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## Why Have Constitutional Courts Been so Important for Democracy in Central Europe (...And So Hated by Those in Power)?<sup>1</sup>

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The contribution reacts to various thoughts about the present state of constitutionalism in the V4 countries. The author argues that the constitutional court, an institutional check on majoritarian decision-making, has been an indispensable component of constitutional-building in the Central European area. However, the model of a highly esteemed constitutional court, with its justices, nominated in a bipartisan manner, has been regularly contested, especially by those who were supposed to be constrained thereby. To outlive current and future populist waves, a result of vibrant discourse between political branches of government and a self-restrained constitutional court has a strong potential to stabilize democracy in the region, marked by authoritarian governments of the second half of the 20<sup>th</sup> century. Thus, the article will reason that we, the Central Europeans, need “more”, rather than “less” constitutionalism to protect the legacy of the last democratic revolution.

**Keywords:** constituent power, constitutional democracy, political constitutionalism, central European constitutionalism.

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*A polity that has reached the point of making a democracy-destroying choice is highly unlikely to respect a judicial decision purporting to preclude it from doing so.*

*Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.*

*Learned Hand; The Spirit of Liberty (1953)*

## Introduction – Democracy and Liberty

The model of governance that during the several past decades demonstrated its viability and was explicitly implemented in Western Europe, and after 1989 also in Central Europe, was constitutional democracy. This model characteristically guarantees free elections that provide legitimacy to the decisions of representatives of citizenry, and at the same time protects individual liberties through the constitutionally entrenched bill of rights. This model is, therefore, a symbiosis between democracy, a procedural part, and constitutionalism, a substantive part. It guarantees everyone's right to participate in governance through the election process, as well as protects fundamental principles of the respective society *erga omnes*, such as the rule of law, separation of powers, human rights and liberties.<sup>2</sup> The substantive part of this mechanism creates multiple constraints on elected representatives and thereby limits the exercise of majoritarian will. In other words, this constellation guarantees that the majority will be able to turn its voice into a policymaking agenda, while protecting fundamental rights of minorities, as well as their possibly dissenting opinions.

The constitutional power-limitation has various internal checks that prevent encroachments of one power into the domain of another. Most importantly, it creates numerous dispersions of power, so that one individual, one party, or even the entire branch of government would not be able to hijack the entire constitutional system. Instead, the multiple political actors are forced to cooperate. On the other hand, however, this complicated organisation produces several side effects that lead to ineffectiveness, dysfunctionality, or even paralysis.

The main tenet of this constitutional constellation is compromise-building, which has affected Western democracies and their politics for decades. Constitutional democracy attempts to find a healthy balance between legitimacy and efficiency of decision-making, resulting in criticism sometimes from one side of the political spectrum, sometimes from another.<sup>3</sup> It allowed minorities to peacefully coexist with majorities and meant that despite their mutual disagreements, various opinions were taken into consideration, and these were subsequently reflected in negotiated solutions and policy-making. The tensions between the branches of government have become a part of day-to-day politics. Thus, "in stable liberal democracies, government will by convention usually lead to consensual outcomes even if it means accepting interpretations that one or the other branch was originally in disagreement."<sup>4</sup>

<sup>2</sup> Zakaria, F. *The Future of Freedom*, 2007, p. 17.

<sup>3</sup> Van Reybrouck, D. *Against elections*, 2016, p. 6.

<sup>4</sup> Minkinen, P. Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, No. 3, 2013, p. 609.

Moreover, the independent judiciary created an effective system of human rights' protection. The constitutional courts, special institutions that became widely popular in most of democratic countries in Europe after World War II, have gone even further. These bodies were designed specifically to protect basic principles of constitutionalism against politically driven decisions. The substantive part of constitutional democracy, thus, gained a huge institutional boost against the popular will of majorities. During the last decades, many serious doubts about the legitimacy of constitutional judiciary and judicial review were articulated. Nevertheless, the strong constitutional court today is the dominant institution of modern constitutionalism. The usefulness of judicial review and its role in the individual's protection, especially in Europe, has not been as forcefully challenged as in the US<sup>5</sup>. According to Fareed Zakaria, "the western model of government is best symbolized not by the mass plebiscite but the impartial judge".<sup>6</sup> The constitutionalism, or the substantive part of constitutional democracy, entrenched in the fundamental constitutional principles, created a rock-solid backbone of modern democratic countries. In that logic, in most western democracies the constitutional judge has become the ultimate guardian of constitutional system and its principles. The normative theory of legal constitutionalism became dominant in most European democracies immediately after World War II, and in Central and Eastern Europe after the fall of communism in 1989.

Nevertheless, constitutional democracy has been a contested term. Its content has been evolving and various modifications have emerged throughout history. The key feature of constitutional power-limitation of majorities, however, remains. The following text will outline some fundamental changes that have been severely modifying the general concept of constitutional democracy. The main objective of this article is to explain how this model of governance was implemented after 1989 in Central Europe, and how it later evolved in this region. The special importance in this process has been given to constitutional courts, the chief defenders of constitutional limitations of democratically transferred power. In this regard, the contribution will clarify why these bodies have been indispensable, especially for this region, and how current waves of populism have started to erode the fundamentals of constitutional democracy. In conclusion, I will argue for "more", rather than "less" constitutionalism in order to protect the legacy of the last democratic revolution in Central Europe.

