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## The Rule of Law in Hungary: Its Perceptions and Treatment by the Political Elites (1990–2010)

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## Abstract

This paper assesses the perceptions and treatment of the rule of law by the Hungarian political elites between 1990 and 2010. An analysis based on the National Assembly records found that members of the parliament mostly regard the rule of law as a limitation on the government and the governing majority. Based on this perception, this paper examines how the governing parties treated the two main limitations: the qualified (two-third) majority requirements for passing legislation and the Constitutional Court. Declining compliance can be pointed out in connection with both institutions. This may be due to the fact that with passing time, the institutions embodying the rule of law seem to be losing their legitimacy in Hungary. This tendency has culminated in the post-2010 government, which has been accused of having authoritarian tendencies.

## 1. Introduction

Nowadays, rule of law is one of the catchphrases in the field of legal and political studies. At the same time, it is at least as contested an ideal as democracy. It has also played a huge role in the transitions of post-communist countries between 1989 and 1992. Especially in Hungary, the change from a socialist dictatorship to a democratic market economy was considered as a revolution under the rule of law. It is therefore important to consider more deeply what important actors may think about the concept and how they treat it in practice. For this purpose, this paper attempts to assess the perceived meaning and treatment of the rule of law by the Hungarian political elites between 1990 and 2010.

This period is significant because the rule of law in Hungary is considered to have been under siege by the government since 2010.<sup>1</sup> However, in order to understand the present situation, it is necessary to examine how it arose. Otherwise, the recent neglect of the rule of law could be simplistically blamed only on the “undemocratic” character of the post-2010 governing party. Conversely, this paper suggests that there is some continuity between the pre- and post-2010 regimes. It argues that the

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whole political elite lacked respect towards, or even disliked, the rule of law. This disrespect became increasingly serious prior to 2010. At the same time, the elites relied on legal rules and legalistic checks and balances, instead of negotiation and consensus seeking.

The political elites here are identified with the parliamentary parties and members of parliament. There are three reasons for this simplification. First, it is usually followed by elite studies,<sup>2</sup> due precisely to the accessible nature of parliaments. Second, top bureaucrats are often parliamentary members, and they are held accountable by the parliament from time to time. Third, in the Hungarian case, the elites have been very stable: from 1990 until 2010, the number of parties was continuously decreasing, but the largest parties have kept their influence.

The structure of this paper is as follows. First, Section 2 summarizes the main discourses on the rule of law in social sciences. Based on this summary, Section 3 examines the senses members of parliament use when discussing the rule of law in their legislative negotiations. The analysis shows that the opposition representatives bring up the concept most often and they talk about it in the context of checks and balances and the limits of the government.

Based on this analysis, Sections 4 attempts to assess the degree to which parliamentary representatives actually respect checks and balances. For this purpose, this paper concentrates on two institutions which counterbalance the parliamentary majority. First, qualified majority laws (or “two-third laws”: legislative acts requiring two-third majority) which provide considerable legislative power to the opposition. Section 4.1 analyzes first the reason for the creation of this institution and second the actual effects of qualified majority rules. It is shown that the function of the qualified majority defined by the Constitutional Court was not and could not be fulfilled.

The second counterbalance is the Constitutional Court. In order to understand the degree to which the Court has been respected, Section 4.2 examines the parliament’s reactions to its decisions on legislative inactivity. These show a gradual decline in the authority of the Court.

Finally, Section 5 offers the conclusion.

## **2. Discourses on the Rule of Law**

Rule of law is a concept with a long history including many changes and various local variations<sup>3</sup>; however, here, the author can only consider its contemporary interpretations. These interpretations can be categorized based on the branches of social science which use the concept. We can at least consider legal theory (jurisprudence), economics, and political science.

Political science tends to refer to the rule of law in a way similar to the way it is used in everyday language<sup>4</sup>: as an aspect of security. One example is White (2013: 24), who takes rule of law to be a “shared commitment to following the rules”. Here, Law-enforcing institutions like the police and military may have a more prominent role than in the jurisprudential understanding. In the eyes of

lawyers, the rule of law is not so much about enforcing the law as limiting the state.

Concepts of rule of law are colored by a variety of normative preferences. Economics has a different preference: it is concerned about economic growth and economic development, thus, it understands the rule of law in connection with the economy. If the judiciary is powerful, and economic laws are impartial, then investors' property rights will be protected, reducing the cost of economic transactions. In this way, a stable legal order can contribute to economic development (Trubek-Santos 2006).

Legal studies unsurprisingly address the concept the most. Here there is already much debate over the possible different meanings. A formal or "thin" interpretation of rule of law refers to the clarity, consistency and stability of the legal rules. Open and clear procedural rules also belong to this requirement. For example, according to Fuller (1964), clearly understandable and publicized laws are the most important elements.

