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Weak-form Instruments and Weak Abusive Judicial Review
How weak-form instruments can be used to protect the democratic minimum?

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ABSTRACT

Mark Tushnet differentiates between two types of judicial review: strong and weak. In the former courts, in the latter the legislature has the last word. Of the two weak-form judicial review lends itself more easily to exploitation to abusive judicial review. Under abusive, more precisely weak abusive judicial review, subdued courts are used to legitimate the actions and laws of an illiberal leader and aid its attacks on the democratic minimum, while trying to maintain an illusion of legitimacy themselves.

In my thesis I examine trough the examples of the United Kingdom and Hungary how weak-form review tools are used in fragile and established democracies to protect the democratic minimum, and how they are exploited by courts conducting weak abusive judicial review to attack the same minimum in an illiberal regime.

In my analysis I point out how the mindset and strategies governing weak abusive judicial review might be exploited by democrats to keep the democratic minimum visible during times of illiberalism and ease the transition back into a more robust liberal constitutional democracy.

I. INTRODUCTION*

1. General remarks on democracy and forms of judicial review

Abusive judicial review is defined by Dixon and Landau as a subverted court attacking a certain democratic minimum in order to help or legitimise an authoritarian or illiberal system.[1] Dixon and Landau differentiate between two different types of abusive review: strong and weak. In case of strong abusive judicial review courts actively clear obstacles from the way of the illiberal regime, while in the case of the weak version they serve as rubber stamps, lending legitimacy to otherwise antidemocratic acts through decisions or the denial of applications.[2]

When looking at models of judicial review it can be ascertained that weak-form judicial review lends itself more easily to be used both in a system of weak or strong abusive review. Weak-form judicial review has the advantage over strong form review in that it leaves a rather wide room for the legislature to manoeuvre in. The legislature can override, ignore or follow the courts directions within the framework of weak-form judicial review as all of these approaches are considered to be a legitimate part of discussion under the weak-form model and thus reaping the benefits of both the weak-form and abusive review schemes. Therefore, weak-form judicial review makes an especially great combination with weak abusive judicial review for illiberal leaders, who strive to consolidate and perpetuate their power. In the following I will outline the concepts and classifications forming the theoretical framework of this paper and present how weak-form judicial review combined with weak abusive judicial review is in many respects a dream come true for illiberal leaders.

* I would like to express my gratitude to Evelin Burján and Zoltán Pozsár-Szentmiklósy and my supervisor Renáta Uitz for their help in developing this thesis.

[1] Rosalind Dixon and David Landau, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 UC Davis Law Review 1322–1326.

[2] ibid 1345–1349.

1.1. The democratic minimum and types of review

Dixon and Landau use a concept of the democratic minimum that is broader than the procedural, electoral democracy focused approach. Their definition *"builds in additional commitments to constitutionalism and the rule of law, including commitments to a degree of protection for certain individual rights, such as freedom of expression, association and assembly, equality or universal access to the franchise"*.[3] These, according to the authors need to be included due to their close connection to election and the checking of power.[4] István Bibó gives a similar construction of what he calls foundational constitutional principles for a new democratic regime in Hungary. He emphasises free elections, an independent judiciary, separation of powers, freedom of religion, speech and press and other such fundamental freedoms. He construes these, and other context-specific constitutional ideas as the basis for a new, stable democratic regime.[5] These concurring constructions of the democratic minimum allow for a broader, more detailed analysis of attempts to undermine liberal democratic constitutionalism and the possible tools to preserve it.

Mark Tushnet distinguishes between strong and weak for judicial review. In his framework, the German and US systems serve as the foremost examples of the strong form model. The characteristic of this is the strong role accorded to courts. In strong form systems the court or courts interpret legislation and decide on its constitutionality in a final and irreversible manner.[6] Under a weak-form system, characteristic of those jurisdictions with a strong tradition of

[3] ibid 1323.
[4] ibid.
[5] István Bibó, 'A Politikai És Alkotmányjogi Kibontakozás Útja (The Way to Political and Constitutional Development)' in Iván Zoltán Dénes (ed), *Bibó István összegyűjtött írásai*, vol 2. (Kalligram Kiadó 2018) 396–399.
[6] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law.* (Princeton University Press 2008) 20–23.

parliamentary supremacy, this decision is far from final. In weak-form review schemes the legislature can legitimately override the courts' decision. This according to Tushnet serves to lessen the tension between the judiciary and the legislature and give the citizenry, represented by the legislature, a chance to respond and have a meaningful dialogue with the judiciary.[7]

Gradbaum describing the weak-form system as it appeared in the United Kingdom, Canada and New Zealand calls it the commonwealth system of constitutionalism, and emphasises, that in this scheme the legislature ultimately has the last word in debates on the compatibility of statues with fundamental rights. He positions the weak-form review system as being between the judicial supremacy of strong form systems and total legislative supremacy with some being closer to one end than the others. Gardbaum further emphasises the dialogical feature of the weak-form system as well as a means to mitigate and balance the tension between the legislature and the judiciary. [8]

While thinking in a dialogue model is not unique to weak-form judicial review systems, the underlying dynamics differ significantly from that of a strong-form system. As Mark Tushnet observes, in strong-form review systems dialogues mainly happens through constitutional amendments, judicial appointments and in some cases the exertion of pressure on the courts. These methods generally mean that the dialogue occurs over a long period of time taking up considerable resources and potentially involving major political costs. [9] Weak-form systems on the other hand provide for a much shorter timeframe of dialogue leaving the final say with the legislature instead of the judiciary. This provides for a more flexible toolbox of intervention on

[7] ibid 23–25.
[8] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2011) 49 The American Journal of Comparative Law 708–710.
[9] Tushnet (n 6) 33–35.

the part of the legislature however it does not automatically mean a reduction in potential political costs as will be illustrated later.[10]

1.2. Different stages of democracy

In this thesis I will work with a three-stage democracy framework. In this a democracy can be considered fragile, established or illiberal. Fragile democracies are defined be Issacharoff, as *"constitutional democracies, usually recently enabled, whose political institutions and supporting groups from civil society are insufficient for managing conflict"*.[11] Issacharoff further elaborates that these democracies have a heritage of authoritarianism, with resulting fractures and formerly repressed groups in society, and a populous that does not have a strong commitment to democratic ideals.[12] Issacharoff identifies the democracies of the third wave of democratisation such as the ones established in Eastern Europe as such following their transition.[13] Hungary, following its democratic transition in the 1990s can be considered to be one of the fragile democracies.

Illiberal democracies on the other hand are democracies in decline. In Sajó's description, the central aim of illiberal systems is the perpetuation of the power and rule of the plebiscitarian leader. Illiberal democracies keep the institutions of liberal constitutional democracies and formerly follow the rules of the rule of law but unleash the embedded repressive potential of democracy. Power and control are centralised and the institutions themselves serve to perpetuate the leader's power and to control society. In the same vein, the rules and processes connected to the rule of law are twisted in a way that helps this goal. This is what Sajó calls

[10] ibid 36; Aileen Kavanagh, 'What's So Weak about "Weak-Form Review? The Case of the UK Human Rights Act 1998' 13 International Journal of Constitutional Law 1022–1023.
[11] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015) 10.
[12] ibid 11–12.
[13] ibid 9.

cheating and describes it as one of the main tools of illiberal regimes to achieve their aims.[14] A classic example of such a democracy is post-2010 Hungary.

Finally established democracies in the context of this paper are, what Tushnet describes when discussing weak-form review as well functioning, or reasonably well functioning democracies and in many respects can be defined as the opposite of the above two stages. Therefore, an established democracy is one in which fundamental rights are respected and reasonably well protected,[15] where the democratic system itself is sufficiently embedded, not newly created and therefore has the institutions, traditions, and well organised civil society necessary to resolve conflicts, and where the citizens are committed to the idea of democracy. An example of which, that I will use in the paper is the United Kingdom, which is considered to be one of the most stable 22 democratic regimes by Robert Dahl,[16] and is used by an example of a relatively well functioning democracy by Tushnet, when talking about weak-form review.[17]

1.3. Courts in different stages of democracy and abusive judicial review

Democracies in different stages use courts for different purposes. In established democracies courts serve to protect fundamental rights and ensure compatibility with the constitution and constitutionalism.[18] The methods and degree to which they can and are mandated to do that differs according to the model of judicial review in place.

Issacharoff give us an overview of the role courts play in fragile democracies. Courts first and foremost play an important role in the establishment and development of a democratic system

[14] András Sajó, *Ruling by Cheating, Governance in Illiberal Democracy* (Cambridge University Press 2021) 4–10.
[15] Tushnet (n 6) 24.
[16] Robert A Dahl, *How Democratic Is the American Constitution?* (Yale University Press 2001) 164.
[17] Tushnet (n 6) 24.
[18] ibid 19–23.

in these regimes, by restraining executive power and historical authoritarian reflexes, overseeing the electoral process and facilitating trust in it by reinforcing its legitimacy, preventing the political force first in power to cement its position and develop a new authoritarian regime, and checks overzealous lustration efforts.[19] Overall, courts in fragile democracies help develop democratic institutions and the limits of power, while also willing to take steps in this process that the political actors would be unwilling or less likely to take.

