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The Predominance of Hungarian Executive Power
over the Legislative and Judiciary Authorities from
the Perspective of Illiberal Democracy (2010–2021).
A Neo-Institutional Approach

Introduction

Today the world observes the disillusionment with liberal democracy. People are less convinced of the effectiveness of the values, norms and procedures of liberal democracy. Instead, they appreciate the solutions that come from the fast-tracking, majoritarian-based political decisive centers. The belief in the anti-majoritarian institutions and guarantees for the superiority of the will of the nation presented by consensual parliaments confronts the preference of the advantage of the executive bodies and their unlimited power to govern.

The tendencies mentioned above are caught by specific political parties that transform them into state politics. The specifics of such parties rely on their eclectic ideology that merges diverse elements. The parties are called populists, though the populist slogans are present in other contemporary parties, as well as conservative, social-democrat, Christian-democrat ones, and others.¹ Yet,

¹ T. Pappas, *The Specter Haunting Europe. Distinguishing Liberal Democracy Challengers*, "Journal of Democracy", 2016, vol. 27, no. 4, pp. 22–36.

the scope of populism that breaks liberal democracy is the greatest indeed in populist parties. In short, populist parties benefit from the popular elections, and if they win, then they start to rule in the name of illiberal democracy. To retain the power, they focus on the priority of the executive body and limit the scope of autonomy of the judiciary and legislative branches.

The populist parties in power do not reject the idea of democracy but try to get rid of its liberal components. They offer redefinition of the rule of state and the rule of separation of power. They insist that the nation in the election let the populist party reinterpret the existing rules of political games. So, in the name of the electorate's legitimization, the populist parties in power weaken the system of checks and balances and create a new hierarchy of the authorities in a state.²

One of the countries of the world that has faced the reinterpretation of the liberal democratic regime is Hungary. Since 2010, the populist party in power, i.e. Fidesz (Hun. *Fiatal Demokraták Szövetsége – Magyar Polgári Szövetség*), has introduced new institutional solutions that question the idea of liberal democracy. The new political system is criticized both inside Hungary³ and the European Union (EU)⁴ because it destroys the fundamental element of liberal democracy which is liberal constitutionalism.⁵

The article aims at analyzing the steps undertaken by Fidesz to reshape the institutional field of Hungarian political system after 2010. The paper focuses on the process of limitation of autonomy of the anti-majoritarian institutions which are the judiciary and legislative authorities. When Fidesz subordinates these authorities, the scope of the competences of executive power increases. The final year of the research refers to 2021 which is the last year of the third consecutive term of Fidesz ruling in Hungary. The thesis of the paper states that the realization of the populist approach by Fidesz leads this party to undermine the core of liberal constitutionalism. In reference to the thesis, I would like to pose the question: What is the trajectory of limitation of the autonomy of judiciary and legislative position in Hungary after 2010?

² A. Antoszewski, *Demokracja nieliberalna jako projekt polityczny*, [in:] *Zmierzch demokracji liberalnej*, eds. K.A. Wojtaszczyk, P. Stawarz, J. Wiśniewska-Grzelak, Oficyna Wydawnicza APSRA-JR, Warszawa 2018, pp. 51–67.

³ In the field of institutional politics, the criticism has been expressed both by opposition parties and some socio-political movements such as *Milla*, *Szolidaritás* and others.

⁴ Ł. Zamecki, V. Glied, *Article 7 Process and Democratic Backsliding of Hungary and Poland. Democracy and the Rule of Law*, "Online Journal Modelling the New Europe", 2020, no. 34, pp. 57–85.

⁵ T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism: the Case of Hungary and Poland*, "German Law Journal", 2019, no. 20, pp. 1140–1166.

To conduct the studies, from the methodological point of view, I use the methods of the analysis and synthesis of materials, the system analysis, the genetic method and neo-institutional approach. In the latter one, I refer to Johannes Gerschewski's concept of the institutional regression of democracy.⁶

1. Theory and methodology

The changes of the liberal democratic regime seem to be the deepest in Hungary both from the regional and world-wide perspective. Poland and Slovenia try to keep the Hungarian pace. Slovakia under the party SMER and Prime Minister Robert Fico (2006–2010, 2012–2020) and the Czech Republic with ANO 2011 and Andrej Babiš in power (2013–2017, 2017–2021) attempted to introduce illiberal solutions, yet the scope was relatively small. This situation and the similar tendencies observed in other parts of the world than Central Europe prompted researchers to analyze the problem and search for more global concepts to cover the actual and factual political transformations.

The researchers present two main hypotheses. The first one states that the contemporary liberal democratic problems are temporary, and the regime will finally overcome the challenges.⁷ The second one claims that the liberal democracy goes through graver transformation and the path to consolidated democracy is not only blocked, but we observe retreat.⁸

No matter what hypothesis is closer to truth, the contemporary problems that challenge liberal democracy provide rich material to conduct the research empirically and theoretically. These two approaches influence each other and aim at revealing how we can name and explain the state of liberal democracy. In the contemporary literature of political science the researchers attempt to name the transformations of the regime of liberal democracy in the countries of the world, among others, by the concepts of: the hollowing of democracy, the

⁶ J. Gerschewski, *Erosion or Decay? Conceptualizing Causes and Mechanism of Democratic Regression*, "Democratization", 2021, vol. 28, no. 1, pp. 43–62.

⁷ The authors of the chapters of the book *Democracy in Decline?*, eds. L. Diamond, M.F. Plattner, Johns Hopkins University Press Books, Baltimore 2015 present such an opinion (F. Fukuyama, R. Kagan, P.C. Schmitter, S. Levitsky, L. Way, T. Carothers, L. Diamond, M.F. Plattner).

