Centralized Judicial Review and the Problem of its 'Over-Centralization'

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Abstract:
The article first describes the process of empowerment of constitutional courts after the fall of the Iron Curtain in 1989. It shows the problems that led illiberal politicians to take over the constitutional courts. Second, it explains how and why some of the constitutional courts in the region of Central and Eastern Europe were captured by the new authoritarian rulers. It seems that strong centralized courts pose a threat to democracy and the rule of law when captured by authoritarians. Finally, the paper calls for the empowerment of ordinary judges and shows how this process might work.
Keywords: constitutional courts; ordinary judiciary; democratic backsliding; rise of authoritarian democracies; centralized judicial review; decentralized judicial review

In this article, I argue that the empowerment of ordinary judges is one of the most effective ways to contain the new wave of illiberalism. In the first part, I briefly describe the process of empowerment of constitutional courts after the fall of the Iron Curtain in 1989. I will show the problems that led illiberal politicians to take over the constitutional courts. Second, I describe how some of the constitutional courts in the region of Central and Eastern Europe were captured by the new authoritarian rulers. Third, I show that strong centralized courts pose a threat to democracy and the rule of law when captured by authoritarians. Finally, I call for the empowerment of ordinary judges and show how this process might work. I argue for a more restrained exercise of constitutionalism by (all) judges because this is the only (albeit insufficient) way to separate the legal from the political. Strengthened ordinary courts can also greatly help in removing the consequences of illiberal politics.

I. The Dreams of New Constitutionalism

At first glance, the fall of socialism in Central and Eastern Europe in the late 1980s meant the complete eradication of the previous legal and constitutional values. New constitutions and laws were adopted, and old textbooks were discarded. Moreover, the collapse of communism in 1989 was accompanied by the rise of the judicial branch, in general. In post-communist Europe, the 1990s saw a shift towards judicialization and the creation of a conflict society. The judiciary had its old competencies restored, including the power to carry out judicial review of executive actions.

Most importantly, however, constitutional courts have been established in all post-communist states. Even in the few countries (Poland and the former Yugoslavia) where the constitutional courts existed before the fall of socialism, their role expanded after 1990. The actual functions of these constitutional courts were limited by authoritarian governments prior to 1990, and consequently, they lacked any significant political influence until the fall of the authoritarian regimes. It was only after the collapse of the socialist dictatorships that the constitutional courts in Poland[1] and the successor states of the former Yugoslavia[2] began to serve as a real check on the government.

The post-communist constitutional courts were designed as powerful institutions capable of protecting the rule of law and fundamental rights against the will of the parliamentary majority. Their most important powers include the review of constitutionality of the legislation and in some jurisdictions (some of the successor states of the former Yugoslavia, the Czech Republic, Slovakia, and more recently Hungary)[3] also the review of constitutionality of decisions of ordinary courts.

1 In Poland, the Constitutional Tribunal was created by a law of 1982; it started to operate in 1986. For the description of the Polish Constitutional Tribunal prior to 1990, see Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edition, Berlin: Springer 2014), 4–13.

2 The Federal Constitutional Court of Yugoslavia was established in 1963, along with the state constitutional courts of the individual republics. For an early socialist description of those courts, see Dimitrije Kulic, 'The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights', Osgoode Hall L J 11 (1973), 275–284. The Federal Constitutional Court of Yugoslavia disappeared with the disintegration of Yugoslavia and the subsequent violent civil war of the 1990s.

3 In Hungary, the Court was granted the power to review constitutional complaints as late as in 2012, within the new Constitution enacted at the beginning of the Orbán

Initially, the post-socialist constitutional courts were seen as successful examples of institutions introducing new notions of the rule of law, separation of powers, and liberal democracy. The original practice of constitutional review of the 1990s and early 2000s was associated with judicial activism, unrestrained and seemingly unchallenged judge-made law. The constitutional courts of Central Eastern Europe acted as agents of social change towards New Constitutionalism[4] in their respective national legal systems.[5] Moreover, in some of these systems, they sought to transform the entire concept of law, to Westernize the post-communist application of the law, and to teach the new proper methods of its interpretation. They did this by mentoring and criticizing ordinary judges for not taking the constitution and human rights seriously enough. In this role, the constitutional courts often effectively replaced the legal academia.[6]

When analysing the early phase of post-communist constitutional courts in the course of the 1990s, one should not neglect the consensus on liberal constitutionalism that prevailed among the elites of the post-communist transition. The constitutional courts emphasized the primacy of the individual over the state.[7]There was a strong consensus that new democratic constitutions should restrain the parliamentary majority and the executive, and through their counter-majoritarian functions, ensure adherence to the basic law of the state. Constitutions and their application were believed and presented to be essentially non-political and capable of restraining crude

era. See the Constitution of Hungary of 2011, available at http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary. In Slovakia, the institute of constitutional complaint was introduced in 2001, following the successful Czech example. On Slovakia, see Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest, New York: CEU Press 2002), 189.

