

**ILLIBERALISM v. THE ECtHR AND EU:
ARE FUNDAMENTAL RIGHTS SAFE IN AN 'ILLIBERAL STATE'?
(THE CASE OF HUNGARY AND POLAND)**

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Orbán Viktor, Prime Minister of Hungary, 2014¹:

“...we have to break up with the liberal principles and methods of organizing a society and generally with the liberal understanding of society.”

“...the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, and I could list a few more, but it does not make this ideology the central element of state organization, but instead includes a different, special, national approach..”

Jaroslav Kaczynski, Founder and President of PiS, former Prime Minister of Poland (2006-2007), 2014²:

“...we have recognised the Polish state as a value of the highest order, and any forms of undermining its sovereignty or existence are unacceptable, dangerous to the nation and a threat to Polishness in its current and historical dimensions.”

ABSTRACT

This short thesis aims to reflect on illiberal trends and politics in two countries, Hungary and Poland, and to show how the European Union and Council of Europe – principally through the judgments of European Court of Human Rights – responded to the recent challenges of human rights and rule of law problems. It can be said, that in these two countries the status of fundamental rights are not safe but at this moment these rights are present and both the domestic and the international institutions are able to protect them – at least on a minimum level. But the perspectives are not so positive either: the constant diminishing of rights, the uncertainty and arbitrariness in all legal and political areas cannot lead us to an optimistic view. The area of rule of law is also permanently subjected to the political decisions - and contrary to the fundamental rights – the EU protection has not been satisfactory so far. Fortunately, some new mechanisms have already been invented and the outcomes we will be able to see in the near future.

¹ <http://mno.hu/tusvanyos/orban-viktor-teljes-beszede-1239645?oldal=3>

² The Law and Justice Party's Program 2014, p.11, <http://old.pis.org.pl/dokumenty.php?s=partia&iddoc=14>

INTRODUCTION

As the idea of so called illiberal democracy³ seems to become a normal way of politics in the last years, it is probably time to describe its features and its consequences and see what possibility – if any – there is to deal with it or to at least restrain these new regimes/politics to maintain fundamental rights, rule of law or constitutionalism in its original sense. Therefore, the relevance and importance of this thesis lies in the research of this very contemporary and definitely fashionable political or philosophical idea of illiberalism and reactions to it. The question whether it is compatible with fundamental rights or the rule of law, especially when we already have few years of practice behind us in the Council of Europe and European Union member countries, Hungary and Poland.

There is a relevant literature on this issue in Hungary⁴, the years of experience and collisions with the Council of Europe, European Court of Human Rights (ECtHR) and European Court of Justice (ECJ), a number of decisions and academic articles have been already published, but only a few comparison of the two countries have been done so far⁵, particularly on these special issues and topics. These topics are the Constitutional Courts in these two countries, their reaction and compliance with the new illiberal political systems, how they can preserve the already achieved rights and how they protected themselves and what the ECtHR response was to the illiberal challenges. The thesis also argues on the side of

³The definition of illiberalism faces with challenges and difficulties but a short description will be provided in the Chapter A/ 3. of this thesis, where the focus will be on the constitutional aspects of illiberal legal systems - which is found to be challenging the rule of law due to its irrational or arbitrary features.

⁴The following should be regarded as the main starting points and the most recent academic publications on Hungary: Jakab András – Gajducsek György: *“A magyar jogrendszer állapota”* (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016. and Armin van Bogdandy – Sonnevend Pál (eds.): *Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania* (Oxford, Hart Publishing, 2015,) and the whole political process had been covered very detailed in the Hungarian law journals, “Fundamentum” and ‘Közjogi Szemle’ with a large number of articles from many scholars.

⁵One of them is very recent one: Balcer, Adam: *Beneath the Surface of Illiberalism: The recurring temptation of ‘nationalist democracy’ in Poland and Hungary – With lessons for Europe* (WiseEuropa Institute - Heinrich Böll Stiftung, Warsaw, 2017), This article focuses on mainly on the historical and political similarities between the Hungary and Poland and finds quite a long parallel issues and reflexes.

extending the range of the research to a recently reformed country, Poland - as a newcomer - and make a comparison on these two Eastern European countries where it is possible. How they have shifted from the rule of law to illiberal governance and whether the EU and ECtHR have new responses on this challenge of illiberalism.

According to the above mentioned starting point, the method is to examine the features of the Council of Europe and EU mechanisms in their present form, how far they are able to stop and turn back these regimes. On the other side, the individual rights can be protected by the Council of Europe or in domestic level even by the constitutional courts. This work focuses on both form of protection. There are two reasons for this: one is the missing legal framework and the other is if the legal mechanism is present (as in the Article 7 of the EU Treaty), due to political reasons and bargaining the real steps have been never taken. Secondly, it also will be shown that the European mechanism and Strasbourg court do not aim and are not entitled to intervene into member state affairs, their limited jurisprudence is well justified in their past. This thesis focuses on both forms of protection, but in case of Hungary the ECtHR judgments and the Hungarian Constitutional Court will be discussed, in case of Poland rather the EU mechanisms will be in the center.

The finding of this thesis is that the existing mechanisms in these international communities and courts have several shortages, but ECtHR - which is by definition the last resort forum for individual human rights violations - is able to face with the fundamental right challenges. Also will be pointed out that in number of cases the domestic constitutional courts also were able to fulfill their rights-protecting function and they started to rely on and comply with international standards and ECtHR decisions. At the same time, this thesis does not claim the total constitutional or rule of law collapse in these two countries, but rather states that there are several safeguards still operating and there are minor progressive steps in some

human rights areas, but the overall constitutional and fundamental right picture has become darker.

The methodology and structure of this thesis is to compare – where it is possible - the two countries most recent developments, but first the thesis lays down the main theoretical background, namely the definition of liberalism and illiberalism. The thesis starts with short description of mainstream contemporary liberalism of last decades and then the main differences between ideas of liberalism and illiberalism. The comparison of Hungary and Poland follows the pattern of focusing on some chosen topics, issues, on which this new type of political power has a specific interest.

In case of Hungary, due to the large number of cases and topics, some limitation must be made and concentrating on some paradigmatic or symbolic questions is required but an overlook of many cases and problems will be present. There is a list of 15-20 important or symbolic cases from which those 4 had been chosen for a bit more detailed discussion that have more significant features of illiberalism. The review of these cases contains the domestic judgments mainly by the countries' Constitutional Court, but the focus will be on the ECtHR jurisprudence how and why it decided pro or contra as the domestic courts. For this reason, mainly those issues have been picked – where it has been possible - that already had been decided both by the domestic courts and the ECtHR, and the decision contradicted to each other.

The time period which the thesis follows in case of Hungary starts from the 2010 general (parliamentary) election when a 2-party coalition occupied 2/3 of the seats and achieved a supermajority in the Parliament. The research also covers the period of the election of 2014, when the supermajority was confirmed – but only for a quite short time – up to the end of 2016. In case of Poland the illiberal political turn showed up after the October 2015

parliamentary election when the country very quickly became the second leading illiberal state within the EU. The significantly shorter period of time - only 1,5 year – leads to a different approach and much less case has been decided by the ECtHR so far than in Hungary. Consequently, in case of Poland I will concentrate more on the new EU mechanism on the structural, rule of law problems and the illiberal transformation of the Constitutional Tribunal.

A. LIBERALISM AND ILLIBERALISM - A POSSIBLE COMPARISON

1. CONTEMPORARY LIBERALISM IN A NUTSHELL

In very short, the main ideas of - one of the - contemporary liberalism are usually determined by the followings: the rule of law, separation (or distribution) of powers, limited government, individualism (autonomy and rights) and neutral state (impartiality).⁶ According to Dworkin the modern liberalism can be they described as a theory and practice of equality, namely, the liberal equality.⁷ This supposes the existence of a liberal political morality based on moral equality of every human being. This equality requires equal treatment (equal concern for every individual) and also equal concern for each and every citizen. The impartiality of state is one of the core idea of the liberal political morality, as in every state the individuals have very different – actually incommensurable – concern, opinions on the good, values, the equal treatment presupposes the impartiality in order to treat individuals equal and

⁶ This short presentation on the following pages is only to show very briefly the 4-5 “modern classical” approach to the liberalism from the 70-ies. Relying on the thoughts and works of, R. Dworkin’s “Liberalism”, András Sajó’s “Limiting Government” and János Kis’s “What is Liberalism, 2014?” are only a bit random choices on the topic, but the Kis’s 2014 book has a respond to the very recent challenges of modern political and constitutional illiberalism. See the exact references down.

⁷ Dworkin, Ronald: “*Liberalizmus*” (“Liberalism” 1978), Budapest, Atlantisz, 1992, pp. 173 – 211. pp.: In this very famous article Dworkin emphasizes the Equality and Liberty part or side of Liberalism, and the basic requirement that the government must treat the citizens as equals, which regards people as equally considered and respected. For him this is the real essence of liberalism.

provide them liberty which is a very essence of human nature. For this, the liberal justification and foundation of individual rights⁸ are necessary for treating equal, otherwise no rights can be preserved and no functioning state and society can exist.

2. LIBERALISM AND CONSTITUTIONALISM

The liberal principles of justice (liberty and moral equality) coincide with the constitutional provisions of a limited government, which maximum purpose is to maintain the rule of law and fundamental rights. So, the constitutionalism in this sense means the limiting of state power⁹ and submission of state institutions to the laws – in the system of rule of law – to ensure that they do not interfere with liberty.¹⁰

Adding to this, according to Kis, liberalism can be and should be defined also as a normative political theory: it evaluates political institutions in the light of an ethical approach.

¹¹ The ethical principles of this liberalism are the equal dignity, moral equality, etc., and from them political principles can be derived: equal rights and equal concern, political impartiality.¹² These values and goals should be maintained by the constitutionalism. Not all the above principles are denied by illiberalism but the political and constitutional institutions built on them have a different preference, mainly following the majoritarian rule in justifying the institutions and the question of majority rule leads us to the illiberalism – populism - and constitutionalism.

⁸ Dworkin, Ronald: “*Liberalizmus*” (in original: “Liberalism” 1978), Budapest, Atlantisz, 1992, pp. 208 – 209.

⁹ Sajó András: “*Limiting Government. An Introduction to Constitutionalism*” (Budapest – New York, Central European University Press, 1999,) p. 9. and 12 – 13.: He puts it on a very short way: “Constitutionalism seeks to cool current passions without forfeiting government efficiency.”

¹⁰ *ibid.*, pp. 32.

¹¹ Kis János: „*Mi a liberalizmus?*” (What is liberalism?), Kalligram, Pozsony, 2014, pp. 537 – 651., respectively pp. 539 – 554, 574 – 580.

¹² The important question of distributive justice is only very shortly discussed here: the egalitarian liberalism uses the but the libertarian refuses it, the illiberalism as a political ideology does not rely on it.

Therefore, complementing and challenging individual liberty, the question of majority rule is always present in the liberal approach, asking what the relation is between individual freedom and the decision of majority.¹³ But majority rule includes nothing more than the possibility for everyone to participate equally in the political decisions (i. e. the voting rights). The majority principle only refers to the democracy side of the society not concerning the liberty side.¹⁴ Majority rule is acceptable only if the minority has the right to take part - or being part – in the decisions. This requirement presupposes the above mentioned moral equality, equal treatment and equal opportunity in decision making.¹⁵ Consequently, according to Dworkin, and contrary to the majoritarian approach, the real democracy is government by the “people as a whole acting as partners in a joint-venture of self-government”. There is no consensus on the basic values or principles, so, the majority rule in a liberal democracy should be followed only if the liberal political equality is present.¹⁶

Constitutionalism – which is both prerequisite and consequence of a liberal democracy - contains the normative order of democracy (the separation or distribution of powers, human rights and moral principles), the check and balances, and the idea of limited government.¹⁷ Illiberalism takes the opposite position and supports the majoritarian principle and a strong executive power with less constraints on it. Contrary, in a liberal system the majoritarian rule always has a subordinated role as it is not in compliance with the liberal principles of individual rights and the equal treatment and concern.

¹³ Dworkin: 'Az Alkotmány morális értelmezése és a többségi elv', in Fundamentum, 1997/1. pp. 7 – 27. Sajó id. pp. 55.

¹⁴ Sajó András: "Limiting Government. An Introduction to Constitutionalism" (Budapest – New York, Central European University Press, 1999, p. 57 – 59.

¹⁵ Sajó rejects the winner-takes-all type of politics because it does not take every individual in account, contrary to liberalism.. ibid., p. 63.

¹⁶ Dworkin, Ronald: "What is Democracy?" in.: Tóth, G. Attila: Constitution for a Disunited Nation: on Hungary's 2011 Fundamental Law), Budapest, CEU Press, 2012, pp. 25 – 34., see p. 28.

¹⁷ Hanák András: "Sötétség délen. Az alkotmányosság alkonya" ("Darkness at noon. The decline of constitutionalism") Budapest, Fundamentum, 2013/1., pp. 63 – 71. the author sees the Hungarian political transformation a permanent – artificial – revolution for a very concrete, special ideology expressed in the National Avowal., pp. 63 – 64.

The separation of democracy from liberal state or constitutionalism is the latter is based on the rights and their safeguards, while in democracy the popular sovereignty has priority¹⁸. The liberal democracy embodies both of them, while the short definition of illiberal democracy where the democratic decision-making is present (regular elections), but the individual rights are not protected by the same measures.¹⁹ The interaction between the democracy and liberalism causes the incompleteness of each: no democracy can be fully developed in a liberal state and vice versa. According to other opinion, this view cannot be maintained, as Kis says: the democracy is always a synonym of the liberal democracy, no illiberal democracy is possible: the concept of democracy is a normative concept, no majoritarian, technical rules can satisfy the conditions of it. A real democracy is per definitionem liberal, because the adjective 'liberal' describes the essence of democracy (equal concern and rights).²⁰ Kis also claims that a government can be justified only if it is limited – by the constitution - for protection of individual's rights, as the political authority in general is based on the individual's interests. The constitutionally limited government is not a minimal state it has to maintain and promote liberal equality in order to treat people equal. That is why the government's substantial limitations are to protect the fundamental rights and provide liberty. The procedural limitations are the separation of powers and checks and balances. This institutional framework can not be perfect.²¹ Liberalism is engaged with capitalist democracy and limited government.²²

¹⁸ Kis János: „*Mi a liberalizmus?*” (What is liberalism?), Kalligram, Pozsony, 2014, pp. p. 608.

¹⁹ Zakaria, Fareed: “*The Rise of Illiberal Democracy*”, *Foreign Affairs*, 1997/11-12., 76/6. pp. 22 – 43.

²⁰ It is worth to cite Kis in short: *ibid.* p. 612.: “...the adjective liberal does not add anything to the word ‘democracy’ which it would not have contained in itself before, it only points to the conditions without which the ‘democratic ideal’ would not be realized even with majoritarian rules. The liberal conditions does not limit but realizes the democracy. The liberal democracy is not result of a ‘bargain’, so, the ‘illiberal democracy’ does not exist.”

²¹ Kis János: „*Mi a liberalizmus?*” (What is liberalism?), Kalligram, Pozsony, 2014, pp. 621 – 630.

²² Kis also emphasizes – reflecting on the recent years’ critics on EU - that the democratization of the international institutions is important to defeat the illiberal critics: democracy is not internal, domestic idea any longer: it must aim a sort of consensus on the European level as well. *ibid.*, . 623.