## 1. Two Constitutional Shifts

In the outlined model of constitutional democracy, which is sometimes understood as democracy in a broader sense, two dominant components, the substantive and procedural, have been mixed. During the last years, maybe even decades, however, the world has witnessed two substantial shifts that intentionally or unintentionally moved the equilibrium of this setting. This part will discuss the

<sup>5</sup> For the concept of "counter-majoritarian difficulty" see *Bickel, A.* The Least Dangerous Branch. The Supreme Court at the Bar of the Politics. 2<sup>nd</sup> edition. New Haven: Yale University Press, 1986; *Bork, R. H.* The Tempting of America: The Political Seduction of Law. New York: Free Press, 1990; *Friedman, B.* The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy. *New York University Law Review*, No. 2, 1998, pp. 333–433; *Tushnet, M.* Taking the Constitution away from the Courts. Princeton, New Jersey: Princeton University Press, 2000; *Waldron, J.* The Core of the Case Against Judicial Review. *Yale Law Journal*, No. 6, 2006, pp. 1346–1407.

<sup>6</sup> *Zakaria, F.* The Future of Freedom, 2007, p. 20.

forementioned two shifts, and will try to clarify the threats of these changes for the stability of constitutional democracy.

The first one, often discussed as undemocratic, and in that sense also undesirable, has been named “juridical shift”, or the shift towards the rule by “juristocracy”<sup>7</sup>. According to opponents of this change, the judicial review and therewith the connected strong position of constitutional courts<sup>8</sup> have been equalized with a process that reinforces a given elite, or perpetuates the power of certain social groups fearing that they might lose their ascendancy in the future.<sup>9</sup> In other words, this understanding equals a shift towards constitutionalism with a rule of unelected judges, imposing their own personal preferences on the entire society. It has been branded as a direct threat to constitutional democracy and a danger to the balance between democracy and constitutionalism. According to this critical theory, the elites have been continuously gaining power through the judiciary and thereby cementing their position at the top to the detriment of the rest. This theory has been researched in many places around the world, but perhaps in Europe, with its supranational entities and international courts, it could be observed in the clearest possible way.

This alteration towards a more rigid form of constitutionalism has most likely not been a product of conspiracy, but rather it has been a consequence of historical development in Europe in the first half of the twentieth century. During this period, the parliamentary majorities possessed an unconstrained access to ultimate power in their respective societies. Unfortunately, the blind trust in majoritarian democracy with no meaningful institutional checks against the abuse of power resulted into a limitless majoritarian terror blessed by the then valid law. Perfectly legal majoritarian dictatorship generated an everlasting warning against the abuse of power and reinforced demands for tenable constitutional checks on power.

Therefore, the constitutional court, as the protector of fundamental democratic constitutional principles and individual liberties against the free will of the legislator, came into prominence in most European countries. This special institution, judicial in its core, embodies a neutral apolitical deliberator, deciding according to fundamental principles, entrenched in the constitution. These principles and their effects, cemented into the fabric of a democratic form of governance, were permanently taken from the disposition of parliamentary majorities. The constitutional court, as any other judicial body, in its deliberations and decision-making should not care about the opinions of certain religions, races, nationalities, genders, sexual orientation, etc. It should act in a just, impartial and unbiased manner, even against the popular will. That kind of impartiality cannot be expected from any political institution, bound by fluid and temporal majoritarian blessing. The acts of politicians do not have to be right, wrong, impartial, or neutral. They, however, must be popularly supported. The decisions of a constitutional court should follow another path, a path of constitutional values.

<sup>7</sup> In French legal environment, the term was popularized by Édouard Lambert in 20<sup>th</sup> century as «Le gouvernement des juges».

<sup>8</sup> “Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries”, see: *Hirschl, R. Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2007, ISBN 9780674025479, p. 1.

<sup>9</sup> *Hirschl, R. Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2007, ISBN 9780674025479, p. 10.

Consequently, the constitutional court became a central institution in most countries of Western Europe. In civil law systems, the constitutional courts started to issue decisions endowed with *quasi*-precedential effects. Thereby, the judiciary in civil law world finally began to declare what the law is.<sup>10</sup> The abstract constitutional provisions have gradually provided the constitutional judiciary with a relatively open-ended discretion to proclaim how modern society should look like, what its preferences should be, and what is right and wrong. In the strong model of judicial review,<sup>11</sup> the constitutional courts are bestowed with a power to nullify the acts of parliament. Thus, the constitutional courts can decide specifically against the will of majoritarian politics, but presumably for the benefit of society. Thus, no wonder that politicians, acting on a laboriously won and temporal political mandate from the people, started to question the legitimacy and authority of constitutional courts. They have been routinely accusing constitutional courts of judicial activism and various forms of political shows, since the decision-making activity often involves the cases and controversies with huge political ramifications.

Sometimes judicial activism can be real, but more commonly the constitutional courts, as their brethren, ordinary courts, have been doing what they were created for – deciding cases and interpreting laws. No reasonable person can nowadays think of eradicating the entire judiciary just on the basis that judges are subjectively imposing their personal will on others, or that they have been interpreting statutes assertively. There is no better alternative for deciding cases, nor a better suited institution to do decision-making in modern society.

A similar logic can be applied to the decision-making of constitutional courts, although they have been deciding cases of a different magnitude. Certainly, these courts have been endowed with powerful functions that, however, correspond with the specificity of the role they have been given in democratic society. The constitutional court, as an institution, serves as a vital constitutional check on the legislative activity of parliament. Besides, the powers of constitutional courts were, at least in Europe, voluntarily transferred to them by the people in the constitutions. This entire shift from democratic majoritarian decision-making of directly elected institutions has been distinctive with a highly spirited form of deliberation of professionals – the constitutional judges. They serve as an intellectual double check on the work of legislatures and its majorities. The whim of directly elected politicians was thus constrained by the discretion of indirectly selected arbiters. This symbolises a move from an unbound passion of current majorities towards a more rational and reasonable logic of deliberation.<sup>12</sup>

Nevertheless, there has also been a second important, traditionally rather overlooked type of dynamics in the equilibrium of constitutional democracy. This shift towards a more direct decision-making has not been criticised. Quite on the contrary, it has been celebrated as a victory of the common man, or something that

<sup>10</sup> Paraphrasing the famous sentence from immortal US Supreme Court decision *Marbury v. Madison*, 5 U.S. 137 (1803) that formally established the judicial review in the US constitutional order. "It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is".