4 In this article I understand New Constitutionalism in the way described by Ran Hirschl. See Ran Hirschl, 'The Political Origins of the New Constitutionalism', Indiana J Global Legal Studies 11 (2004), 71–108; or Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press 2007).

5 For some early jubilant views, see e.g. Gábor Halmai (ed.) *A Megtalált Alkotmány? A Magyar Alapjogagi Bíráskodás Elsö Kilenc Éve /The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights* (Budapest: INDOK 2000); Procházka (n. 3); W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International 2002).

6 I tried to show this transformative potential of some constitutional courts in Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden and Boston: Brill 2011), chapter 5.

7 E.g. judgment of the Czech Constitutional Court of 18 October 1995, no. Pl. ÚS 26/94.

politics. However, too many decisions of the constitutional courts sided with neoliberal policy solutions and prescriptions and generally preferred neoliberal ideology in the interpretation of their constitutions.

The constitutional liberalism of the 1990s was linked to the 'The End of History' thesis, i.e. the ultimate triumph of liberal capitalism, often presented through its neoliberal array and a plethora of free market policies.[8] No one dared to question 'the only possible' path to the future. In their neoliberal zealotry, the post-communist constitutional courts' case law was often one-sided, especially when compared to the application of similar principles in Western jurisprudence.[9]

Moreover, the political elites of the 1990s often seemed to be unaware of the enormous political power vested in the constitutional courts. In the 1990s, the concept of law was understood in a non-political way, and the law was seen as a logical set of rules and principles to be applied by endowed professionals who were able to follow the logic of the law. Constitutional courts initially faced little external criticism or opposition to their decisions, resulting in whatsome scholars have called the 'liberal government of judges'. Mainstream political ideology provided a protective veil for the constitutional courts' activities, hiding even the most radical examples of judicial lawmaking.[10] Although judicial activism was criticized by local legal academia and the majority of ordinary judges, it was relatively easy to downplay this kind of criticism as a reaction of conservative scholarship and judiciary, associated with the former regime.[11]

These circumstances often shaped the environment for unbound judicial activism of constitutional courts. The President of the Hungarian Constitutional Court in the 1990s Sólyom once (in)famously remarked that the genuine purpose of the Court was to read '*the invisible constitution*'.[12]

8 Adam Sulikowski, 'Government of Judges and Neoliberal Ideology' in: Rafal Mańko, Cosmin Cercel and Adam Sulikowski (eds), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Oxford: Counterpress 2016), 16–31.

9 Cf., for an analysis of the Hungarian Court, Catherine Dupré, *Importing The Law In Post-Communist Transitions: The Hungarian Constitutional Court And The Right To Human Dignity* (Oxford: Hart 2003), 126–127.

10 Sulikowski (n. 8).

11 See Kühn (n. 6), 229 (and the sources quoted in footnote 143).

12 See Sólyom's concurring opinion in the Death Penalty Case, decision 23/1990 of 31 October 1990 (translated in: Laszló Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: The University of Michigan Press 2000), 126). This conception has been criticized for blatant activism (What is 'invisible constitution'; are judges above the lawmakers

Although other constitutional courts were less open about their judicial legislating, judicial activism became a common phenomenon in the 1990s and the early 2000s.

Most importantly, the constitutional courts often styled themselves as the sole and indispensable guardians of the New Constitutionalism, entering the scene as a sort of *deus ex machina* to resolve issues that could not be decided by other bodies. As a result, one of the most fundamental problems that emerged after 1989 was the 'over-centralization" of constitutional review. By this, I mean that the continuing guarantee of the rule of law was completely centralized and concentrated in the constitutional court, while the powers of the ordinary judiciary were correspondingly limited.[13] If the constitutional court then comes under the control of one political faction, as was the case in the Orbán Hungary after 2010 and in Poland after 2015, the gates are wide open for systemic change, while the guardians of the constitution (other than the captured constitutional tribunal) are effectively absent.

The first important change began when politicians realized what their constitutional courts were capable of and that they were not only legal institutions but also important political players capable of influencing national politics. An early example of this phenomenon was the way the Polish Constitutional Tribunal made its decisions during the first government of the conservative Law and Justice Party (PiS) in the period 2005–2007, which effectively frustrated many of the conservative reforms.[14] The Tribunal openly defended classical liberal concepts of the rule of law. This made the Tribunal a political actor ('politicized it") in the eyes of the conservatives (PiS) and its supporters. Conservative hostility to the Tribunal culminated in the realization that if their policies were to be put effectively into practice, they would first have to remove an obstacle represented by

and are they the only legitimate power to read it?) and neither the Court nor its President has ever used this expression again. Cf. András Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary', Oxford J Legal Studies 15 (1995) 253.

13 Cf. Zdenek Kühn, 'Making Constitutionalism Horizontal: Three Different Central European Strategies' in: András Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International Publishing 2005), 217–240.