3. ILLIBERALISM: DEFICITS IN RULE OF LAW AND IN FUNDAMENTAL RIGHTS

Sajó made a distinction between the ‘rule by law’ and ‘rule of law’ when describing the liberal and illiberal politics separation: the latter excludes the arbitrary decision-makings, prefers due process-mechanism through the whole legal system or norm hierarchy in civil law countries and substantial legality with certain principles (non-discrimination, etc.).²³ These are less significant or even missing in illiberal regimes. According to Zakaria, the liberal democracy (or constitutional democracy) – similar to the above mentioned features - can be defined as a political system marked by free and fair election, rule of law, separation of powers, basic liberties, property rights.²⁴ The similar short description of illiberalism is “routinely ignoring constitutional limits” and “depriving their citizens basic rights and freedoms”.²⁵ Zakaria also writes, democracy is about to select the government, constitutional liberalism is about the government’s goals: individual autonomy and dignity²⁶.

From the political side, constitutional liberalism has lead to democracy but democracy has not always lead to constitutional liberalism: its essence is limited power of government, while democracy’s feature is to accumulate the power and using it. The notion and existence of a constitution is neither a guarantee for constitutionalism.²⁷ The illiberal democracies can take a subtle and sophisticated form today, and there are completely differing political system, that cannot be described by the same terminology, there is no such a thing – similarly to liberalism - as general illiberalism. It also can take different general forms which makes the definition more complex or impossible, as there are completely differing political system, that

²³ Sajó András: *”Limiting Government. An Introduction to Constitutionalism”* (Budapest – New York, Central European University Press, 1999. p. 205 – 214.

²⁴ Zakaria, Fareed: *”The Rise of Illiberal Democracy”*, Foreign Affairs, 1997/11-12., 76/6. p. 22.

²⁵ *ibid.*, 23.

²⁶ *ibid.*, 26.

²⁷ Landau, David: *’Abusive Constitutionalism’*, UC Davis Law Review, 2013, vol.47, pp. 189 – 215, see the Introduction, pp. 189 – 195.

cannot be described by the same terminology. Basically, there can be three large types of illiberal constitutionalism differentiated: the theocratic, the communitarian and the ethno-national identity based states. Hungary and Poland are from the last type, while many Arabic countries belong to the first, some Asian are from the second.²⁸

Varol describes the recent situation in constitutional law as a ‘stealth authoritarianism’ which differs from the post-World War half-dictatorships.²⁹ Hungary can be regarded as one of the prototype of this new system which is more subtle, usually relying on and using the existing, liberal legal systems and provisions. In other way, “stealth authoritarianism serves as a way to protect and entrench power when direct repression is not a viable option. Stealth authoritarian practices use the law to entrench the status quo”.³⁰ These regimes diminish the accountability of the state, consolidates its power, blur transparency, modify electoral laws. And as a result “partisan alternation might not occur even in the face of changing political preferences by the electorate.”³¹ The practice of stealth authoritarianism includes the directed public prosecutor system, the electoral laws, libel lawsuits, voters registration, unreasonable entry barriers, specified campaign financing laws, charges of non-political crimes, such as tax-evasion, surveillance laws and institutions, establishing GONGOs, government organized NGOs. All these practices and measures discussed by Varol are present in Hungary and many of them in Poland.³²

Therefore, illiberalism is a problem within democracy, not outside of it, it has legitimacy (regular, free elections, popular support, etc.), they are reasonably democratic, but the danger

²⁸ Li-Ann Thio, “*Constitutionalism in Illiberal Polities*”, in M. Rosenfeld & A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) pp. 133 – 152., but especially pp. 135 – 138..

²⁹ Ozan O. Varol: “*Stealth Authoritarianism*”, 100 *Iowa Law Review* 1673, May 2015

³⁰ *ibid.*, 2 – 3.

³¹ *ibid.*, 4.

³² Varol also mentions (Ozan O. Varol: “*Stealth Authoritarianism*”, 100 *Iowa Law Review* 1673, May 2015 p. 23.: Hungary is an example of those countries which play a very sophisticated game with the rules and creates a mix of laws which are separately comply with the rule of law.

is that they discredit the liberal ones. So, the situation is more complex: economic, religious, civic liberties are the core of the human dignity and autonomy – as we have seen above - those countries that provide them are not dictatorships and provide a better environment for the citizens despite the limited political choice³³ such as Malaysia, Singapore.³⁴

In 1997 Zakaria saw the waves of illiberalism coming in most part of the world, especially in the Third World, where strong executive powers are also strengthened the illiberalism.³⁵ The examples of the apparent advantages of fresh strong democracies had lead to fall. It is hard to see any patterns, but it can be claimed that illiberalism is not more successful or more efficient than the constitutional democracies.³⁶ But he mentions Hungary and Eastern-Europe as definite constitutional democracies protecting individual rights and property in 1997.³⁷

Why is freedom in the centre of liberalism or constitutionalism? According to the individualist approach, liberty is the only way to fulfill the goals and means the very essence of human beings.³⁸ The fundamental rights can best serve the idea of a liberal society which main purpose is to maintain and help the pursuit of happiness for each and every member of it. Contrary, illiberalism also denies this individual approach and goals, it uses politics as a

³³ Zakaria, Fareed: “*The Rise of Illiberal Democracy*”, Foreign Affairs, 1997/11-12., 76/6. p. 41.

³⁴ These are better places economically than Slovakia and they have a very perfect electoral system – writes Zakaria. There is a wide range of illiberal democracies, almost 50% of democracies are illiberal, according to Zakaria. Zakaria, *ibid.* p. 25. Zakaria’s examples show it is hard to demonstrate the illiberalism with one feature: Sweden violates the property rights in many sense, UK has a established church which contradicts to the State neutrality,

³⁵ In his 2003 book (Zakaria, Fareed: “*The Future of Freedom: Illiberal Democracy at Home and Abroad*”, New York – London, W. W. Norton & Company, 2003), Zakaria mentions Russia as the example of illiberalism, how after 2000 the country turned back to the semi-democratic route, and Venezuela and Central-Asia, Pakistan, India, Indonesia – no Eastern-European country has been mentioned. According to Zakaria, the solution is more US and international support and intervention - with responsibility - to this countries, Zakaria, *ibid.* pp. 117 – 118.

³⁶ According to Zakaria the advantage of liberal democracies that the ethnic conflicts, nationalism are also better treated by constitutional remedies than simple power. Peace is easier achievable by liberal approach: negotiations, public participation, tolerance, patience, etc.

³⁷ Zakaria, Fareed: “*The Rise of Illiberal Democracy*”, Foreign Affairs, 1997/11-12., 76/6. p. 33.

³⁸ Sajó András: “*Limiting Government. An Introduction to Constitutionalism*” (Budapest – New York, Central European University Press, 1999. pp. 244 – 245.

goal for community goals. The safeguards of freedom is the rule of law in the legal system and ‘checks and balances’ in constitutional law.

To the question which fundamental rights should be protected in a liberal democracy and why, a list of negative and positive rights can be given.³⁹ The illiberalism doubts both of them, but prefers the positive ones: voting rights and other participatory rights are considered to be important - at least in theory – as they resemble to populist idea of illiberalism. On the limitation of fundamental rights illiberalism claims that there can be several reasons for constraints: the efficiency of the state, the welfare for everybody, or any communitarian goal, the very abstract idea of national interest, or just the moment-based political interest to grab or maintain political power. So, the separation – or in Hungary the distribution - of powers is present in illiberalism as well but the balance between the powers is missing. That is why illiberalism weakens the checks and balances system and did so in Hungary after 2010⁴⁰ and Poland after 2015.

4. IS THERE A HUNGARIAN OR POLISH WAY OF ILLIBERALISM?

Is there a special illiberal ideology in Hungary? Is there any difference in Hungary or Poland from the general illiberalism? The Hungarian illiberal model is probably the best described as ‘paternalist populism’.⁴¹ The very special feature is that the Fidesz – the leading Hungarian political party⁴² - is not a clear populist party, it is very elitist in many ways. The classical populism has four elements: anti-elitism, popular-participation, majoritarian

³⁹ *ibid.*, 259 – 268.

⁴⁰ Bánkuti, M. – G. Halmai – Kim Lane Scheppele: “*From Separation of Powers to a Government without Checks*” (In: Attila, Tóth Gábor (ed.): *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*. 237-269.pp., Budapest- New York, CEU Press, 2012): the authors clearly demonstrated how the shift has systematically and ‘professionally’ happened just within 1-2 years in Hungary.

⁴¹ Enyedi Zsolt: “*A paternalista populizmus a Fidesz és Jobbik ideológiájában*” (“Paternalist populism in the ideology of Fidesz and Jobbik”) Budapest, Fundamentum, 2015/2-3., pp. 50 – 61.. p. 51.

⁴² On the present Hungarian political party system of Parliament see Chapter B./1. of this thesis,

principle, and the leader-principle⁴³. The majoritarian-rule overwrites individual or minority interest, denies the multi-cultural or non-conventional life or pluralism. These features also entail the rejection of the neutral-state.⁴⁴ The elitism is present in the redistribution policy: the tax-system prefers the middle-class and above, the public policies, social policies restraints the lower-class⁴⁵ and creation of a new, artificial, narrow elite, the idea of hierarchy in society. These are opposite to the populism, but denying the values of all intellectual, cultural, ‘non-productive’ activities – as they are totally worthless - is a typical populist attitude.

Emphasizing duties over the freedoms, the collective interest and goals, the ethnicist approach are all the populist side of this Eastern-European illiberalism and these are represented very clearly in the new constitution of Hungary. The anti-individualism with stronger state makes also the difference from Western populism. In Hungary and Poland the idea of economical illiberalism is also present which means a protectionist politics strengthened also by populism, entailing to reduce the transnational capitals and investments. The state interference in economy is increased, but on an arbitrary way, complemented with instability in regulations and insecure property rights (sometimes various form of confiscations).⁴⁶

In short, Enyedi writes, the ideal of law-and-order, traditions, paternalism versus autonomy, free-market, small-state, creates the double-faced (elitist and populist) mixed variation of illiberalism in this region. This is complemented with Eastern-European nationalism and a majoritarian, anti-pluralist ideology provides the essence of Hungarian

⁴³ Enyedi Zsolt: “*A paternalista populizmus a Fidesz és Jobbik ideológiájában*” (“Paternalist populism in the ideology of Fidesz and Jobbik”) Budapest, Fundamentum, 2015/2-3., pp. 50 – 61.p. 50.

⁴⁴ Enyedi, ibid: pp. 51 – 52.

⁴⁵ Enyedi, ibid: pp. 55 – 56.

⁴⁶ Kis: id. p. 655.

political reality.⁴⁷ The Polish political and constitutional system has a very strong Roman-Catholic foundation and “missionary” - or ideology driven – politics but together with a Western orientation. The illiberal turn in Poland happened in normal way of parliamentary election with a very and unique surprising result, for which there is no real explanation concerning the recent years’ progress and stability in Poland.⁴⁸

The Hungarian illiberalism has also been carried out in a very usual, constitutional way without any surprise in 2010 elections.⁴⁹ After the new government entered into office, all modifications and weakening of checks and balances system happened within the existing constitutional framework, without any major violation of the law, but it resulted that Fidesz has achieved an authoritarian regime with a small chance to substitute it in a normal political way⁵⁰. This is what Tushnet calls the feature if illiberal states: they form a normatively constitutional systems that are not fully constitutional but has a normative power and justification of the legal systems. Hungary is a good example of this type of illiberalism⁵¹. Fidesz and PiS – the leading governing party in Poland - have very similar reflexes, attitudes toward the state, history, the ‘West’, or share the similar cultural perceptions, memories, identity, etc.^{52 53}

⁴⁷ Enyedi sees the process a well-based and planned construction which has been systematically built in the last decade, and uses any tool and measure with a high efficacy to preserve its power. See *ibid.* 51 – 52. The system has a ideological background but the to maintain the popularity and power, the Fidesz is immediately ready to react and modify the its policy for any practical reason. See the Sunday shop-closing laws and its withdrawal.

⁴⁸ The more detailed descripton of the Polish political turn on fall of 2015 see in Chapter C./1.

⁴⁹ Tushnet, M.: “*Authoritarian Constitutionalism*”, *Cornell Law Review*, Volume 100, 2 January 2015, pp. 393 – 460. on Hungary see. pp. 433 – 435.

⁵⁰ *ibid.*, 435.

⁵¹ *ibid.*, 459.

⁵² Balcer, Adam: „*Beneath the Surface of Illiberalism: The recurring temptation of ‘nationalist democracy’ in Poland and Hungary – With lessons for Europe*” (WiseEuropa Institute - Heinrich Böll Stiftung, Warsaw, 2017, pp. 47 – 55.)

⁵³ But the practical politics is different: the so called “brotherhood” between the Fidesz and PiS are not always so clear: in the European Parliament Fidesz voted 94% with the PO and only supported 66% the PiS propositions. In the European Council Fidesz supported the 81% and 87% the PO. Source: VoteWatch Europe. The reason is the membership of Fidesz and PO of the same party-family in EU, the European People’s Party, while the PiS belongs to the ‘Alliance of Conservatives and Reformists in Europe’ family.

B. HUNGARY: A PIONEER IN ILLIBERALISM

1. THE FUNDAMENTAL LAW: STEP TO A NON-NEUTRAL STATE?

As we have seen above in Chapter A. the neutrality of state is one of the main feature of a liberal state and the question is whether Hungarian illiberalism abandoned this principle – as usually the illiberal regimes do.

The Hungarian political change happened in April 2010, when the parliamentary elections results were the followings: Fidesz-KDNP 67,88% (262 seats of the total of 386), MSZP 15,28%, (59 seats), Jobbik 12,18% (47 seats), LMP 4,15% (16 seats), (plus 2 seats independent).⁵⁴ Poland the governing parties had similar results, but the supermajority is missing, as we will see.⁵⁵

The background and base of Hungarian legal-constitutional illiberalism go back far in the history, the appearance and strength of it is not surprising. According to Tölgyessy, Hungarian constitutionalism has a very weak roots⁵⁶, the Western-type rule of law legal system never was entrenched in the country's history.⁵⁷ The 1990-2010 period - which is considered by Tölgyessy only a short interlude – was the only one transitional road to the constitutionalism but it was interrupted in 2010, probably for a long time. The 2010 general election was both an action and reaction to the frustration of the last decades and can be seen as an interaction between the Fidesz and population of Hungary.⁵⁸ But it was a very

⁵⁴ http://valasztas.hu/hu/parval2010/354/354_0_index.html

⁵⁵ Chapter C. /1.

⁵⁶ On the lack of relevant constitutional tradition in Hungary, see: Sonnevend, Pál – Jakab, András – Csink, Lóránt: *“The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary in Hungary”* In Armin van Bogdandy – Sonnevend Pál (eds.): *Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania* (Oxford, Hart Publishing, 2015, pp. 33 – 111.), pp. 35 – 36.

⁵⁷ Tölgyessy, Péter: *“Politika mindenekelőtt”* (“Politics above all”) in.: *A magyar jogrendszer állapota* (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016., pp. 17 – 42.