Finally, illiberal regimes have their use of the courts as well. As Dixon and Landau states, illiberal systems use the courts to provide them legitimacy through abusive judicial review, by legitimising their actions or removing obstacles from the way of the consolidation of power.[20] Moustafa and Ginsburg further elaborate on the functions of courts in authoritarian regimes, which functions also often appear to some degree in populist illiberal regimes, as they themselves bear marks of authoritarianism. These functions, according to Moustafa and Ginsburg include the aforementioned legitimacy; the element of social control as both in side-lining political opponents and restricting the manifestation of popular will; ensuring administrative and order within the system and among its operators; providing a framework of legal redress for investors and foreign corporations, thereby boosting the economy; and finally enacting policy changes that would be politically too risky for the executive or legislature to implement.[21]

From the three examined stages, abusive judicial review finds its home in the illiberal one, as it is central to illiberal democracy's particular use of the courts. Illiberal democracies aim at

[19] Issacharoff (n 11) 189–213.
[20] Dixon and Landau (n 1) 1322–1326.
[21] Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tamir Moustafa and Tom Ginsburg (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 4–10.

perpetuating the leader's power, by exploiting the flaws in the democratic framework, while maintaining the guise of legitimacy. Courts pay a key role in this.

As mentioned above, Dixon and Landau differentiate between strong and weak abusive judicial review. Weak abusive judicial review means the upholding of laws or actions that infringe on the constitutional minimum, thus legitimising them and deflecting scrutiny from the government. This according to Dixon and Landau serves both internal and external legitimisation functions. Internally, the suspect laws or actions are more readily accepted due to the respect and legitimacy accorded to the courts, while externally the courts can be upheld as independent institutions guarding constitutionality that affirmed the actions or laws in question, therefore making every external critique invalid. Dixon and Landau also emphasise the art of balancing when engaging in weak abusive judicial review. This balancing is done between supporting the government and avoiding the accusation of being a mere rubber stamp by keeping the illusion of a degree of independence.[22] An art that becomes of particular importance when looking at the practice of the Hungarian Constitutional Court.

In the case of strong abusive judicial review courts themselves work directly to clear obstacles from the way of the powerholders. This manifests itself in strong decisions often breaking with previous practice of legislative intent. Dixon and Landau identify strong abusive judicial review's main benefits in enabling the executive to circumvent limitations on its power both in regard to policy changes, legislative amendments and the inherent boundaries of executive power present in the principle of the separation of powers. Decisions with such effect position courts as actors actively engaged in the undermining of the democratic minimum and tearing down the foundations of constitutional democracy. Yet it still can serve as a valuable tool for

[22] Dixon and Landau (n 1) 1345–1349.

deflecting external criticism, since the attacks are not carried out by the political branches, but rather by the courts.[23]

The models viewed together, the compatibility of weak-form judicial review with weak abusive judicial review is quite striking. This combination, the use of weak-form tools to engage in abusive judicial review carries with it several benefits. Firstly, it retains the legitimising function of weak abusive judicial review, since courts can still affirm the compatibility of executive action or laws with the constitutional or fundamental rights framework. Secondly, it makes the balancing act of supporting the government without manifestly being a mere rubber stamp remarkably easier. In weak-form judicial review systems ultimately it is the legislature who has the last word, and it is perfectly legitimate within the framework of the model for the legislature to override to override the courts. It should not raise as many questions especially if done sparingly. This enables the government allied courts to pick and choose "battles" by selecting cases of perhaps lesser importance to express dissent against laws or executive action, since it is of little consequence. If the case is still of some importance to those in power, they can simply and legitimately override it and point to the base features of the model to establish legitimacy. If the case is of no significant importance, they can simply obey the courts and point to these occasions when dismissing their critics as examples for a well operating system of checks and balances, since the judiciary does seemingly serve as a constraint on power. Therefore, weak-form judicial review combined with weak abusive judicial review is kind of worst of both worlds for democrats and best of both worlds for illiberal leaders as everybody finds what they are looking for. Leaders the tools and legitimacy needed to undermine constitutional democracy, courts the opportunities sufficient to maintain the illusion of their independence and legitimacy.

[23] ibid 1349–1353.

In the following I will examine through the examples of the United Kingdom, and Hungary in two different stages of democracy how the democratic minimum is protected in politically sensitive cases in a weak-form a system and how that mode of protection can serve as a guide and a possible example for those who seek to preserve some of this minimum in an illiberal regime in hopes of a democratic restoration. In selecting politically sensitive cases I will use the relevance of the issue to the political agenda, the history of the issue within a given context and the political reactions and aftermath of the analysed decisions.

II. WEAK-FORM REVIEW IN THE UNITED KINGDOM

2. The Human Rights Act and the case of the United Kingdom

2.1. Weak-form tools and the Human Rights Act

The Human Rights Act of 1998 (hereafter: HRA) aimed at guaranteeing fundamental rights protection, thus an important part of the democratic minimum, in the United Kingdom, while also respecting the doctrine of parliamentary sovereignty. The HRA had the arduous task to walk the line between constitutionalism and democracy in a context strongly skewed towards the side of democracy. Thus, the HRA established a system of weak-form judicial review closely connected to the jurisprudence of the ECtHR.

Under section 3 of the HRA courts have an obligation to interpret legislation in a way that it is compatible with ECHR rights. This interpretative mandate is quite extensive. The courts can add or retract words, restrict the scope of a general, wider provision, or even depart from the unambiguous meaning of the legislation. The limits of this departure being set out in the case of Ghaidan v Godin-Mendoza, as the fundamental features of the legislation and the issues that require parliamentary deliberation.[24] Issues requiring parliamentary deliberation are mostly changes and choices in social policy, that the courts in order to avoid legislation by the judiciary avoid make.[25] Fundamental features of the legislation however are much more difficult to pinpoint, as sometimes a precise language is sufficient, while in other cases the role of a rule within the legislation in question is examined, with Smit describing the role of the fundamental features limitation as an occasional check on the flexible interpretation under section 3.[26]

[24] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (Routledge 2017) 149–151.
[25] Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after Ghaidan v Godin-Mendoza' (2007) 70 The Modern Law Review 299–300.
[26] ibid 303; Fenwick (n 24) 151–152.

Recognising the limits of interpretation however, section 4 enables certain courts to issue a declaration of incompatibility when an ECHR compatible interpretation is not possible. This declaration would not strike the statute in question down, it is up to Parliament to decide whether and if so, how to address the incompatibility. This approach was intended to establish a model of dialogue between the courts and the legislature.[27] As of 2021, 44 declarations have been issued, 34 of which were upheld on appeal. Aside from the most recent one, all of them have been addressed, or proposals for addressing them have been made.[28] This chapter will focus on the declaration of incompatibility in highlighting the potential of weak-form tools in politically sensitive cases.

2.2. The declaration of incompatibility and its context

The issue with the dialogue theory arises from the context of the HRA. On one hand it "brings rights home", meaning it bases itself in the ECHR. On the other hand, it also lets the ECtHR slip through the door to a certain extent. By bringing the ECHR home through the HRA declarations of incompatibility take on a new, international dimension. As the declarations themselves are based on the ECHR and the respective case itself has the possibility of reaching the ECtHR, a declaration of incompatibility represents a "prediction" of the ECtHR's judgement by the courts. This gives declarations of incompatibility a quasi-international character. As while they do not put obligations on the Government or Parliament, they contain the threat of a future international obligation, that can be avoided by simply complying with the declaration.[29]

[27] Christopher Crawford, 'Dialogue and Declarations of Incompatibility under Section 4 of the Human Rights Act 1998' 25 Denning Law Journal 43–45.
[28] Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021, December 2021
[29] Kavanagh (n 10) 1024; Fenwick (n 24) 173.

This makes it incredibly costly for Parliament to override a declaration of incompatibility. It would require an investment of significant political power as MP's are generally willing to comply with judicial decisions through legislation.[30] Furthermore courts seem to select cases in which a declaration is issued carefully, issuing declarations on laws which are meant to be amended anyway or are unlikely to be doggedly defended by the Government. In other cases which have the possibility to be more contentious courts often include soft suggestions on the avenues of amendments to be taken.[31] Finally by non-compliance the Government risks both embarrassment on the international stage in the form of an ECtHR judgement and a scandal on the domestic stage as it would openly declare that it supports and upholds legislation that violates human rights and is willing to defy the judiciary to do so.[32]

This is despite the fact, that the declaration of incompatibility is considered by the ECtHR, as an ineffective remedy on multiple grounds, due to its weak-form nature that allows wide discretion to the ministers. The ECtHR upheld the possibility however that it may come to consider the declaration as an effective remedy, if there is sufficient practice of compliance on the side of the Government, therefore in effect it becomes stronger. [33] This point is yet to be reached. Chandrachud argues that a constitutional convention rendering the possibility of non-compliance with a declaration of incompatibility unallowable may be emerging, but given the nature of the declarations, the strategic selection of cases in which courts issue them and the possible responses by the Government no clear statement can be made whether it has already cemented itself.[34] Chandrachud gives the Hirst group of cases as an example for the tactics

[30] Fenwick (n 24) 173.
[31] Chintan Chandrachud, 'Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility' [2014] Public Law 2–6.
[32] Kavanagh (n 10) 1024–1026.
[33] Burden v. the United Kingdom, Application no. 13378/05, 29 April 2008; Hobbs v. the United Kingdom (dec.), Application no. 63684/00, 18 June 2002
[34] Chandrachud (n 31) 7–10.

available to Parliament and the Government, and the time elapsed and resolution reached only strengthen his arguments on the lack of an existing constitutional convention.

Given the nature of the declaration of incompatibility as a quasi-international non-obligation, with an emerging but not yet crystallised constitutional convention to reinforce it, what can be said about its usefulness in protecting rights, and therefore elements of the democratic minimum? In the following I will explore this question through two of the more contentious, and politically sensitive cases of declarations of incompatibility that concern elements of the democratic minimum, namely equality and electoral rights.