⁸ J. Møller, S.-E. Skaaning, *Third Wave. Inside the Numbers*, "Journal of Democracy", 2013, vol. 24, no. 4, pp. 97–109; R.S. Foa, Y. Mounk, *The Democratic Disconnect*, "Journal of Democracy", 2016, vol. 27, no. 3, pp. 5–17; I. Krastev, *The Strange Death of Liberal Democracy*, "Journal of Democracy", 2007, vol. 18, no. 4, pp. 56–63.

democratic backsliding,⁹ deconsolidation of democracy,¹⁰ de-democratization.¹¹ The researchers notice that the changes can lead to the regimes placed even outside democracy as well and call them: new authoritarianism,¹² new competitive authoritarianism,¹³ hybrid authoritarianism,¹⁴ third wave of autocratization.¹⁵

Huge empirical material to some of the above-mentioned concepts is produced by Hungary after 2010. Due to longevity of more than a decade of Hungarian non-liberal democracy, there are some achievements in the field of this case of studies. The Hungarian transformation is labelled and analyzed by different methodological concepts. In 2018, Matthijs Bogaards underlined that there had been at least ten names of the Hungarian regime under the rule of Fidesz proposed by the researchers.¹⁶ And since then, there have appeared some more. In my opinion, the multiplication of names can rich the science but also shadow the essence of the analyzed phenomenon. To understand the clearness of the rather complicated regime outcome of transformation in Hungary, I refer to the project which stays in the contrary to liberal democracy, which is illiberal democracy. Such an approach is justified by the fact that it contains the most critical factors that determine the death of liberal democracy as a political concept.

The notion of illiberal democracy was introduced into the political field by Fareed Zakaria. In 1997, he stated that societies elect non-liberal democratic forces in free and fair elections in some countries. Then the authorities do not respect the rule of law, which can limit their omnipotence. Ruling elites criticize liberal constitutionalism because it establishes the system of checks and balances, which weakens the unrestricted activity of the executive branch. Two others branches – legislative and judiciary – are subordinated by the executive. This

⁹ B. Greskovits, *The Hollowing and Backsliding of Democracy in East Central Europe*, <http://politicalscience.ceu.edu/sites/politicalscience.ceu.hu/files/attachment/event/1113/greskovitshollowingandbackslidingofdemocracy-globalpolicy2015.pdf>, access 29 XI 2021.

¹⁰ M. Brusis, *Democracies Adrift: How the European Crisis Affect East-Central Europe*, "Problems of Post-Communism", 2016, vol. 63, no. 5–6, pp. 263–276.

¹¹ M. Bogaards, *De-democratization in Hungary: Diffusely Defective Democracy*, "Democratization", 2018, vol. 25, no. 8, pp. 1481–1499.

¹² J. Jaskiernia, *Authoritarian Tendencies in the Polish Political System*, [in:] *New Authoritarianism. Challenges to Democracy in the 21st century*, ed. J.J. Wiatr, Verlag Barbara Budrich, Leverkusen 2019.

¹³ S. Levistky, L. Way, *The New Competitive Authoritarianism*, "Journal of Democracy", 2020, vol. 31, no. 1, pp. 51–65.

¹⁴ G. Scheiring, *The Foundations of Hybrid Authoritarian State Capitalism in Hungary*, "Sociology", 2020, no. 1, pp. 119–131.

¹⁵ A. Lührmann, S.I. Lindberg, *A Third Wave of Autocratization Is Here: What is New about It?*, "Democratization", 2019, vol. 26, pp. 1095–1113.

¹⁶ M. Bogaards, *op. cit.*

usurpation also undermines the vertical accountability of powers. But, at the same time, the authorities maintain the institution of free elections and other state institutions to build the façade of democracy but deprive it of liberal component of transparency and the restriction of freedom of the executive power.

More than two decades have passed since Zakaria's article was published and new signs of deterioration from liberal democracy have occurred. The cases have contributed to theoretical approaches to how illiberal democracy can be defined as well. Yet it must be underlined that some researchers state that today democracy can be only defined by liberalism and there is no other democracies than liberal ones. So, if someone claims there are different types of democracies, they do not understand the contemporary idea of democracy indeed.¹⁷

The entities responsible for illiberal change are populist parties that benefit from social disappointment with the liberal democratic elites. They show the gap between the nation and the elites, stating that they (populist parties) represent oppressed people and set them free from such elites. When the populists win the elections, they claim the whole nation legitimizes them to implement new regime solutions. They limit the autonomy of anti-majoritarian institutions in the name of fast-tracking and effective dominance of the executive power. They get rid of liberal elements of democracy such as a rule of respecting the rights of minorities or separation of powers. They question pluralism and undermine the position of opposition. This situation moves the party rivalry from the model of diverted ideological parties to two-camped model of pro-liberal-democratic parties from one side and populist ones from the other one.

The political changes in Hungary are sometimes analyzed through the prism of illiberal democracy by the reference to partial elements of political system. Among the researchers who refer to such an approach are: András Bozóki, Peter Wilkin, Ivan Krastev, Jacques Rupnik, Péter Krekó and Zolt Enyedi, Attila Ágh.¹⁸ In their research they focus on various aspects of the illiberal democratic changes. From the perspective of dysfunctionality of political culture, András

¹⁷ G. Sartori, *Teoria demokracji*, Wydawnictwo PWN, Warszawa 1998.

¹⁸ A. Ágh, *The Orbán Regime as the Perfect Autocracy. The emergence of the zombie democracy in Hungary*, https://www.researchgate.net/publication/355034454_Agh_Perfect_autocracy_in_Hungary, access 23 XI 2021; A. Bozóki, *Broken Democracy. Predatory State and Nationalist Populism*, "Athenaeum. Polish Political Science Studies", 2015, vol. 48, pp. 247–262; I. Krastev, *The Unraveling of the Post-1989 Order*, "Journal of Democracy", 2016, vol. 27, no. 4, pp. 5–15; P. Krekó, Z. Enyedi, *Explaining Eastern Europe: Orbán's Laboratory of Illiberalism*, "Journal of Democracy", 2018, vol. 29, no. 3, pp. 39–51; J. Rupnik, *Explaining Eastern Europe: The Crisis of Liberalism*, "Journal of Democracy", 2018, vol. 29, no. 3, pp. 24–38; P. Wilkin, *The Rise of Illiberal Democracy: The Orbánization of Hungarian Political Culture*, "Journal of World System Research", 2018, vol. 24, no. 1, pp. 5–42.