A different understanding of rule of law takes a further step and emphasizes the importance of constitutionalism. Constitutionalism in a broad sense means that the basic laws bind not only the society, but also the legislators: the political elites themselves. For example, according to Dicey (1885: 202), rule of law expresses the "supremacy of law as opposed to arbitrary power, and excluding the existence of arbitrariness on the part of the government". According to McCubbins, Rodriguez and Weingast (2009: 28–29), "one key element of rule of law is the constitution - or, more accurately, a scheme of constitutionalism", which means the judicial review of political and administrative decisions and other means of limiting arbitrary political power.

Several authors, however, go beyond instrumental definitions and argue for certain internal values in the law. These values refer to a substantial/material or thick meaning, which includes some requirements for the contents of the legal rules. These requirements can be based on the principles of justice (like Rawls 1971) or on certain human or fundamental rights. According to the International Commission of Jurists (1959), rule of law expresses the "equal treatment of all people before the law, fairness... and basic human rights" (quoted by Weeramantry 2000: 42–43). According to the American Bar Association (2008), rule of law covers many elements, including self-government, fair and impartially enforced laws and legal ethics.

The last step to broaden the meaning of rule of law is to understand it as the perfection of democracy. This connection of democracy and the rule of law is also debated (Maravall and Przeworski 2003). In any case, if democracy is regarded in procedural meaning as the rule of majority as a result of free and fair elections, then rule of law can be taken to be the counter-majoritarian institutions of constitutionalism and judiciary. It is also possible to argue that rule of law provides the element of liberalism of the liberal democracy. If democracy is understood as "the equal dignity of every individual" as Dworkin (1986) states, then rule of law is an integral part of democracy.

Table 1 summarizes the main scholarly discussions of the rule of law:

**Table 1 Main Interpretations of the Rule of Law**

<b>Branch of science</b>	<b>Interpretation of the rule of law</b>	<b>Examples from the literature</b>
Jurisprudence	<b>Consistency of legal rules</b>	Fuller (1964), Raz (1977)
	<b>Limited government</b>	Dicey (1885)
	<b>Protection of fundamental rights</b>	ICJ (1959), ABA (2008)
	<b>Justice, fairness</b>	Rawls (1971)
	<b>Democracy</b>	Dworkin (1986)
Economics	<b>Protection of property rights for economic development</b>	Trubek-Santos (2006)
Political science	<b>Security and compliance</b>	UN HCHR (2006), Sepe-White (2013)

Source: author's own summary.

### **3. The Perceptions of Hungarian National Assembly Members concerning Rule of Law (1994–2010)**

Although the concepts discussed above were developed by different branches of social science, they cover everyday interpretations of rule of law. Thus, based on these interpretations, it is possible to examine how a certain group of people regards it. This paper concentrates on the perceptions of the rule of law of the Hungarian political elites before 2010, attempting to assess their perception on rule of law by syntactically analyzing the records of the National Assembly sessions, and identifying the contexts in which the rule of law is mentioned by the representatives. As will be seen, the rule of law is mostly mentioned in the context of checks and balances and the limits of the government.

Table 2 shows the results of the enquiry, covering the years between 1994 and 2010. It begins in 1994 because earlier records were not available online, and ends at 2010, because this paper's scope is only until the recent, post-2010 government. In these years, the specific phrase "the rule of law" was referred to or mentioned more than 1600 times by the members of the National Assembly.<sup>5</sup> To see the possible differences between the views of the governing and opposition parties, their numbers were calculated separately. The possible contexts are based on the review in Section 2. The rule of law was mentioned as an element of democracy, as the limits of the government/the state and the governing parties, in relation with human rights, in relation with the justice and fairness of the legal rules, in relation with property rights, in relation with compliance and security, and in other contexts which cannot be assigned to any of the above categories. These interpretations are not logically exclusive, but they give us insight into what members of parliament may be thinking when they talk about the rule of law.

These data suggest the relative prominence of some views of the rule of law, discussed here in

**Table 2 In What Contexts Do the Members of Parliament Talk about the Rule of Law during the Sessions? Aggregated Numbers of References to the Rule of Law (1994–2010)**

	By governing parties	By opposition parties	Total
<b>Rule of law and democracy</b>	75	126	201
<b>Rule of law and the limits of government</b>	149	657	806
<b>Rule of law and human rights</b>	69	122	191
<b>Rule of law as justice</b>	17	41	58
<b>Rule of law and property rights</b>	7	21	28
<b>Rule of law and security</b>	98	99	197
<b>Other contexts</b>	79	87	166

Source: author's own calculations based on the records of the Hungarian National Assembly

order of decreasing frequency. First, in almost 50% of the cases, references to the rule of law are associated with the limits of the government and the governing majority. Typical sentences expressing this view<sup>6</sup> are: “the fact that two Constitutional Court justices have not yet been elected because of the sabotage of the government shows that the governing coalition has difficulty with adhering to the *limits imposed by the rule of law*,”<sup>7</sup> or “the bill has to provide *guarantees* to everyone, this is a basic *condition of the rule of law*”<sup>8</sup>.