<sup>11</sup> For different forms of judicial review, see: *Tushnet, M.* Alternative Forms of Judicial Review. *Michigan Law Review*, No. 8, 2003, ISSN 0026 2234.

<sup>12</sup> Despite their undemocratic nature, the constitutional and supreme courts in many societies retain higher approval ratings than political branches of the government. For the US example, see electronic resource at <http://news.gallup.com/poll/194057/supreme-court-job-approval-rating-ties-record-low.aspx> [last viewed 08.06.2018].

everyone should appreciate. It has been a move in the opposite direction to the first wave. There have been many examples that illustrate this worldwide and, according to my opinion, even more consequential trend. These changes are well documented, for instance, by the shift from bicameralism to unicameralism, rather weak unelected, more professional upper chambers of parliaments, shifts from indirect to direct elections of upper chambers (e.g. USA), and head of states (e.g. Slovakia in 1999, the Czech Republic in 2013), direct presidential primaries (e.g. USA), more popular invocation of referenda. Furthermore, less formal, but more dangerous processes are the informal shifts to majoritarian politics through perpetual appeals of politicians to their direct obligation to follow the will of “the people”, thereby undermining the other indirectly elected or nominated institutions. Many times, these changes have been denoted as “waves of the future”, bringing enhanced legitimacy and a more direct form of decision-making into the complicated system of constitutionally constrained government. The equilibrium of constitutional democracy that consists of both democracy and constitutionalism has been seriously eroded.

The main problem with popularly elected leaders and institutions has been their instantaneous responsiveness to public opinion. According to the public choice theory, the main intent of politicians is to survive in a political arena for as long as possible (i.e., to get re-elected) and, thereby, remain in power. Thus, these actors have become quite obsessive with public opinion polls and pressures of interest groups. This trend has subsequently produced a tendency to polarization of politics, various forms of gridlocks and non-compromising ideological political standpoints. The above polarisations and perpetual disappointment of voters resulting from compromising aspects of day-to-day politics contributed to generating a toxic political environment, in which it has become virtually impossible to dispense with even petty disagreements by traditional ways of negotiation, concession, or cooperation. A greater appeal to a direct form of democracy then, quite paradoxically, also created a less tolerant and more ideological political setting.<sup>13</sup> With fewer indirectly nominated institutions that traditionally had served as vital checks on social equilibrium, prevented tyranny of majority, and produced long-term policy-making goals, the entire public sector became much more impulsive to any, even radical, public preferences.

This second shift, towards decreasing participation of indirectly nominated institutions in decision-making, has been characterised by a tremendous appeal to the “passion” of public-at-large. These passions, however, have been prone to exploitation by various political manipulators and interest groups, as we could see in many recent elections (USA, UK, France, etc.) and popular referenda (Hungary, Turkey, etc.). It is, thus, possible to express serious doubts engendered by a model according to which “democratization” should always be the leading tenet of decision-making. Historically, this tendency has been misleading and proved to be wildly abusive. This change, as well as any other limitations of indirectly nominated institutions have been very easy to promote and “to sell” to the electorate. We live in a democratic age and many other aspects of our daily life except politics have also been democratized.<sup>14</sup> Therefore, the shift towards the decision-making of “we the people” has become politically advantageous and almost no one dares to criticise it.

<sup>13</sup> Zakaria, F. *The Future of Freedom: Illiberal Democracy at Home and Abroad*. W. W. Norton & Company, 2007, p. 106.

<sup>14</sup> *Ibid.*, pp. 11–17.



With those two outlined shifts, one towards the reason [of judges, professionals and other indirectly nominated institutions] and one towards the passion [of “the people”], it is possible to see that the middle ground, or the compromise between the majority and minorities in constitutional democracy, erected around political compromises and checks on powers, has been rapidly losing its ground. The basic mechanism of constitutional democracy, created to enable political discourse and deliberations with its vital background checks against abuse of power, has started to appear dysfunctional in many countries. Any check on the majority is, of course, undemocratic at the first sight, but these checks have proven to be indispensable for tolerant political systems, providing a platform for reasonable debate. The shift towards “we the people”, to the more legitimate and less restricted rule of majority, has further threatened the aforementioned equilibrium and produced more attacks on other constitutional safeguards.

The ultimate end of those two shifts is something we would not like to end up with. With no checks, we cannot blindly rely solely on judges, nor can we trust the decisions of majorities, as they can be quite easily manipulated and exploited. Historically, it has been far easier to invoke the passions and fears of the people than to invoke their reasons and thoughtful decisions. Impulsive and emotional reactions are much more natural to human beings than a deliberative approach and calm decision-making. People tend to react spontaneously on imminent threats. That is why the populism and popularly elected leaders have a much easier job of gaining attention and spreading their simple solutions, grounded in emotions, prejudices and biases. That comes as a clear contrast to the much harder job of justification of the role of judges, or other indirectly nominated institutions and their inevitability in the equilibrium of constitutional democracy. It is far more appealing to point toward direct threats posed by anything unknown than to convince the public with a reference to reason, noble principles, or lofty goals of constitutionalism. It is, therefore, much easier to win the attention and thereby gain political capital by oversimplified, passionate invocations than by a “legalistic tango” that comes in often vague judicial reasoning.