Bozóki focuses on the illiberal destruction of the post-1990 state stability which was possible due to communist heritage of etatism, loyalty and corruption among the citizens. Peter Wilkin analyzes the changes in Hungary by the reference to oligarchizing of political culture of the leader of Fidesz and the introduction of dependence of state and private entities. A socio-political perspective is presented by Ivan Krastev, who claims that Fidesz convinced the society of the primacy of economic values that it can offer and then produced illiberal democracy in Hungary on political ground. Atilla Ágh offers the concept of the three-phased transformation in Hungary, which eventually leads to de-Europeanization and Hungarian isolation. Jacques Rupnik states that illiberal democracy in Hungary is based on weak liberalism, while Péter Krekó and Zsolt Enyedi focus on institutional transformation of the legal bodies.

In my opinion, the approach towards institutional transformation directs our attention to the scenario of expanding control over the state, its administration and subordination of the society by the legal obligations. Such tendencies are destructive for the liberal rule of law. Their understanding can help explain the trajectory of deterioration of political regime not only in Hungary but in any country facing illiberal challenges. I am convinced that the analysis of the regime transformation through the prism of the deterioration of the functions of institutions can show how the mechanism of illiberal changes acts.

To adapt the neo-institutional approach to the conducted research, I refer to the concept presented by Johannes Gerschewski. Among other recent theories on neo-institutionalism, one can indicate those developed by Steven Levitsky and Maria V. Murillo,¹⁹ Elisabeth Clements and James Cook,²⁰ or Peter Hall.²¹ By choosing Gerschewski's concept, I would like to underline its rich value in explaining institutional changes. The previous approaches mentioned above focus on defining the institutions by the fact of what they are legally expected and then by searching the unidirectional way of what is stated by the law and how the institutions act. Gerschewski offers a clearer and broader perspective on the institutional changes, expressing his conviction of the internal and external conditions of the institutional changes.

¹⁹ S. Levitsky, M.V. Murillo, *Variation in Institutional Strength*, "Annual Review of Political Science", 2009, vol. 12, no. 1, pp. 115–133.

²⁰ E.S. Clements, J.M. Cook, *Politics and Institutionalisms: Explaining Durability and Change*, "Annual Review of Sociology", 1999, no. 25, pp. 441–466.

²¹ P. Hall, *Politics as a Process Structured in Space and Time*, [in:] *The Oxford Handbook of Historical Institutionalism*, eds. O. Fioretos, T. Falletti, A. Sheingate, Oxford University Press, Oxford 2016, pp. 31–50.

First of all, Gerschewski uses neo-institutionalism to explain contemporary liberal democratic regression. Secondly, he considers the endogenous and exogenous causes that can unfold the process of the transformation of institutions. So, the causes of the changes are hidden inside the institutions and outside them. Briefly speaking, the inside hidden causes exist in the political system, while the outside ones refer to the surroundings of the political system, among others, international area. Thirdly, Gerschewski claims that the process of institutional democratic regression starts with a critical juncture. This short moment interrupts a long phase of liberal democratic stability. Fourthly, after the critical moment takes place, a punctuated equilibrium begins and leads to liberal democratic deterioration. Fifthly, Gerschewski claims the change of liberal democracy into another regime can occur and be labelled as decay (made by internal actors) or erosion (forced by external actors).²²

2. The endogenous and exogenous basis of illiberal democracy in Hungary

The fundamental reason for the current deterioration of liberal democracy is the absence of experiences relating to liberalism in the countries which undergo the democratization process. In the region of Central and Eastern Europe, poor liberal foundations are translated into a disadvantage in the operation of civil society, weakening the position of individual human rights and fading of the idea of rule of law. Generally, such a conclusion may be drawn that disappointed societies are less prone to believe that liberal democracy is the best structural solution. The citizens question democratic values and norms and think that finally an effective action should be taken to heal the unbearable political situation.²³

Therefore, populism, being the basis for illiberal democracy, may find strong supporters among citizens.²⁴ As a result of the changes put in place by the populist parties governing in a country, there are situations which are an opposite of liberal democracy. Some researchers claim that illiberalism as such does not involve a crisis of democracy in a global sense but a transformation in the liberal understanding of democracy. It makes a different, new stage of the regime's development.²⁵ While for other researchers, contemporary democracy

²² J. Gerschewski, *op. cit.*

²³ S. Levistky, L. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, Cambridge University Press, Cambridge 2010.

²⁴ J. Rupnik, *From Democracy Fatigue to Populist Backlash*, "Journal of Democracy", 2007, vol. 18, no. 4, pp. 17–25.

²⁵ I. Krastev, *The Strange Death of Liberal Consensus*, "Journal of Democracy", 2007, vol. 18, no. 4, pp. 56–63.

can only be a liberal one, and if the component of liberalism is taken out, there is no democracy at all.²⁶

The context of the endogenous causes that may trigger the mechanism of introducing illiberal democracy results in social fear of the internal and external situation that liberal democratic elites could not solve. This fear was the central point for the populist Fidesz to present itself as a liberator of the unbearable social situation. Taking a look at the concerns of the Hungarians in 2009–2021 shown in Table 1, there is interesting regularity that paves the way to the popularity of the illiberal project of democracy. The initial date (2009) was chosen as a direct and preceding year of the Fidesz parliamentary victory. This year presents the social concerns just one year before the party gained real political power to rule. The final year of the analysis (2021) refers to the last year of the third consecutive term of the governance of this party.

Table 1. The internal and external social concerns of the Hungarians, 2009–2020 (in %)

	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009
Economic situation	23	31	19	13	13	15	26	30	23	43	43	49	51
Unemployment	5	10	6	7	14	13	18	50	24	57	61	57	58
Terrorism	18	13	22	29	45	34	20	1	1	0	0	1	1
Immigration	33	30	40	54	58	68	43	3	0	1	1	1	1

Source: Author's own study based on the Eurobarometer, <https://europa.eu/eurobarometer/screen/home>, access 1 XII 2021.