⁵⁸ *ibid.*, pp. 31 – 33.

important question is whether there was any coercion to make new constitution.⁵⁹ In the last two decades there was several possibilities (1994 – 1998: Left-liberal 2/3 majority in Parliament) and missed opportunities.⁶⁰ Kis in his article answered a categorical ‘no’: there were no reasons to make new constitution and no political party promised to draft one.⁶¹ Also, Sólyom - first President of the Hungarian Constitutional Court (HCC) - sees an uprise and decline of Hungarian constitutionalism, where the process ended up in the new Fundamental Law.⁶² The very new perception of constitutionalism which contained the refusing of constitutional culture, and supported the total sovereignty of legislation⁶³ lead to the degradation of Fundamental Law to everyday politics.⁶⁴

The illiberal character of Fundamental Law is shown in several of its Articles: the anti-individual approach is seen in the workfare-state⁶⁵ where the conformity, duties - versus or at least before the liberties – patriotism, collectivism, community are the most important notions.⁶⁶ The Christianity is also emphasized through the whole text including an lifestyle-conformism: the concept family, children, marriage - only between a man and a woman⁶⁷ –

⁵⁹ There were attempts to justify the need for Fundamental Law. See the very first one is the Csink, L. – Schanda, B. – Varga Zs. A. (eds.): *“The Basic Law of Hungary. A First Commentary”*. Dublin, Clarus Press, 2012.) on the basis of the incoherence and final ending the ‘1989 system change’. The debate started by Majtényi Balázs’s comment on this book, see. Majtényi B.: *“Alkotmánypropaganda. Megjegyzések az Alaptörvény barátai ‘első kommentárjához’*. (Constitutional Propaganda. Comments on the “First Commentary” by the Friends of the Fundamental Law), Budapest, Fundamentum, 2012/2., pp. 147 – 150., Majtényi argues that the justification to draft a new a constitution is not well-grounded, only political intentions can be found behind the constitution-making. p. 148. The opposite opinion: Majtényi, L. – Szabó, M. Dániel (eds.): *“Az elveszejtett Alkotmány”* (“The Wasted Consitution”). (Budapest, L’Harmattan – EKINT, 2011.): This book and its articles argues that therewas no need for a new constitution, the ‘1989-Constitution’ could fulfill its mission, the very high number of amendments during the last 20 years could secure the liberal, rule of law feature of it.

⁶⁰ Kis János: *“Introduction: From the 1989 Constitution to the 2011 Fundamental Law”*, pp. 1 -25., in.: Tóth, G. Attila: *Constitution for a Disunited Nation: on Hungary’s 2011 Fundamental Law* (Budapest, CEU Press, 2012),

⁶¹ *ibid.*, 8 – 9.

⁶² Sólyom, László: *“The Rise and Decline of Constitutional Culture in Hungary”* In.: Armin van Bogdandy – Sonnevend Pál (eds.): *Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania* (Oxford, Hart Publishing, 2015), pp. 5 – 33.

⁶³ *ibid.*, 16 – 17.

⁶⁴ *ibid.*, 19.

⁶⁵ Pap András László: *“Személyiségkép és alkotmányos indentitás a NER-ben I-II-III.”* (“The Personality and Constitutional Identity in the System of National Cooperation”), Budapest, Közjogi Szemle, 2014/4. pp. 2 – 4.

⁶⁶ Fundamental Law, Article ‘G’ (2), or the Freedom and Responsibility (Chapter XIII. and XX.)

⁶⁷ Fundamental Law – ‘Foundation’, Article ‘L’

with a definitely patriarchal connotation. According to Pap this illiberal anthropology is probably not able to construct a ‘constitutional identity’ in the future, therefore it will not be accepted by the majority of Hungarians⁶⁸. Szente also has similar opinion: the circumstances of drafting, the ideological background and constant amending of the Fundamental Law leads to the consequences that neither consensus nor even respect can evolve to it. The minimum requirements of a constitution are fulfilled, the basic distribution of powers and rights are present in the Fundamental Law but it is not enough to maintain a (liberal) constitutionalism.⁶⁹ Other scholars are critical also but on a different way: “We, however, still hope that the mistakes of the Basic Law drove Hungary further from the European constitutional mainstream can be corrected in a legal and peaceful way”⁷⁰ and it is “still alive but severely impaired”.⁷¹ The most radical criticism has been given by Scheppele, claiming a long and systematic destruction of the Hungarian constitutionalism.⁷² The Venice Commission of Council of Europe published Opinions about the Hungarian procedure as well, with guidelines and objections on the constitutional drafting procedure.⁷³

The *National Avowal*, which is a preamble to the Fundamental Law before the Foundation Chapter resembles more to a political or ideological manifest. It has a disputed history and provoked numerous attacks both from lawyers and political scientist.⁷⁴ The Avowal - one of

⁶⁸ Pap András László: “Személyiségkép és alkotmányos indentitás a NER-ben I-II-III.” (“The Personality and Constitutional Identity in the System of National Cooperation”), Budapest, Közjogi Szemle 2015/2. p. 7.

⁶⁹ Szente, Zoltán: “Az Alaptörvény (2012 – 2015)” (“The Fundamental Law”), in: A magyar jogrendszer állapota (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016, p. 239.

⁷⁰ Sonnevend, Pál – Jakab, András – Csink, Lóránt: “*The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary in Hungary*” In Armin van Bogdandy – Sonnevend Pál (eds.): Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania (Oxford, Hart Publishing, 2015, pp. 33 – 111.), p. 109.

⁷¹ *ibid.*, 88.

⁷² Scheppele, Kim Lane: “*Understanding Hungary’s Constitutional Revolution*” In: Armin van Bogdandy – Sonnevend Pál (eds.): Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania (Oxford, Hart Publishing, 2015), (pp. 111 – 125.), on pages 115 – 122. she provides a long list of destructed points of constitutionalism, and also writing that Hungary is more dangerous than many would think.

⁷³ Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary (Opinion No. 614/2011, 28 March 2011 and Opinion on the New Constitution of Hungary (Opinion No. 618/2011, 17- 18 June 2011)

⁷⁴ Just to mention 2 of them: Szente Zoltán: “*A historizáló alkotmányozás problémái – a történeti lakotmány és a Szent Korona az új Alaptörvényben.*” (“The Problems of the Historical View of Consituition-Making – The

the most explicit illiberal text of the last 7 years of constitutionalism – due to its generality gives a chance to several interpretation but all of them are contrary to any contemporary constitutional law approach. The Article ‘R’ (3) of Fundamental Law refers to the Avowal as the Fundamental Law must be understood in the light of the National Avowal. But it contains mainly wishes, claims, political declarations, interpretation of the last Century’s history and so on, which supposes it is not a legal text - actually it is without paragraphs or numbers.⁷⁵

The also highly disputed⁷⁶ *Transitional Provisions* of Fundamental Law had a very uncertain status due to the content, circumstances and places it has been created.⁷⁷ The decision of HCC⁷⁸ partly declared public law-invalidity – due to the acceptance of it and the substantive and procedural provisions it contained. The status and function of Transitional Provisions were not clear not even sure – whether it is a part of the Fundamental Law – the only legal solution was to cancel it.⁷⁹

It is a development that the HCC judgments of constitutional amendments can be proceeded only on procedural questions, the substantial examination is out of the scope of

Historical Constitution and Hungarian Holy Crown in the new Fundamental Law”), Budapest, *Közjogi Szemle*, 2011/3., pp. 1 – 14. and Csink Lóránt – Fröhlich Johanna: „*Történeti Alkotmány és kontinuitás az új Alaptörvényben*” (“Historical Constitution and Continuity in the Fundamental Law”), Budapest, *Közjogi Szemle*, 2012/1., pp. 9 – 15. These articles have agreements on many issues, but the latter one stresses the importance of historical principles, the need to refer to historical constitutions of Hungary as a help in the interpretation, the mere theoretical, moral approach is not able to provide a ‘solid base’ for the future interpretation.)

⁷⁵ Szenté writes (ibid. pp. 12- 14.) that the Avowal will be considered only as an ‘ornament’, without any practical usage, but the ‘ideological mission’ has been fulfilled with it.

⁷⁶ Sonnevend, Pál – Jakab, András – Csink, Lóránt: “*The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary in Hungary*” In Armin van Bogdandy – Sonnevend Pál (eds.): *Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania* (Oxford, Hart Publishing, 2015), (pp. 33 – 111.) see a detailed evaluation on pages 49 – 52. on the oddity of these Provisions.

⁷⁷ Hanák András: “*Sötétség délben. Az alkotmányosság alkonya*” (“Darkness at noon. The decline of constitutionalism”) Budapest, *Fundamentum*, 2013/1., pp pp. ibid.: 64 – 65., this article provides a detailed overlook on the modification of FL and the fate of TP with a pessimistic outcome which conclude to the definite decline of Hungarian constitutionalism.

⁷⁸ 45/2012 (XII. 21.) AB

⁷⁹ Lápóssy, Attila – Szajbényi Katalin: *Az Alaptörvény Átmeneti Rendelkezéseinek alkotmányosságáról* (“On the Constitutionality of Transitional Provisions of the Fundamental Law”), Budapest, *Közjogi Szemle*, 2012/2., pp. 1 – 9. They argued that the Transitional Provisions should be eradicated as soon as possible as it is not reconcilable with the Fundamental Law. It has declared by the HCC, partly in 45/2012.

HCC.⁸⁰ The provision of the 4th Amendment of Fundamental Law has already prohibited the substantial review.⁸¹ After the first modification of the Fundamental Law⁸² the second modification⁸³ included the compulsory retirement of judges and public prosecutors at the age of 65 and 62. It prescribed the voters' prior registration which rule was put in the Transitional Provisions of the Fundamental Law so the HCC was able to examine and annul it as an unconstitutional modification.⁸⁴

The infamous 4th Amendment of Fundamental Law⁸⁵ has the ideal-typical anomalies of an illiberal regime.⁸⁶ This modification clearly shows how the Government reacts and thinks about democracy and rule of law.⁸⁷ This Modification is the largest, containing the most point which are the followings:⁸⁸ The political manifest part of the Transitional Provisions is put into the Closing Provisions of the Fundamental Law after it was found unconstitutional. So, the Government used the same usual trick as previously had already done when the HCC decided statutes unconstitutional, the response was to make those statutes part of the

⁸⁰ In the 61/2011. (VII. 12.) and 45/2012 (XII. 29.) decision the HCC made attempts to exceed the jurisdiction over substantial questions.

⁸¹ Gárdos Orosz, Fruzsina: *"Alkotmánybíráskodás 2010 – 2015"* ("Constitutional Jurisdiction 2010 - 2015") in.: *A magyar jogrendszer állapota* ("The Condition of the Hungarian legal system"), Budapest, MTA, 2016., pp. 442 - 479.) pp. 467 - 468.), The HCC interprets the Fundamental Law as a coherent system including the referring to general, substantial norms and former HCC decisions as well.)

⁸² May 2012, Closing Provisions of Fundamental Law, point (5)) included the provision which declared the Transitional Provisions part of Fundamental Law.

⁸³ November 2012 (T/8288)

⁸⁴ 1/2013.,(I. 5.)

⁸⁵ 1 April 2013, T/9929

⁸⁶ The 3rd Modification of FL on December 2012 aimed the property rights over the lands and forests, so the illiberal feature is less important here. The 5th Modification the issue of churches – due to heavy international critics – has also reappeared. The concept of 'recognized churches' with privileges, and political advertisements in campaign is allowed, and 'the right to legal judge' principle is confirmed as the authority to replace cases of the National Office of Judges has been cancelled.

⁸⁷ I followed here Sente's Sente, Zoltán: *"Az Alaptörvény (2012 – 2015)"* ("The Fundamental Law"), in.: *A magyar jogrendszer állapota* ("The Condition of the Hungarian legal system"), Budapest, MTA, 2016., pp. 213 – 242.) analysis here, who gives a broad overlook on the 4th Modification as well and found it a very typical essence of an illiberal regime. pp. 218 – 220.

⁸⁸ There are less important modifications from the total of 26, or those ones which have already been found unconstitutional by the HCC later, but were typical for the illiberal approach: the university students' regulations, or the prohibition of homeless from public places, which responded to the HCC 38/2012. (XI. 14.), the diminishing the classical autonomy of the university with the economical-chancellor system, or the increased discipline authority for the President of the Parliament.)

Fundamental Law.⁸⁹ The most important one is regulation of the procedures of amending the Fundamental Law: it has been declared here that only the procedural review can be taken place by the HCC.⁹⁰ The recognition of churches - which is one of the most disputed legal issue of the last few years – also under the jurisdiction of the Parliament as a 2/3 majority statute. The political campaign spending – after the HCC decision⁹¹ which found unconstitutional the legal constraints on campaign spending – the Government embodies the unconstitutional rules into the Fundamental Law. The very problematic rules of the freedom of expression must not aim the violation of dignity of Hungarian national, ethnic, racial, religious community, which rule actually has re-established the freedom of expression as a community-right.

The reception of Fundamental Law is mixed, mainly negative. In their joint opinion⁹² Hungarian scholars express their doubt about the legitimacy of the Fundamental Law, because of the procedure that it went through, the lesser protection of privacy, and the decreasing protection of human rights, the limited power of HCC, the lower independency of every other court with a new supervising system on them, and the radical transformation of the ombudsman system.⁹³

To sum up, as we have seen above in Chapter I./3., the rule of law requirement is a very essence of constitutionalism, but the following are definitely diminished it: the decreasing role and jurisdiction of HCC, the pressure on the judicial branch, the methods and content of

⁸⁹ The private life provisions of the Modification declared the marriage as the basis of a family, and the children obligations towards the parents. These comply with the 'conservative' and 'conformal' understanding of family. The Government is always very sound to regulate private life relations and questions in the Constitution.

⁹⁰ On the different academic approach on review of the substantial provisions: see: Chronowski Nóra et al.: "Túl az Alkotmányon", ("Beyond the Constitution") Budapest, Közjogi Szemle, 2010/4, pp. 4 – 6. majd később Naszladi, Georgina: Az alkotmánymódosítások alkotmányosságáról döntött az AB ("The HCC Decision on the Constitutionality of the Constitutional Modifications"), Budapest, Közjogi Szemle, 2011/3., pp. 65 – 66.

⁹¹ 1/2013 (III. 1.)

⁹² Z. Fleck – G. Gadó – G. Halmai – Sz. Hegyi – G. Juhász – J. Kis – Zs. Körtvélyesi – B. Majtényi – A. Tóth G.: Opinion about Hungary's Fundamental Law („Vélemény Magyarország Alaptörvényéről”) In: Fundamentum, 2011/1. 61 – 77.pp.)

⁹³ *ibid.*, 74 – 75.

legislation, especially the randomly chosen 2/3 majority laws. Sente evaluates the Fundamental Law as a legal text which was not able to control the power - in this sense the original function of constitutionalism is not fulfilled.⁹⁴ But the Government used it as a political tool, changing it without hesitation. The Fundamental Law became only a legitimacy-tool to justify any political will.⁹⁵

2. THE CONSTITUTIONAL COURT: TRANSFORMATION AND SURVIVE

The Hungarian Constitutional Court has been modified in many ways since 2010. An illiberal state needs less independent legal bodies or checks, therefore the HCC modification also directed a more loyal, less independent structures and judges with a modified jurisdiction. Some scholars are even unsure about the existence of an independent constitutional court in Hungary.⁹⁶ Others claim there is a weakened but still working HCC which is able to fulfill its function with a rather narrowed influence on Hungary's legal life.⁹⁷ But Gárdos does not go so far, she claims only a definite change in the HCC role and weight.⁹⁸

In 2010 the process of nomination and appointment of judges were modified.⁹⁹ From then judges are selected and appointed by a Parliament Committee which members are delegated not from each political party – as it had been for 20 years – but the Committee

⁹⁴ Sente, Zoltán: “*Az Alaptörvény (2012 – 2015)*” (“The Fundamental Law”), in: A magyar jogrendszer állapota (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016., (pp. 213 – 242.) p. 238. An interesting data, that according to Sente, until December 2015 the 27,5% of the Fundamental Law has been changed or added. Sente p. 238.