The world of unrestrained majoritarian democracy has always been a natural habitat for populism and a terrible place for minorities and their opinions. This is nothing new and this trend has been clearly spotted and pointed out by many philosophers throughout history.<sup>15</sup> Europe learned its lesson not that long ago, although it does not seem that this message still resonates nowadays. Consequently, it seems that we have been slowly heading towards that “democratic trap” again.<sup>16</sup> Simple and easy solutions have proven incapable of protecting individuals, or even majorities themselves in the long term. The unrestrained will of the people has been far more dangerous than judicial deliberative processes. The judges have never truly ruled any country, only produced more assertive decisions and expressed certain

<sup>15</sup> E.g. Aristotle in his major work *Politics* regarded democracy, or the mob rule, as a bad form of government, alongside with tyranny and oligarchy; Thucydides associated popular rule with aggressiveness; Kant distrusted unfettered democratic majoritarianism and believed that democracies with no separation of powers, checks and balances, the rule of law, protection of individual rights were tyrannical; Carl Schmitt, in a strict reading of his work, considered democracy and dictatorship to be two sides of the same coin.

<sup>16</sup> Van Reybrouck, D. *Against elections*, 2016, p. 31: “Nowadays it is often forgotten, but fascism and communism were originally attempts to make democracy more vital, based on the idea that if parliament was abolished, the people and their leader would be better able to converge (fascism) or the people could govern directly (communism) ”.

legal and moral preferences. In my opinion, it is the majoritarian politics that is far more dangerous for the future than *le gouvernement des juges*. Although, as I already pointed out, we do not want to end up blown away by any of those two shifts and it is in our best interest to protect the equilibrium of constitutional democracy that was created as a composition of both directly and indirectly elected bodies.

## 2. The Case of Central Europe – V4 Countries<sup>17</sup>

After a brief overview of possible threats to the concept of constitutional democracy, the attention will turn to the Central European region, known as the V4 region. This part will be elaborated on the previous findings, applying them to this part of Europe.

Firstly, we will start with the main constitutional commonalities of V4 countries. Perhaps most importantly, these countries share many characteristics because of their common history, quite recent communist past, and a clear break with it in 1989, during the so called “the Autumn of Nations” (later also as “the 1989 revolution”). The nuances of changes were, however, a bit different – in Poland and Hungary they occurred after roundtable settlements and talks, while in the then Czechoslovakia the democratic transformation happened after the Velvet revolution. In all these countries, the first free elections were held in 1990, and brought about the era of democracy commenced. These countries have become the examples of a quick and successful transition from authoritarianism to democratic form of governance. Later, they were all accepted into the European integration clubs (NATO in 1999 and 2004; and EU in 2004).

The V4 countries adopted new democratic constitutions: Slovakia in 1992, The Czech Republic in 1993, Poland in 1997, and finally also Hungary, at first with a major constitutional amendment in 1989, and later with a new constitution in 2011. These constitutions recognize sovereignty of people, separation of powers and protection of human rights as their core foundational tenets. Therefore, it is possible to say that these constitutional systems all have followed the model of constitutional democracy, in which the will of majority is balanced by the system of constitutional safeguards. Democratic elements in these countries were embodied in their national parliaments that with one small exception were also endowed with the constitution-making authority.<sup>18</sup> To counterbalance powerful political parliaments, similarly

<sup>17</sup> The countries of so called “Visegrád four” – the Czech Republic, Slovakia, Poland and Hungary.

<sup>18</sup> The constitution-making body in all V4 countries is the parliament. There is one exception. In Poland, when the constitution is being replaced, confirmation by constitutional referendum is required (Art. 235 § 6). In Hungary, constitution-making through referenda has been explicitly forbidden (Art. 8 § 3). In Hungary: “For the adoption of a new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required.” (Art. 5 § 2). In Poland: “A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.” (Art. 234 § 4). In the Czech Republic: “The concurrence of three-fifths of all Deputies and three-fifths of all Senators present is required for the adoption of a constitutional act...” (Art. 39 § 4). In Slovakia: “For the purpose of adopting or amending the Constitution, a constitutional law, in approving an international treaty according to Art. 7, para. 2, for the adoption of a resolution on plebiscite on the recall of the President of the Slovak Republic, for bringing a prosecution of the President and for the declaration of war on another state, the consent of a three-fifths majority of all Members of Parliament shall be required.” (Art. 84, para. 4).



strong constitutional courts,<sup>19</sup> as the supreme judicial bodies with constitution-interpretative powers, were established.<sup>20</sup> The development of relationship between these two principal bodies and therewith associated connection between political and constitutional components of constitutional democracy, however, followed quite diverse paths.

In Hungary, from the very beginning of its existence the constitutional court under the leadership of its first president László Sólyom became the central institution of the national constitutional realm.<sup>21</sup> The situation changed gradually and with the ascent of Viktor Orbán, the political branch of government gained momentum. The Orbán led Fidesz-coalition has won 4 out of 5 elections since 2002. The parliamentary majority changed the “rules of the game” by a new electoral law to cement its position in power (2012), and in 2011 even adopted a brand-new constitution. The constitutional court was later packed with pro-Orbán judges, as it had become the biggest target of political branches. Nowadays, the constitutional court is paralyzed and does not play a role of serious contender of parliament or government.

In Poland, the Constitutional Tribunal played a very active constitutional role from the moment of its democratic inception. It effectively blocked several attempts of constitutional take-over and decided many contentious disputes. The situation changed rapidly, when a very thin single-parliamentary-majority of 2015 election<sup>22</sup> “hijacked” the entire constitutional system. Professor Sadurski termed the situation as *constitutional coup d'état*, in which “the factual change of the constitution is being reached through sub-constitutional measures”<sup>23</sup>. On the other hand, the political leader of the present governing Law and Justice (PiS) majority, Jarosław Kaczyński, proclaimed that “in a democracy, the sovereign is the people, their representative parliament and, in the Polish case, the elected president. If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation.” The situation in Poland became even more serious with a so-called judicial reform that *de facto* put courts and judges into subservience of the executive branch.<sup>24</sup>

In the Czech Republic, the constitutional court grew more incrementally than in the previous two examples, but subsequently gained respect and prominence.