The above-mentioned indicators of social concerns belong to two groups. The first one includes concerns about the internal situation, e.g. economic situation and unemployment, while the second one refers to external concerns such as terrorism and immigrants. The populist party, such as Fidesz has to present itself as an effective entity able to limit the internal fears and show the danger of the external ones to get power and retain it. The party wants to close the borders to illegal migrants. All these tasks seem to be realized.

Fidesz was able to reduce the concern about economic situation felt by the Hungarians and, due to the redistribution and pro-social offer of the government politics after 2010, retain it in rather a small proportion. In 2009, the year before the electoral success of Fidesz, 51% of the Hungarians worried about their economic situation. Still, in 2012, the percentage dropped to less than 30% (23%), in 2016 – less than 20% (15%). In 2021, 23% of the Hungarians were concerned

²⁶ G. Sartori, *op. cit.*, p. 481.

about their economic situation. Regarding the second indicator of the fear of internal situation during the Fidesz government, fewer Hungarians are afraid of unemployment than before 2010. The decrease of this fear is enormous. In 2009, 57% of the society was afraid of the situation and in 2010, even 61%, but since 2015, only about 10% of the society has expressed employment uncertainty (in 2021 – 5%). The Hungarians' concern about the external situation was used by Fidesz to show that only this party can secure the country. First, Fidesz took advantage of the growing threat of terrorism and illegal immigration in Europe and then, through controlled media, increased the society's concern about this issue even more. As the opinion polls reflected up till 2014 only 1–3% of the Hungarians were afraid of the immigrants and terrorism. After that year, the sense of fear grew rapidly to about 30–40% and even 68%. In 2021, 33% of Hungarians were afraid of immigrants and 18% – of terrorism. The factor of social uncertainty, fear and concerns is a bridge between the existence of liberal democracy and illiberal one. Fidesz benefits from presenting the disadvantage of liberal democracy to develop its illiberal project.

The second endogenous cause of the contemporary illiberal democracy in Hungary is connected with the entities responsible for the process of democratization. If we look at the problem of liberal democracy in Hungary, the era of liberalism in political field in the country was short and practically lasted for about two decades, starting from 1989. In that period, the post-communist Hungarian Socialist Party (Hun. *Magyar Szocialista Párt, MSzP*) assumed the strategy of liberal party merging it with the social-democratic approach. After its victory in parliamentary elections in 1994, 2002, 2006, it was supported by a typical liberal formation without communist origin, namely the Alliance of Free Democrats (Hun. *Szabad Demokraták Szövetsége, SzDSz*).²⁷ As a result, from the beginning of the democratization process in Hungary, we were dealing with a combination of liberalism and social democracy, thanks to which the processes of modernization of the state, society and economy took place and close relations between individuals and a state were maintained.²⁸ Simply put, liberalism was introduced by the ruling, post-communist party and the society chose the party to govern not because its indeed liberal program but because the affiliation of MSzP to pro-social slogans.²⁹ So, Fidesz using the illiberal tactic, accused MSzP elites of the destruction of the state by the using liberalism as a state ideology.

²⁷ I. Krastev, *The Strange...*, *op. cit.*, pp. 56–63.

²⁸ J. Rupnik, *Explaining...*, *op. cit.*, pp. 24–38.

²⁹ P. Wilkin, *op. cit.*

The third reason that triggered the mechanism of illiberal democracy was the wise and far-sighted strategy of Fidesz, developed since the mid-1990s. In 1993, Viktor Orbán became a monocratic leader of the formation. He decided to abandon the liberal program of Fidesz and pragmatically referred to the traditional, Christian and conservative values. Orbán changed the profile of this party from liberalism into conservatism and started to build a network of relations both with loyal politicians and economists. It helped him to become one of the most influential politicians and serve as prime minister in 1998–2002. Then, in 2010, he won the parliamentary elections and has been the prime minister since then who redefined the political regime.

In politics, he uses the strategy of a populist leader who can divide the society into “we” and “they” and spread the feeling of hatred towards other than nationalist, Christian and conservative values. In his speeches, he refers to the idea of exclusion of the Hungarians by the others, but at the same time, he excludes the others living in Hungary who do not support him. He juggles the concepts of ethics and morality and relativizes them in the public sphere.³⁰

The exogenous basis of illiberal democracy in Hungary is the growing popularity of such a regime in other parts of the world. The global social changes regarding the greater role of the contemporary state influence young and fragile liberal democracies, like Hungary, showing that the economy fulfils social needs and, therefore, citizens should withdraw from politics. Both illiberal democracies and many autocracies use elections to legitimize the right to exercise power by non-democratic actors. After the victorious and sometimes falsified elections, the winning authorities even claim that their countries are fully democratic. Such a way and pattern of political system is then intentionally reflected in political program of Fidesz. The 2020 index of Freedom House: Nations in Transit places Hungary among transitional or hybrid regimes. From 2016 to 2019, Hungary was semi-consolidated democracy and before 2016 – a consolidated democracy.³¹

In 2014, in Romanian Băile Tuşnad, Viktor Orbán said that he supported the idea of an illiberal country, whose concept referred, in his opinion, to Russia, China, Singapore, Turkey and India. Having said that, he underlined that a state may temporarily adopt solutions differing from those in place in Western Europe, i.e. to develop economically but without supporting liberalism at the same time. In the political sphere, however, the state may remain democratic,

³⁰ J. Debreczeni, *Viktor Orbán. Jeden obóz, jeden sztandar, jeden wódz*, Akurat, Warszawa 2015, pp. 407–459.