14 Sadurski (n. 1), 8–9.

the Constitutional Tribunal.[15] '*The Constitutional Tribunal was trying to play the role of a sovereign, i.e. to break the principle of the sovereignty of the people, the principle of democratic state of law (the rule of law), and the principle of balance of power; these are all constitutional principles*,' claimed J. Kaczyński, the leader of PiS,[16] in line with his view that the law and legal argumentation were only a continuation of politics by other means.

Politicians realized that if the constitutional courts were instrumental in the liberal reforms of the 1990s, they could also be used in the illiberal reforms of the 2010s and 2020s. This danger is related to the fact that the success and strength of the legal transitions of the 1990s and the early 2000s were quite dubious. While the books of the old era were discarded, laws were repealed and new institutions were created, we should not underestimate the continuing strength of the old values, principles, and legal thought in general. After all, the authors of those discarded books remained in academia, even as they seemingly began to produce new writings virtually overnight. Along with the academics, the entire legal personnel of the old era survived the systemic change, and this contributed to the persistence of the spirit of the old legal culture. Even though much of the 'other Europe' became part of the European Union, it would be too simplistic to assume that the region became part of the Western European political and legal landscape with the fall of the Berlin Wall.[17] The deepest layers of the old legal culture are inherently resistant to sudden change. Moreover, the most persistent features of the legal culture are often those associated with the

15 Tomasz Tadeusz Koncewicz, 'The Polish Constitutional Crisis and "Politics of Paranoia"', VerfBlog, 3.11.2016, https://verfassungsblog.de/the-polish-constitutional-crisis-and-politics-of-paranoia/.

16 Dawid Bunikowski, 'The Crisis in Poland, Schmittian Questions, and Kaczyński's Political and Legal Philosophy', 18.10.2017, 10. Available at SSRN: https://ssrn.com/abstract=3055443.

17 Alas, the region disappeared from the scrutiny of comparative scholarship. The old 'Socialist Legal Family', which most comparative law treatises had posited, was seemingly replaced by a legal black-hole. Cf. Rafal Mańko, 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective', European L. J. 11 (2005) 527, 547–548, discussing the fact that the most recent edition of Zweigert and Kötz' treatise on comparative law simply discarded the Socialist Legal Family 'without writing anything in their place'. For more recent elaboration by the same author, see Rafal Mańko, 'Survival of the socialist legal tradition? A Polish perspective', Comparative LR 4 (2014), 1. Some more recent treatises on comparative law started to take into account Eastern European legal culture again as a distinct entity. See Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press 2019), 533–553, discussing at length specific features of Central and Eastern European legal systems.

region's illiberal and authoritarian pre-communist past, although they were modified during the socialist era.[18]

II. Illiberal Revolution and the Abuse of Constitutional Courts

The imported notion of judicial activism seems to be slowly dying out in the region. As I mentioned at the beginning, during the socialist period, the region's idea of constitutional courts – if they existed at all (Poland, Hungary) – was the idea of self-restrained constitutional courts, with crude politics taking precedence over so-called socialist legality. This idea is slowly regaining ground in the region. By contrast, the revival of activist constitutional courts in the 1990s could be seen as a short-term deviation from the established rule. Last but not least, some constitutional courts have lost much of their operational autonomy because they have been captured by the new elites willing to reshape the political system.

The constitutional tribunal could be captured in many ways. One extreme possibility is blatant illegality, i. e. violation of the rules of election or appointment of judges. In Poland at the initial stage of the Constitutional Tribunal's crisis, the tribunal's decisions were openly disregarded until the control over the Tribunal was achieved through questionable judicial appointments and open violation of the electoral process in 2015 and 2016. This path to a captured tribunal is the easiest to deal with legally. That is why the European Court of Human Rights can question the composition of the Polish Constitutional Tribunal and its character of being 'a tribunal established by law' within the meaning of Article 6 of the Convention.[19]

In yet other countries, the constitutional court fell under the control of illiberal majorities peacefully and lawfully, due to the long-term dominance of one political party in the Parliament, quite often combined with packing

18 Ironically, the most solid democratic traditions in Central Europe before World War II are those from the old Austro-Hungarian Empire (1867–1918). See Martin Putna, *Obrazy z kulturních dějin Střední Evropy* [Images from the cultural history of Central Europe] (Prague: Vyšehrad 2018) (author, a renowned Czech cultural historian, travels in his literary, political and historical wanderings throughout the wide territory of the former Austro-Hungarian Empire, from Bohemia, Moravia and Silesia through Austria, Hungary to Transylvania, Croatia, Dalmatia, Galicia, etc.).

19 For a detailed analysis of the Polish development after 2015, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

the court, i.e. expanding the number of judges and appointing friendly ones to the bench (Russia, since the mid-1990s; Hungary, after 2010[20]).