<sup>19</sup> “Those who end up in a minority must be able to trust that they will not be raped and robbed by the majority if they cede power to them. How could they be reasonably expected to do that? The best way to inspire the minority with this trust was to install a strong, impartial constitutional court that will check those in political power without exerting power itself.” Steinbeis, M. Constitutional Courts in Decline. Available: <http://verfassungsblog.de/constitutional-courts-in-decline/> [last viewed 08.06.2018].

<sup>20</sup> Arato, A. Post Sovereign Constitutional Making: Learning and Legitimacy. Oxford University Press, 2016, p. 207.

<sup>21</sup> Ibid., pp. 195–204.

<sup>22</sup> 235 / 460 in the Sejm (37.6%) and 61/100 in the Senate.

<sup>23</sup> Sadurski, W., Steinbeis, M. What is Going on in Poland is an Attack Against Democracy. Available: <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/> [last viewed 08.06.2018].

<sup>24</sup> Bojarski, Ł. A Polish legal road roller: Can the political sentence be stopped? Available: <http://www.constitutionnet.org/news/polish-legal-road-roller-can-political-sentence-be-stopped> [last viewed 08.06.2018]; Sledzinska-Simon, A. The Polish Revolution: 2015–2017. *International Journal of Constitutional Law*, blog. Available: <http://www.icconnectblog.com/2017/07/the-polish-revolution-2015-2017> [last viewed 08.06.2018]; Koncewicz, T., T. Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe. Available: <http://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/> [last viewed 08.06.2018].

Despite several very contentious decisions<sup>25</sup>, the court is now an undisputed intellectual guardian of the constitution. After the last general election, the situation became more turbulent, as some radical political parties were elected into the parliament. Furthermore, the leader of the strongest political party, former minister of finance, an oligarch, and the current prime minister has been criminally investigated. The very same person had previously gained power in many influential media. Despite this development, the well-respected constitutional court has not yet been attacked.

In Slovakia, during the very tumultuous foundational period, the quasi-authoritarian regime under the leadership of prime minister Vladimír Mečiar, diminished and paralysed all the other constitutional institutions. The prime minister then ruled the country with an iron fist. Many suspicious links between the government and the Slovak criminal scene were investigated in the subsequent periods. After this unstable interval, finally, in 1998 Slovakia took a pro-EU direction and reformed its constitutional system to conform with the criteria of European democracy. A relatively modest constitutional court, which in its beginnings approached most of cases in a very formal way, gradually established a place at the epicentre of constitutional system. Nowadays, the constitutional court epitomises an important veto player that reviews the constitutionality of parliament's activity. Recently, however, the constitutional development was shaken by the constitutional amendment that enabled the parliament to annul the amnesties granted in the foundational era. The parliament abolished these amnesties, in the name of the people and subsequently, in a highly political decision, the constitutional court approved the annulment of amnesties.<sup>26</sup> This decision, however, possibly opened the Pandora box of unexpected consequences for the entire constitutional equilibrium. Undoubtedly, this decision tilted the constitutional pendulum further to political branches.

The very last note of this part is dedicated to something that all aforementioned countries have in common. Something that has proven extremely relevant during the evolution of constitutional systems in the V4 region. Based on the communist past, only relatively weak civil societies were formed in Central Europe. That remains a valid statement even today. Similarly, only a limited support exists for a strong and independent system of constitutional institutions that would monitor the exercise of state power. The realm of political power and the authoritarian leadership still has a staunch support among people. That is most likely a relic from the authoritarian past that did not create any sentiment for strong counterbalance of the ruling class. Most people had lived their entire lives in authoritarian regimes, when unexpectedly and quite swiftly the 1989 revolution brought them a democratic change. The expectations and hopes for better lives, comparable with those in Western Europe, have not been fulfilled yet. Thus, even after 25 years of full-fledged democratic forms of government, many people of Central Europe still have sentiments about the pre-1989 era. Therefore, strong and sometimes even semi-authoritarian leaders invoking shortages of constitutional democracy that have been exacerbated further by local problems of corruption, nepotism and other frauds,

<sup>25</sup> Such as decision PL. ÚS 27/09 (21.09.2009), nicknamed *Melčák*, in which the Court declared constitutional statute unconstitutional; decision PL. ÚS 5/12 (31.01.2012), nicknamed *Holubec*, in which the Court declared decision C-399/09 of the Court of Justice of the EU *ultra vires* for the first time in history of European Union.

<sup>26</sup> Decision PL. ÚS 7/2017.

have been quite successful in gaining popularity in this region. Recent examples of widely popular leaders Kaczyński, Orbán, Fico and Babiš that were using similar patterns of populism are quite telling.

### 3. Normative Point of View

In this part, the article will address the theoretical background of politicians' frequent appeal to the general will of the people as an ultimate source of all state power. The politicians have been often justifying their decisions by invoking the will of people. The Central European constitutions were designed specifically to limit politicians and their representations *vis-à-vis* other institutions. The institutions that have been very frequently denounced by this populist appeal were constitutional courts. According to many politicians nowadays, as well as in the past, however, the undemocratically nominated constitutional judges should not constrain the free will of the people exercised through their directly elected representatives. In a similar vein, they further argue that the judges cannot unilaterally impose their own views on society and must mainly take into consideration the will of majority. The contentious questions should be decided in the political arena, not in the courtrooms. In other words, the politicians have been trying to use "the shift to the people" to enhance their position *vis-à-vis* other checks on the exercise of power and to get rid of them.