³¹ Freedom House, *Nations in Transit*, <https://freedomhouse.org/country/hungary/nations-transit/2020>, access 26 XI 2021.

but not liberal democratic. Viktor Orbán officially used the expression “illiberal democracy”. In this context, he asserted that Christian democracy may be an alternative to liberal democracy. Such a Christian democracy is supposed to protect not the faith itself but Christian culture as the foundation of social fabric, which means that the regime should be anti-immigration, promote the traditional family model with the exclusion of same-sex relationships.³²

3. The critical juncture and punctuated equilibrium

The breaking point of the linear development of the Hungarian process of democratization occurred just after the 2006 parliamentary elections, which were won by the socialist MSzP. The consecutive victory suggested that the society was satisfied with the previous four years, but did not know the full details of the then political and economic situation. A few months after the elections, the leader of MSzP and Prime Minister Ferenc Gyurcsány told his colleagues in a private meeting that he had cheated about Hungary’s high level of economic indicators during the campaign. In fact, Hungary had been facing the first symptoms of recession. Subsequently, the recording of the meeting was published, and Hungarians learnt the truth. They started to manifest their dissatisfaction, and mass demonstrations were held for the first time since 1990. It was not until 2009 that the prime minister resigned.

Nobody knew then that this situation could be a turning point in contemporary Hungarian history. Social anger was met with Fidesz’s desire to regain power. The demonstrations were, therefore, organized or supported by the party of Viktor Orbán. Although the social dissatisfaction was diminishing throughout the next four years, Fidesz did not forget the 2006 case of Gyurcsány. Viktor Orbán refused to take part in parliamentary sessions and discussions, showing his disregard for MSzP. In 2008, the party was able to call the referendum on the issue of free access to the system of health and universities. The results were valid, and Hungarians supported the idea, which ruined the plans of the governing MSzP searching for funds to repair the worsening state of the Hungarian budget.

So, the critical juncture of revealing the secret speech of the prime minister in 2006 caused the punctuated equilibrium of social agreement with the political elites and led to support for Fidesz. In the 2010 parliamentary campaign, Viktor Orbán used populist propaganda to receive as much support as possible.

³² C. Tóth, *Full text of Viktor Orbán’s speech at Băile Tuşnad*, <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>, access 29 XI 2021.

He questioned the right of the post-communist elites to govern the country, underlined the bad situation of the people, especially those from the villages, accused cosmopolitical liberal class that intercepted all economic benefits after 1990, promoted Christian, traditional and conservative values. He promised to help small country enterprises, introduce social reforms. But on the other hand, he vaguely referred to the possible redefinition of Hungary's political system and regime.³³ At that time Fidesz did not have a precisely defined opinion whether to change the elements of liberal democratic political system or to change liberal democratic regime into illiberal one.

4. Decay of liberal democratic regime as a result of institutional superiority of the executive branch over the legislative and judiciary ones

The early announcements of redefinition of liberal democratic regime in Hungary were expressed by Fidesz in 2007. István Stumpf, Orbán's loyal colleague, stated that a new constitutional order should be introduced. He referred to the strengthening of the position of executive power. Since then Fidesz had been in opposition for three years and finally, in 2010, regained power holding 2/3 of parliamentary mandates. To start the institutional changes, Fidesz reduced the number of votes from 4/5 to 2/3, enabling the government to change the constitution. It was then that Fidesz could redefine the political system which eventually shifted towards illiberal democracy.³⁴

In the 2011 Fundamental Law there are rules and provisions that emphasize the rule of separation of powers. Article B, para 1 of the Fundamental Law states that "Hungary shall be an independent, democratic rule-of-law State". It means that the country agrees to limit power of any specific body. The development of such an approach is presented in Art. C, para 2 that states: "the functioning of the Hungarian State shall be based on the principle of the division of powers". The Fundamental Law is the supreme law of Hungary and shall be binding upon everyone, the legislative bodies must pass the acts in accordance with the Fundamental Law (Art. C, para 3; Art. R, para 1; Art. T). To strengthen the rule of separation of powers, Art. C, para 2 states: "No one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone

³³ S. Kubas, *Sukcesy wyborcze Fidesz-MPS i ich wpływ na konsolidację prawicowych rządów na Węgrzech*, [in:] *Polskie wybory 2014–2015. Kontekst krajowy i międzynarodowy. Przebieg rywalizacji. Konsekwencje polityczne*, t. 2, red. M. Kolczyński, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017, pp. 349–350.

³⁴ idem, *Negacja dorobku i zdobyczy węgierskiej demokracji po 2010 roku*, „*Studia Polityczne*”, 2018, vol. 47, pp. 125–126.

shall have the right and obligation to resist such attempts in a lawful way”³⁵ To weaken the independent legislative and judicial power, Fidesz decided to redefine the law regulations in this matter. The realization of illiberal democratic rule of dominance of the executive power over the other two branches started just after 2010. Below I will analyze the changes in the position of legislative and judicial powers that are taking place in Hungary at the same time as the excessive dominance of the cabinet increases.

In the field of legislation Viktor Z. Kazai calls the changes made by Fidesz a radical instrumentalization of parliamentary legislation. This notion means that the parliament is used by the government for implementing its political program in the form of the statutory law, but very quickly and without consensus with the opposition.³⁶ The transformation of the parliament’s position and its subordination to the executive power comes from two sources in Hungary. The first one is connected with contemporary situation in the states with the parliamentary model of governance. Today, legislatures increasingly reflect the will of the executive branch that has a majority in the parliament. It means the autonomy of parliament is limited as well as the autonomy of individual deputies who are disciplined by their parties. The role of opposition diminishes as the ruling majority can pass their projects without the opposition’s agreement. But the second source of the legislative subordination to the executive branch are specific decisions made by Fidesz after 2010. Despite the generally weaker position of parliaments in political systems, liberal-democratic constitutionalism guarantees a well thought out and consensual legislative process. In Hungary, however, there are evident symptoms of illiberal democratic tightening of the parliaments without any respect for the opinion of the opposition and accelerated and erroneous drafting of legal acts.

There are several exceptions to the liberal democratic praxis that were introduced by Fidesz after 2010. The first one refers to the lack of public consultations on draft laws or their superficial character in the pre-legislative phase. One of the brightest examples was the form of national consultations before passing the Fundamental Law. Fidesz sent the citizens some proposals for systemic changes hidden behind other questions to the citizens via e-mails. Then, the answers were sent back to the Office of the Prime Minister. The opinions of

³⁵ The Fundamental Law of Hungary, https://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf, access 8 XII 2021; A. Patyi, *Chapter X. The Courts and the Judiciary*, [in:] *The Basic Law of Hungary. A First Commentary*, eds. L. Csink, B. Schanda, A.Zs. Varga, Claruss Press, Dublin 2012, pp. 311–348.