⁹⁵ Sólyom, László: “*The Rise and Decline of Constitutional Culture in Hungary*” In.: Armin van Bogdandy – Sonnevend Pál (eds.): Constitutional Crisis in the European Constitutional Area. Theory and Politics in Hungary and Romania (Oxford, Hart Publishing, 2015), pp. 5 – 33., p. 28 – 30.

⁹⁶ Halmai Gábor: In Memoriam magyar alkotmánybíráskodás, in: Fundamentum, 2014/1-2., pp. 36 – 66.

⁹⁷ Gárdos Orosz, Fruzsina: Alkotmánybíráskodás 2010 – 2015 (“Constitutional Jurisdiction 2010 - 2015”) in.: A magyar jogrendszer állapota (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016., pp. 442 - 479.)

⁹⁸ *ibid.*, 442 – 446. all together she mentions 6 modification until 2014 in 55 different points. p. 445.

⁹⁹ The modification of 5 July 2010 of the ‘old’, 1989 Constitution’s 32/A.§ (4)

reflects only on the proportion of the representatives of the parties. This entails that a 2/3 majority can totally control the process.¹⁰⁰ The second modification¹⁰¹ is the election of the HCC President who is elected by the Parliament, decreasing the independence of the HCC. In April 2011, the majority also increased the numbers of the judges from 11 to 15.¹⁰² At the same time the 9 years and once renewable serving time rule was modified and the now 12 years and non-renewable rule entered into force. The personal changes are also worth to follow: The numbers of judges increased from 11 to 15. The age-limit of 70 years of the judges has been taken out by new the Act on HCC¹⁰³ which rule also strengthens the newly elected Judges. Recruitment and appointment of the new judges also have been carried out by the new Government on a way which support its political interest.¹⁰⁴

The Fundamental Law Article 24. enumerates seven types of jurisdiction:¹⁰⁵ the largest modification – beside the restriction on financial laws - in the jurisdiction of HCC is the ‘*actio popularis*’¹⁰⁶ – the ‘a posteriori abstract norm-review’ by anyone - replacement by the ‘real

¹⁰⁰ The Government has the same 2/3 majority in the Committee as in the Parliament, the Committee reflects on the Parliamentary proportions, while in the previous system it would have only 2 vote from the 5. There were six parties in the Parliament in 2010: Fidesz and KDNP as the Government (They ran the election in a coalition, but in the Parliament they formed 2 separate fraction.), MSZP, Jobbik, LMP.

¹⁰¹ Statute of 2011/LXI, § 5. which reads: “...The 2/3 of the Representatives elects the President of the HCC...”

¹⁰² The age-limit of 70 years of the Judges has been taken out by the Statute of 2011/CVI. (latter Act of 2013/CCVII. § 42.) which rule also strengthens the newly elected judges.

¹⁰³ Act of 2011/CVI. (later also: by Act of 2013/CCVII. § 42.)

¹⁰⁴ The 5 new judges – elected without consent – are clearly or at least moderated supporters of the Government: Balsai István, Dienes-Ohm Egon, Pokol Béla, Szalay Péter, Szívós Márta. Balsai was a representative of Fidesz in the Parliament. By 2012, 7 judges of the 15 are newly elected, Government-related, no-consent. According to Halmai: Halmai Gábor: “*In Memoriam magyar alkotmánybírsákok*” (“In Memoriam Hungarian Constitutional Adjudication”), Budapest, Fundamentum, 2014/1-2. pp.36 – 56.) the turning point was February 2013, when the last 2 judges were appointed, Salamon László – also a former representative – and Juhász Imre joined the HCC, changing the last left-right consensus elected judges, Holló András and Bihari Mihály.)

¹⁰⁵ These are: to examine the prior constitutionality of statutes, in individual case the compliance with the Fundamental Law, Constitutional complaint for individual case and violation, a posteriori examination of statutes. (This last one can only be initiated by the Government, ¼ of Representatives, President of the Supreme Court, Attorney General, the Ombudsperson. The *actio popularis* allowed anybody to challenge the constitutionality of any statute.) , the domestic law compliance with the international law. It is similar in the Statute of 2011/CLI (Abtv.).

¹⁰⁶ Tóth J. Zoltán: “*Az egyéni alapjogvédelem az Alkotmányban és az Alaptörvényben I-II*”, (“The Protection on Individual Rights in the Hungarian Constitution and Fundamental Law”) Budapest, Közjogi Szemle, 2012/3., pp. 11 – 19., and 2012/4., pp. 29 – 39.) The Statute of 1989/XXXII. (Abtv.) § 48. (1), (2) provided the possibility to claim the unconstitutionality of a statute in individual cases. The ‘*actio popularis*’ provided the possibility for any citizen to challenge any statute without any legal interest. The Fundamental Law includes 3 ways:

complaint’¹⁰⁷ which allows complaints only for those applicants who already have a “ordinary court” judgment and this judgment should be reviewed from the constitutional point of view.¹⁰⁸ The lack of ‘actio popularis’ also lead to the stronger and wider jurisdiction of the President and the ombudsman at the same time it puts a larger responsibility on them.¹⁰⁹

The evaluation of the last 6 years’s experience a weakened but existing, operating HCC: we can observe the followings: (political) partiality in some cases, lack of constitutional reasoning, less use of former decisions and principles, reduced scope of jurisdiction, permanent political pressure, missing consensus in the appointment procedures.¹¹⁰ The HCC does not see – or just pretends it – vary obvious constitutional problems, challenges,¹¹¹ The apparent incompetence is the rejecting the annulments of a law, or declaring only the violation, or annulling the statute without remedying it. Halmai sees that the HCC - due to its limited rights and judges - is not able to control the Hungarian constitutional system, not able to maintain the original rule-of-law system from the past 20 years.¹¹² Also there is illusionary,

extraordinary complaint (FL. § 26. (2)) – when the normal legal remedy missing – and the ‘real complaint’ (Fundamental Law. § 27.) which is an ‘extra remedy-level’ against the judgments. The very general and abstract ‘actio popularis’ has been replaced by the a procedure which requires the legal interest, effect in the case from the complaining person. See the Opinion of the Venice Commission (28 March 2011) in its 614/2011 CDL-AD (2011) 001: ‘Opinion on 3 legal questions arising in the process of drafting the Constitution of Hungary’ The Committee agreed.) It confirmed and advised the invention of the new type of real-complaint as it can be used both against the statutes and judgments, but the legal interest must be present.

¹⁰⁷ Abtv. § 27.

¹⁰⁸ Gárdos Orosz, Fruzsina: “*Alkotmánybíráskodás 2010 – 2015*” (“Constitutional Jurisdiction 2010 - 2015”) in.: A magyar jogrendszer állapota (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016., pp. 442 - 479.) pp. 454 – 463. A very detailed description of the 3 different type or interpretation of the complaint. The jurisdiction of the new HCC has not been modified a lot: beside (a) the new ‘real-complaint’ and the other 2, there are the followings: (b) A posteriori norm-review initiated by the court, (c) a posteriori abstract norm-review, (d) a priori abstract norm-review. And also: Abtv. § 26 (1) and (2) the original complaint existing before 2012: individual complaint against a concrete statute used in the given procedure. The second Abtv. § 26 (2) ‘direct complaint’, without judicial decision, and the Abtv. § 27 (2) is real-complaint against a concrete judgment/decision if it referred to an allegedly unconstitutional statute.

¹⁰⁹ Uitz, Renáta: “*The illusion of a constitution in Europe: The Hungarian Constitutional Court after the 5th Amendment of the Fundamental Law.*” in.: Bell, John – Paris, Marie-Lucy: “Rights-Based Constitutional Review: Constitutional Court in a Changing Landscape” Chettenham, UK, Edward Elgar Publishing, 2016. pp. 374 – 405., see pp. 385 – 387.

¹¹⁰ Halmai Gábor: “*In Memoriam magyar alkotmánybíráskodás*” (“In Memoriam Hungarian Constitutional Adjudication”), Budapest, Fundamentum, 2014/1-2. pp. 36 – 63., pp. 36 – 37.

¹¹¹ The best example is the election-campaign billboard decision, which refused to annul a clearly discriminative statute. See shortly discussed in Chapter B./4.

¹¹² Halmai Gábor: “*In Memoriam magyar alkotmánybíráskodás*” (“In Memoriam Hungarian Constitutional Adjudication”), (Budapest, Fundamentum, 2014/1-2. pp. 36 – 63pp.) pp. 58 – 60.

surface-like functioning in the existence of HCC, only relying on the former jurisprudence and decisions mean the largest support for new decisions.¹¹³ The positive side is that the HCC exists, functions, the self-defense reflexes work, the compliance with the international standards and ECtHR can be considered good.

3. EU AND COUNCIL OF EUROPE RESPONSES TO HUNGARY: 2010 – 2015

The Council of Europe body, “European Committee of Democracy through Law” (Venice Commission) published in June 2011¹¹⁴ clearly draw attention to the points mentioned above.¹¹⁵ Picking up some points from the Opinion: the 68. point clearly misses the total abolition of death penalty¹¹⁶, describes the political modification of HCC¹¹⁷, critics on the judicial system, public prosecution office, ombudsman office. The main critics points sums up the followings: the Fundamental Law were not drafted under a transparent, clear, democratic process. The support of this law is also questionable. There are far too many 2/3 laws in it, and their number can be increased randomly and without any control. The guarantees are reduced, the existing level of human rights are not properly maintained, the system of checks and balances is weakened.¹¹⁸

¹¹³ Uitz, Renáta: “*The illusion of a constitution in Europe: The Hungarian Constitutional Court after the 5th Amendment of the Fundamental Law.*” (in.: Bell, John – Paris, Marie-Lucy: “Rights-Based Constitutional Review: Constitutional Court in a Changing Landscape” Chettenham, UK, Edward Elgar Publishing, 2016. pp. 374 – 405.) see p. 405.

¹¹⁴ ‘*Opinion on the Constitution of Hungary*’, European Committee for Democracy through law (In: Attila, Tóth Gábor (ed.): *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law.* 491 - 535.pp., Budapest- New York, CEU Press, 2012) 491 – 535.pp.

¹¹⁵ Bánkuti, M. – G. Halmai – Kim Lane Scheppele: “*From Separation of Powers to a Government without Checks*” (In: Attila, Tóth Gábor (ed.): *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law.* 237-269.pp., Budapest- New York, CEU Press, 2012)

¹¹⁶ ‘*Opinion on the Constitution of Hungary*’, European Committee for Democracy through law: points 91 - 101.

¹¹⁷ *ibid.*, points 102 -105.

¹¹⁸ *ibid.*, points 141 – 150 and after.

In the „Amicus Brief” several scholars states that the 4th Amendment of the Fundamental Law is also a very a rude step against the constitutionalism.^{119 120} The Venice Commission also published an Opinion on this Amendment with a critical voice.¹²¹

There had several critics been made by different European Union bodies on Hungarian constitutional transformation: the European Parliament published the ‘Tavares-report’.¹²² The European Commission referring to the Article 258. of TEU (the infringement procedure) also made clear its position on the Hungarian legislation:¹²³ especially the compulsory retirement for judges¹²⁴, the question of independence of Hungarian National Bank, the modification of ombudsman system. It criticized the ‘rule of law’ and constitutionalism in Hungary. The very important opinion of European Committee of Democracy through Law (Venice Commission) published in June 2011, under the title of „Opinion on the New Constitution of Hungary” is clearly draw attention to the main points mentioned above.¹²⁵

¹¹⁹ M. Bánkuti – T. Gombos – Z. Fleck – G. Halmai – T. Rozgonyi – B. Majtényi – L. Majtényi – E. Polgári – Kim L. Scheppele – O. Salát - B. Somody – R. Uitz: “*Amicus Brief a Velencei Bizottsághoz az Alaptörvény 4. Módosításáról*” (“Amicus Brief to the Venice Commission on the 4th modification of the Fundamental Law”) In: *Fundamentum*, 2013/3. 5-39.o.

¹²⁰ In this modification - and may be several others to follow up - the Government again narrowed the jurisdiction of the HCC (on taxes, annual budget), criminalize the homelessness, the freedom of religion and establishment of churches are cut down very roughly, and the most important to the theme of checks and balances, that the supervising function of the Constitution by the CC is banned. See: M. Bánkuti – T. Gombos – Z. Fleck – G. Halmai – T. Rozgonyi – B. Majtényi – L. Majtényi – E. Polgári – Kim L. Scheppele – O. Salát - B. Somody – R. Uitz: “*Amicus Brief a Velencei Bizottsághoz az Alaptörvény 4. Módosításáról*” (“Amicus Brief on the 4th Amendment of Hungarian Fundamental Law”) In: *Fundamentum*, 2013/3. 5-39.o.

¹²¹ Venice Commission: Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD (2013) , 012.Opinion 720/2013.

¹²² “Report on the situation of fundamental rights: standards and practices in Hungary” and also by the EP: “European Parliament Resolution of 3 July 2013 on the situation of fundamental rights standards and practices in Hungary, A7-0229/2013.

¹²³ “Statement of the EC on the situation in Hungary on 11 January 2012”

¹²⁴ The European Court of Justice (Luxembourg) decided on behalf of the judges on 6 November 2012, 286/12, ECJ v. Hungary

¹²⁵ Bánkuti – Halmai - Scheppele: 491 – 535.pp. and to pick up some points: the 68. point clearly misses the total aboliton of death penalty, the points from 91 to 101. describes the changes int he CC, 102 – 115 the judicial system, prosecutino office, ombudsman. The main critics in the 141 – 150. points sums up the followings:the Fundamental Law were not drafted under a transparent, clear, democratic process. The support of this law is questionable. There are far too many 2/3 laws in it, and their number can be increased randomly and without any control. The guarantees are reduced, the existing level of human rights are not maintained, the system of checks and balances is weakened. The Opinion also emphasize the limited jurisdiction of HCC.

In their other joint opinion¹²⁶ these Hungarian scholars express their doubt about the legitimacy of the Fundamental Law, because of the procedure that it went through, the lesser protection of privacy, and the decreasing protection of human rights, the limited power of CC, the lower independency of every other court with a new supervising system on them, and the radical transformation of the ombudsman system. A recent development that the European Parliament ordered the European Commission to start the first stage of the ‘new mechanism on the strengthening the rule of law’ in Hungary procedure.¹²⁷

4. ECTHR AND HUNGARY: OVERLOOK AND TYPICAL CASES

The relation and interaction between the two courts - ECtHR and HCC - also can be a signal for the protection of fundamental rights in an illiberal state.¹²⁸ The Convention can be considered as a transnational constitution for the member states with several functions. The very essence and nature of the ECHR and Council of Europe membership rest on the principle of subsidiarity, consequently the protection of the Convention’s rights is principally the task of the states. Only if a member state is not able or not willing to maintain the Convention’s provisions then enters the Court or other bodies of the Council. The subsidiarity of ECHR deploys a prior role the domestic courts, especially to constitutional courts. Generally it can be said that according to Uitz the new Fundamental Law and new HCC basically follow and comply with the international standards, but it does quite hectic and unforeseeable way,

¹²⁶ Z. Fleck – G. Gadó – G. Halmai – Sz. Hegyi – G. Juhász – J. Kis – Zs. Körtvélyesi – B. Majtényi – A. Tóth G.: “*Opinion about Hungary’s Fundamental Law*” („Vélemény Magyarország Alaptörvényéről”) In: *Fundamentum*, 2011/1. 61 – 77.pp.