The above-mentioned types of reasoning strongly resemble basic principles of political constitutionalism, the normative theory that accentuates the perils of a strong form of judicial review to protect individual rights at the national and transnational level.<sup>27</sup> Rather than relying on the judiciary and its definitions of constitutional rights, political constitutionalism values the permanent disagreement about fundamental values of each society. This stream of thinking prefers a "nothing-is-set-in-stone" approach, in which every question is up for a debate in a fair political arena. As much as any other political question, even the content of rights must be open for a contestation, and not for judges to decide.<sup>28</sup> In this concept, the constitutional courts do not respect political agreements, in which the people have equal participation. Therefore, judicial decisions cannot be considered legitimate.

The intellectual counterpart of political constitutionalism is legal constitutionalism. This concept is characterised by judicially determined fundamental values (human rights, rule of law, etc.). These values are constitutionally entrenched by an ultimate sovereign power, the people, and thereby placed beyond the reach of political determination. It argues that human rights are so important for the functioning of democracy that they cannot be sufficiently protected by the parliamentary majorities, nor can they be taken hostage by any kind of parliamentary majority.<sup>29</sup> Legal constitutionalism endorses a strong role for the judiciary that is capable to protect fundamental values, sometimes even against the constitution-making body. This robust version of legal constitutionalism has been, however, seriously contested, since the constitutional definition of democracy by

<sup>27</sup> Goldoni, M. Two internal critiques of political constitutionalism. *International Journal of Constitutional Law*, Vol. 10, issue 4, 2012, p. 926.

<sup>28</sup> *Ibid.*, p. 930.

<sup>29</sup> Alexy, R. *Theory of Constitutional Rights*. Oxford University Press, 2002, p. 297.

a court is always quite dangerous business<sup>30</sup>. That kind of judicial review is also doubted as an elitist way to wield political power without legitimacy<sup>31</sup>. On the other hand, the constitutional court can be understood as an elitist institution that exists to confront another elitist institution, the parliament<sup>32</sup>.

I believe that political constitutionalism, determining the content of fundamental rights through the political process, is not a viable justification of what has happened in Central Europe, nor a model for the future of this region.<sup>33</sup> The V4 constitutions, founded on historical inexperience with human rights' protection, established a persuasive rationale for strong constitutional courts capable of protecting fundamental values. Moreover, the entire Europe with its concept of internationally recognized, non-negotiable, absolute rights is historically the world's most successful model of human rights' protection. After World War II, Europe clearly rejected the idea of political constitutionalism. Nowadays, it remains a peculiarity mostly characteristic to common law professors.<sup>34</sup>

The current situation in Central Europe, in which populist majorities have been claiming the adherence to the "will of the people", as well as the popular mandate to change the equilibrium of constitutional democracy, has been only cloaked as a shift to political constitutionalism. The ambition of populist leaders has certainly not been to create a political arena for a just deliberation,<sup>35</sup> but to usurp the power for themselves. In political constitutionalism, a disagreement is considered "as a creative force bringing many positive effects to the deliberation-table, such as plurality of opinions, epistemological benefits, mutual learning, and political accountability through constant challenges to political power".<sup>36</sup>

<sup>30</sup> Möllers, Ch. *The Three Branches: A Comparative Model of Separation of Powers*. Oxford University Press, 2015, p. 130.

<sup>31</sup> Hirschl, R. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2007, ISBN 9780674025479, p. 10.

<sup>32</sup> The principle very well-known from the Federalist Papers, No. 51: "ambition must be made to counteract ambition".

<sup>33</sup> As suggested by Adam Czarnota (available: <http://verfassungsblog.de/the-constitutional-tribunal/> [last viewed 08.06.2018]). A similar diagnosis is also given by Paul Blokker (available: <http://verfassungsblog.de/from-legal-to-political-constitutionalism/> [last viewed 08.06.2018]), although I do not concur with his solutions (Civic constitution? – an idealistic version of something that is impossible to achieve).

<sup>34</sup> Although Mark Tushnet argues that "the popular "acceptance" of judicial review is perhaps rather a sign of resignation to the fact that democratic majorities have been unable to eliminate a practice favoured by political elites than of positive support for the practice" – Tushnet, M. *Against Judicial Review*. *Harvard Law School Public Law & Legal Theory Working Paper Series*, 2009, p. 16.

<sup>35</sup> Several important constitutional warnings for Hungary have been stated from the European Commission for Democracy Through Law (Venice Commission) Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (Venice, 17–18 June 2011). Available: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e) [last viewed 08.06.2018]; as well as from the Opinion on Act CLI of 2011 on the Constitutional Court of Hungary Adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session (Venice, 15–16 June, 2012); Available: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)009-e) [last viewed 08.06.2018]. Regarding the current situation in Poland, see Sadurski, W., Steinbeis, M. *What is Going on in Poland is an Attack against Democracy*. Available: <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/> [last viewed 08.06.2018], or Mazzini, M. *For Central Europe's Illiberal Democracies, the Worst is yet to Come*. Available: <http://verfassungsblog.de/for-central-europes-illiberal-democracies-the-worst-is-yet-to-come/> [last viewed 08.06.2018].

<sup>36</sup> Goldoni, M. *Two internal critiques of political constitutionalism*. *International Journal of Constitutional Law*, Vol. 10, issue 4, 2012, p. 930.