³⁶ V.Z. Kazai, *The Instrumentalization of Parliamentary Legislation and Its Possible Remedies: Lessons from Hungary*, “Jus Politicum”, 2019, no. 23, pp. 237–256.

the opposition were not taken into account by Fidesz in the consultations. The other example refers to the package of acts called "Stop Soros". Fidesz initiated superficial public consultation that emphasized anti-immigrant policy, but *de facto* the laws were hidden in provisions on broader restriction of NGOs activity. The second praxis is connected with the increase in the lack of limitation of the government's power in the context of the separation of powers and the imposition of government's will without seeking a compromise with the opposition. Fidesz decides about some cases individually in the form of cardinal acts that previously were dealt with the opposition (e.g. family law, social law, taxation policy). The third aberration concerns the role of pluralist composition of committees in the parliament. They reflect the plenary dominance of Fidesz. Between 2010 and 2014, only 3 out of 533 legislative proposals of the opposition were adopted by the parliament. The fourth transformation of the functioning of the parliament after 2010 embraces the provisions on the parliamentary political groups. To avoid the split in Fidesz, the party majority passed the law that prevents the deputies who leave their party during their term of office from representing other parties. They must become independent and unaffiliated to the end of the term. The fifth aberration refers to the fact that many amendments are introduced just before the final voting which makes consensual deliberations impossible. The sixth element of illiberal destruction in the legislation process is the introduction of quick procedures for passing some acts that shorten the deadlines for any comments and possible changes proposed by the deputies. Between 2010 and 2014, 136 bills were adopted in the urgent procedure and 26 in the exceptionally urgent one.³⁷

The negative consequences of the instrumentalization of the Hungarian parliament are connected with the worsening quality of the legislation. The adopted acts require amendment due to their handicapped character. In 2011, one third of adopted acts were amended throughout the next year.³⁸ Because of such irregularities, the acts are often the subject of the supervisory work of the Constitutional Court. Kazai analyzed the cases litigated by the Constitutional Court between 2010 and 2019 brought by applicants who claimed that they were of an aberrant nature. There were the following cases: on defiance on pre-parliamentary phase in the preparation of legislative proposals and violation of the hierarchy of norms with the lack of adequate legal basis, the violation of technical rules of the standing orders, the quality of parliamentary work, the abusive use of the rules of the law making the procedure, the violation of the

³⁷ *Ibidem.*

³⁸ *Ibidem.*

qualified majority rule, irregularity in respect of the exercise of Presidential political veto.³⁹

The development of unrestricted executive dominance has been criticized by the EU and the Council of Europe. The institutions questioned the fact that cardinal acts were adopted in the express procedure without any justification, the lack of consultations between Fidesz and the opposition while passing important acts, poor quality of the bills, insufficient involvement of public partners in the legislative process, non-compliance with the statutory right to pass the acts.⁴⁰

The weakening of the rule of separation of powers in Hungary concentrates not only on the advantage of the executive branch over the parliament, but also over the judiciary. Although the 2011 Fundamental Law provided modest provisions on the judiciary system that did not cover possible changes in this branch, subsequent cardinal acts developed important organizational and procedural changes. Such an approach was tactical because Fidesz had to rethink how to subordinate the judiciary more carefully. The Fundamental Law reveals the very general structure of the judiciary, according to which the courts make decisions on the criminal, civil and public administration matters. The courts can review judicial decisions, as well as refer to the legality of local government decisions. However, there was nothing in the Hungarian constitution about the specific division of the courts. The only institution of the judiciary presented in the original text of the Fundamental Law was the Curia which replaced the Supreme Court on the highest position in the judiciary system. Such a vague and general approach gave some extra time for Fidesz to think how to take full control over the judiciary. The Fundamental Law stated that the judges should make decisions on the ground of legalism, but also obliged them to presume if the statements correspond to common sense, ethics, economic goals and common benefits. It introduces a kind of political and subjective perspective on the process of judgment which should be free of such tendencies.⁴¹

The redefinition of the Hungarian judiciary system was supplemented by the amendments to the Fundamental Law and to cardinal acts: Act CLXI of 2011 on the organization and administration of courts and Act CLXII of 2011 on the legal status and remuneration of judges.⁴² In the original text of the Fundamental Law,

³⁹ V.Z. Kazai, *The Misuse of the Legislative Process as Part of the Illiberal Toolkit. The Case of Hungary*, "The Theory and Practice of Legislation", <https://www.tandfonline.com/doi/full/10.1080/20508840.2021.1942366>, access 3 XII 2021.

⁴⁰ *Ibidem*.

⁴¹ The Fundamental Law of Hungary, *op. cit.*

⁴² Act CLXI of 2011 on organization and administration of courts, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2012\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2012)007-e), access 4 XII 2021]; Act

the vague reference to the judiciary went hand in hand with the depreciation of the role of judicial self-government. The establishment of such a body was introduced by the fifth amendment to the Fundamental Law of September 16, 2013. Thus, the two-year gap between the adoption of the Fundamental Law and legal establishment of the judicial self-government means that Fidesz neglected this matter. Upon the fifth amendment, the composition of the National Judicial Council consists solely of common courts judges and the President of the Curia. The Council, apart from its consultative competences, may request the dismissal of the Head of the National Judicial Office and propose candidates for the post.