¹²⁷ ‘European Parliament Resolution of 10 June 2015 on the situation in Hungary’

¹²⁸ In 2017 we can see the ratio of ECtHR pending complaints has increased to 11,2% (8962 pending application) of the total pending cases of 79750 from 47 member countries, Hungary is between Russia and Turkey. (http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf)

including both progressive and annoying surprises.¹²⁹ The arbitrary features of Hungarian illiberalism can be traced in many places, but the Fundamental Law itself is able to provide protection and uses the international references and cases.¹³⁰

They do so, because in the Fundamental Law in Article Q. 2 and 3 requires¹³¹ harmony and compliance with the international law. The ECHR is part of the Hungarian domestic law¹³², its place is under the Fundamental Law and above the statutes.¹³³ The most problematic question is the place of ECtHR's case law: Is the HCC bound by the ECtHR decisions? The HCC is divided on this question, the usual dissent opinion from the right-wing judges from all over in Europe. Dissents of the decision claim the priority of national sovereignty has always priority in every interpretation, and the Article Q of Fundamental Law should be interpreted this way. Actually, the task of the domestic courts is to interpret the Convention on an abstract, normative level, search for the rules and principles behind the concrete decisions.¹³⁴

The primal questions are whether the HCC is really the 'last resort' in the rights protection and how the HCC or other Hungarian legislation follows the ECtHR standards.¹³⁵ How often does the HCC use the Convention and case law of Strasbourg? Basically we can state that HCC is open and willing to use and follow the ECtHR decisions¹³⁶, but we can meet - in few

¹²⁹ Uitz, Renáta: "*Nemzetközi emberi jogok és a magyar jogrend*" ("International Human Rights and the Hungarian Legal Order"), in.: *A magyar jogrendszer állapota* ("The Condition of the Hungarian legal system") Budapest, MTA, 2016., pp. 173 – 210.

¹³⁰ *ibid.*, 209 – 210.

¹³¹ Fundamental Law, Article Q reads: "In order to comply with its obligation under international law, Hungary shall ensure that Hungarian law be in conformity with international law."

¹³² Act of 1993/31.

¹³³ The relevant HCC decisions are 34/2013 (XI. 22.) and 36/2013 (XII. 5.). Both of them confirm the minimum level or protection must not be decreased by any domestic courts.

¹³⁴ 13/2014 (IV. 18.) decision of HCC on the public officers. Judge Pokol's dissents.

¹³⁵ In 2017 we can see the ratio of ECtHR pending complaints has increased to 11,2% (8962 pending application) of the total pending cases of 79750 from 47 member countries, Hungary is between Russia and Turkey. (http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf)

¹³⁶ Polgári, Eszter: "*Az Alkotmánybíróság esete az Emberi Jogok Európai Egyezményével: Az elvárások és a gyakorlat*" (The Hungarian Constitutional Court meets the ECHR: The expectations and the practice), Budapest, In: *Fundamentum*, 2015/4., pp. 5- 17., it is also stressed in the article that the Convention is applied not only thorough the Court, but also through domestic legislation.

cases only – explicit resistance – these cases are the most exiting ones from the illiberal point of view. The HCC has the right - and obligation – of annulment of domestic statutes which violate the international law¹³⁷, which entails that the ECHR can be referred in any procedures in case of violation and the Fundamental Law contains most of the ECHR provisions directly. The ECHR should be regarded as a ‘prior interpretive base’¹³⁸ on which the HCC can rely on, also as a minimum point, standard: if two jurisdictions are in conflict the stronger protection takes priority. If the domestic protection is higher than the Convention can not be served as a measure to reduce the domestic protection, and vice versa, if the Convention provides the higher standards then it must be followed.¹³⁹ To put in a simple way: the higher protection always prevails from the competing jurisdictions.¹⁴⁰

Following the schedule above, this subchapter discusses those symbolic, illiberal issues which have been judged by HCC and it contradicted to the Government legislation founding them unconstitutional. There are more problematic cases that were accepted by HCC but the ECtHR found violations. In the fundamental rights area at the first sight there are no significant change, but the protection of them is under constant attack.¹⁴¹ There are some rights which protection level or quality has been diminished, to name a few of them:

The Act of 2011/C. on the Freedom of Religion and Consciousness withdrew the legal status from many churches. This Act was found unconstitutional by the HCC¹⁴² but the 4th Amendment made the church-discrimination possible again as the HCC is not entitled to

¹³⁷ Statue of 2011/151. Abtv., § 30.

¹³⁸ Polgári, Eszter: “*Az Alkotmánybíróság esete az Emberi Jogok Európai Egyezményével: Az elvárások és a gyakorlat*” (The Hungarian Constitutional Court meets the ECHR: The expectations and the practice), Budapest, In: Fundamentum, 2015/4., pp. 5- 17., p. 7.

¹³⁹ ECHR Article 53: „Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedom which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”

¹⁴⁰ Equivalency-rule, see on this 61/2011 AB

¹⁴¹ Szente, Zoltán: “*Az Alaptörvény (2012 – 2015)*” (“The Fundamental Law”), in: A magyar jogrendszer állapota (“The Condition of Hungarian legal system”), Budapest, MTA, 2016., pp. 213 – 242. (pp. 230 – 231.)

¹⁴² Decision 164/2011. (XII. 20.) and followed by the Act of 2011/CCVI., also refused by the HCC (Decision 6/2013. (III. 1.)

investigate it any longer.¹⁴³ The ECtHR also decided on the behalf of the ‘small-churches’ in case of Magyar Keresztény Mennonita Egyház and Others v. Hungary.¹⁴⁴ The so-called 3-strike rule in the Criminal Code¹⁴⁵ found partly unconstitutional by the HCC on 8 July 2014¹⁴⁶ but other very symbolic criminal law issue, the real-life imprisonment are included in the Fundamental Law.¹⁴⁷

However, only a few judgments of HCC are in explicit opposition with the ECtHR. The explicit resistance can be divided into two parts:¹⁴⁸ the legal resistance and the political. The first type can be observed in the ideological cases: the display of red-star cases¹⁴⁹. There was a violation of Article 10 of the Convention, but the Hungarian legislation did not follow the Court’s decision, the HCC had to force the compliance.¹⁵⁰

A very emblematic issue was in 2013-2014 the so-called ‘tobacco-shop law’¹⁵¹. This Act has been found constitutional¹⁵² by the HCC but ECtHR in judgment of Vékony v. Hungary¹⁵³ decided the 1st Protocol of the Convention has been violated due to the lack of any compensation, legal certainty. The ECtHR decision also noticed the followings: the disproportionate interference to the property rights is unacceptable but the lack of remedy or

¹⁴³ The Venice Commission: “Opinion on the Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities in Hungary”, CDL-AD (2012) 004, Opinion 664/2012.

¹⁴⁴ 2014, 70945/11, there several other decisions as well on this issue, not mentioned here.

¹⁴⁵ Act of 2012/C. § 81 (4)

¹⁴⁶ Decision of 23/2014 (VII. 15.)

¹⁴⁷ Fundamental Law, Article IV. 2. Discussed in more detailed in the next subchapter.

¹⁴⁸ Polgári, Eszter: “Az Alkotmánybíróság esete az Emberi Jogok Európai Egyezményével: Az elvárások és a gyakorlat” (The Hungarian Constitutional Court meets the ECHR: The expectations and the practice), Budapest, In: Fundamentum, 2015/4., pp. 6 -7.

¹⁴⁹ Vajnai v. Hungary 33629/06, 2008. and Fratanolo v. Hungary 29459/10, 3/11/2011.

¹⁵⁰ Of course these issue and the cases go back before the illiberal state, the sensitivity of the question and historical ambivalence to it are excellently used by the illiberal Government on regular bases.

¹⁵¹ The “Act of 2012/134. on the decreasing of smoking of minors and the commerce of tobacco-products”, in very short: the rights to retailment of the tobacco-products was re-regulated and redistributed by concessions to the Government related companies and persons.

¹⁵² AB 3194/2014. (VII. 15.) HCC decided the contrary (3194/2014, VII. 15.) claiming that the right to property has not been violated, the commerce of tobacco products is not prohibited, only the conditions and permission had been modified. See also Polgári, Eszter: “Az Alkotmánybíróság esete az Emberi Jogok Európai Egyezményével: Az elvárások és a gyakorlat” (The Hungarian Constitutional Court meets the ECHR: The expectations and the practice), Budapest, In: Fundamentum, 2015/4., 13 – 14..

¹⁵³ Vékony v. Hungary, 13 January 2015, (Application no. 65681/13)

any serious criteria and legal procedure complemented by a very short time for the preparation. This judgment can be regarded as one of the most political judgment and the minimum level of protection (of property rights) has not been maintained. Szente also claims that the Fundamental Law was not able to provide strong protection in property rights cases: the arbitrary practice - based on short political interest – could prevail in many area: energy-providers, private pension funds, number of punitive extra taxes are the examples of the illiberalism.¹⁵⁴

To continue, there are cases that show the approach and attempt of an illiberal Government to change the independency of judicial branch¹⁵⁵ and the Hungarian ombudsman system.¹⁵⁶ These cases shows that the individual rights violation are easier to protect than the institutional corruption.¹⁵⁷ The individual rights are harmed and respond or reflection is given to system problems by the ECtHR or ECJ or by HCC. These cases were famous in Hungary: the mandatory retirement of judges - in order to replace the higher-ranked judges from all courts and also judged by the ECtHR, the case of giving notice without reasoning for public employees, the cancellation of private pension-funds.¹⁵⁸ The similar – apparently labour law – recent case is the *Baka v. Hungary*¹⁵⁹ by the ECtHR: This Grand Chamber case significantly represents the illiberalism and its approach to rule of law and freedom of expression. The

¹⁵⁴ Szente, Zoltán: “*Az Alaptörvény (2012 – 2015)*” (“The Fundamental Law”), in: *A magyar jogrendszer állapota* (“The Condition of the Hungarian legal system”) (Budapest, MTA, 2016., pp. 213 – 242.), pp. 232 – 233.

¹⁵⁵ AB 33/2012 (VII. 17.): The Act was found unconstitutional.

¹⁵⁶ Act of 2011/CXI.

¹⁵⁷ Szabó Máté Dániel: “*Idegeneket hív magyarok ellen segítségül*” (“Foreigners are called to help against his own nation”), Budapest, Fundamentum, 2012/3., pp. 81 – 83., The article stresses that the institutional torsions are responded only by political solutions despite the existing legal procedures.)

¹⁵⁸ The case of judge-retirement was picked by the ECJ because of the age-discrimination and the data-protection ombudsperson’s office cancellation. This institutional modification is more connected to the illiberal state, the question was whether the transformation violated the independence of the ombudsperson’s office. The ECJ declared the harm of independence, there could have been other possibilities to modify the structure. But the real question was whether the level of already achieved protection of rights was also harmed, which question was not touched by the ECJ. No stepping-back is acceptable from the existing protection level, the comparison with other member state is not applicable either, only the domestic level can be the measure, and in this case there was an existing and operating independent office for data protection.

¹⁵⁹ *Baka v. Hungary*, 20261/12, 23 June 2016

arbitrary “reorganization” of the Hungarian court system¹⁶⁰ violated the Article 6 of Convention on right to fair trial, as Mr. Baka had no forum for legal remedies to turn to. The process also violated Article 10 right to freedom of expression because Mr. Baka’s opinion and criticism were not harsh or personal removing him from his office was disproportionate and unnecessary¹⁶¹ (§ 175.)

There is one type of problems of where neither the HCC nor the ECtHR protected the fundamental rights. This is the area of voting rights where the Court found the application inadmissible. As it has been mentioned above in the theoretical part of this thesis, the electoral systems are very crucial institutions in the illiberal systems due to their alleged populist and majoritarian, ‘direct democracy’ features. Probably this was the reason why the Government had a long struggle on this issue which ended up in a new substantive¹⁶² and procedural¹⁶³ electoral acts both of which have already underwent many modifications. The essential condition for any liberal democratic election is the general, equal, free, direct and secret ballot conditions in conjunctive order. The new Hungarian laws only partly in harmony with these conditions.¹⁶⁴ The generality condition is fulfilled, but the equality is violated as the domestic address holders can vote only at the embassies when they are abroad, while the citizens without Hungarian address can vote in letters.¹⁶⁵ HCC declared the equality condition for the electoral system, which included the opportunity to vote to everyone regardless to the address, for example.¹⁶⁶ In a latter decision the HCC refuses the complaint about voting in letters, on the ground of inadmissibility, as the letter voter have not been effected, so they can not file a

¹⁶⁰ Act CLXI of 2011, entered into force on 1 January 2012

¹⁶¹ § 168 – 176. and the ‘chilling effect’ arguments also appears in the Court’s reasoning, see § 173.

¹⁶² Act of 2011/CCIII.

¹⁶³ Act of 2013/CCCVI.

¹⁶⁴ Unger, Anna: “*A demokratikus választások alkotmányos és politikai ismérvei és a magyar választási rendszer*” (“The political and constitutional features of the democratic elections and the Hungarian system of elections”) Budapest, Fundamentum, 2014/4. pp. 5 – 21.). Unger summarizes in the following, ibid. p. 22.: general, but not equal, free, but not fair and partly direct the Hungarian system.

¹⁶⁵ The Venice Commission made critics on the electoral system which critics have been denied by the Government, see. “Joint Opinion” of Venice Commission, 662/2012.

¹⁶⁶ 22/2005 (VI. 17.)

complaint.¹⁶⁷ This very problematic statute has no reasoning for the distinction between the 2 voting methods, there are no necessity and proportionality conditions, the statute discriminates between citizens without legitimate aim.¹⁶⁸ The HCC did not provide protection on the inequality of the system either. The rule of law also requires the foreseeability and stability, but in Hungary the electoral law is the most often modified one, according to the political interest.¹⁶⁹

5. ECtHR: A FEW HIGHLIGHTED CASES

The following four different cases show the Hungarian responses to the fundamental rights violations in a bit more detailed description. These judgments by the ECtHR reflected to different legal area (criminal procedures, civil tort law in right to property, and freedom of expression) proving the general will of the state to comply with the international standards – sooner or later.

The prison overcrowd case of *Varga and Others v. Hungary case*¹⁷⁰ shows the example of attempt to comply from the Hungarian authorities: the HCC followed and referred to ECtHR judgment and legislation made the necessary follow-up steps to satisfy the requirements. The

¹⁶⁷ 3048/2014 AB.

¹⁶⁸ *Oran v. Turkey*, 15 April 2014 (case 37920/07 – Chamber Judgment, [2014] ECHR 396, 28881/07) the same type of statute is within the MA of the member state, the electoral system can be regulated on a domestic level.