In fact, the composition of constitutional courts has inevitably become a political issue in many developed Western democracies too. In the Central and Eastern European region, however, this is in conflict with the ideological foundations of the 1990s, i.e. those of non-political legal reasoning. Moreover, even though Western democracies are aware of the political nature of constitutional decision-making, the need to reach a compromise and consensus on candidates effectively produces good candidates who share the basic vision of the rule of law. In short, a shared vision among Western European political elites of what makes a good lawyer will eliminate nominees who are profoundly ideological, but mediocre lawyers at best.[21]

Even in those Central European countries where constitutional courts still operate autonomously, the level of judicial activism is not comparable to what it used to be during the first two decades after the fall of the Iron Curtain. The Czech Republic could serve as an example. The reasons for the strength of the Czech constitutional system and its ultimate guardian are partly institutional and partly purely accidental. The institutional reasons lie in a unique model of judicial appointments to the constitutional court, inspired by the United States (the President appoints with the consent of the Senate). This model (especially the Senate, which has traditionally been sceptical of Czech Presidents and their attempts to expand their power) has made it difficult for populist presidents since 2003 to appoint judges of their ideology who would be subservient to the demands of those in power.[22]

But even the Czech model carries obvious risks for future development. The Czech Constitutional Court has willingly pushed itself into a role that does not belong to it – into the role of a kind of super-review court that

20 Sadurski (n. 1), 10–13.

21 However, the fact that justices of different ideologies share a basic consensus on legal reasoning and basic constitutional principles can also be seen by critics as further evidence that they are ultimately part of the same establishment or 'Deep State'.

22 On the Czech system, see Zdenek Kühn, 'The Czech Constitutional Court in times of populism. From judicial activism to judicial self-restraint' in: Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (London: Routledge 2021). Cf. Hubert Smékal, Jaroslav Benákand Ladislav Vyhnánek, 'Through Selective Activism towards Greater Resilience: The Czech Constitutional Court's Interventions into High Politics in the Age of Populism', International Journal of Human Rights 26 (2022), 1230–1251.

ultimately assesses the correctness and fairness of each and every individual decision made by ordinary courts (via constitutional complaint). The Court did its best to centralize the constitutional review of the legislation and to limit the power of the ordinary courts in this respect. The Court insisted that it alone had the power to review the constitutionality of the legislation.[23] In doing so, the Court deprived the general judiciary of its most effective power to resist any legislation that is in sharp conflict with the rule of law.

It is unlikely that Central and Eastern European constitutional courts will be completely abolished in the foreseeable future. The effects of the global rise of constitutional adjudication still control the mainstream political rhetoric. New authoritarians do not want to be seen as autocrats running wild. Today's authoritarians are more resourceful in this regard than were pre-1989 communist rulers. Indeed, they can also make good use of the constitutional judiciary. By controlling the constitutional court, they can shift the constitutional system even without the power to amend the constitution. You do not need the legislative supermajority to change the constitution if you control the ultimate interpreter of the constitution.

The captured court can become a welcome tool for politicians in power in their efforts to dismantle constitutional guarantees and structures. M. Kovalčík calls this 'instrumental abuse of constitutional courts', which can include various techniques by which populists can use the constitutional court as an instrument to gain control over the entire legal system. These techniques include the 'governing, do not disturb' technique (not annulling laws that are by all means unconstitutional); the legitimation technique, through which populists justify their actions (e.g. the tribunal annuls the laws from the old era as unconstitutional, thus providing the populists with an excuse to enact a new and controversial law); the extra-legal technique, which involves using the authority of judges in the media etc.[24]

When the Polish Constitutional Tribunal came under the full control of the Law and Justice Party (PiS) in December 2016 (I repeat, this was done by very questionable means, most likely in direct conflict with the Constitution and the Constitutional Tribunal Act), the Tribunal immediately began to side with the ruling party. The new Chief Justice, who controls the

23 Cf., for a broader regional trend in the same direction, Sadurski (n. 1), 35.

24 Michal Kovalčík, 'The Instrumental Abuse of Constitutional Courts: How Populists can Use Constitutional Courts against the Opposition', International Journal of Human Rights 26 (2022), 1160–1180.

allocation of cases, prevented the judges elected by the previous parliamentary majority from deciding important cases. Interestingly, the PiS deputies challenged several laws as unconstitutional (although they could have easily repealed the laws themselves, given their majority in the Parliament), and the Tribunal quickly provided the answer the PiS needed.[25]

The Hungarian ruling party, on the other hand, does not need this kind of assistance, because since 2010 (with a brief pause) it has enjoyed a qualified supermajority in the Parliament, which is necessary to adopt or to amend a new Constitution and to select the personnel of all important political institutions. The actual practice of the Hungarian Constitutional Court, after it became fully dominated by people close to the ruling Fidesz party, is self-restraint in relation to the legislature. From an illiberal perspective, any law passed by the ruling majority in the Parliament can never be unconstitutional, because that is what the people represented by the deputies actually want. Legal arguments cannot be used to assess the constitutionality of legislation, because this could easily turn into supplementing one (legitimate) political opinion with another (illegitimate) one, made by unelected judges.[26]

In yet another role, constitutional courts could also protect the national constitutional values and principles from encroachment by supranational courts. After all, it is much more stylish for a national constitutional court defending national constitutional identity to reject rulings of the Strasbourg or Luxembourg Courts than for a national government to do the same.[27] The steps taken by the Polish Constitutional Tribunal since January 2017 are a certain variation, or rather a caricature, of the same.[28]

25 See W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule of Law (2018), 1–22 (explaining how the Tribunal started to protect the government from laws enacted long before PiS took power).