The above-mentioned neglect of the importance of the body representing the interests of judges was met with the simultaneous appreciation of the institutional control of the judiciary by Fidesz. That is why Fidesz constitutionally anchored the National Judicial Office in the fourth amendment of March 11, 2013. The higher position of that body in comparison with the National Judicial Council is strengthened by the fact that it was introduced earlier into the Fundamental Law. Of course, the substantive competences granted to it, place the National Judicial Office very high. The Head of Office took over many competences that previously belonged to the President of the Supreme Court and to the liquidated State Council of Judiciary. The Head of the Office is elected by the parliament for nine years by a 2/3 majority of votes at the request of the President of Hungary. The Head has broad competences: managing the administration of the court system, appointing and dismissing courts presidents, presenting candidates for judges to the President of Hungary and deciding about the replacement of judges. The Head of the National Judicial Office creates the budget for the judiciary and reports to the parliament on the functioning of this branch of the government.⁴³

Before the 2014 parliamentary elections, Fidesz wanted to take control over the judiciary as soon as possible. That is why after the transformation of the law made after 2010, the specific political decisions were made. There were two of them that paved the way for the executive to control the judiciary. First of all, Tünde Handó, József Szájer's wife, became the Head of the National Judicial Office. József Szájer was the chief creator of the Fundamental Law and close friend of Orbán at that time. In the following years, Handó carefully realized the plan of Fidesz. Secondly, by lowering the age of retiring judges from 70 to 62, Fidesz was able to fill the vacant posts with new, loyal judges.

CLXII of 2011 in the legal status and remuneration of judges, [https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD(2012)001-e), access 5 XII 2021.

⁴³ R. Grabowski, I. Halász, *Ewolucja węgierskiego modelu zarządzania sądownictwem i samorządu sędziowskiego na Węgrzech w latach 1989–2019*, „Przegląd Prawa i Administracji”, 2019, no. 346, vol. CXIX, pp. 177–178.

What is more, Fidesz reorganized the structure of the Hungarian system of courts and gave them names referring to the anarchic ones that existed in the country several centuries ago. This solution underlined the conservative attachment of Fidesz to Hungarian tradition. Let us start with the Highest Court's name, the Curia, the only court mentioned in the Fundamental Law. Then the Act CLXI of 2011 on the organization and administration of courts defines the following structure under the Curia: five regional courts of appeal, twenty regional courts, 113 district courts. The Fundamental Law allows for the creation of specific types of administrative and labour courts. Yet, they do not make a separate structure as hierarchically are under the Curia. So, there are twenty administrative and labour courts on the level of the region and five of them – on the higher regional level.⁴⁴

The last case of the politicisation of the administrative courts is essential from the perspective of expanding power of Fidesz over the Hungarian judiciary system. As public administration fulfils many tasks and is crucial for the existence of contemporary state, the executive power would like to control it completely. Judicial control and supervision play an essential role here. That is why in Hungary, since 2010, it has been an arduous task to precisely define the administrative system of courts that supervise the administration. The Fundamental Law neither mentioned the structure nor functions of the administrative courts. Generally, they existed upon the acts from 1991, among others, the Act XXVI on the Code of Civil Procedure.

But in 2016, Viktor Orbán announced the changes in the system of administrative courts. In December 2016, two acts were passed in this merit in the National Assembly. President János Áder vetoed them and sent to the Constitutional Court, which in 2017, enforced the parliament to withdraw from the acts the notion of the Supreme Administrative Court as it does not exist in the Fundamental Law. The acts became valid from January 1, 2018. In June 2018, the parliament passed the seventh amendment to the Fundamental Law, which stated that the Administrative Supreme Court is the highest court of the administrative courts. Implementation of the administrative judiciary reform has drawn huge criticism both in Hungary and the EU, mainly because the entire administrative judiciary would be placed under the supervision of the minister of justice. After the wave of criticism, in 2019, Fidesz announced its resignation

⁴⁴ Courts of Hungary. Hungarian Judicial System, <https://birosag.hu/en/hungarian-judicial-system>, access 12 XII 2021.

from continuing the reform and abandoned the idea of tightening its power over the administrative judiciary.⁴⁵

Although Fidesz expanded its control over the judicial institution, it cannot supervise all situations within the institution. The following example illustrates Samuel Valenzuela's thesis that once the institutional pattern is created, institutions start to live their own lives and draw on the political creators that planned them.⁴⁶ Between 2018 and 2019, the Hungarian judiciary was in a constitutional crisis. The Head of the National Judicial Office, Tünde Handó, claimed that the National Judicial Council acts illegally after the resignation from the composition of the board of the Council of the judges representing the administrative and labour sectors. The actual cause was the conflict between the state-controlled Office and the self-government Judicial Council. Then the President of the Council submitted a motion to the parliament to remove the Head of the Office, yet the National Assembly voted it down. The end of the case was surprising as Handó resigned and was appointed as the judge of the Constitutional Court.⁴⁷

To conclude the analysis of institutional transformation in the field of judiciary let us focus on the Constitutional Court. It was one of the first institutions over which Fidesz needed to take control after 2010. In the process of democratization, this body became one of the most influential public institutions with great recognition and many times opposed the illegal decisions of the legislative and executive authorities.⁴⁸ Fearing that the autonomy of the Constitutional Court would undermine the governmental decisions, Fidesz formally conducted the process of limiting the competences of this body. Until the end of this process, the Constitutional Court had repeatedly ruled on the unconstitutionality of acts after 2010, e.g. the first three amendments to the Fundamental Law of 2012. Fidesz, however, included all the questioned cases in the renewed version of the Fundamental Law as the fourth amendment in 2013. This amendment introduced more restrictions on the legal position of the Constitutional Court as today it can review acts only for procedural reasons, not substantive ones, and

⁴⁵ I. Horvath, *Renascence of the Administrative Jurisdiction in Hungary*, "Bratislava Law Review", 2019, no. 1, pp. 92–102.

⁴⁶ S. Valenzuela, *Democratic Consolidation in Post-Transitional Setting: Notion, Process, and Facilitating Conditions*, Kellogg Institute Working Paper #150. December 1990, <https://kellogg.nd.edu/publications/workingpapers/WPS/150.pdf>, access 3 XII 2021.

⁴⁷ Amnesty International, *Hungary: Fraudulent fear rules among judges*, <https://www.amnesty.eu/news/hungary-fraudulent-fear-rules-among-judges/>, access 3 XII 2021.