¹⁶⁹ The OSCE/ODIHR also recognized the problem: “Limited Election Observation Mission Final Report”, Warsaw. 6 April 2014) The OSCE also criticized the media freedom on the elections: it was not balanced, neither free nor equal. The lack of media-pluralism and the unregulated campaign of the 3rd parties (civil organizations) also raises questions of unequal conditions and unbalanced availability to the media.

¹⁷⁰ *Varga and Others v. Hungary*, 10/06/2015 Application Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13

case is about the permanent problem of prison overcrowd in Hungary which problem has not been corrected in the last two decades.¹⁷¹

The applications included two claims: the violation of Article 3 on prohibition of torture or degrading, inhuman treatment and Article 13 the right to effective remedies, which – according to the claims - were missing.¹⁷² The prison facilities argued that they had no discretionary rights, they had to take everybody and this obligation entails the lack of liability. (§ 17.)¹⁷³ The Government argued that not all the domestic remedies have been exhausted, so the application should have been rejected as inadmissible (§ 40.). The Court rejected this reason, claiming that there are no effective remedies available in this type of cases in Hungary (§ 43.). The Court also sets up standards: the size of sleeping area-area, the right for free moving and also the 3 square meters for each inmates (§ 74.).

But the specific feature of the case is that it is also a pilot-judgment: the Court referred the Article 46 of the Convention on the proper obligation of implementation of those judgments where systematic or structural problems were found. The Court mentioned 450 prima facie meritorious cases in prison overcrowd in Hungary (§ 94. and § 98.) in which the Court also gave some legal guidelines: to decrease the number of prison sentences, reducing the use of pre-trial detention (§ 104-105.), more frequent use of in-home custody, put in force more effective remedies. (§ 106.) The pilot judgment also requires an Action Plan from Hungary to draft within 6 months (§ 113.) including general and individual measures. It also

¹⁷¹This situation is confirmed by the CPT (Committee on Prevention of Torture) CPT/Inf (2014) 13 recommendations: § 37, 79, 80 of the Report. The CPT provided an detailed description of overcrowd in its Report, including some measures and conditions.

¹⁷² These two Article are in conjunction, while the A3 contains a substantive right, the A13 can be triggered only if the A3 violation is present.

¹⁷³This reasoning were accepted by the domestic court on all levels, up to the Supreme Court. The prison placement procedure is based on the Decree no. 6/1996. (VII. 12.) of Minister of Justice on the Rules of Imprisonment.

includes the purpose to reduce the prison sentences (§ 109.) using preventive and compensatory remedies for violations. (§ 113.)

The Hungarian Government responded in an Action Plan¹⁷⁴ with the following points: the just satisfaction has already been paid to a few inmates, and - as individual measures - many inmates had already been released or replaced. As general measures, legislative actions have been taken place: reduction of prison population, the new institution of reintegration custody, compensatory remedy according to the Civil Code of Hungary. Despite of some political announcement the Government is willing to take steps and comply with Council of Europe and follow the international obligations.

The second highlighted cases, the *real-life imprisonment* – also as a criminal law issue – is also a very emblematic and important question to the Hungarian illiberal regime.¹⁷⁵ in case of *László Magyar v. Hungary*¹⁷⁶ (in which Hungary has violated Article 3. (A3) of the Convention, soon after, the Hungarian legislators recently responded in a way which also was refused by the Court in the *T. P. and A. T. v. Hungary*.¹⁷⁷

The question should also be evaluated under the Article 3. (A3) whether its implementation is considered inhuman or degrading treatment in its existing form. The Court's standards are clear: the very core is the concept of (a.) reducibility (§ 119.) and (b.) review without which no real life imprisonment is in compliance with the ECHR. There also must be a (c.) (fair) procedure (reasoning, etc.), so the purely discretionary ways (presidential pardon, etc.) are not enough, and the mandatory review must be in a (d.) certain time – the imposing of the sentence - which date is announced and known to the inmates (§ 110 – 114.) The concept of reducibility consists of 'de facto' and 'de jure' part: it is not enough to

¹⁷⁴ DH-DD (2016) 1223 Updated Action Plan (Hungarian Government), 14 November 2016

¹⁷⁵ It is included in the new Fundamental Law, Article IV. (2), just right under the III. (1) Article, which prohibits the inhuman and degrading punishment and treatment.

¹⁷⁶ *László Magyar v. Hungary* 73593/10, (20 May 2014)

¹⁷⁷ *T. P. and A. T. v. Hungary* 37871/14 and 73986/14, (4 October 2016).

legislate in a proper way (*de jure*), it is also necessary to have existing, ‘real world’ releases or reducing real life imprisonment happening in reality (*de facto*).¹⁷⁸ No of these conditions were met by the Hungarian law, so the judgments were similar as in *Vinter v. UK* case. There is a place for margin of appreciation in criminal law issues (§ 120.), but only within limits (§ 25.). The Hungarian legislation answered with a quite new law¹⁷⁹ – partly responding to Magyar-case decision – set up a new mechanism which can be summed up and described very shortly in the following points: *ex officio* clemency procedure which is the crucial novelty in the upgraded mechanism, but only after 40 years served in prison. The new procedure contains the standards and safeguards (Section 46/F) and decides about setting up a new body (Clemency Board) (Section 46/E) The composition of this panel investigating the reasons for release is appropriate to the Convention, the *ad hoc* bodies participating in the process are independent and can also be regarded as progress in the mechanism. It is very important and a progressive step to involve experts (psychologists, psychiatrists, etc.)

As it could be seen in advance, the rule of 40 years, only after which the applicant could be subject for mandatory pardon procedure was the main issue of the case. Government had the following reasons for such a long waiting time: the margin of appreciation applies, so it is the member states’ decision (according to the state’s criminal policy) to determine the limit. The 40 years is ‘normal, reasonable’ time for retribution – as a penological justification – and according to the Hungarian legal policy the normal, basic life sentence contains 25 – 40 years imprisonment before the possible review, consequently an “under 40 years rule” would cause an unacceptable advantage to real-life imprisonment prisoners. Additionally, the 25 years limit given in the *Vinter*-case is only a ‘tendency’ far for a rigorous, accepted standard. According to this, Hungary is under pressure to make further steps to be able to comply with

¹⁷⁸*Vinter and Others v. The United Kingdom*, 66069/09, 130/10 and 3896/10 The *Vinter*-case gave a clear itinerary for the legislators and stated that the complete loss of hope has a greater impact than the procedural shortcomings, so the ‘review’ and ‘prospect of release’ are twin rights in hand-in-hand.

¹⁷⁹ Act of 2013/CCXL on the Execution of Punishment, Measures and its modification (2014/LXXII.)

the ECHR standards, but as a political issue, the Government is not so willing to comply and this issue a very symbolic and important question for the illiberal criminal policy.

Thirdly, similar to the prison overcrowd case, the case of *98% punitive tax on severance-payment* would also have been able to trigger a pilot judgment procedure, but – due to the possibility and risk of mass application and an other pilot judgment – the Government decided to modify the statute. The 98% tax for dismissed public servants or state-owned companies was found unconstitutional by the HCC¹⁸⁰ and the ECtHR arrived to the same conclusion: *R. Sz. v. Hungary*¹⁸¹, *N. K. M. v. Hungary*¹⁸², *Gáll v. Hungary*¹⁸³. The Article 1 Protocol 1. violation was found by the Court: the applicants claimed an unjustified deprivation of property with no remedy available (§ 3.)

In the *R. Sz. v. Hungary* ECtHR challenged the domestic law¹⁸⁴ which was about various financial issues including the severance payments. First, the HCC decision¹⁸⁵ found most of the act unconstitutional.¹⁸⁶ On 16 November 2010 a modification entered into force on 31 December limited the retroactive scope of the act after 2005, but the HCC decided¹⁸⁷ to annul it again.¹⁸⁸ On 14 May 2011 the Parliament re-enacted a modified version of the law, restricted the severance payment only after the 2010 period. (§ 15 – 17. of the judgment.) The Government mainly argued on the general interests as a legitimate aim, and a fair balance between the individual rights and the economic crisis. (§ 26 – 27.) On the other side, the

¹⁸⁰ AB 184/2010 (X.28.) and 37/2011 (V. 10.)

¹⁸¹ *R. Sz. v. Hungary*, 41838/11 (2 July 2013): for state-owned company employees.

¹⁸² *N. K. M. v. Hungary*, 66529/11 (4 November 2013): in case of dismissal of civil servants.

¹⁸³ *Gáll v. Hungary*, 49570/11 (4 November 2013): in case of civil servants.

¹⁸⁴ Act of XC. 2010 (22 July 2010)

¹⁸⁵ AB 184/2010. (X.28.)

¹⁸⁶ HCC emphasized the inapplicability of ‘good morals’ and retroactive effect of the act, and the confiscatory feature of the Act.(§ 10 – 11. in the *R. Sz. v. Hungary* Chamber decision and also the excessive and individual burden).

¹⁸⁷ AB 37/2011 (V. 10.)

¹⁸⁸ After the Modification of the (old) Constitution, the HCC could not decide on financial questions, so this annulment was based on referring to the human dignity.

applicant argued with a disproportionate and retroactive method of the Act. In the Court assessment the foreseeability argument appears (§ 37.) the substantial deprivation of income the applicant had to suffer, also the good faith standing and acquired rights, contractually stipulated compensation (§ 48.) and disproportionate to the Government's aim (§ 60 – 62.)

Finally, the *N. K. M. v. Hungary* (overall tax-burden is 52%) based on the same arguments (§ 35.) the legitimate expectation is present. The question of proportionality and public interest (§ 55 – 59.) and acting in good faith (§ 68.) and “the Court recalls that taxation at a considerably higher tax rate than that in force when the revenue in question was generated could arguably be regarded as an unreasonable interference with expectations protected by Article 1 of Protocol No. 1.” (§ 74.) and “In the Court's opinion, those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons. Therefore the measure cannot be held reasonably proportionate to the aim sought to be realized.” (§ 75.)¹⁸⁹

A typical case is the freedom of expression Chamber and Grand Chamber decision of *Karácsony and Others v. Hungary*¹⁹⁰ which case is about the freedom of speech in the Parliament but it is also an example of the HCC and ECtHR interaction and compliance.¹⁹¹ There was a violation of Article 10 (freedom of expression) and 13 (absence of effective remedy) of the Convention, according to the Grand Chamber decision. What makes the case much more interesting is the pioneer role of the Court, because previously it did not intervene the debate between a Representative and the Parliament.¹⁹²

¹⁸⁹ *Gáll v. Hungary*: in this case : overall tax-burden is 62% for civil servant the public interest within the margin of appreciation is applicable (§ 58.) – otherwise the reasoning is similar to the other two cases.

¹⁹⁰ *Karácsony and Others v. Hungary* 42461/13 and 44357/12, 17 May 2016 (Grand Chamber Hearing was taken place on 8 July 2015)

¹⁹¹ More detailed analysis discussed in Kazai V. Zoltán: “*Strasbourgi manifestum a liberális demokrácia védelmében*” (‘The Strasbourg manifest for the protection of liberal democracy’) in, *Fundamentum*, 2015/2-3. pp. 96 – 103.

¹⁹² The domestic legal procedure was based on the Act no. XXXVI of 2012, entered into force in 20 April 2012, the “Parliament Act”

The HCC decision¹⁹³ found the regulation constitutional for the following reasons: there are several precedents in the history for regulating the freedom of speech in the Parliaments and referred to the autonomy, dignity and authority of Parliament represent a constitutionally justified limitation on freedom of expression. (repeated in GC § 34.). HCC also maintained that there is a proportionate and properly balanced, rational regulation (GC § 41.)

The idea of the statute was that President/Chair of the Parliament/House – under his discipline authority - had the right to propose a financial penalty for those Representatives who hurt the respect of the House. The majority of the House decides, and there is no possibility to appeal against the decision, the Hungarian court or the HCC have no jurisdiction on the Parliament's internal provisions. This was the base for the violation of Article 13. The Government argued (both in the Chamber and Grand Chamber judgments, GC § 65.) that (a.) this is an internal, private affair of the Parliament, with a wide margin of appreciation (GC § 99.) (b.) the respect of the House deserves the discipline authority, (c.) and the responsibility of the Representatives is very special and 'high' (GC § 86 – 90.) The ECtHR denied these reasoning and claimed the very protected type of freedom of expression in the political life.

The Court also stressed the proportionality of the sanctions, the unfair procedure, the lack of harm, but the assessment included and referred the illiberal democracy. As in Hungary the media freedom has decreased, the new media laws (2010/184 and 2010/144 statutes) give less possibility to the media, the freedom of speech has a strengthened priority. Article 10 also includes the non-traditional ways of expressions, the political opposite's right are always takes priority.

The Court denied (§ 76 – 79. and § 82 – 83.) the Government's argument on effective remedies, and also maintained the freedom of expression (GC §141 – 144.) as a fundamental

¹⁹³ 3206/2013 (XI. 18.)) § 32 – 38. and 3207/2013 (XI. 18.)

right in the political sphere. The role of margin of appreciation (GC §143 – 147.) – which also was an argument of Government – should not abuse the freedom of expression. The ex post facto disciplines’ (GC § 156 – 159.) without any legal remedy or procedural safeguards. Due to this, the interference to the right of freedom of expression was not proportionate to the legitimate aim pursued because it was not accompanied by adequate procedural safeguards (GC § 161 – 162.)

To sum up the takeaways from cases above, it can be said that the executions of the Strasbourg judgments are not really problematic, the illiberal state - due to its very rational and practical attitude in critical but sensitive situations – is ready to respond in a very rational way. The HCC decisions are sometimes hectic but they overall fulfill the requirements of protection. The main challenge is the preventive phase, the prior compliance – the domestic legislation itself - to the Convention.¹⁹⁴

C. POLAND: THE ROOKIE AFTER THE PIONEER

1. THE BACKGROUND – POLITICAL LANDSLIDE: ELECTION 2015

As it has already been mentioned shortly in Chapter 2./4., Poland had a different route on the illiberalism. There are important differences from Hungary in many points. The Polish political turn started only 1,5 years ago, in October 2015, while Hungary already has a 7 years of experience, so the trailblazer is Hungary, Poland has a chance to follow it and it is

¹⁹⁴ Polgári, Eszter: “Az Alkotmánybíróság esete az Emberi Jogok Európai Egyezményével: Az elvárások és a gyakorlat” (The Hungarian Constitutional Court meets the ECHR: The expectations and the practice), Budapest, In: Fundamentum, 2015/4., pp. 5- 17., see pp. 14 – 15.

doing.¹⁹⁵ This difference in time also explains the different responses from international communities: Poland has no ECtHR judgments so far, but there are quite new EU mechanisms on the rule of law in Poland, while in Hungary the fundamental rights protection provided by ECtHR is more advanced, but the EU protection was rather elementary in the first few years of the Hungarian illiberalism.¹⁹⁶

The important starting point, the parliamentary election was held in 25 October 2015 with a 51% turnout.¹⁹⁷ The total win of ‘Law and Justice’ (‘Prawo i Sprawiedliwość’, hereinafter ‘PiS’)¹⁹⁸ was surprising, PiS received 37,51% votes which resulted in 235 seats from the 460 of the Sejm, The Civil Platform (‘Platforma Obywatelska’, ‘PO’) achieved 24,09%, 138 seats, Kukiz’15 8,81%, 42 seats, Nowoczesna 7,6%, 28 seats, Polish Pleasant Party (‘Polskie Stronnictwo Ludowe’, ‘PSL’) 5,13%, 16 seats.¹⁹⁹

This was the very first time for a single party²⁰⁰ to win and obtain the majority in Parliament without coercion for coalition – just like in Hungary. The two governing parties, Fidesz and PiS have very similar reflexes, attitudes toward the state, history, the ‘West’, cultural perceptions, memories, identity, etc. The main difference is the Roman-Catholic

¹⁹⁵ Balcer sees a definite parallel between the two countries: the historical legacy, nostalgia, the independency-based nationalism, the so-called harm policy, heroism, martyrdom, self-sacrifice. All this presuppose deeply entrenched illiberal traditions. pp. 14 – 22. in Balcer, Adam: *Beneath the Surface of Illiberalism: The recurring temptation of ‘nationalist democracy’ in Poland and Hungary – With lessons for Europe* (WiseEuropa Institute - Heinrich Böll Stiftung, Warsaw, 2017).