What has been happening in Central Europe, especially in Hungary, Poland and may very soon also arise in the Czech Republic, however, has not been an invocation of political constitutionalism, but rather a dangerous appeal to the Schmittian concept of political constitutional theory<sup>37</sup>. In this realm, “the nation is the ultimate factual source of a constituent power that cannot logically be constrained by what it may have constituted”<sup>38</sup>. This power, as an outcome of a sovereign act of constitution-making power cannot be subjected to normative constraints that could define or rule over its validity or legitimacy.<sup>39</sup> In other words, the constituent power can do everything, even to resign from the human rights’ protection.<sup>40</sup> This historically discredited vision of ultimate power, in which the popular will is unrestrained, is far more dangerous than the concept of political constitutionalism. Tendencies, in which the will of majority shall prevail over any restrictions, is another invocation of the second shift from the constitutional democracy’s equilibrium – the shift towards an unrestrained “we the people”.

Therefore, the constitutional courts, the guardians of constitutionally entrenched fundamental values, have been the first targets of majoritarian purges. The judiciary, as the non-political branch of government, has historically been the main obstacle of unrestrained dominance of the majority.<sup>41</sup> Because the constitutional court is undemocratic in its nature, it can take different, non-political standpoints and thereby observes the tenets of constitutional democracy, even if they are unpopular. This institution, unaccountable to the popular majority and its perpetual volatility, represents a protecting layer against the passionate reaction of public opinion. Thus, the constitutional court as an institution has attained the most prominent position in those countries, which had experienced a strong totalitarian, or authoritarian past.<sup>42</sup> In some of those examples, the judiciary has even dared to step into the constitution-making process (e.g. Germany, Austria, South Africa, the Czech Republic). Since then, the constitution-making body was bound not only by the prescribed constitution-making procedure, but also by substantive rules, promulgated by the constitutional court.<sup>43</sup>

The communist past has very likely been one of the main reasons why constitutional courts have gained such an importance in Central Europe. The anti-majoritarian features, protecting the system of constitutional democracy, have been intentionally sown deep into the constitutional fabric by decisions of first democratic majorities after the fall of communism. It was conducted to prevent

<sup>37</sup> Political theory is not a “real” normative theory, more a practical one (see *Minkinen, P.* Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, Vol. 11, issue 3, 2013, p. 592).

<sup>38</sup> *Minkinen, P.* Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, Vol. 11, No. 3, 2013, p. 592.

<sup>39</sup> *Ibid.*, p. 595.

<sup>40</sup> Although Stacey argues that this might not be the case. According to his reading of Schmitt’s theories, even Schmitt was a proponent of a “*Rechtstaat*” constraint on the constituent power (Stacey, R. Constituent power and Carl Schmitt’s theory of constitution in Kenya’s constitution-making process. *International Journal of Constitutional Law*, No. 3–4, 2011, pp. 606–614).

<sup>41</sup> *Acemoglu, D., Robinson, J., A.* Why Nations Fail: The Origins of Power, Prosperity, and Poverty, 2013, pp. 325–330.

<sup>42</sup> These institutions are either virtually non-existent, or highly contested in countries with no previous authoritarian experience, such as the UK, Norway, Sweden, USA, New Zealand, or the Netherlands.

<sup>43</sup> For a comparative analysis of unconstitutional constitutional amendments and various approaches of constitutional courts towards this issue see *Roznai, Y.* Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea. *American Journal of Comparative Law*, 2013, pp. 657–720.

authoritarian tendencies, and to protect the constitutional system against populist majorities. Therefore, each attack against the V4 constitutional court is an assault on the post-communist constitutional legacy.

The V4 constitutional courts, designed as apolitical bodies, were endowed with powers to decide issues of the highest constitutional degrees. Obviously, some of these issues were also of high political relevance. Consequently, in those cases, the constitutional courts have been accused of judicial activism, or blamed for exercise of political power. Since the court has never been constructed to defend itself in public, it became a relatively easy target for politicians. The shift towards “we the people”, in which politicians claim exercise of the will of the people, without any restrictions, the constitutional courts became sometimes politically undesirable. The constitutional court as an institution has thus become the supreme target of politicians. In Hungary<sup>44</sup> and Poland, the constitutional courts became “packed” and later completely paralyzed.

Nowadays, in Central Europe, a visible and very dangerous populist shift towards the unrestrained rule of majority, masked behind “the ultimate will of the people”, has become increasingly popular. This trend reminds us of the situation of not that distant a past, in which these countries slipped into authoritarian regimes. Current majorities have already started to deconstruct checks that had been intentionally placed to protect constitutional democracy against the tyranny of majority. The problem has been exacerbated by the lack of social and political inclusion and by an increasing number of attacks on the independent judiciary and free media.

## Conclusions

After World War II, Western Europe deliberately opted for constitutional democracy as a blueprint for its constitutional setting. This concept of constitutionally entrenched fundamental values has proven highly successful. Thus, after the fall of communism in 1989, the countries of Central European region decided to follow the pattern.

One of the most notable features of this scheme is the principle of checks and balances, in which no institution can gain dominance over the others. This institutional design was not created to make the process of decision-making less effective, but to make it more inclusive and less prone to hijack by majorities. It has been crafted as a compromise between two competing tenets – efficiency and legitimacy.<sup>45</sup> The decreased level of effectiveness of decision-making has been balanced by a requirement of broader coalition and compromise-building. The patience with deliberation and compromises, however, was not central in the politics of Central Europe, heavily influenced by a lengthy period of authoritarian forms of government. One of the most central preconditions for functioning of constitutional democracy has been public trust and inter-institutional respect. After 1989, in the V4 countries, however, political institutions in several instances severely diminished the reputation of indirectly nominated bodies that served as critical checks on the exercise of state power. Institutional respect takes more than one generation to develop but it is indispensable for the survival of constitutional democracy.