⁴⁸ G. Halamai, *The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court*, [in:] *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. W. Sadurski, Kluwer Law International, The Hague – London – New York 2002.

cannot refer to its own decisions made before January 1, 2012.⁴⁹ The 2011 Act on Constitutional Court made it possible to accelerate changes in this institution, e.g. increased the number of judges from 11 to 15 (Fidesz immediately gained 4 of its own judges), extended the term of office of the President of the Court from 9 to 12 years that prolonged future control over the Court even if Fidesz lost the parliamentary elections (in 2015, the parliament elected a new, loyal to Fidesz, chief of the institution), liquidated the possibility for judges to remain in office until the age of 70 and abolished the action popularis rule.⁵⁰

Conclusions

The thesis included in the introduction stated that the realization of the populist approach by Fidesz leads to undermining the core of liberal constitutionalism. Instead of such a rule, the party offered illiberal constitutionalism.⁵¹ Since its inception under the 2011 Fundamental Law and its subsequent development, it has challenged the liberal-democratic political and legal project of the state by weakening the system of checks and balances due to the growing competences of the executive power. After 2010, constitutional illiberalism has not developed the transparent politics and horizontal accountability of authorities in Hungary. On the other hand, although Hungary still operates on the basis of a multi-party system, the lack of pluralism and the opposition's lack of access to fair and substantive public discussion proves that Fidesz has subjugated the media and civil society and presents itself as the *vox populi*. Therefore, in this populist approach, there is no need for any constitutional and law restrictions for the executive authorities.

Now, let us return to the question posed in the introduction: what is the trajectory of limitation of the autonomy of judiciary and legislative position in Hungary after 2010? As already mentioned, the incorporation of illiberal democratic constitutionalism into the political system in Hungary has triggered and continues to develop the trajectory of undermining the position of the legislative and judiciary powers at the expense of the executive one held by Fidesz.

The entity responsible for the redefinition of liberal democratic background of Hungarian contemporary institutions is Fidesz and its leader Viktor Orbán.

⁴⁹ S. Kubas, *The Position and Activity of the Constitutional Court in Hungary: 2011–2019*, "Przegląd Prawa Konstytucyjnego", 2019, no. 5, pp. 351–364.

⁵⁰ Act CLI of 2011 on the Constitutional Court, <http://www.mkab.hu/rules/act-on-the-cc>, access 28 XI 2021.

⁵¹ T. Drinóczy, A. Bień-Kacała, *op. cit.*, pp. 1140–1166.

The party was able to benefit from both endogenous and exogenous factors to transform the institutions in the light of illiberal democracy. The endogenous factors were: the weak experiences with liberalism in Hungary, social uncertainty and fear of the future as well as the disappointment with political elites that had introduced liberal democracy between 1990 and 2010. The exogenous factor was connected with the worldwide dissatisfaction with the outcome of liberal democracy.

In 2006, using terminology derived from Gerschewski, Hungarian mechanism of democratic regression found itself at the critical point of discrediting Fidesz's main political rival, the MSzP. Orbán offered the Hungarians "a better future". Yet, he did not reveal the hidden desires to re-establish institutions only to give himself and Fidesz unlimited power. The punctuated equilibrium of the development of liberal democracy, initiated in 2010, meant a violation of the rule of separation of powers and the subordination of the legislative and judiciary authorities to the executive power.

The Hungarian National Assembly was transformed into an institution without deeper deliberation. Changes in the legislative branch that impede the autonomous activity of the parliament and increase the supervision of the executive power are the following: lack of public consultations on projects, elimination of the opposition during the legislative process, lack of restraint of the government in imposing its own projects, decreasing role of pluralist composition of committees, provisions on parliamentary political groups that make it impossible to create a separate group of deputies who leave the original party, quick procedures for passing some acts, the necessity to amend acts immediately after their introduction due to weak legal basis.

Taking control of the Hungarian judiciary by the executive power was one of Fidesz's very first moves after the 2010 election victory. In order to subordinate the judiciary, the ruling party created a new body – the National Judicial Office – whose head can manage and supervise the courts and judges. Generally, the Minister of Justice extended his competences as well. To accelerate the process of control over the judiciary, some judges were forced to retire earlier. The creation of the Curia, which replaced the Supreme Court, should be interpreted in the same context as the rapid control of the composition of the Curia board. To silence the Constitutional Court, Fidesz passed new act that shortened the scope of competences and autonomy and gradually filled this body with loyal judges.

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Abstract: The article analyzes the problem of limiting the competences of the Hungarian legislative and judiciary at the expense of the increase in the significance of the executive after 2010. Although the Fundamental Law provides the rule of the separation of power, Viktor Orbán and his party, using their position in the parliament and government, limit the autonomy of the judiciary and legislative authorities. From the methodological perspective, the analysis is embedded in the neo-institutional approach and derives from the concept of the mechanism of democracy regression proposed by Gerschewski. The main question posed in the article refers to the trajectory of limiting the autonomy of the judiciary and legislative power in Hungary after 2010.

Keywords: Hungary; institutions; separation of powers; illiberal democracy

Przewaga władzy wykonawczej nad władzą ustawodawczą i sądowniczą na Węgrzech
z perspektywy demokracji neoliberalnej (2010–2021). Podejście neoinstytucjonalne

Streszczenie: Artykuł poddaje analizie problem ograniczania kompetencji władzy ustawodawczej oraz sądowniczej kosztem wzrostu pozycji władzy wykonawczej na Węgrzech od 2010 do 2021

roku. Mimo konstytucyjnych gwarancji dotyczących zasady separacji władzy, w praktyce jest ona podważana przez rządzący Fidesz i premiera Viktora Orbána. Z metodologicznego punktu widzenia podejście nieinstytucjonalne jest głównym podłożem, na którym oparte są niniejsze badania. W tym kontekście skorzystano z koncepcji Johanessa Gerschewskiego dotyczącej mechanizmu regresu instytucji demokracji liberalnej. Głównym pytaniem badawczym postawionym przez autora jest problem przebiegu trajektorii ograniczania pozycji władzy sądowniczej i ustawodawczej na Węgrzech po 2010 roku.

Słowa kluczowe: Węgry; instytucje; podział władz; demokracja illiberalna