2.3. Testing the declaration of incompatibility

2.3.1. A v Secretary of State for the Home Department (2004)

One of the first major challenges to the declaration of incompatibility as a tool for rights protection came in the form of the A v Secretary of State for the Home Department case in 2004, better known as the Belmarsh-case. The case concerned the Anti-terrorism, Crime and Security Act of 2001 (hereafter: the T Act) enacted after the 9/11 attacks. The T Act enabled the detention of foreign nationals who were deemed to pose a threat to national security. The decision whether a foreign national presented a threat to national security was made by the Secretary of State through the issuance of a certificate.[35]

The case was brought to the Judicial Committee of the House of Lords by nine foreign nationals detained at Belmarsh prison. The Judicial Committee issued a declaration of incompatibility with regards to section 23 of the T Act, declaring that it infringed on rights specified in Articles

[35] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)

5 and 14 of the ECHR by allowing for the detention of foreign nationals without a trial, while not employing such measures against British citizens. Section 23 was thus disproportionate and illogical as well as discriminative as it made nationality the basis of potential detention.[36]

Members of Government expressed strong opinions against the judgement both in public and in private. The Government was aware of and even debated the option of not complying with the declaration of incompatibility, but ultimately concluded that they had to follow the judgement of the Judicial Committee. The underlying reason was the recognition that a failure to comply with the decision would trigger a constitutional crisis close to an election and would put the Government in a position where it would be seen as violation fundamental rights and the constitution. As Crawford notes, while the Government would probably have liked to keep the T Act intact it could not do so due to the immense political pressure, which in turn meant that there was no real discussion between the judiciary and Government as there were no arguments or options the Government could safely bring to the table following the decision.[37] Thus the Government finally acquiesced and introduced a Bill amending the incriminated sections of the T Act in February of 2005.

Fenwick on the other hand argues, that the development of anti-terrorist measures and legislation between the Belmarsh case and 2011 can be seen as a product of dialogue between the judiciary and the Government.[38] While her claim at first seems to contradict that of Crawford it may not necessarily be the case. Fenwick acknowledges the difference between the Belmarsh case and later decisions by making the distinction of paradigmatical changes

[36] Ibid.
[37] Crawford (n 27) 63–68.
[38] Fenwick (n 24) 1080–1081.

required due to judicial interference in the Belmarsh case and slow compliance building with Article 5 of the ECHR in the cases related to control orders.[39]

The full picture can be drawn up as the Belmarsh case, while not allowing space for discussion itself, was part of a larger discussion on measures affecting rights under Article 5 of the ECHR, by setting out the framework and limits of discussion by confining the legislature withing a certain paradigm that can be then perfected through the back and forth of the courts and Parliament. Thus, the Belmarsh case more than anything illustrates the power behind declarations of incompatibility and their role with regards to the discussion theory. Even when declarations frustrate the Government's policy agenda, the executive sees no choice but to comply by addressing the main points of contention. This addressment however does not need to be final and perfect, just good enough to avoid a further declaration of incompatibility and enable a two-sided engagement with the judiciary. It would appear that discussion begins where incompatibility ends, and it unfolds in the confines of declarations of incompatibilities.[40]

2.3.2. The Hirst group of cases

The greatest challenge to the powers of the declaration of incompatibility came in the form of the Hirst group of cases. Starting in 2005, with the namesake Hirst v. United Kingdom (No. 2) case, the prisoner voting rights saga took 13 years to come to a perhaps temporary conclusion.

In the starting, Hirst v. United Kingdom (No. 2) case the ECtHR examined the issue of the blanket ban on prisoner voting in section 3 of the Representation of the People Act of 1983 (hereafter: the R Act). The Court found that such a measure is not proportionate and it's

[39] ibid 1090–1091, 1098–1100.
[40] For such a debate unfolding within the confines and in the wake of a declaration of incompatibility see: House of Commons Debate, January 26, Vol. 430., Column 311

automatic and indiscriminative nature violates Article 3 of Protocol No. 1. of the ECHR, calling section 3 of the R Act a "blunt instrument".[41]

In the spirit of the HRA the Hirst case was "brought home" in 2007 by the Registration Appeal Court of Scotland. In the case of Smith v. KD Scott, the Court issued a declaration of incompatibility with regards to section 3 of the R ACT based on the Hirst case, despite the Secretary of State informing the Court that measures to comply with the Hirst decision were being undertaken and thus a declaration of incompatibility was unnecessary.[42]

The struggle over prisoner voting rights would continue however for a further 11 years, entailing four further judgements by the ECtHR against the United Kingdom and the Committee of Ministers of the Council of Europe getting more closely involved by 2015. The Committee finally declared the group of cases closed in 2018, following administrative measures put into place by United Kingdom.[43] These changes however were limited, only making voting available for prisoners on a temporary license, for whom the lack of voting rights was considered an anomaly and unintended consequence of the R Act anyway.[44]

The Hirst group of cases provide important insights on the limits and workings of the declaration of incompatibility. Firstly, it shows the limits of the declaration of incompatibility in a setting in which it should be at the height of its power. The declaration issued in Smith v. KD Scott was based on a decision by the ECtHR and was indirectly reinforced by further ECtHR decisions four times. In theory this declaration should have had added weight due to

[41] Hirst v. the United Kingdom (No 2) Application no. 74025/01, 6 October 2005
[42] Smith v. KD Scott Electoral Registration Officer [2007] ScotCS CSIH_9
[43] CM/ResDH(2018)467
[44] Briefing Paper Number 07461 on Prisoners' voting rights: developments since May 2015, House of Commons Library, 19 November 2020

these decisions as the Government knew through Hirst that noncompliance was to be rewarded by more and more lost cases at the ECtHR. The Government was periodically reminded of this through the judgements handed down by the Strasbourg court, yet it failed to comply for a further 11 years. Even though the Government gave in by 2018, it is questionable whether the solution accepted by the Committee of Ministers is actually sufficient to comply with either the declaration of incompatibility or the judgements of ECtHR, as the incriminated section 3 of the R Act remains unchanged.[45]

Secondly it highlights another issue related to the limits of declarations of incompatibility, connected their non-binding nature. Namely, that there is limited point to issue a declaration when a declaration has already been issued. This is illustrated by the case of R (Chester) v. Secretary of State for Justice in 2013, in which the Supreme Court argued, that a further declaration of incompatibility with regards to section 3 of the R Act would serve no useful purpose given that a declaration has already been issued.[46] This highlights that once a declaration has been issued, the judiciary runs out of options to remedy the violation of rights, and that the Supreme Court does not consider further declarations on the same issue useful tools for this purpose.

Compared to the Belmarsh case, this highlights the judiciary's weakness in the dialogue model. The various Governments, with supports from the major parties of Parliament and the population could afford to ignore the declaration for 11 years, making lacklustre efforts to gain time. Even the compliance itself, if it can be considered as such, came as a result of international pressure, which is ultimately in line with the theoretical framework behind the HRA system,

[45] Elizabeth Adams, 'Prisoners' Voting Rights: Case Closed?' [2019] UK Constitutional Law Blog.
[46] R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent) [2013] UKSC 63

raises the question, whether compliance could have been achieved through a declaration of incompatibility.

However, the fact, that the Government continuously had to create new fig leaves to try and obscure from judicial scrutiny the continuing non-compliance shows that even in these cases the judiciary possesses some power. Both in the Smith and R (Chester) cases, the government pointed to these fig leaf efforts to try and avoid declarations of incompatibility. Thus, it cannot be said, that these only served to hide from the ECtHR, but the Government was also wary of the domestic courts. This perhaps puts the question, whether the lack of ECtHR jurisprudence would have made government compliance less likely in a somewhat different light. Were it not for the ECtHR it could be reasonably expected that the courts would have been more active in getting the Government to comply, as they would have been the strongest judicial actors in these cases. As Crawford observes the context of the Hirst case weakened the relevance and power of the declaration. This, combined with the lack of publicity, the fact that the declaration was not issued by the highest court of the land and the public support the blanket ban enjoyed all made non-compliance viable for the Government.[47]

Thus, it seems that the declaration of incompatibility is at its most powerful state when the ever-present threat of a condemning ECtHR judgement is real but not yet realised. When the threat becomes reality, the domestic courts, no longer being the primary actors in charge of forcing compliance, can take backseat role and let Strasbourg take the lead in resolving the issue.

[47] Crawford (n 27) 76–77.

2.4. The power of the declaration of incompatibility

The declaration of incompatibility has proven to be a strong, yet nuanced tool in the hand of the courts to resolve right violation by legislation and therefore protect elements of the democratic minimum. In light of the afterlife of Belmarsh, and the Hirst group of cases however Crawford's claim, that there is no real discussion connected to the declarations despite goals of the HRA, and that the judiciary is in an overwhelmingly more powerful position compared to the Government, may not strictly hold up. By the nature of the weak-form review scheme the Government has plenty of opportunities to avoid or delay compliance given the right circumstances. The afterlife of the Hirst group of cases may prove decisive with regards to the theory of discussion happening in the wider context of a declaration. The Joint Committee on Human Rights considers the declaration resolved. Further judgements should thus result in a back and forth between the judiciary and the Government, and perhaps the ECtHR aimed at perfecting the details of this resolution. The cornerstones have been set, whether the discussion ensues remains to be seen. What can be said for certain however is that a weak-form instrument, such as the declaration of incompatibility can prove to be effective in protecting the democratic minimum, or at least in the Hirst group of cases keep up awareness and pressure with regards to its contents.