26 Sadurski (n. 1), 12.

27 For a nice example of Russia and its complex relations with the European Court of Human Rights Alexei Trochev, 'The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State' in: Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge: Cambridge University Press 2017), 125–149.

28 See the judgments of the Polish Constitutional Tribunal of 7 October 2021, K 3/21 (proclaiming judgments of the EU Court of Justice ultra vires), and of 24 November 2021, K 6/21 (doing the same with regards judgments of the European Court of Human Rights).

Finally, there is another danger. The captured constitutional court could eliminate any threat to the new political regime from the ordinary judiciary, especially if it is equipped with the power to review the decisions of the ordinary courts. The Constitutional Court could provide a welcome means of controlling the decentralized judicial decision-making of the ordinary (general) courts within a single body composed of a few judges who have been ideologically vetted through political appointments (as opposed to the much less ideologically predictable ranks of ordinary judges).

III. The Struggle for the Autonomous Role of Ordinary Judges to Promote Constitutionalism

The new Hungarian Constitution of 2011 introduced a long-awaited constitutional complaint against decisions of the ordinary courts. Individual constitutional complaints replaced the previous *actio popularis*, which allowed virtually anyone to challenge any Hungarian law (but not a court decision).[29]

On the one hand, this change seems positive, as it brings Hungarian law into line with the mainstream position in Central Europe (constitutional complaints against decisions of the ordinary courts exist in Germany, Czechia, Slovakia, Slovenia, etc.). On the other hand, this reform could also serve other purposes. First, it could give a meaningful purpose to the captured Constitutional Court, which had lost its primary mission — to be a real check on the legislature and effectively review the constitutionality of legislation. More importantly, it could also provide a much-needed check on the decentralized judicial decision-making of the ordinary courts. This control would be exercised within a single court composed of judges who have undergone ideological control in the form of political elections in Parliament.

The Hungarian example is one of the many similar trends empowering constitutional judiciary and disempowering the ordinary courts. Since the 1990s, the institutional settings of the Central European constitutional systems have made it very difficult for ordinary courts to uphold the rule of law. Over the past decades, constitutional courts in the region have done

29 Fruzsina Gárdos-Oros, 'The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint', Acta Juridica Hungarica 53 (2012), 302–315.

their best to centralize the constitutional review of legislation and to limit the power of ordinary courts in this regard. The constitutional courts insisted that they alone should have the power to review the constitutionality of legislation (compliance with both the Constitution and international human rights treaties).[30] In doing so, they deprived the general judiciary of its most effective power to resist any legislation that would be in sharp conflict with the rule of law.

This is no doubt due to a widespread feeling that ordinary judges are not competent to elaborate complex constitutional doctrines. However, this exclusionary approach may further alienate ordinary judges and increase their reluctance to cooperate and explain constitutionalism.

In Central Europe, one may too often find the idea that ordinary judges should not engage in constitutional reasoning, that they are incapable of taking constitutional rights and values seriously, and that the constitutional court is not a 'court' but a special and unique body outside the judicial power.[31] Under such conditions, centralized constitutional review runs a clear risk of being 'over-centralized'; constitutionalism is only a vague and in practice selectively applied idea (only when the case reaches the constitutional court). If the central role of constitutional courts in building the rule of law is overemphasized, ordinary courts have a strong tendency to disappear from the story. While the nature of centralized post-communist constitutional courts is exclusive (they are the main forum for constitutional arguments, they and only they can annul the law and formal annulment, by which the law ceases to be valid, as opposed to setting law aside, is something that matters a lot in Central Europe), their argumentation must include the ordinary courts, and the ordinary courts must be invited to engage in the rule of law building.

The complete centralization of the review of the constitutionality of laws (including the review of their compliance with international human rights treaties), contrary to the prevailing view in the 1990s and early 2000s, may

30 Sadurski (n. 1), 35 ff.

31 For this view in Poland Walerian Sanetra, 'W sprawie związania sądówpowszechnie obowiązującą wykładnią ustaw' [On the impact on the ordinary courts of the generally binding interpretation of statutes], Przegląd Sądowy 6 (1996), 3, at 8–9, arguing that the Constitutional Tribunal is not a court and, therefore, the judges cannot be bound by the decision of such a non-judicial body. For the view that after the enactment of the new Constitution of 1997 the Tribunal is clearly a 'court' see Lech Garlicki, 'Trybunał Konstytucyjny a sądownictwo' [The Constitutional Tribunal and the Judiciary], Przegląd Sądowy 8 (1998), 3, at 4.