Second, the rule of law is often mentioned together with democracy. Third, the rule of law is relatively often mentioned together with the demand for security and compliance. This interpretation is often changing depending on whether the political left or the political right is governing. Between 1994 and 1998, the right-wing opposition parties associated the rule of law with security and compliance more than 50 times (in contrast with the government's 10 times). Between 1998 and 2002, when the moderate right-wing Alliance of Young Democrats was the governing party, they referred to this context more frequently. One example is this sentence: “the purpose of the government is creating security for the citizens, restoring public trust, protecting peace and strengthening *citizens' trust in the rule of law*”<sup>9</sup>. From 2002 until 2010, under left-wing governments, the rule of law as compliance and security was seldom mentioned. Only at the time of the 2002 summer demonstration and the 2006 autumn protests<sup>10</sup> did the governing parties mention rule of law as security, when blaming the opposition of supporting criminal actions.

Fourth, human rights or fundamental rights are also often mentioned in connection with the rule of law: “rule of law shall protect personal data”<sup>11</sup> or “[the ombudsman's report] consists those complaints which are about the harm of those fundamental *rights which should be protected by the institutions of the rule of law*”<sup>12</sup>. Human rights and limits on the government may appear to be the same thing from two different sides. However, human rights sometimes require active involvement to the society by

the government. Also, the two views emphasize different approaches. Human rights focus on the empowerment of the individual, while limiting the government concentrates on the prevention of abuses of power.

Fifth, representatives talk about the rule of law in many different contexts which were not mentioned in Section 2. Rule of law as a part of expectations is especially important, often in reference to the European Union's guides on legal harmonization in order for accession. It is also used sometimes arbitrarily to legitimize criticism of certain legal acts. For example, "it is the task of the Ministry of Justice to create a regulation which is in accordance with the internal and international expectations concerning the rule of law"<sup>13</sup>. Besides these, rule of law also appears as a part of good governance, transparency, consistency, and accountability.

Finally, the rule of law in connection to fairness and justice and the rule of law as the protection of property rights are relatively marginal.

To summarize the analysis of the parliamentary records, it can be said that the most prominent meaning or rule of law was limits on the majority and state power. This understanding of the representatives is close to some widely-accepted ideas about the rule of law, which regards it as a constraint of arbitrary power. It is not necessary, however, for this to be the case. In some other contexts, political actors regard rule of law more as a requirement for the general public to comply. For example, in Russia<sup>14</sup>, China<sup>15</sup> or pre-1990's South Korea<sup>16</sup>, political elites do (or did) not emphasize the rule of law imposing a limit on their power. On the other hand, in the Hungarian case, the widely-accepted meanings of "checks and balances" and "counter-majority rules" are prominent, and the rule of law is associated with the liberal constraints of democracy.

#### **4. The Treatment of the Rule of Law by Members of Parliament: the Cases of Qualified Majority Laws and Compliance with the Constitutional Court**

Thus, the rest of the paper will further examine the limitation of the majority and its power. Although there are many legal institutions in the Hungarian public law structure designed to protect the rights of citizens against state power (especially that of ombudsmen), here the author will focus on those which have the real decision-making power constraining the government. In other words, the focus is the rules on those actors which can make legally binding decisions. There are two of these, the qualified majority rules of the Constitution and the Constitutional Court. First, the author will discuss the situation of the qualified majority (or as it is better known, "the two-thirds majority") laws, before examining the relationship between the Parliament and the Constitutional Court regarding those decisions where the Court issues legislative obligations to the Parliament. In both cases, there are some indicators which can show the tendencies and changes in the relationship of these with members of Parliament.

#### 4.1. The Treatment of Two-third Majority Laws

The Hungarian Constitution requires the approving votes of a two-thirds majority of the members of parliament on a wide range of legislative issues<sup>17</sup>. Although the Constitutional Court interpreted and “enforced” these qualified majority rules, the rules do not make the Court the counterbalance of the government. The purpose of these rules is to empower the opposition. Nevertheless, the Court’s decisions on this issue are important in order to understand the actual function and meaning of this rule.