<sup>44</sup> Arato, A. *Post Sovereign Constitutional Making: Learning and Legitimacy*, 2016, pp. 216–218.

<sup>45</sup> Van Reybrouck, D. *Against elections*, 2016, p. 5.



In that regard, the introduction of strong constitutional courts with numerous important competences in Central Europe provided a shortcut for a vital check against abuse of power from parliamentary majorities. The constitutional courts protect fundamental principles of this system, as well as dissenting minorities and those who can never be directly represented in the parliaments.<sup>46</sup> Therefore, it is in the paramount interest of all people, to protect the constitutional court as an institution against political ill-treatment. The selection process of constitutional judges is, therefore, of an utmost importance and must be conducted either in a non-partisan, or a bipartisan manner, otherwise the court will lose its revered neutrality and can be easily targeted as even further politically biased. The constitutional court cannot be pushed into the world of politics, which would completely discredit its reputation. In Poland and Slovakia, the selection of constitutional judges so far has been clearly partisan. In Hungary, the 2011 constitutional overhaul was a factor contributing to the entire process of nominations becoming much more political.<sup>47</sup> Additionally, the 2011 constitution diminished the significance of previously adopted decisions, so that the current politically blessed composition of court does not have to deal with previously formulated constitutional principles.<sup>48</sup> The only country that has at least tried to make the nomination process more inclusive, has been the Czech Republic. That produced the least politically affected constitutional court in the region. Despite its apolitical prerequisites, the court became quite activist and rendered several very controversial decisions.

In light of the previous statements, I strongly believe that the V4 constitutional courts must remain faithful to the basic principles of the 1989 revolution. The break with their authoritarian past was not only about the elections and majorities, i.e. about procedural aspect of democracy. It was also about fundamental values and rights and their subsequent real, not just formal protection. The 1989 revolution was also about the principle of limited government, which cannot be concentrated in one's hands, one body, or one institution.<sup>49</sup> Another milestone that could claim a common fundamental constitutional value in V4 countries was the principle of

<sup>46</sup> Ely, J., H. Democracy and Distrust: A Theory of Judicial Review. Harvard University Press, 1980, pp. 77–80.

<sup>47</sup> Arato, A. Post Sovereign Constitutional Making: Learning and Legitimacy, 2016, p. 209.

<sup>48</sup> The 2013 constitutional amendment eliminated all decisions of the constitutional court prior to 2011 as precedents.

<sup>49</sup> Recently, I have argued elsewhere that the people of the Slovak Republic have truly spoken only three times in post-communist history. Firstly, and most significantly, during the Velvet revolution. It was a clear and definite break with the communist past. That expression of sovereign created a framework in which people still live in Slovakia today. This framework established a democratic state based on the rule of law principle. These new qualities included, most importantly, free elections and protection of fundamental rights. All subsequent constitutional changes elaborated on these tenets. These were gradually enhanced, but never compromised. The second time when the Slovak people spoke was during the foundation of the independent Slovak Republic in 1993. Finally, the third time they spoke was during the constitutional change that opened the Slovak legal system to international legal influences. According to this concept, the constitution-making body in Slovakia (the parliament) can even adopt a brand-new constitution. This, however, must remain within the framework of the 1989 revolution. I do not argue that the fundamental change can only come with another revolution, but the break with the past must be clear and obvious, and it only remains in the purview of the sovereign people. Thus, no constitutional body, i.e. any kind of parliamentary majority, can turn completely its back on the fundamental principles formed during the last democratic revolution (Baraník, K. Ústavodarná moc a Politika. In: Večeřa, M., Hapla, M. (eds.) Weyrovy Dny Právni Teorie 2017 – Sborník z konference, Masarykova Univerzita 2017, pp. 31–55).

international openness, demonstrated by accessions to EU and NATO. Additionally, these legal systems agreed to follow internationally recognized standards of human rights, as well as common European tenets of limited government. I believe that the break with their dualistic past not only opened the aforementioned legal orders to international influences, but also reformulated their fundamentals in the pan-European manner. These virtues are no longer in the disposition of parliamentary majority and only another clear break with the past will be able to disrupt them. No legislative majority can abandon them just by all-encompassing invocation of the “will of the people”.<sup>50</sup>

Another important constitutional deficiency of the V4 region is the lack of a developed civil society that would constitute another important check against usurpation of power by the majorities. In case of that kind of assault, organised civil society should stand up and defend the constitutional institutions. That is a decisive warning for each potential usurper. In such instances, the people not only protect the institutions themselves but first and foremost defend the democratic form of government. The lack of organised civil society only strengthens the demand for impartial constitutional courts in this region.

The institutional framework is the key to preserving the constitutional equilibrium created by the 1989 revolution. The institutional balance is not a zero-sum game but instead should be perceived as a win-win scenario for all the participants and in everyone's interest. The constitutional judiciary as the guardian of individual rights and liberties plays a critical role in this task, because one day anyone could end up in a position of minority. This placement should, however, not equal discrimination, repression, or irrelevance. The minorities, their opinion and wellbeing must always be taken into consideration and be guaranteed by the constitutional system itself. Society and its institutions should provide a place in which the participation in an ongoing debate is essential for decision-making. That is the main lesson that history teaches us, and we should learn from it, if we do not want to repeat the same “democratic” mistakes again.

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<sup>50</sup> Even Schmitt, the main proponent of unrestrained constituent power, claimed that the decision of the Reichstag, even unilateral, cannot turn German Reich into the absolute monarchy, nor into the communistic regime. Therefore, he distinguished between the parliament (constituted power) that is bound by the framework created by the sovereign (constituent power) that is clearly unrestrained and unlimited in exercise of its power (In: *Schmitt, C. Constitutional Theory.* Duke University Press, 2008, pp. 151–152).

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