actually weaken the rule of law and the protection of rights. For example, by monopolizing the review of the conformity of laws with human rights treaties, the Czech Constitutional Court has paradoxically weakened the possibilities of defending democracy in the future.[32]

Against this background, the Polish regular judiciary has always seemed more open to the protection of constitutionalism and the rule of law. Since the Constitutional Tribunal cannot review the constitutionality of the decisions of the ordinary courts, the Polish ordinary courts, and especially the higher courts of the ordinary judiciary (the Supreme Court and the Supreme Administrative Court), took their role in the protection of individual rights very seriously. They developed a new constitutional doctrine, they practiced horizontal constitutionalism,[33] and they dealt with sophisticated issues of intertemporal effects of law or methodology of individual rights. The Supreme Court, for example, dealt extensively with the new 1997 Constitution in more than 60 decisions in less than two years after the Constitution came into force.[34] The reasoning of Polish courts is often instrumental and pragmatic.

This is also an explanation of why the Polish ruling elites turned against the Polish ordinary judiciary in general and the Supreme Court in particular in 2017, immediately after gaining full control over the Constitutional Tribunal. Faced with the independent actions of the Supreme Court in early 2017, the new ruling elites were well aware that without control over the Supreme Court (and subsequently the lower courts), they would not have full control over the judiciary. Mere control of the Constitutional Tribunal (which, unlike in the Czech Republic or Hungary, does not have the power to overturn decisions of ordinary courts) is not enough.

32 In Czechia see judgment of the Constitutional Court of 25 June 2002, No. Pl. ÚS 36/01, which – despite the clear wording of the Constitution – found out that the 'constitutional order' includes international treaties on 'human rights' – thus depriving ordinary courts the power to set aside the domestic legislation which is in conflict with such an international treaty. This judgment, too, is intertwined with scepticism towards ordinary courts and their ability to protect international commitments against the legislature.

33 For a long list of these decisions Anna Wyrozumska, 'Direct Application of the Polish Constitution and International Treaties to Private Conduct', Polish Yearbook of International Law 25 (2001), 5.

34 Procházka (n. 3), at 113.

IV. Empowering Ordinary Courts as a Rule of Law Counterrevolution

This brings us to the central question of this paper. What chance do ordinary courts have of defending the rule of law against the rising authoritarian regime, especially when it controls the constitutional tribunal?

First, we could recall that in the 1990s, the ordinary judiciary in the region initially resisted the pressure of constitutional courts aimed at truly protecting fundamental rights and the Constitution.[35] It could be expected that three decades after the transition to democracy, this attitude of ordinary judges has already changed and many of them (most likely the majority) have actually internalized the principles of the rule of law. In other words, the judiciary has become part of the democratic political system and protects its values. To give an example, at least some of the Polish ordinary judges after December 2016 (when the Constitutional Tribunal was captured by the new political elite) were ready to enforce the principles of the rule of law instead of the incapacitated Constitutional Tribunal.[36]

However, we must also bear in mind that the judiciaries of Central and Eastern Europe are a part of the traditional continental model. Judges in the continental model of civil law resemble bureaucracy in terms of style, thinking and decision-making. They embrace a formalist and bureaucratic model of law, including its characteristic style of judicial reasoning. For a judge-bureaucrat, any appeal to a defence of the rule of law and its basic principles has little charm. Furthermore, because of the hierarchical nature of continental judiciaries, there is also a way how to get ordinary judges under control. What is needed in this regard is simply to replace court presidents with loyal jurists who will do what is expected of them. The courts' presidents have control over the allocation of cases and have many 'sticks and carrots" at their disposal throughout the court. All in all, the power to appoint the president of a court amounts to (sort of) control over the entire court.[37]

35 In the 1990s and early 2000s, this occasionally turned into clashes with constitutional courts. For more on this, see Kühn (n. 6), chapter 5. Cynically speaking, we could say that in the 1990s the ordinary judges also protected the system, even if it was the old and failed system of the communist power.

36 See Sadurski (n. 19), 96–131.

37 In fact, this was the second step taken by the Polish PiS party after it assumed control over the Constitutional Tribunal. The so-called 'judicial reform' they introduced comprised the replacement of a significant number of the Polish general courts' presidents by the Minister of Justice. The Minister of Justice replaced 149 out of the

Despite these setbacks, it is clear that the existence of an independent judiciary (against the backdrop of the captured Constitutional Court) provides some important channels for decentralized judicial review and more robust protection of the rule of law. We cannot expect a full-scale defence of the rule of law, after all, it is neither necessary nor desirable (and the nature of the legal process before the ordinary courts does not allow it). The case-by-case approach of the ordinary courts (responding to legal problems presented by real cases) would rather enable small incremental advances. Their formalistic conception of law and emphasis on legalism gives ordinary judges some important advantages: for example, their work appears non-political, which gives them more chances to block formal violations of the rule of law. This is the essence of 'defensive legalism,' which emphasizes the formal legal criteria for protecting key principles of the rule of law (as opposed to the more substantive approaches of the constitutional judiciary, which could be more easily accused of being visibly politically biased).[38]

