system deserve the presumption of being democratic. It is for this reason that the abuse of rights by a government (Article 18 of the Convention) is subject to the strictest scrutiny in the ECtHR with a presumption in favour of the government.

The ECtHR seems to move into a position where subsidiarity is king and where the fact that a measure was adopted by a parliament elevates it to something respectable that is beyond scrutiny in ordinary cases. Where it is a parliamentary decision that causes the interference into a human right, the origin of the interference is held to be an important element increasing the margin of appreciation,[48] as if a democratic par-

44 A small but not insignificant exception to this may be the refusal of the Irish High Court to execute a European Arrest Warrant because it could not trust the independence of the Polish courts. *Minister for Justice and Equality v LM* Case 216-18 CPU. However, as in the *Aranyosi* context the possible 'excommunication' of Poland means that the common legal system will suffer: the accused and the convicted will remain in countries which have very little to do with these people and will have difficulties with the fair conviction of the wrongdoers. *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*. Judgment of the Court (Grand Chamber) of 5 April 2016. Joined Cases C-404/15 and C-659/15 PPU.

45 See the above cited handling of judicial dismissals. It will remain to be seen how effective the Article 7 procedures against Poland and Hungary will be. Given the political set up of these procedures requiring unanimity from all but the targeted member state, it is unlikely that they will amount to much.

46 *Application no. 20261/12*, Judgment of 23 June 2016.

47 *Application no. 22254/14*, Judgment of 22 November 2016.

48 *Animal Defenders v. United Kingdom*, Application no. 48876/08 (Grand Chamber). Paras 108-9.

liamentary legislation was unable to violate human rights. While there is certainly merit in treating decisions of well-functioning liberal democracies with deference and respect and conversely treating those of authoritarian states with a higher level of scrutiny. However, this schematic approach does not function well where a state is in danger of giving up its liberal democratic character but respects formalities. As mentioned, the rule of law in the EU is based on mutual trust and respect and this assumption backfires to the detriment of the rule of law where the trust is unfounded.[49]

A more aggressive defence of the rule of law at the international level is a possibility but it would require a proper normative perspective, a kind of a militant rule of law. The first step in that respect would be a legally operational definition of the rule of law. Neither the existing EU mechanisms nor the political actors seem particularly interested or legitimated to act in this sense. Unfortunately, bureaucratic interests and suspicious personal interests of European politicians (e.g. serving the gas industry or jockeying for office) make such action unlikely.

Yet it would unfair to deny the importance of the Haltung of the legal profession and of the remnants of civil society in emerging illiberal regimes. Judicial decisions continue to indicate standards even where state authorities fail to implement or obey judicial decisions only superficially (in form but not in substance). Even a single judgment can collectivize the dispute and repoliticize it. As long as the rule of law standards are somehow upheld, measures that serve the illiberal regime will remain naked and of dubious legitimacy. Moreover, domestic resistance in the name of the rule of law and human rights may move the legal dispute into international politics. But again, what can one expect of international bodies and the community of states which maintain constitutionalism but regularly grant concessions to populism and to isolationist sovereignty claims?

VII. Conclusion

In *Gramsci's* already mentioned theory there is a civil society that is governed by consent beyond the political society.[50] When interpreting current events in this frame one can say that the emerging populist domination permeates civil society and generates a xenophobic antiliberal consent. We are not confronted with *Thomas Mann*'s Zauberer *Cipolla*, mesmerizing people. There is a popular consent here that is dissatisfied with the "legal niceties" causing delays in court and protecting malefactors like 'migrants'. Of course, such dissatisfaction is manufactured but that does not change the popularity of the anti-formalism and quick fixes. Consider the sudden popular agreement around the anti-migrant measures, which disregard the rule of law in terms of inappropriate expedited procedures and even in disregard of the applicable (EU) law. This attitude is not limited to voters of illiberal parties. The illiberal domination

49 Likewise, trust becomes counterproductive where the EU (in Article TEU 4 (2) recognizes in a way the importance of national identity as expressed in constitutional identity. If the "identity" is determined by the national courts as being illiberal and incompatible with EU law the nationalistic-nativist demise of the rule of law will be legitimated.

50 *Gramsci*, fn. 43; *Joseph A. Buttigieg*, Gramsci on civil society, boundary 222.3, 1995, pp. 1-32.

is not based on an imposed and constrained consent, even if it is manipulated and based on lies: it relies on the pre-modernity, traditionalism and fears that are part of the popular thought.

These pre-modern emotional elements were to some extent suppressed by liberal constitutionalism and the rule of law. It happens that the suppression was not successful. More to the West the same components exist, and the suppression is less and less successful by the day. In the ECE (like in most Western countries) the political power of the illiberal manipulator is perceived as liberation among large chunks of the public. It is hard to describe these events in terms of a revolution. This is a post-modern counter-revolution that is not a peculiarity of the post-communist countries: it is part of the return to national sovereignty, nativism and tribalism. This development undermines the integrated presence of Europe in the world competition: here lies the importance of the illiberal "revolution" in the ECE: as a sovereignist endeavour it contributes to the decapacitation of the West to live according to its still popular enlightenment based form of life.

One of the problems of handling the problems of Eastern Europe within the European Union is not only the lack of interest but also the lack of will to understand. Understanding is hampered by the fact that the Member States are afraid to recognize their own shortcomings and trends in what happens in the East. All the elements of the legislation and institutional reform in Hungary are justified by a solution that is accepted in an eminent democracy. It is a collection of the shortcomings of western constitutionalism.[51] This is what happened to the rule of law in the illiberal democracies: one night the inebriated rule of law, the king over an occupied country fell asleep in his majestic robe, and the next morning he woke up shivering in rugs. When *His Majesty* complained, he was told that this is a better robe, made of pieces of many royal mantles; if he shivers because the material is so thin, and mothball eaten this is only because it has served in other kingdoms for so long.

The departure from the elementary requirements of the rule of law is either not seen by the general public or is considered to be of a limited importance as the legitimacy of the illiberal regime depends on the popular endorsement that is based on the nationalistic emotions. The rule of law is of little importance for the social regime legitimacy where the regime is justified by claims of the popular sovereignty. This should not be confused with the revolutionary denial of the rule of law and legality, but the illiberal populism can rely on certain darlings of the contemporary democratic theory. Populism sings the notes of republicanism that despises constitutionalism as a legalistic restriction of the popular sovereignty. The populist political movements were fed up with the power of the courts and insisted on the political constitutionalism. In this context the rule of law is not appreciated as it is formalistic and often serves delay of justice. But the government needs to remain legalistic and the rule of law, even if abused, is a part of the official canon.

So, in the end, what is the role of the rule of law in the legitimacy of the illiberal democracies? Clearly, it is not irrelevant as the governments work to achieve their,

51 *Renáta Uitz*, Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary, International Journal of Constitutional Law 13.1, 2015, pp. 279-300.

oftentimes nefarious, goals through the legal system and in accordance with the rules of the game. The governments and their cronies rely on certain aspects of the rule of law in protecting their own position and their own assets. There are plenty of examples of this through-out the paper. But clearly, they also do not appreciate the rule of law on any deeper level as discussed in the second part of the paper. They do not see value in following the rules of reason and fairness for the reasons that the rule of law is valued, rather they see it as a smoke screen for their activities that may justify them to some, and hide them from others.