III. THE CONSTITUTIONAL COURT AND TWO STAGES OF DEMOCRACY IN HUNGARY

3. Setting the scene – the Constitutional Court of Hungary

3.1. Rise

The Constitutional Court of Hungary was established during the democratic transition of 1989. The Court, its powers and structure were a result of a compromise and mutal fear of the result of the upcoming free democratic elections by both the democratic opposition forces and the ruling state socialist party. The Constitutional Court was originally intended to have fifteen members, but the appointment of new justices ultimately stopped at eleven which became the official size of the Court.[48]

The new Court's main task was a posteriori review of legislation. A cornerstone of this was the instrument of action popularis. This provided unlimited standing to citizens to challenge laws in front of the Constitutional Court which enabled the court to create a robust jurisprudence encompassing most provisions of the Constitution, and also enabled the Court to develop and image of an independent and reliable arbiter and as a result increase its recognition and popularity among the populace.[49]

3.2. The extension and development of instruments

The Court also used this influx of cases and the rather barebone nature of the Act on the Constitutional Court the develop and in some respects extend its competences. Sólyom points

[48] István Kukorelli, Imre Papp and Imre Takács, 'Az Alkotmánybíróság (The Constitutional Court)' in István Kukorelli (ed), *Alkotmánytan I. (Constitutional studies I.)* (Osiris Kiadó 2007) 448–449.
[49] László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary' (2003) 18 International Sociology 151–153.

out multiple avenues of expansion. The Court in order to give exhaustive interpretation to constitutional provisions did not consider itself strictly bound by the application and addressed connected constitutional issues as well. Through the creation of the concept of living law the Court also moved towards individual rights protection, enabling itself to examine judicial practice to some degree. Finally, the court sought to create cooperative instruments such as pro futuro annulment of legislation and legislative omission.[50] As a further instrument the requirement of constitutionality was developed, which in this period was not yet characterised as tool of cooperation.

Out of these new instruments the requirement of constitutionality and the legislative omission are of particular importance to this paper. The requirement of constitutionality, as it will be presented in detail below, was intended to be a softer tool than striking down laws and was meant to mark the boundaries of constitutional interpretation in the case of legislation with possibly unconstitutional applications.

Legislative omission on the other hand is characterised as an instrument of cooperation by Sólyom. Summarised concisely, the legislative omission meant that the Court held that there was an unconstitutionality caused by the legislature's failure to create the necessary legislation. The Court would then point out what legislation was missing and would set a deadline for the legislature to create it.[51]

The legislative omission however had its own course of evolution. The Constitutional Court soon departed from the formal requirement of a delegation of legislative power, or a legislative

[50] ibid.
[51] ibid 152.

obligation set out by law to use the instrument, and soon a rule giving competence to a state institution or the protection of a right set out by the Constitution was enough to warrant the declaration of a legislative omission.[52] The jurisprudence concerning the deadline evolved as well, with the Court introducing extension mechanisms in 1997.[53] The Court even stared declaring omissions in conjunction with other instruments such as the pro future annulment of legislation. The legislative omission however never lost its cooperative nature according to Sólyom and serves as a hotbed for activism.[54]

Both the requirement of constitutionality and the legislative omission bear the characteristics of weak-form instruments. In both cases the final word is ultimately with the legislature that may or may not act, that has the opportunity to legitimately override the Court's decision with its own as both the omission, and as it will be presented below, the requirement serve to correct the legislature's mistake. And in both cases, there is a track record for some ignorance, with the legislature not complying with the omissions on an alarming scale under the end of the first Constitutional Court's term,[55] and as will be shown below, both the legislature and executive institutions of the fragile and illiberal democracy ignore requirements.

Both instruments have analogous tools in the HRA toolkit, with the requirement being similar to strained interpretation and the omission to the declaration of incompatibility with the notable lack of a connected threat of international obligation, which perhaps weakens this instrument. The possible solutions to an ignored omission even bear the marks of weak-form dialogue with suggestions being made for the court to use public pressure or the formally neutral president to

[52] László Sólyom, *Az Alkotmánybíráskodás Kezdetei Magyarországon (The Beginnings of Constitutional Adjudication in Hungary)* (Osiris Kiadó 2001) 331–338.
[53] Decision no. 64/1997. (XII. 17.) of the Constitutional Court of Hungary
[54] Sólyom (n 52) 341–342.
[55] Dániel Karsai, 'A Mulasztásos Alkotmánysértés Szankciórendszere (The System of Sanctions for Legislative Omissions)' [2003] Jogtudományi Közlöny 3.

nudge the legislature into action.[56] In my analysis I will place emphasis on the requirement of constitutionality, as it plays a central role in the abusive judicial review of the illiberal Constitutional Court and highlighting how the omission could be a tool used for good by exploiting the illiberal Court's aims and strategies. Based in the description of the beginning of constitutional adjudication, the question may arise: how did this rather bold Court an illiberal one? This will be summarised below.

3.3. And fall

After the landslide electoral victory in 2010, the Fidesz-KDNP government used its supermajority in the National Assembly to push through a series of amendments affecting the Constitutional Court. These amendments raised the number of justices from eleven to fifteen and modifying the way justices are elected. Under the previous arrangement party groups could nominate one member each to the nomination committee. Under the new regime, the number of delegates was tied to the proportion of seats each group had in the Assembly. This left no influence on the nomination process for opposition forces, and since the election itself required a two-thirds majority, the new government could nominate and elect whoever it wanted.

This new regime was further cemented in the new Fundamental Law in 2012, which replaced the old Constitution and in the new Act on the Constitutional Court. The Fundamental Law took away the competence of the Court to elect its own president from among its members and gave that power to the National Assembly. The new Act further reduced and reformed the competences of the Court. Actio popularis, once a cornerstone of the protection of constitutionalism in Hungary was abolished, and in large part replaced with a system of constitutional complaints mechanisms, which severely restricted the types of applications that

[56] ibid 4–8.

could be lodged with the Court and the timeframe in which it could be done.[57] The new Act also codified two instruments developed in the jurisprudence of the constitutional court: the requirement of constitutionality and the legislative omission.

Finally, the Fidesz-KDNP majority used its stable supermajority to punish the Constitutional Court by restricting its competences or overriding its holdings through constitutional amendments if a "wrong" decision was made. Through these tools, the habit of punishment and the modification of the election process, a pro-Fidesz majority was reached on the Court by 2013 and the institution became much more docile as a result of that.[58]

[57] Fruzsina Gárdos-Orosz, 'The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint' (2012) 53 Acta Juridica Hungarica 308–314.
[58] Kálmán Pócza (ed), *Constitutional Politics and the Judiciary, Decision-Making in Central and Eastern Europe* (Routledge 2019) 99.

4. The advent of the requirement of constitutionality and the Sólyom-court of Hungary

4.1. Invention of the requirement of constitutionality

The requirement of constitutionality is an invention of the first Constitutional Court of Hungary, commonly referred to as the Sólyom-court after its first president. The concept came about as the consolidation of the doctrine of the living law, its basis being, that legislation has to be examined with respect to how it is applied, and the Constitutional Court has to step in when an unconstitutional application becomes the norm, to keep interpretations within constitutional bounds. [59] The consolidation of the doctrine into the requirement of constitutionality enabled the Court to not only interfere when the dominant application was unconstitutional, but when the possibility of an unconstitutional interpretation arose, limiting the possibilities to constitutionally permissible ones.[60]

This solution was intended to be a tool to "spare the legal system" by not striking down legislation vested with the potential of unconstitutionality if they can be redeemed.[61] András Holló, former judge of Constitutional Court described the requirement of constitutionality as a gentler form of judicial review, a soft alternative to striking down of laws.[62] The first traces of the requirement of constitutionality appear quite early, in 1991, however whether the formulated requirement constituted an erga omnes obligation is questionable.[63]

[59] Renáta Uitz, 'Egyéni Jogsérelmek És Az Alkotmánybíróság (Individual Claims and the Constitutional Court)' [1999] Fundamentum 46.
[60] ibid 46–48.
[61] András Holló, 'Néhány Megjegyzés Az „alapok" (Húsz Év) Védelmében… (Remarks in the Defence of the "Foundations" (Twenty Years))' [2012] Jogelméleti Szemle 261.
[62] ibid 9.
[63] Gábor Halmai, 'Az Aktivizmus Vége? A Sólyom-Bíróság Kilenc Éve (The End of Activism? Nine Years of the Sólyom-Court)' [1999] Fundamentum 16.

The first clear formulation of a requirement of constitutionality came about in 1993 in a decision concerning the appointment of judges. In the judgement, the Court defines the requirement of constitutionality as part of ex post judicial review, aimed at bridging the gap between two extremes: the striking down and leaving in force of norms. The Court stated that just because an unconstitutional interpretation of the norm is possible it does not necessarily need to be struck down. In this case the Constitutional Court can draw up the constitutional boundaries of possible interpretations.[64]

The Court held that a requirement of constitutionality should be used where the language of a norm was unclear to an extent that it threatens fundamental constitutional constructs, regardless of whether that unclarity was a mistake or a conscious design choice on the part of the legislature. In the eyes of the Constitutional Court both are mistakes representing a threat to constitutionality. However, when possible, the legal system has to be spared, through for example a requirement of constitutionality.[65]

The Court however made some further reservations. First, the it did not discard the living law theory completely and held that the law may be struck down if an unconstitutional interpretation becomes dominant. This dominance, based on the language used by the Court has to be near absolute. Second, the Court emphasized that through requirements of constitutionality it neither applies nor interprets the law in question. That is the task of the ordinary courts. The only thing it does is reflecting the norm in question to the constitutional order and the legal system as a whole, and through that drawing up the constitutional boundaries of interpretation and application. Finally, the Court held that requirements of

[64] Decision No. 38/1993. (VI. 11.) of the Constitutional Court of Hungary
[65] ibid.

constitutionality constitute erga omnes obligations regardless, if they are contained in a decision that dismisses the petition, as they are substantive decisions on principles of constitutionality.[66]

After its invention the tool soon became widely used by the Constitutional Court. According to Kálmán Pócza, between 1994 and 1998 15,9% of all decisions involved a requirement of constitutionality per year.[67] Requirements of constitutionality issued during the Sólyom-court era (1990-1998) still constitute 25% of all requirements issued.