Ordinary courts have several important ways of protecting the rule of law. The first principle is called the principle of constitutionally conforming interpretation. This principle, which originated in Germany,[39] is well known in Central Europe. By its very nature, this principle cannot be centralized only in the constitutional tribunals, and it provides important avenues for ordinary judges to engage in debates about the proper meaning

total number of 730 presidents and vice-presidents of the courts over a period of six months. As explained by the Polish Association of judges, *Iustitia*, for instance, the court's president could influence his or her judges by not extending deadlines for drafting judgments and, in case of a subsequent delay, he/she can initiate disciplinary action against the given judge. See Iustitia: *The Response to the White Paper Compendium on the Reforms of the Polish Justice System*, available at https://www.iustitia.pl/informacje/2172-re-%20sponse-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-repub-%20lic-of-poland-to-the-european-commission.

38 Cf. interesting remarks Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries', Eur. Pub. L. 14 (2008), 99–124.

39 Cf. Germany, where it is referred to as the principle of the constitutionally conforming interpretation (*Verfassungskonforme Auslegung*). Peter Sachs (ed.), *Grundgesetz: Kommentar* (München: C.H.Beck 1996), 61–62. The Federal Constitutional Court held that '*if a rule allows several readings, but only one reading leads to a constitutionally permissible construction, the reading consistent with the Basic Law is obligatory.*' BVerfGE 49, 148 (157). In Germany, the first decision which established this doctrine was BVerfGE 2, 266 (282), quoted in Sachs at 61, n. 61.

of constitutional principles (and, if necessary, to disobey overly politically driven opinions of their domestic constitutional courts). As a leading expert on comparative constitutionalism has noted, bringing interpretation into line with fundamental rights is often much more durable and far-reaching than simply striking down the law as unconstitutional.[40] This is for the simple reason that interpretation (unlike annulment) would often go virtually unnoticed by other important political actors.

The second is the power of the ordinary courts to protect international treaties in general and human rights treaties in particular. The ordinary court cannot annul national legislation because it is in conflict with an international treaty – but it can set aside the legislation in an individual case. Setting aside is a more subtle instrument than its formal derogation (annulment). Depending on the circumstances, it may mean only partial inapplicability of legal regulation to certain types of situations, with the result that the legal regulation is fully applied to other types of situations.

Third, there is the direct effect of EU law and its primacy over national law. In practical terms, what matters most for the purposes of this paper is that when implementing EU law, the national authorities of the Member States, including the courts, are bound by EU law to respect EU law, including the principles of the rule of law and (EU) fundamental rights.[41] This includes the obligation to interpret national law in conformity with EU law[42] and to set aside national law which is contrary to EU law. In declaring

40 András Sajó, 'Constitutional Adjudication in Light of Discourse Theory', Cardozo LR 17 (1995), 1193, at 1208 ('*constitutional tribunals have more of a chance to provide lasting and unsupervised determinations of the law by interpreting the law rather than voiding it.*'). Although Sajó is describing constitutional tribunals, this argument is even stronger with respect to ordinary judiciary.

41 As perfectly explained already by Francis Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', ELRev 26 (2001), 331, at 333.

42 Judgment of the Court (Third Chamber) of 13 July 1989, case 5/88, *Wachauf* ('*Since* [the requirements of the protection of fundamental rights in then Community law] *are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.*'). The Court followed the advice of its Advocate General Sir Francis Jacobs who reasoned that '[a]*lthough the Court's case-law has hitherto been concerned with respect for property rights by the Community legislator itself, the same principles must in my view apply to the implementation of Community law by the Member States, since it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator.*' AG opinion, para. 22.

these principles, the Court of Justice has associated itself with ordinary national courts, rather than constitutional courts, in the task of making European law supreme.[43]

The rule of interpretation consistent with EU law, including EU fundamental rights and principles, is one of the key factors of European constitutionalism. It can be seen as a prerequisite for any rational system of judicial review. However, this rule also involves a shift of power within national judicial systems. It strengthens the power of the Court of Justice, which could uniformly impose its version of fundamental rights and the principles of separation of powers on national ordinary courts. By interpreting European rules against the background of their national implementation, the Court of Justice considerably extends the impact of its case law throughout the national legal systems.

Illiberal regimes are very sceptical about the nature of law; they see law as pure politics hidden behind the veil of legalistic jargon. But could the opposite be true? Is the law really autonomous; does the constitution really constrain the government? Or is it a mere sham, devoid of meaning in itself and entirely dependent on its interpreter? I suspect that the early, overtly activist nature of the jurisprudence of constitutional courts in Central Eastern Europe actually justified and legitimized the fears of illiberal thinkers that constitutional law could be abused for political purposes. It also showed illiberal leaders a possible way to strengthen and legalize their cause simply by taking over the personnel of the tribunal that says what the constitution is.