¹⁹⁶ It is worth to note that Kis in 2011 argued that Poland has no far-right, illiberal majority in the ‘90s and early 2000, but in Hungary the illiberal trend strengthened after 2006, in Poland the populism was weak in the 2000s and the socialist-liberal Government was in power for 8 years. The strongest illiberal turn happened in 2015. (Kis János, *Introduction: From the 1989 Constitution to the 2011 Fundamental Law*, pp. 1 -25.) p. 13 – 14.

¹⁹⁷ An important event before the parliamentary election, in 24 May 2015 the presidential election has been won by Andrzej Duda (PiS) who has defeated (by 51,55%) Bronisław Komorowski (President at that time). This surprising result showed the possible outcome for the 2015. President Duda - entered into office on 5 August 2015 – immediately expressed his support to the Hungarian Prime Minister on the immigration.

¹⁹⁸ The PiS was established in 2001 and for a short time, 2006-2007 it was in power, with the Prime Minister Jarosław Kaczyński and the Presidency of his twin, Lech Kaczyński, who died in airplane crash in Smolensk in 2010.

¹⁹⁹ The former left-wing party coalition (United Left, ‘ZL’) could not reach the threshold (8% for coalitions, 5% for single parties), despite of its success in 2001 (45%) and the extraordinary election in 2007, where the governing PiS - only after 2,5 years of office – had been defeated by the left.

²⁰⁰ Actually PiS is 3 party coalition: Solidary Poland (‘SP’) Right Wing of the Republic (PRZ) and Poland Together (PRZP). This is a bit similar to Fidesz, which also integrated the ruins of many former right-wing parties but officially Fidesz has only one partner, the ‘People’s Party of Christian-Democrats’

traditions in Poland.²⁰¹ On the constitutional law area there are key differences between the two countries: Poland has no new constitution and to amend - or invent - new constitution the 2/3 of supermajority (307 seats) is needed, but PiS has only 51%, (235 seats) - so unlike to Hungary - Poland has no really chance to renew the constitutionalism on the Hungarian way. This does not mean that the illiberal turn is impossible and very soon after the election the following points have been made clear: the Constitutional Tribunal (CT) stood in the center of the attack.

The lack of political power to draft a new constitution²⁰² caused a sudden turn right after the election: 5 new members (from the total of 15) of the CT had already been elected by the PO Government right before its resign after the lost election. but President Andrzej Duda (former PiS member) denied to appoint the 5 judges, waiting for the new Sejm – with PiS majority - to elect other 5 judges.²⁰³

At the same time, the CT decided about the consequent judges: it found that only 2 of the 5 judges appointment was unconstitutional, but the Sejm has already elected the new 5 judges, so the 2 judges were also refused by President Duda. The dead-end situation blocked the

²⁰¹ Balcer, Adam: Beneath the Surface of Illiberalism: The recurring temptation of ‘nationalist democracy’ in Poland and Hungary – With lessons for Europe (WiseEuropa Institute - Heinrich Böll Stiftung, Warsaw, 2017, pp. 47 – 55.)

²⁰² The similarity of constitutions and Constitutional Courts in Hungary and Poland, see the debate between two scholars, Uitz Renáta and Tóth Gábor Attila: Tóth generally denies Hungary has a democratic Constitution, while Poland has, so the comparison is really not possible. Poland followed the 2-step model on constitution drafting after 1989, after the first stage which made the democratic elections possible, the second stage made the new constitutions possible. Hungary had only one stage, and the 2011 Fundamental Law is not the second one, but rather something very different. Also the self-defense of the constitutional court differs: the Polish one made steps to protect itself, the Hungarian one was not so brave – according to Tóth. Uitz claims that the HCC put a pressure on the legislation, Tóth denies this, saying that only a fake-pluralism left from the constitutionalism. So, the similarity between the two countries on this topic can be only limited. <http://szuveren.hu/jog/a-lengyel-parhuzam-vitaban-uitz-renatal>

²⁰³ Similarly, the continuous change of judges in Hungary led to overtake the HCC by the Fidesz delegated judges in 2013. Halmai Gábor: “*In memoriam magyar alkotmánybíráskodás*” (“In Memorima Hungarian Constitutional Adjudication”), Budapest, Fundamentum, 2014/1-2. pp. 36 – 56.

Court for a time. This meant blocking the role of CT, which can be understood as a violation of rule of law – the Framework procedure of EU has been based on this CT issue.²⁰⁴

2. EU AND THE RULE OF LAW - 2015: THE NEW FRAMEWORK MECHANISM IN GENERAL

As we have seen in case of Hungary, the ECtHR decisions are basically effective and applicable in the domestic law, but they are slow and provides remedies mainly for individual right violations and does not effect the structural-illiberalism or rule of law. So, beside the ECtHR, are there other possibilities to protect the individual rights or rule of law in the EU countries?²⁰⁵

For individual rights, there are new institutions cooperating between the EU and Council of Europe, such as the Fundamental Rights Agency.²⁰⁶ The Agency has been erected after the Nice Treaty before the EU expansion in 2004, but the regarding the risk of 10-country expansion. The Agency has no decisive authority or individual complaint, its main activity is information collection, monitoring and advisory.²⁰⁷

²⁰⁴ see the subchapter no. 4. 'EU Applications and Responses to Poland' of this Thesis.

²⁰⁵ The United Nation's rapporteurs and many other measures are not discussed here. Just to mention an example: An international measure on human rights is the UPR (Universal Periodic Review, "Shadow-reports") is proceeded by the UN, with several stages (hearings, recommendations, reports, enforcements). Hungary was subjected to this procedure in 2012 on the hate crime against the Roma minority. See on Hungary: Orsolya Jeney: Civil szervezetek árnyékjelentései az emberi jogokról ("NGO shadow-reports on human rights"), in Fundamentum, 2012/3., This procedure is considered by Amnesty International one of the best opportunity for publicity to draw attention on the international level.

²⁰⁶ The European Union Agency for Fundamental Rights (FRA), an 2007 established agency, successor of 'European Monitoring Centre on Racism and Xenophobia'. FRA is managed by two European Commission representatives and and expert of Council of Europe. The FRA already has several annual reports on the fundamntl rights: Fundamental Rights Report 2016, <http://fra.europa.eu/en/publication/fundamental-rights-report-2016>, or the <http://fra.europa.eu/publications-and-resources/publication/annual-reports> . FRA cooperates with UN ans OSCE as well, mainly to guard the Charter of Fundamental Rights. The Agency has "only" advisory and recommendation function.

²⁰⁷ Sadurski, Wojciech: "*Harapjon is, ha már ugat: A 7. Cikk története, az EU bővítése és Jörg Haider*" (In original: "Adding Bite to the Bark. The story of Article 7, EU Enlargment and Jörg Haider"), Budapest, Fundamentum, 2012/3., pp. 5 – 33, here pp. 21 – 23. It is also important to note, that the Agency itself is

The EU community reaction for rule of law challenges – as the Council of Europe is not designed or established for structural question of checks and balances or rule of law – is 7th Article of TEU²⁰⁸ and its deterrence effect. The implementation of 7th Article reacts on the breach of Article 2nd.²⁰⁹ But it has been never used so far, as it is considered as an ‘ultima ratio’ procedure which lead to disintegration and more explicit resistance from some member states.²¹⁰ The 2-stage procedure contains a preventive stage including recommendations in ‘case of clear risk of a serious breach’, the determination phase and the sanctional in case of ‘existence of a serious and persistent breach’ (systematic breach) of the Treaty.

It is important, that the scope and jurisdiction of EU law has been extended over the EU law and the basic principles of the EU had been declared: democracy, rule of law and human

questionable, as human rights competences have not been delegated to the EU except the 7th Article mechanism. Sadurski stresses the orthodox interpretation according to which there is no legal ground for this type of competence expansion, but there are counter-arguments as well: (a.) the Charter of Fundamental Rights has already been invented by the EU, so the EU itself has changed and expanded itself to the human rights area, (b.) the 7th Article includes political and fundamental/human rights provisions, so it goes beyond the pure economical view, (c.) it only contains shared competence about the fundamental rights issues, with the principle of subsidiarity.

²⁰⁸ The most important sections of the Article 7th read as the following:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. ...The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

²⁰⁹ Article 2. of TEU reads as: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

²¹⁰ Sadurski, Wojciech: *“Harapjon is, ha már ugat: A 7. Cikk története, az EU bővítése és Jörg Haider”* (In original: “Adding Bite to the Bark. The story of Article 7, EU Enlargement and Jörg Haider”), Budapest, Fundamentum, 2012/3., pp. 5 – 33., the long process of making the mechanism was started in the Amsterdam Treaty (1997) and sanction part of 7th Article was complemented by the preliminary (preventive) section. The background of the preventive section of 7th Article is originated in the Austrian parliamentary election in 1999, when the far-right Austrian Freedom Party (FPÖ) formed a coalition with the Austrian People’s Party. There was no EU respond to the situation, only informal ‘EU-14 sanction’ for a shorter period of time, only one-sided actions from 14 member states.)

rights. (All these 3 area are out of the original jurisdiction of EU, and from the ‘4 freedoms’.) To start the mechanism violation only one of the 3 is enough, and it is also applicable in the private parties’ relations. (i. e. natural persons v. companies, etc.)

The rule of law requirement for every member state can be found in the ECHR Preamble²¹¹ and Article 3 of Statute of Council of Europe²¹² and also in the TEU²¹³. The EU concept of rule of law contains the following conditions²¹⁴: legality (transparency, accountability, pluralistic legislation, etc.), legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review, equality before the law, respecting the fundamental rights. So, rule of law is not a formal requirement only, but the EU is substantively based on it.

The new mechanism, introduced by the European Commission - as the guardian of the TEU – in 2012²¹⁵ to give an alternative or intermediate measure between the ‘soft power of political persuasion’ and the ‘nuclear option’ of Article 7 TEU. So, the aim was to fill a gap and to precede and complement the Article 7. The previously existing measures were not effective: the ‘Infringement Procedure’ (Article 258 of TEU) can be applied only to breach of EU laws. The Framework emphasized that there are situations of concern which fall outside the scope of EU law for these cases the preventive mechanism (Article 7 (1)) and sanctioning mechanism (Article 7 (2)) are provided. The main challenge of the Article 7 is the complicated and slow with political bargaining in the background, it does not allow quick

²¹¹ „...governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law...”

²¹² „Every member of the Council of Europe must accept the principle of rule of law and of the enjoyment by all persons within its jurisdiction of fundamental rights and freedom, and collaborate sincerely and effectively in the realization of the aim of the Council...”

²¹³ Article 2. TEU, see note above 207.

²¹⁴ European Commission: Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, Brussels, 11/3/2014, Final Version, (COM(2014) 158 final) hereinafter "the Communication". p. 4.

²¹⁵ In 2012, when the Framework was invented, it referred as “recent events in some member states have demonstrated that a lack of the respect of the rule of law...systematic threat to rule of law, etc. referred mainly to Hungary. Poland came only 3 years later.

reactions. The Framework is to provide a preventive measure before the Article 7 in the situations where “systematic and adversely affect the integrity and stability of institutions and safeguard mechanisms”²¹⁶ The Rule of Law Framework has three stages: in the assessment phase the Commission receives all the relevant information from Council of Europe and FRA to decide on continuing the procedure. If the assessment confirms the Commission’s concerns about the breach of Article 2, the second step is the recommendation with time limits. The last step is follow-up section with control and monitoring from the Commission.²¹⁷ There are no sanctions in this new intermediate procedure, but failing the follow-up results in Article 7.

3. EU AND ECHR APPLICATIONS AND RESPONSES TO POLAND

In April 2017 this thesis can not analyze the ECtHR practice in case of Poland, because of the following reason: in springtime of 2017 there are approximately 80 communicated cases submitted by Poland from the last 1,5 year of illiberalism.²¹⁸ But due to the Court’s procedure and constant case overload, no judgment has been published yet from the illiberal period of Poland. It can be said in advance: after an overlook of the communicated cases, they include different kind of alleged violations of various Article of the Convention, the time of

²¹⁶ Framework, p. 6 – 7.

²¹⁷ Framework reads exactly as: “In a first stage (“Commission assessment”) the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law (§ 6). If, as a result of this preliminary assessment, the Commission believes that there is a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a “rule of law opinion”, substantiating its concerns and giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and be followed by further exchanges. In a second stage (“Commission Recommendation”), if the matter has not been satisfactorily resolved, the Commission can issue a “rule of law recommendation” addressed to the Member State. In such a case, the Commission indicates the reasons for its concerns and recommends that the Member State solves the problems identified within a fixed time limit, and informs the Commission of the steps taken to that effect. In a third stage (“Follow-up to the Commission Recommendation”), the Commission monitors the follow-up given by the Member State to the recommendation. The entire process is based on a continuous dialogue between the Commission and the Member State concerned. If there is no satisfactory follow-up within the time limit set, resort can be had to the ‘Article 7 TEU Procedure’; the procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.” (§ 7.)

²¹⁸Source:[http://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:\[%22COMMUNICATEDCASES%22\]}](http://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22]})

the judgments are not predictable but the results probably will be similar due to the case-law system and many of the applications have the same complaint as the Hungarian ones had. This also means - only as a speculation – that numbers of violations will be found by the Court.

On the contrary, the recent EU mechanism²¹⁹ “Recommendation of the European Commission regarding the rule of law in Poland” (RRLP)²²⁰ focuses on two questions, the first is the November 2015 events, the Constitutional Tribunal (CT) and its President and Vice-President status. The new Polish Parliament modified the Act of CT. The CT acted 2 judgments on the shortening of the mandate of judges and the Tribunal’s President. In this Recommendation Poland has been advised to work together with the Venice Commission. In December 2015 the Government asked for a Venice Commission Opinion but acted statutes before the Opinion arrived and appointed the judges as it is mentioned above. (§ 8 – 9. and 11. of RRLP). Poland responded that the reform of CT was in compliance with the Polish customary law and emphasizing the progressive effects of the reforms. (§ 14.)²²¹ And two judgments of the Constitutional Tribunal on the appointment of judges had still not been implemented. (§ 16.) In March 2016, the Constitutional Tribunal ruled that the law adopted on 22 December 2015 was unconstitutional.²²² As the judgment should have been published to enter into force, the lack of publishing resulted in no effect (§ 19.).

²¹⁹ It is important to note, the rule of law procedure ‘dialogue part’ included a very long correspondence between EU Commission and Government of Poland in the period of December 2015 and July 2016. Only a very simplified and shortened presentation can be found in this thesis.