4.2. Evolution and use of the requirement of constitutionality

As can be seen, the requirement of constitutionality was conceived as a tool to be used on the judiciary and the executive controlling the way they interpreted and applied laws. It however soon transformed into a much broader tool. Sólyom outlines, that the requirement of constitutionality took on many roles beyond the original function of correcting unclear laws with potentially unconstitutional interpretations in many respects becoming similar to the HRA's strained interpretation. It was used to construe a restrictive or expansive interpretation of a law, to insert a new rule which it did not contain, or what Sólyom considers to be the final breaking with the original concept, to prescribe the contents of a future law in a decision that strikes down a norm.[68]

These functions are quite distant from the original design. The Court in many respects became a positive legislature in the view of Sólyom, when it creates requirements of constitutionality which insert content into laws that was not intended to be in it by the legislature or modifies its

[66] ibid.
[67] Pócza (n 58) 104–105.
[68] Sólyom (n 52) 364–370.

effects to a degree that was not the legislature's original intent. The Court further steps into the shoes of the legislature when it "cuts out" parts of laws in creating a requirement of constitutionality. Sólyom classifies these cases as ones where the Court essentially amends the law instead of clarifying it. Similar effect is achieved, when the Constitutional Court chooses from multiple alternatives the one that is contrary to the legislature's intent, which according to Sólyom can usually be ascertained. In these cases, the Court keeps the law in effect in a way that the legislature never intended it to be construed.[69]

A further straying from the original context according to Sólyom was when the Court stared instituting new rules into examined legal norms that could not be discerned from them through interpretation. These cases represent a break with the concept of the requirement of constitutionality being part of the ex post judicial review competence a tool of constitutionality control for the application of the law. The complete abandonment of the original concept in Sólyom's eyes came when the Court applied it in conjunction with the striking down of legislation, using the requirement to prescribe the content of future legislation.[70] With these developments the creation of a requirement of constitutionality de facto became a separate competence and tool of the Constitutional Court deployed by itself in decisions dismissing a petition or in conjunction with other tools.

The latter use is the most relevant for the purposes of our analysis, however. Sólyom emphasises that the Court used this method in cases of great importance, giving several examples.[71] While the term "cases of great importance" cannot be wholly substituted for

[69] ibid 366–368.
[70] ibid 368–370.
[71] ibid 370–371.

politically sensitive cases, nevertheless there is a considerable overlap between the two. One such case cited by Sólyom is the first Bokros-decision of 1995.

4.3. The first Bokros-decision

The basis of the first Bokros-decision was the so called Bokros-package. The package was a series of economic reforms aimed at cutting government spending and welfare in the name of economic stabilisation. The package was presented as a solution to the crisis of the Hungarian economy and remains controversial to this day.[72]

The challenge was directed against the certain legislative amendments serving economic stabilisation Act XLVIII. of 1995 (hereafter: Gst.). Specifically, parts two and three of the Act dealing with welfare structures. The petitioners alleged that the rapid and comprehensive reform of the welfare system, coming into effect only a half month following promulgation, violated the principle of the protection of acquired rights and the principle of legal certainty by abolishing or fundamentally modifying welfare programs that play a crucial role in in the livelihood of families. Petitioners further contended, that this also violated the duty of the Hungarian state to protect mothers and families and provide social security, stipulated under Articles 66-67 and 70/E of the Constitution.[73]

The Court struck down the provisions stipulating the coming into effect of the challenged provisions and instituted a new requirement of constitutionality. The Court stated that when conducting such a thorough reform it is a requirement of constitutionality to make the changes

[72] Gábor Kecső, '43/1995. (VI. 30.) AB Határozat – Bokros-Csomag (Decision No. 43/1995. (VI. 30.) of the Constitutional Court - The Bokros-Package)' in Fruzsina Gárdos-Orosz and Kinga Zakariás (eds), *Az alkotmánybírósági gyakolat, Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020 (Constitutional jurisprudence, 100 decisions of theoretical significance of the Constitutional Court 1990-2020)*, vol I. (HVG-ORAC Lap- és Könyvkiadó 2021) 370–371.
[73] Decision no. 43/1995. (VI. 30.) of the Constitutional Court of Hungary

with such a timeline that those affected by them can adopt and plan their finances accordingly, finding ways to offset the financial effects of the changes.[74] This requirement was discerned from the requirement of adequate time for preparation with regards to new legislation, which the Court considered to be an element of legal certainty and therefore the rule of law.

This use of the requirement of constitutionality, as Sólyom stated is a radical break with the original concept. Here the Court did not mark the boundaries of constitutional interpretation but created a requirement for a provision that was struck down, therefore in effect not outlining the boundaries of constitutional interpretation but that of constitutional legislation. This abandoned the concept of the requirement of constitutionality being part of ex post judicial review as a softer alternative to striking down laws. The Court using the requirement of constitutionality in this way positions it as a stronger tool than the ordinary annulment of legislation, as in that case the Court merely strikes down a law leaving a relatively wide margin for the legislature. Striking down laws and creating requirements of constitutionality with regard to the struck provisions however restricts the legislature's discretion when creating the new provisions as it sets clear boundaries and constraints on what that future provision can contain.

The case can be considered politically sensitive given the laws importance to the Hungarian Government's efforts to salvage the economy in part by cutting back social spending. This is further reinforced by the reactions following the decision. The first Bokros-decision and especially the ones that followed drew heavy criticism from the government parties and MPs, with some alleging Court overreach that could upset the separation and balance of powers and

[74] ibid.

the Court nudging the country towards bankruptcy by hindering the reforms.[75] There were even discussions of withdrawing the Republic Guard that provided for the security of the building of the Court as part of a larger scheme to reduce spending and the smaller coalition party started entertaining the idea of restricting the competences of the Court which ultimately came to nothing.[76]

While it can't be said that the Court took such tough approach on every case of great importance when creating a requirement of constitutionality as it becomes apparent with the later Bokros-decisions, the fact that the Court saw one such case as an opportunity to continue to push the limits of the tool and the self-perception of the Court presented by its president László Sólyom in an interview in August 1995 do give us a good overview of how the Court positioned itself and the requirement of constitutionality with regards to the executive and legislature.

In the interview Sólyom states, that *"The Hungarian Constitutional Court is different from other such institutions in that our main concern is not how we can avoid cases."*,[77] and when talking about constitutional courts in Europe *"…they are not afraid of conflicts, do not hide from challenges."*[78]

These statements from the president of the Court along with the development of the requirement of constitutionality with special regards to the first Bokros-decision, reveals a

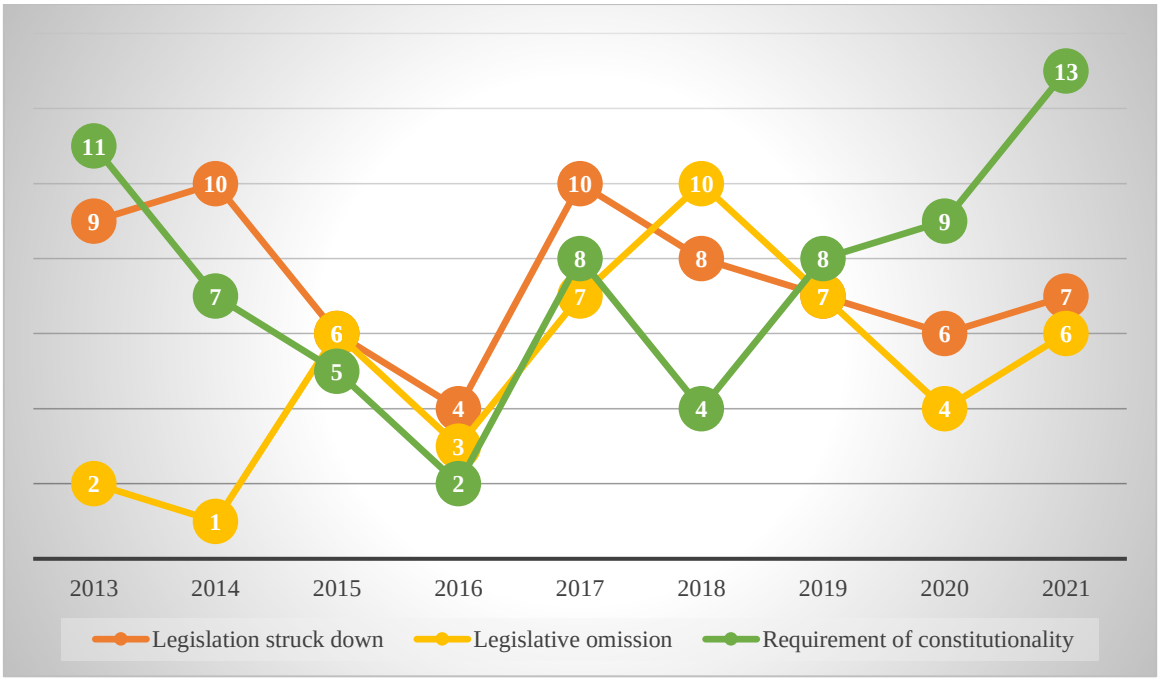
[75] Noémi Molnár, 'Gazdaság És Jogállam. Az Alkotmánybíróság Érték És Szerepkeresése a Megszorító Állam Idején. A 43/1995. (IV. 30.) AB Határozat És a Kapcsolódó Határozatok Elemzése (Economy and the Rule of Law. The Constitutional Court's Search for Role and Values during the Austerity State. The Analysis of Decision No. 43/1995. (VI. 30.) and Connected Decisions)' in Tamás Győrfi, Endre Orbán and Viktor Zoltán Kazai (eds), *Kontextus által világosan: A Sólyom-bíróság antiformalista elemzése (Clear by context: the anti-formalist analysis of the Sólyom-court)* (L' Harmattan Kiadó 2021) 244–245.
[76] ibid 245.
[77] Lajos Pogonyi and András Sereg, 'Megmarad-e a Fekete Gólya? Az Alkotmánybíróság Elnöke a Bokros-Csomagról, És Arról, Hogy Miért Hárította El a Köztársaságielnök-Jelöltséget' *Népszabadság* (19 0 1995) 21. (translation by the author)
[78] ibid. (translation by the author)

Court that does not shy away from taking a stance in important or even politically sensitive cases, but is willing to put the democratic minimum first and thus limit the potential of the requirement of constitutionality as a tool for and deflecting unpleasant issues. An attitude that will change with the second prominence of the tool.