However, if we should give up any hope that the law is capable of limiting the government, this will open the floodgates for unlimited government. Illiberal democracy can easily turn into just another model of an authoritarian regime. That would bring Central Eastern Europe back to the political landscape the region abandoned three decades ago.

In illiberal regimes, ordinary courts could operate in a subversive manner. The answer to the new authoritarians is to promote the value of general rules and their ability to control the ruling power, but to do so — as far as possible — in an impartial and non-political manner (which does not exclude far-reaching political consequences of judicial decisions based on

43 Case 106/77 *Simmenthal*, para. 26 ('[N]*ational courts must protect rights conferred by provisions of the Community legal order and that it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of community rules*').

legalistic reasoning). Judicial decision-making should follow formal rules and principles and not be driven by free value judgments, emphasizing judicial self-restraint (when legitimate political options to be decided by politicians are at stake) and keeping the judiciary out of pure politics. Courts should let politicians rule; courts should intervene only when the formal rules have been violated or when established case law or constitutional dogmatics require it.

I am well aware that this may sound naive. My task is not to eliminate judicial discretion altogether, but rather to reduce the level of judicial activism. A certain amount of judicial discretion is inevitable. The point is that it should not eliminate politics and the ability of politicians to govern.

The ordinary judiciary, with its formalities and seemingly non-political nature, can provide an important impetus for strengthening the rule of law. Moreover, it is not a few judges of constitutional courts, but thousands of judges of ordinary courts who cannot be easily controlled by the ruling power; the complete control of the entire judiciary is practically possible only in the most extreme versions of authoritarian regimes or in a totalitarian society.[44]

Therefore, a system of centralized constitutional review with some decentralized features seems preferable because it makes the rule of law and constitutionalism much more robust and viable at the same time. All judges — and not just those in the constitutional courts — are there to protect constitutional rules and principles, if necessary disregarding the fact that the decision will upset important political actors. If ordinary judges were involved in this task, the rule of law and constitutionalism would be much stronger than if the Constitutional Court tried to perform the same task as the 'only fighter on the battlefield'.

Authoritarians try to fill the general and abstract language of the constitution with their values. Liberal constitutionalism must reject this. But the goal of liberals should not be to do the same thing in reverse, to fill the constitution with neoliberal economic principles or identity politics. Trying to replace the political with the legal should be a liberal counter-revolution.

44 Peter H. Solomon, 'Courts and Judges in Authoritarian Regimes', World Politics 60 (2007), 122–145, especially 125 ff.

V. Conclusions

In sum, dangerous trends of democratic backsliding in the Eastern European region have also been facilitated by the drive toward overly powerful constitutional courts. Empowering constitutional courts and centralizing judicial review of legislation often means disempowering or weakening the power of ordinary (general) courts. In the first decade of post-communist transformation, powerful constitutional courts could have accelerated the transition to a new conception of law and constitutionalism. What made sense in the first decade of transformation is now becoming risky. Just as the constitutional courts were used by the architects of the great transformation of the 1990s, they could be used by the architects of the transition to authoritarianism.

Constitutional courts in the region claimed exclusive authority to review the constitutionality of legislation. In the 1990s, many Western observers applauded this trend because it also meant fighting untrustworthy post-communist judges and problematic legal scholars. Constitutional courts became the champions of liberalism and new constitutionalism. Because they were vested with very broad powers, they also had the potential to transform the entire legal system and push ordinary judges toward the ideals of the rule of law.

But the authoritarians and illiberal politicians noticed the opportunities which centralized judicial review provided for the illiberal 'counterrevolution'. Ordinary courts devoid of any political power, as known in the countries of Eastern Bloc by the 1980s, could thus be revived through this kind of 'over-centralization' of constitutional courts. Since it is difficult to control the entire judiciary (unless we are in a pure totalitarian state), the new illiberal politicians find it tempting to take over the personnel of the constitutional court — and to give the captured court even more power.

That is why the empowerment of the ordinary judiciary in Central Europe is becoming an essential task of our time. We need to take seriously the power of ordinary judges to set aside the legislation in conflict with EU law (without any advice or assistance from the domestic constitutional court). Moreover, the ordinary courts must play an important role in promoting international treaties, which take precedence over domestic law (the power of ordinary courts includes both harmonizing interpretations, such as interpretation of domestic law friendly to international law, and setting aside domestic law in conflict with international law). Last but not least, the

power of interpretation to harmonize the law with the Constitution is also an important tool in the work of ordinary judges.

It is not just to keep constitutionalism and the rule of law strong. There is another reason why decentralizing judicial review is necessary to make the rule of law viable. If the opposition were to win elections in Hungary or Poland, the posts held by the former regime in institutions such as constitutional courts could become the last strongholds of the old regime and effectively block the new ruling elites and their reforms. In this way, we will see the mirror image of what happened after the fall of communism, when these were ordinary judges who were some of the last strongholds of the old legal thought and culture.