²²⁰ C (2016)/5703, 27 July 2016, (European Commission, Commission Recommendation of 27.7.2016 regarding the rule of law in Poland, C(2016) 5703 final). This refers back to 2014 Framework: “For this reason the Commission, taking account of its responsibilities under the Treaties, adopted on 11 March 2014 a Communication “A new EU Framework to Strengthen the Rule of Law”. This Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails.” TFEU, Article 292.

²²¹ Letter of 19 January 2016 from Minister of Justice Mr Ziobro to First Vice-President Timmermans.

²²² The Sejm adopted a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges.

On March 2016, the Venice Commission published its opinion "On amendments to the Act of 25 June 2015 on the Constitutional Tribunal". It contained that the Polish Government must react in accordance with the rule of law to CT challenges and recover somehow the ineffective feature of CT (§ 20.)²²³ The Opinion continues on: "On 26 April 2016, the General Assembly of the Supreme Court of Poland adopted a resolution attesting that the rulings of the Constitutional Tribunal are valid, even if the Polish Government refuses to publish them in the Official Journal." (§ 26.)

In April 2016, Representatives of Polish Parliament (Sejm) tabled a proposal CT Act. This proposal contained several provisions which were already criticized by the Venice Commission in its opinion of 11 March 2016 and declared unconstitutional by the Tribunal in its ruling of 9 March 2016. This included the requirement of a two-thirds majority²²⁴ for adopting decisions for "abstract" constitutional review of newly adopted laws. (§ 27.) Sejm approved new Act on the Constitutional Tribunal replacing the previous one. The Commission responded and started a dialogue with Polish government, without any serious consequences (§ 31.). This whole process shows the Polish illiberalism's approach to the constitutionalism and their own Constitutional Tribunal and we claim that Poland showed an explicit resistance against the EU and Council of Europe decisions or opinions and still is showing.

In conclusion, the following recommendations have been published to Poland: "the Commission considers that the Polish authorities should respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These judgments require

²²³ Opinion no. 833/2015, CDL-AD(2016)001.

²²⁴ There is a good progress regarding the majority votes good progress: Article 69 provides: "Rulings shall be adopted by a simple majority of votes." This is an improvement compared to the amending Act of 22 December 2015 in so far as it no longer contains the unconstitutional requirement of a two-thirds majority for adopting decisions and thus addresses this concern previously raised by the Commission.

that the State institutions cooperate loyally in order to ensure, in accordance with the rule of law, that the three judges that were nominated by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected. “The relevant provisions of the law adopted on 22 July 2016 on the Constitutional Tribunal are contrary to the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and to the opinion of the Venice Commission and raise serious concerns in respect of the rule of law.” (RRLP, page 10., § 17.) Secondly, also according to the Recommendation, “the refusal to publish the judgment of 9 March creates a level of uncertainty and controversy which will adversely affect not only that judgment, but all subsequent and future judgments of the Tribunal.” (RRLP p. 11., § 21.) Thirdly, the effective functioning (abstract review, etc.) of the Constitutional Tribunal must be recovered. (RRLP p. 19. § 66.)²²⁵

Finally, the Commission took the view that the effect of the amendments concerning the attendance quorum²²⁶, the voting majority²²⁷, the handling of cases in chronological order and the minimum delay for hearings, in particular their combined effect, undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution. (RRLP p. 12. § 28. and RRLP p. 13., § 30.)

In the new law adopted on 22 July 2016 on the Constitutional Tribunal some of the above mentioned concerns are still existing in the new law: attendance quorum, etc. still undermines the efficient functioning of CT. (RRLP p. 16. § 44.), simply because the Polish Government

²²⁵ Law of 25 June 2015 on the Constitutional Tribunal, published in Official Journal on 30 July 2015, item 1064, as amended. The law adopted on 22 December 2015 was published in the Official Journal on 28 December; item 2217.

²²⁶ The amended Article 44(3) stated that "Adjudicating in full bench shall require the participation of at least 13 judges of the Court".

²²⁷ According to the amended Article 99(1), judgments of the Constitutional Tribunal sitting as a full bench (for "abstract cases") required a majority of two-thirds of the judges sitting.

insists on the control of CT and the above mention measures are the most appropriate tool to control it.²²⁸ The possibility of Public Prosecutor-General to prevent examination of cases (RRLP p. 17. § 53.) But his/her absence can block the constitutional examinations and this rule can be regarded as an indirect restriction.²²⁹

According to a very dense summary of the Commission's finding, it is worth to quote: "for the reasons set out above the Commission is of the opinion that *there is a situation of a systemic threat to the rule of law in Poland*. The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a *constitutional justice system has been established, its effectiveness is a key component of the rule of law*. Respect for the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union..." (RRLP p. 20. § 72 – 73.) So, the following recommendations has been proposed: (RRLP p. 21. § 74.): "implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and its subsequent judgments. Finally, ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account. The Commission invites the Polish

²²⁸ "Overall, the effects of certain provisions of the law adopted on 22 July 2016, taken separately or in combination, raise concern regarding the effectiveness of constitutional review and the rule of law." (RRLP p. 15., § 41.)

²²⁹ Article 61(6) provides that "Absence from the hearing of the Public ProsecutorGeneral, who has been properly notified thereof, or his/her representative shall not prevent examination of the case unless the obligation to participate in the hearing results from the provisions of the Act." Article 30(5) provides that "The Public Prosecutor-General or his/her deputy shall participate in cases examined by the Tribunal sitting in full bench".

Government to solve the problems within three months of receipt of this recommendation, and to inform the Commission of steps taken to that effect.”

There were many responses or resolutions on the Polish situation in that time after the election, just to name a few: Poland has also been sent a Complementary Recommendation by the European Commission.²³⁰ The European Parliament also European Parliament Resolution on Poland.²³¹ At the same time the Venice Commission adopted two opinions on Constitutional Tribunal.²³² In both of them the Commission expressed the unsatisfactory development in Poland regarding the rule of law. A very recent comment on the Polish situation evaluates a still existing, constant deterioration from the rule of law.²³³ An important sentence from this report claims that “by activating the Rule of Law Framework up to the third and last stage in the procedure, the Commission has demonstrated its continued commitment to hold the Polish government to account for its attacks on the rule of law.”²³⁴

To conclude, this procedures show calls for two remarks: on one hand the EU has decided to step forward and create new measures and mechanisms to regulate the illiberal member states, but on the other hand the implementation and efficiency are still in question. The fundamental rights protection is still in a better position – at least on the international level. While the rule of law, structural challenges are still unanswered, however further step has already been taken. But, is a country such as Poland are explicitly and willingly and proudly rejects the recommendations and any measures from the EU community, the question is still present: Should the EU apply the 7th Article or something similar?²³⁵

²³⁰ European Commission, Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, C(2016) 8950 final.

²³¹ 2015/3031(RSP))

²³² Venice Commission 833/2015.

²³³ Published in February 2017: www.hrw.org/news/2017/02/16/open-letter-college-commissioners-regarding-situation-poland

²³⁴ id.

²³⁵ Human Rights Watch is not afraid to suggest: „On the other hand, recommending resort to the Article 7 TEU procedure would send a strong signal to Poland and other Member States, as well as the public, that the

D. CONCLUSION

As we have seen, the so-called illiberalism is not easy to define. The question was whether it is only ‘*a phrase of an empty populist demagoguery*’ or ‘*a serious, coherent legal-political theory*’²³⁶. Probably it can be described as an attitude or an approach without clear or exact constitutional or legal conditions. But to define the legal side of illiberalism it is the weakened rule of law system and denying the idea of limited government. Despite the uncertainty, the following are also can be attributed to illiberalism: the secondary importance – or non-importance – of fundamental/individual rights and the corruption of rule of law.

This thesis also sought to answer, how deep or far illiberalism can be considered as a counterpoint of liberalism. Does it have a positive statement or coherent ideology? The answers were probably ‘No’, only tendencies and directions can be seen as illiberalism can take various forms in reality.²³⁷ The Hungarian and Polish type of illiberalism is a special kind of it – compared to the Asian ones²³⁸ - and they have unique features as well²³⁹, they are mixed or hybrid regimes with special historical backgrounds and values, but they also share

Commission is committed to ensuring compliance with the EU’s founding values and that it is ready to do what is needed to preserve them from attacks. It would open up a new phase in which both the Polish government and all the EU institutions will have to face up to their own responsibilities to uphold these values. Finally, it would send a strong signal to civil society in Poland that the Commission stands by its side in its fight for a society in which democracy, the rule of law, human rights and the other values protected under Article 2 TEU are upheld.”
www.hrw.org/news/2017/02/16/open-letter-college-commissioners-regarding-situation-poland

²³⁶ Pap, András László: “*Személyiségkép és alkotmányos identitás a NER-ben I-II-III.*” (“The Personality and Constitutional Identity in the System of National Cooperation”), Budapest, Közjogi Szemle, 2014/4., (pp. 1 – 12., 2015/1., pp. 1 – 11., 2015/2., pp. 1 – 8.): pp. I./ 5 – 6.

²³⁷ See Zakaria on the multiple forms in time and geographical appearance of illiberalism, and how different approaches it has depending on the economic or human rights issues. Zakaria, Fareed: “*The Rise of Illiberal Democracy*”, Foreign Affairs, 1997/11-12., 76/6. pp. 22 – 43. pp. 25 – 32.

²³⁸ See Zakaria overview in his 2003 analysis about the Islamic and Russian democracies and regimes. Zakaria, Fareed: “*The Future of Freedom: Illiberal Democracy at Home and Abroad*”, New York – London, W. W. Norton & Company, 2003. pp. 96 – 102. and 119 – 161.

²³⁹ The political use of Catholicism and Anti-communism with rather selective memories on the socialist past, etc. Enyedi also mentions collectivism complemented with a very unique Eastern-European nationalist approach, etc. Enyedi Zsolt: “*A paternalista populizmus a Fidesz és Jobbik ideológiájában*” (“Paternalist populism in the ideology of Fidesz and Jobbik”) Budapest, Fundamentum, 2015/2-3., pp. 50 – 61.: pp. 57 – 59.

similar approaches: officially denying the idea of ‘open-society’, the reduced importance of rights and weakened separation of powers.²⁴⁰

As we stepped further in the thesis and identified the illiberal state with the two above mentioned criteria – the reduced role of rights and rule of law - the consequence is the following: the protection of fundamental rights in an illiberal state at his moment is possible and basically satisfying, but only with restrictions and uncertainty. But this protection is due to the international protection or domestic courts. The ECtHR judgments also show that the legal remedies are present – at least in individual complaints. We have also seen in case of Hungary that the HCC is also able - and willing! – to provide protection. The interplay and compliance between the domestic and international organizations are satisfying – only in a few cases they are controversial, but it is usually appropriate and sometimes fruitful.

It also could be observed that some liberal rights are in more danger than others: a centralized, executive-power-based illiberal regime has a different and non-liberal perception of freedom of expression and many other rights. (Or those rights that are not related to the conformity and lifestyle requirement of the illiberal government both in Hungary and Poland.) We have also seen illiberalism has features of arbitrariness and randomness – which emerges from the voluntary, autocratic or irrational approach to political power – and these features can put pressure on any fundamental rights at any time and this causes the above mentioned uncertainty for the future. Unfortunately, the remedies for public law corruptions or torsions

²⁴⁰ At the same time some political orientation can differ: Poland’s historical experience with Russia and Ukraine help to maintain the Western-NATO commitment, while Hungary plays a very controversial back-and-for game between the ‘West’ and the ‘East’.

are less hopeful. As the ECtHR is only able to provide – as a case law-based court – an indirect protection and it cannot interfere in structural problems.²⁴¹

Consequently, the responses and possible remedies for illiberal challenges are divided into two parts, similar to the problems above: the individual rights protection's 'last resort' is the constitutional courts and the ECtHR.²⁴² But the structural, institutional, rule of law challenges and problems can be addressed by the EU whose legal – not political - measures are different and limited as well: finally the EU has already recognized the problem, the new mechanism ("Framework") invented recently is an advanced response in case of Poland. The so-called "nuclear response" Article 7 of TEU is a too heavy answer, while the Venice Commission of Council of Europe or other EU bodies' Opinions or Resolutions, etc. are too weak responses.²⁴³ But the effective legal procedures and mechanisms (Article 7. or the new Framework mechanism) to protect the rule of law – or liberal democracy in general – are all hard to start or the EU has no experience on using them.²⁴⁴

Whether the Hungarian and Polish illiberalism are trends or not the answer is uncertain, at his moment no general 'illiberal wave' is clearly visible within the EU. Brexit, presidency of Donald Trump and other political - possible - victories in Europe could lead to negative conclusions. But at the same time the opposite results of different elections in the Netherlands, Austria and probably in France can serve an opposite opinion. In Eastern Europe, everyday stability, the familiar, informal relations, the abandoning of complicated questions and answers, the frustration together with apathy together presuppose a long

²⁴¹ The individual rights violation also can have a "structural side", see the Hungarian prison overcrowd pilot judgment or real-life imprisonment cases. These cases refer to the illiberal criminal policy and legislation.

²⁴² The limited jurisdiction, the requirement of exhausting all the effective domestic remedies, the limited "just satisfaction", and the slowness and case overloads reduce the efficiency.

²⁴³ It is interesting to note that many of these EU, Council of Europe measures can be very well used in domestic politics. It can be observed that a 'real-illiberal political leader' is waiting for an international "attack" to show and prove a 'freedom fight' against international organizations and critics.

²⁴⁴ The way out of illiberalism also requires the following conditions that should be fulfilled together: an appropriate domestic political environment, as the illiberalism is also a psychological, social attitude, question of values. The EU and international helps are also needed.

illiberal regime in Hungary.²⁴⁵ This long-lasting feature of the region²⁴⁶ and some other countries provide an excellent ground for a further research in the future. These studies will be able to rely on the longer experience in Poland and Hungary and they can analyze the results of the EU practices and mechanism.

Finally, it is important to declare that the illiberal democracies are not dictatorships, the minimum level of constitutionalism has been preserved²⁴⁷ and the fundamental rights do exist. The uncertainty, relativity and lower preference of rights, complemented by a weakened rule of law are the really essence of illiberalism and these features are hard to cope with and probable it will take a long time to turn back to original constitutionalism.

And as a last comment, it was also a bit annoying to see that Hungary – along with Poland – was one of the first Central-European state to join the ECHR in 1993. But also Hungary was the first country in the EU that started to move away from the Convention and the EU in 2010. And Poland joined Hungary in 2015...

²⁴⁵ Tölgyessy, Péter: *“Politika mindenekelőtt”* (“Politics above all”) in.: A magyar jogrendszer állapota (“The Condition of the Hungarian legal system”), Budapest, MTA, 2016., pp. 17 – 42., p. 42.

²⁴⁶ Central-Asian illiberal democracies, Azerbaijan, Kazakhstan, or even Turkey have less chance to turn back on the road without an international ‘umbrella’ above them.

²⁴⁷ Pap, András László: *“Személyiségkép és alkotmányos indentitás a NER-ben I-II-III.”* (“The Personality and Constitutional Identity in the System of National Cooperation”), Budapest, Közjogi Szemle, 2014/4.,(pp. 1 – 12., 2015/1., pp. 1 – 11., 2015/2., pp. 1 – 8. pp). I./ 2 – 3. and III/. 6 – 8.

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