5. Requirements of constitutionality in the practice of the post-2010 Constitutional Court of Hungary

The requirement of constitutionality as a tool employed by the Constitutional Court rose to new prominence again after Fidesz took power in 2010 and implemented changes to the Constitutional Court. According to Kálmán Pócza, the Court "reinvented" the requirement of constitutionality in 2013 and started prominently using it.[79] The number of requirements adopted each year by the Court remained consistently high ever since, with the number of adopted requirements overtaking both the number of declared legislative omissions the number of laws struck down in 2019. This turn also resulted in the decisions of the Court becoming weaker with regards to controlling the legislature, with the Court reaching its weakest in 2015 and presumably weakening ever since.[80] This trend even became more striking in 2021, a year that was almost entirely a state of emergency, when the Court should have been at its strongest, controlling emergency legislation. Instead, it became the year with the highest disparity between requirements of constitutionality and the strong-form instrument of striking down laws.

[79] Pócza (n 58) 106.
[80] Kálmán Pócza, Gábor Dobos and Attila Gyulai, 'Mítosz És Valóság. Mennyire Korlátozta Az Alkotmánybíróság a Törvényhozás Mozgásterét? (Myth and Reality. To What Extent Does the Constitutional Court Restrict the Legislature?)' 61 Állam- és Jogtudomány 77–79; ibid 83–89.



Instruments used by the Constitutional Court of Hungary between 2013 and 2021[81]

5.1. Requirement of constitutionality in the post-2010 reality

The new prominence and use of the requirement of constitutionality can be attributed to multiple factors all pointing to the same direction, signalling a similar purpose for the re-emergence of the tool, namely its week-form nature and how that lends itself to abusive judicial review.

From among the factors Pócza emphasises the personnel changes on the Court, pointing out that due to court-packing and the changes made to the election of the members of the Court, by 2013 the Fidesz-elected justices made up the majority of the Court that resulted in weaker judgements, among them the re-emergence of the requirement of constitutionality.[82] Zsuzsa Szakály on the other hand interprets the weaker nature of the requirement of constitutionality as a potential safe haven for the Constitutional Court in politically sensitive cases, since the

[81] Source of data: alkotmanybirosag.hu
[82] Pócza (n 58) 109–110.

Court can, to a lesser degree, correct constitutional issues in legislation without outright declaring that it considers the underlying legislation unconstitutional. Szakály also points out the practicality of the requirement of constitutionality over striking down legislation with regards to the courts. She argues that the exchange between the Constitutional Court and ordinary courts became more intensive, due to the constitutional complaint becoming the main tool of constitutional remedy, and therefore a tool that provides a clear interpretational guide to the courts is more useful than leaving the issue up to the legislature, hoping that it would get it right the second time.[83]

However, the most original take on the use of requirements of constitutionality comes from justice Balázs Schanda. Schanda argues that the post-2010 Constitutional Court, and especially the post-2012 Court represents a different mindset, considers itself to be in a different role. Schanda calls this Court a compromise-seeking one, that is more intent on seeking a solution that is equally acceptable to the legislature and members of Court as well. Furthermore, Schanda states, that despite the Fundamental Law coming into effect, the Court did not have to deal with hard, fundamental issues relating to the state and the rule of law, as even when such questions were brought in front of the Court, it only had to inspect the smaller, technical details, not the large issue itself.[84] These arguments imply that Schanda is mainly talking about the post-2013 Court, when the Fidesz-appointed justices reached a majority as such a mindset could be hardly attributed to the Court in 2012.

[83] Zsuzsa Szakály, 'Alkotmányos Követelmények a Magyar Alkotmánybíróság Gyakorlatában 2012 Után (Requirements of Constitutionality in the Jurisprudence of the Constitutional Court after 2012)' (2020) XVI. Iustum Aequum Salutare 176–177.
[84] Balázs Schanda, 'Az Alkotmánybíráskodás Új Szerepe Az Alaptörvény Első Évtizedében (The New Role of Constitutional Adjudication in the First Decade of the Fundamental Law)' [2021] Acta Humana 119–120.

Perhaps more important are justice Schanda's arguments relating to the requirement of constitutionality as a tool used by the Court. These arguments reinforce those made by Szakály, in that Schanda also frames the requirement of constitutionality as a tool for "delicate cases", a categorisation, that based on the examples brought by Schanda covers politically sensitive cases. Schanda states, that the Court uses compromise seeking techniques in such cases, such as the delaying of decisions and the adoption of requirements of constitutionality, explaining this compromise-seeking approach as one stemming from the Court's perception of its own role.[85]

However, Schanda does not seem to support Szakály's argument on the question of constitutionality of the underlying legislation. Instead, he characterises the requirement of constitutionality as a partial annulment of the legislation that is situated between the striking down of a law and deeming it constitutional, as a weaker form of the former option.[86] This implies that the Constitutional Court does find the law unconstitutional when it adopts a requirement of constitutionality, but it refrains from striking it down in the spirit of "compromise". This interpretation is supported by justice Stumpf's dissenting opinions on two decisions of the Court adopting a requirement of constitutionality. In both cases Stumpf points out, that the Court is using the requirement of constitutionality to de facto amend the legislation in question that is missing key provisions required for it to be constitutional, rather than striking it down.[87]

Stumpf in his first dissent outlines the cases in which a requirement of constitutionality can justifiably be adopted, taking a rather restrictive stance, closer to the original concept of

[85] ibid 119–121.
[86] ibid 120.
[87] Decisions no. 21/2016. (XI. 30.) and 27/2013. (X. 9.) of the Constitutional Court of Hungary, the dissenting opinon of justice dr. István Stumpf

instrument as developed by the Sólyom-court. In his opinion a requirement of constitutionality should be adopted, when the proper interpretation of legislation is unclear or cannot be discerned by the courts, due to the omission of the legislature, and the main line of interpretation followed by the Courts is not unconstitutional. In these cases, he argues, the Constitutional Court can justifiably adopt a requirement of constitutionality to narrow the range of interpretations to the constitutional ones, but if the legislation is so defective, that the requirement of constitutionality would constitute a de facto amendment or the logical line of interpretation for the courts would be an unconstitutional one, the Court has to declare the legislation unconstitutional.[88] Stumpf then uses these criteria as basis to criticise the Court's use of requirements of constitutionality in the given cases.

Overall, the Constitutional Court uses the requirement of constitutionality as a weaker form of striking down legislation, that it nevertheless considers unconstitutional. The requirement of constitutionality therefore in many cases serves as a de facto amendment serving to patch over the legislature's mistake in the spirit of "compromise". This creates a reversed dynamic compared to the United Kingdom's system under the Human Rights Act, as the Court only gives a very week signal, if any, to the legislature that a mistake, resulting in the unconstitutionality of the legislation has been made, and subsequently rushes to fix it instead of confronting those in power. The Court does this in the spirit of "compromise" or rather more eloquently in the spirit of fear and submission. Behaviour such as this can be considered characteristic of Dixon and Landau's concept of weak abusive judicial review. As the Court ultimately dismisses applications and therefore legitimises the law in question with small caveats that theoretically call the constitutionality of the legislation into question. This last

[88] Decision no. 27/2013. (X. 9.) of the Constitutional Court of Hungary, the dissenting opininon of justice dr. István Stumpf

element however does not appear clearly in the language of the decisions therefore it can be considered as being part of the Court's effort to maintain an image of legitimacy while also helping the illiberal regime's attacks on the democratic minimum. In the following I will illustrate the Court's use of the requirement of constitutionality in "delicate", politically sensitive cases that affect elements of the democratic minimum, freedom of speech, and equality. Through my analysis I will compare the dynamics manifested in these cases to those seen under the HRA's system.

5.2. The Court and "delicate" cases

When selecting cases for comparison I aimed to choose cases from the jurisprudence of the Constitutional Court of Hungary, that are similar to the UK cases discussed in the chapter on the HRA. There had to be a similarity in the context and subject of the legislation in question, a similarity in underlying policies, governmental behaviour, and final outcome. To satisfy these criteria I compare the Belmarsh-case with the scaremongering legislation case[89], as both are overly wide, crude reactions to a public emergency found to be incompatible with fundamental rights, and both of which were remedied in some form with no government opposition. Whereas the Hirst and anti-homeless legislation cases[90] both target disadvantaged groups of society with low social standing, in both instances the respective governments took a stand against the courts in supporting their policy choices and due to this stand, the fundamental rights violations were failed to be meaningfully remedied in both.

[89] Decision no. 15/2020. (VII. 8.) of the Constitutional Court of Hungary
[90] Decision no. 38/2012. (XI. 14.) of the Constitutional Court of Hungary, Decision no. 19/2019. (VI. 18.) of the Constitutional Court of Hungary

5.2.1. Scaremongering

The legislation on scaremongering was created as part of the response to the COVID-19 pandemic in 2020. The amendment to the Criminal Code made the *"uttering or publishing a statement one knows to be false or with a reckless disregard for its truth or falsity at times of special legal order with intent to obstruct or prevent the effectiveness of protective measures"* a felony.[91]

The case was brought to the Court via constitutional complaint. The applicant argued that the provision on scaremongering had no clearly discernible content and was therefore open to arbitrary use and carried with it the risk of retrospective wisdom, where the provision would be applied to statements that were based on information not known to be false at the time but has been proven to be false since. Further the applicant argued that the provision violates their right to freedom of expression as it is to broad, too general, and therefore has a chilling effect on public debates regarding the pandemic and government response to it.[92]

The Court rejected the complaint arguing that the main elements of the scaremongering provision were already included in the Criminal Code's other provisions and therefore there is sufficient jurisprudence to discern their meaning. The Court further argued that no logical interpretation of the provision can include the criminalisation of statements that are based on facts that seemed true at the time of the statement and that no logical interpretation can include the criminalisation of statements relating to the public debate, as the applicability of the provision does not extend to statements debating or critiquing the government's response to

[91] Act C of 2012 on the Criminal Code 337. §
[92] Decision no. 15/2020. (VII. 8.) of the Constitutional Court of Hungary [1]-[21]

the pandemic or the necessity of a certain measure, only to purposefully false statements aimed at obstructing the protective measures.[93]

Nevertheless, the Court found it necessary in the interest of legal certainty to adopt a requirement of constitutionality with regards to the provision in question. In the requirement the Court clarified that the provision only extends to statements that were known by the perpetrator to be false at the time of their making or have been purposefully distorted to be false by the perpetrator.[94] This requirement meaningfully limited the scope of a provision, that in the Court's opinion could only logically be interpreted in a constitutional manner anyway.

Therefore, despite rejecting the complaint, the Court implicitly accepted that the provision was overly broad, contradictory to its own reasoning, as it adopted a requirement of constitutionality that addressed some of the specific concerns the applicant raised by curtailing the scope of the provision. This, in the above presented logic of the Constitutional Court, means that it partially annulled the provision as it found it unconstitutional but resorted to using a weaker sanction.

Similar to the Belmarsh-case, the legislation in question was part of a hasty response to a global emergency. Similarly, the legislature employed the broadest, harshest measures at its disposal disregarding the complexity of the question. In both cases implicitly or explicitly, but the courts caught up on this overly broad character of the legislation signalled its mistaken nature towards the legislature and gave guidelines for correcting it. In the Hungarian case however, the Constitutional Court not only gave the guidelines but did the correcting as well by limiting the scope of application via the requirement of constitutionality.

[93] Ibid. [40]-[61]
[94] Ibid. [62]-[63]

This means that while in Belmarsh, the Judicial Committee placed the burden of restoring and respecting the democratic minimum on the Government and Parliament through the declaration of incompatibility, in the Scaremongering-case the Hungarian Constitutional Court somewhat patched the unconstitutional parts of the provision over, therefore legitimising the law in question as ultimately constitutional, and left the restoration of the democratic minimum to the citizens wrongly convicted based on the wrongful application of the provision, with the assumption that these citizens will make their way through the judicial system and eventually to the Constitutional Court. An assumption that is far from certain and is based on a process that takes several years and carries with it considerable costs, and an approach quite cynical in a system that bases itself on the dismantling of that constitutional minimum.

The two different approaches create two different dynamics. Under the HRA the legislature has to act within the constitutional bounds respecting the democratic minimum, and is called to correct itself by the courts when it oversteps. Under the Hungarian approach however these bounds become transgressable, with no one calling out the legislature, with the Constitutional Court even doing the favour of constitutionalising unconstitutional acts through the requirements of constitutionality in a textbook manner of abusive judicial review.

5.2.2. The criminalisation of homelessness

The criminalisation of homelessness has long been on Fidesz's agenda, with the first attempt arriving as early as between 2010-2012 with legislation being enacted that allowed local government to impose sanctions on people habitually dwelling in certain public space in the centre of settlements and amendments to the Act on Minor Offences that criminalised such

behaviour altogether. A provision included in the new Minor Offences Act in 2012.[95] The not-yet subdued Constitutional Court struck all related legislation down in 2012, as it found that the criminalisation of homelessness has no logical constitutional foundation and is therefore contrary to the principle of the rule of law.[96]

The Government countered with the Seventh Amendment to the Fundamental Law in 2018, that raised the issue to a constitutional level, incorporating the illegality of habitually dwelling in a public space into the text of the Fundamental Law itself. Subsequently the provisions of the Minor Offences Act criminalising such practice were reinstated. 178/B. § of the Act made it a minor offence to habitually dwell in a public space. Law enforcement officials had to warn the offender to leave the space in question and seek aid in homeless shelters and through similar supporting social infrastructure. If the supposed offender did not oblige an official warning would be handed out. Following three warnings in 90 days the person would be charged with a minor offence resulting in fines or a maximum of 60 days of incarceration.

Action against the related provisions of the Minor Offences Act were brought through judicial initiative by five different judges in five different cases. The initiating judges all argued that the criminalisation of homelessness has no logical, constitutional foundation as stated by the Constitutional Court in its 2012 ruling, and that the seventh amendment did not provide such a foundation as the issue of homelessness remains a social rather than a public safety issue that the state cannot address through criminalisation. The judges raised the argument that the unclear wording of the provision gave ground to arbitrary application, as it did not stipulate clearly what constitutes habitual dwelling or the time that needed to elapse between warnings.

[95] a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény
[96] Decision no. 38/2012. (XI. 14.) of the Constitutional Court of Hungary

Further, neither the judges nor law enforcement officials were afforded any discretion with regards to the handing out of warnings and the initiation of court proceedings and therefore could not decide based on the facts or the context of the particular cases whether the provision of the Minor Offences Act should be applied. Therefore, the judges argued, the provision violated the principle of the rule of law. The judges further argued that the criminalisation violates among others, the right to human dignity of homeless persons by forcing them to use the social infrastructure that is severely limited in availability. The judges argued that the homeless persons would be subject to objectification and dehumanisation due to this process.[97]

The Constitutional Court rejected the applications. Firstly, it stated that due to the changes in the legal and constitutional framework, the Seventh Amendment to the Fundamental Law in particular, its 2012 decision was no longer applicable.[98] The Court stated that the Fundamental Law aims to protect the use of public spaces for public purposes and therefore the use of public space by anyone has to respect the rights of other citizens with respect to public space usage.[99]

Secondly, the Court argued that the Fundamental Law places at its centre the image of a person who is part of the community that is the nation and lives their life with their responsibility towards that community in mind. Citizens have an obligation to cooperate with the state in achieving its constitutional goals, such as solving the issue of homelessness, and this obligation stems from the individual's responsibility towards the community. Therefore, the Minor Offences Act does not criminalise homelessness itself but rather the breach of this obligation for cooperation by homeless persons.[100] Further, the Court stated, that deciding on what

[97] Decision no. 19/2019. (VI. 18.) of the Constitutional Court of Hungary [31]-[32]
[98] Ibid. [51]-[54]
[99] Ibid. [55]-[56]
[100] Ibid. [60]-[69]

constitutes habitual dwelling is the task of the courts through their application of the provision, and the provision itself did not violate the principle of legal certainty.[101]

Finally, the Court denied the presence of scarcity in the relevant social infrastructure and stated that the state can only fulfil its social obligations towards those in need if those people cooperate with the state. The Court further stipulated that homelessness does not form part of the right to human dignity and stated that nobody had the right to be homeless. With this argument the Court reinforced the paramount nature of the sate obligation to combat homelessness and the homeless persons' obligation for cooperation stating, that the legislation's primary goal was to channel homeless persons into the existing social infrastructure, and should homeless persons become objectified or dehumanised in the process they should turn to the ombudsman or the courts for remedy.[102]

Nevertheless, the Court adopted a requirement of constitutionality, stating that the provision could only be employed if the service could verifiably have been provided to the homeless person in question within the relevant social infrastructure and if its application was in line with the goal of channelling homeless persons into the social infrastructure. With this the Court adopted a requirement that emphasised the need for free capacity in a social infrastructure framework where the Court denied the presence of capacity issues, and the need to observe the goals of the legislation where the Court denied that the legislation can be used for other purposes than its primary goals.

[101] Ibid. [80]-[83]
[102] Ibid. [95]-[104]

Parallels can easily be drawn with the United Kingdom's Hirst group of cases. In both instances the starting point was a stronger form of judicial control mechanism. In the UK's case an ECtHR judgement, in the Hungarian case a classic strong form judicial review remedy, the striking down of the unconstitutional laws. In both cases the government followed a law-and-order mindset and fought against the courts employing various tactics, in the UK those being delay tactics, while in Hungary those being hostile amendments to the Fundamental Law to undermine the Court. And finally, in both cases weak-form review instruments were employed, but whereas in the UK it merely meant a step on the road, meant to facilitate the Government to restore and respect the democratic minimum, in Hungary it meant the end of the issue, with no requirement towards the Government to correct the implicitly acknowledged problems present in the legislation. The criminalisation of homelessness with some corrective caveats was legitimised, and the burden was again placed on the citizens, and especially on a very vulnerable group of citizens to bring legal action if they find that the provision was unjustly used against them, if they were objectified and dehumanised in the process. They are meant to make their way through the legal system all the way to the Constitutional Court, through no small expense in time and money to restore the democratic minimum. A rather heavy burden to place on some of the most underprivileged.

5.3. Fig leaves for abusive judicial review

In creating requirements of constitutionality, the Court seemingly tries to patch over the unconstitutionality created by the mistakes of the legislature. These patches are however of dubious quality. Even Sólyom, in a fragile democracy lamented on the fact that courts ignore requirements, thus limiting their effectiveness.[103] In the illiberal setting the executive and the legislature often ignores it as well. The Court declared that it is a requirement of

[103] Sólyom (n 52) 372.

constitutionality, that state institutions only extend the period for answering freedom of information requests by 90 days if there is real danger that answering the request would endanger their efforts to combat the pandemic and if they describe this reason to the applicant.[104] Yet most state institutions still use the 90 day rule as an automatic extension and provide no reasoning for it. With regards to special economic zones established in the state of emergency, the Court held as a requirement of constitutionality that the National Assembly shall provide adequate funds when it prescribes a new obligatory task for local governments, and that this funding cannot be restricted to the degree that it makes the functioning of local governments impossible even in a state of emergency.[105] Yet the National Assembly continued to set up special economic zones and therefore restrict the revenue of opposition led local governments putting their functioning into jeopardy. Therefore, the requirement of constitutionality is nothing more than an instrument of weak abusive judicial review in the illiberal system, used to justify the restriction of state transparency, local self-government, and therefore local democracy.

Justice Schanda, when talking about the role and self-perception of the Court under Fidesz's regime states, that the Constitutional Court follows András Jakab's advice in carefully using the space it has, to protect constitutionality.[106] Adhering to weak-form review tools in the face of a constitutional majority that is hostile to strong-form tools and has repeatedly shown its willingness to strike back at the Court should it use its strength might be in line with Jakab's advice. But the specific use of those weak-form tools, the context of their use, and the dynamics thus created are certainly not. The Court manifestly engages in abusive judicial review,

[104] Decision no. 15/2021. (V. 13.) of the Constitutional Court of Hungary
[105] Decision no. 8/2021. (III. 2.) of the Constitutional Court of Hungary
[106] Schanda (n 84) 118.

legitimising legislation that is damaging to the democratic minimum, while trying to find theoretical frameworks to keep its legitimacy.

In the final part of my thesis, I will discuss how the attitudes underlying the Court's abusive judicial review strategies might hold opportunities for democrats to restore liberal constitutionalism should the illiberal regime fall, and to strengthen an upcoming democratic system against its re-emergence.

IV. A CHANCE FOR DEMOCRATS?

6. Exploiting fondness for weak-form methods

We have seen what effect well-chosen weak-form instruments in the appropriate context can have on the protection of the democratic minimum in politically sensitive cases through the example of the United Kingdom. We have also seen what weak-form instruments can do when used for abusive judicial review. What is striking however is which instrument the Hungarian Constitutional Court chooses to use for this purpose.

The Court predominantly uses the requirement of constitutionality. It uses it as a tool of compromise even though it was originally construed as a tool of subtle confrontation. It however largely ignores the legislative omission in politically sensitive cases which was originally construed as an instrument of cooperation, therefore the Court's own logic presented by Schanda would dictate its use. The logical explanation for this contradiction is that the Court wants to avoid confrontation with the legislature to the greatest extent possible. Even if it means that the citizens have to bear the burden of the legislature's mistakes and the restoration of the democratic minimum.

The Court also has a need and desire for legitimacy. This is inherent in the logic of weak abusive judicial review, where courts try to avoid being seen as mere rubber stamps, as that would undermine both their authority and the entire point of abusive review.[107] This desire for legitimacy can be seen in the choice of instrument, the requirement of constitutionality, as it formally is not a complete dismissal of applications but is supposed to be a weak remedy, and in how Schanda frames the mindset of the Court. Seeking compromise can be a legitimate

[107] Dixon and Landau (n 1) 1346–1348.

strategy in a weak-form system where the dialogue is more active and continuous. This was illustrated in the UK cases, where courts even made suggestions for possible solutions to problems or declined to issue a declaration of incompatibility since one was already in place and government action was ongoing. The Sólyom-court also held a similar mindset in some cases, the development and evolution of some instruments such as the pro futuro annulment and the legislative omission was openly an effort towards a more cooperative approach by a strong-form court. The issue lies however with the selection of cases and democratic context. The current Hungarian Constitutional Court admittedly adopts this approach in politically sensitive cases in an openly illiberal system. This transforms the compromise seeking mindset described by Schanda from an appreciably judicial strategy to plain abusive judicial review. This combination however, abusive judicial review's inherent desire for legitimacy and the Court's fear of confrontation may hold opportunities in the long term for democrats in the form of the legislative omission.

Legislative omission has been falling out of favour with the Court in the past three years despite it also being a weak-form instrument, and the requirement of constitutionality is admittedly favoured over it in politically sensitive cases. This however should not be the case. Despite it being directed towards the legislature, the nature of the omission is not necessarily confrontation, but cooperation as emphasised by Sólyom.[108] And given the current illiberal regime's stance on complying with omissions,[109] and the nature of the omissions themselves, an omission would not by no means constitute a stronger obligation for the legislature or a stronger stance by the Court. It would also retain most "benefits" of abusive judicial review. Decisions declaring omissions still dismiss the applications, and establish, that there is nothing

[108] Sólyom (n 49) 151–153.

[109] See on this: https://hvg.hu/itthon/20220524_Tucatnyi_jogalkotasi_mulasztasara_figyelmezteti_a_kormanyt_Tordai_Bence

fundamentally, manifestly unconstitutional in the legislation in question, it only needs some correction to avoid a lower level of unconstitutionality that is present. In this manner the omission is quite similar to the requirement of constitutionality. The main difference being that it places the burden of restoring the democratic minimum on the legislature instead of the citizenry.

The Court would further have the ability to set a wide timeframe for this correction and to extend it based on the principles of decision no. 64/1997 to keep in line with its "compromise seeking" agenda. The legislature could even comply in some manner in select cases strengthening the illusion of a substantive dialogue and therefore the legitimacy of the regime and its decisions. The regime could also choose to ignore the omissions with little to no repercussion as it does already, since it would still be unlikely for the Court to actually strike down laws. Therefore, the omission would carry with it all the benefits the requirement of constitutionality provides in a weak abusive judicial review system, but with a strengthened legitimacy element.

If the use of omissions is so advantageous for the regime, what chance does it hold for democrats? What would be the benefit of the Court using omissions instead of requirements in politically sensitive cases? The benefit would be to the increased integrity of the democratic minimum and to the restoration and robustness of liberal constitutional democracy after the fall of the illiberal regime.

The example of the UK has shown how an instrument similar to the omission can serve to safeguard the fundamental rights that are part of the democratic minimum in an established democracy. The high compliance rate in the Sólyom period has shown how the omission can

also protect the democratic minimum in a fragile democracy. In the restoration process these omissions could serve as basis for legitimacy in amending laws, as they would not signal that the issue has been fixed by the Court, but rather that an issue that was not considered overly serious at the time needs action on the part of the legislature. Action that was not taken. This would make omissions actionable points for dismantling the system of cardinal (supermajority) laws that are supposed to keep the illiberal system in place after the leaders are gone. The laws affected by these omissions could be brought to the Court to be struck down as the omission has not been, and perhaps lacking a two-thirds majority cannot be, corrected and therefore a stronger response is necessary in the defence of constitutionalism. This actionable nature would also mean that the restoration of the democratic minimum would not depend only on the political will, as while the primary burden of restoration is on the legislature, citizens in many instances would be able to bring cases to the Court themselves, dismantling parts of the illiberal framework that the body politc would keep for its own benefit, therefore making the restoration more comprehensive.

This use of the omission would also increase its strength once the restoration process advanced farther from the stage of fragile democracy. Restoration through actions based on omissions would increase the obligatory character of omissions, making them more akin to their UK counterparts, the declarations of incompatibility. This, while having positive effects on the overall constitutional culture would also mean that the Constitutional Court would really have a differentiated toolkit for protecting constitutionality and the democratic minimum in a post-illiberal established or at least not-so-fragile democracy, with each tool being as effective as the others just having a different working mechanism. This would also strengthen the democratic system, since a substantive repositioning of the legislative omission towards the

declaration of incompatibility would leave less room for abusive judicial review should a less democratic regime return.

Finally, it would also strengthen the democratic minimum's integrity, by not necessitating that the jurisprudence of the illiberal Court be disregarded creating a break in the continuity of constitutional jurisprudence. Conducting abusive judicial review, and therefore attacks on the democratic minimum would mean that the Court does not completely disregard that minimum in helping the regime dismantle it, but rather downplay its significance and fail to enforce the measure it prescribed to protect it in its prima facie perfectly legitimate and constitutional jurisprudence. From these decisions however the content of the democratic minimum would shine through and therefore it could be established as something that even an illiberal Court dabbling in abusive judicial review held important. This would strengthen this as concept that needs to be enforced both liberal and illiberal regimes, something overarching that cannot be as easily dismissed by the rhetorical tools of illiberal leaders should such a regime return, and also as something against all political and legal aspirations could objectively be judged against since it is valid in at stage of democracy.

Arguing for the Hungarian Constitutional Court to strike down laws in politically sensitive cases would be pointless. An illiberal court in an illiberal regime that has shown in willingness to punish the Court should it remember to do its job will simply just not do that. Instead, democrats should focus on the Court's mindset and try to lure it into declaring legislative omissions that can be beneficial for them in the long run. Analysing the Court's abusive strategies and making them help the democratic cause might just help liberal constitutional democracy to emerge quicker and stronger from the illiberal experience.

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