Usually in the case of constitutional amendments or constitution making, a qualified majority (supermajority) is required in legislative bodies. Other laws outside the constitution do not require qualified majority. In the Hungarian case however, the 1989–90 constitutional amendments require a qualified majority in a wide range of topics. In practice, these require the same majority as amending of the Constitution. Table 3 shows the range of topics requiring a two-thirds majority before 2010, while Table 4 lists the new topics which were added to these by the new Basic Law of 2012.<sup>18</sup>

Based on this compilation, there are four possible observations. First, the two-thirds majority decisions cover a very broad range of topics. Basically, with the exception of public administration (the executive branch), two-thirds majorities are required to modify the main elements of the state structure. For example, a judicial reform is not possible without a two-thirds majority. Second, much fundamental human right legislation is also subject to two-thirds laws. This circumstance possibly broadens the range of the qualified majority requirement to almost every important decision. Some Hungarian constitutional lawyers and political scientists even stated that while supermajorities are the exception in Western countries, in Hungary, it has become the basic rule (Kukorelli 1995, Körösenyi 1998). Third, the elections to several high administrative positions also require two-third majority. This brought about the possibility of leaving some of these positions unfilled if the government and the opposition cannot reach an agreement on them.

While this paper focuses on events before 2010, it is interesting to see the tendencies toward broadening the range of these laws. Thus, fourth and finally, the tendency is that under the new Basic Law — which became possible because of the two-third majority of the right-wing Alliance of Young Democrats in the 2010 elections — several governmental agencies (the executive branch), along with additional policy issues, were added to the already sizeable list.

Why do the “two-third majority laws” exist in Hungary? The two-thirds amendment rule to the Constitution can be traced back to the first written Hungarian constitutional text of 1949. This document adapted the amendment rule of the 1936 Soviet Constitution, which stated that “the Constitution of the U.S.S.R. may be amended only by decision of the Supreme Soviet of the U.S.S.R. adopted by a majority of not less than two-thirds of the votes cast in each of its Chambers” (Article 146 of the USSR Constitution, 1936).

In 1989, when the Opposition Roundtable was negotiating with the governing Communist Party



**Table 3 Decisions Requiring Qualified Majority (1990–2010)**

<b>Sovereignty:</b> joining the EU, changing the anthem and the coat of arms, declaring war or irregular states
<b>New Constitution</b>
<b>Election of the following positions:</b> president of the republic (if this fails two times, a simple majority is sufficient), justices of the Constitutional Court, ombudsmen, president of the Supreme Court, president and vice-president of the State Audit Office
<b>State organization:</b> legislative rules, ombudsmen, structure and process of the Constitutional Court, structure and process of the Supreme Audit Office, laws on the army and on military action, laws on the police and border guards, salary and status of members of parliament, rules of popular referendums, rules of the justice system, laws on local municipalities, the electoral system, laws on the public media
<b>Human rights:</b> restrictions on legal remedies, freedom of movement, personal data protection, public data transparency, freedom of religion and churches; laws on the freedom of association; laws on party finance; laws on refugees; laws on national and ethnic minorities; citizenship law; laws on strikes

Source: author's own compilation.

**Table 4 New Topics of Qualified Majority Laws after 2012**

<b>Sovereignty:</b> official awards, usage of the national flag and coat of arms
<b>Human rights:</b> creating a state agency for data transparency, legislative participation of national and ethnic minorities, creating a state agency for protecting families
<b>State organization:</b> parliamentary committees, regulatory agencies, laws on public prosecutors, rules of the State Budget Council
<b>Policy issues:</b> the protection of national wealth and the rules of responsible budget policy, laws on the supervision of financial organizations, basic rules of taxation and pensions

Source: the author's own compilation.

about constitutional changes, there was no new constitution or amendment initiated. Only the legal rules necessary for the transition were to be created. It is a common view among Hungarian political scientists that two-thirds laws are the effect of distrust between the government and the Opposition Roundtable. According to this argument, since no one knew who would win the first free elections, both sides tried to gain some legal guarantees that their rights would be respected (Körösényi 1998).

But in fact, they may rather be the creations of circumstance. One of the drafters of the constitutional amendments and a prominent figure of the Opposition Roundtable, Peter Tölgyessy (2014) stated in a conference that a legislative mistake happened. In the Constitution, a phrase appeared which stipulated that “the basic rights and the obligations of the citizens shall be regulated in a law with constitutional power”. (Constitution of the Hungarian Republic, 8. § (2) as valid at the time of the decision) This was interpreted broadly by the Constitutional Court. Since most major laws clearly affect the rights and obligations of citizens, with one of its first decisions, the Court nullified a legislative act concerning family law (Constitutional Court Decision no. 4/1990). A “law

with constitutional power” basically meant that the given law should be accepted with the same supermajority as the Constitution. In the case 4/1990, although the family law regulation was a minor one, the Court still argued that it affected the basic rights of the citizens. If this precedent had been followed, practically no law could have been accepted with a simple majority. Even the state budget and the list of ministries would have belonged to the category requiring a supermajority.

Thus, a political pact was organized between the two biggest parties, the governing right-wing Hungarian Democratic Forum and the liberal opposition Alliance of Free Democrats, to amend the Constitution (Act no. 40 of 1990) to limit the range of the two-thirds laws. After this, the topics requiring two-thirds majority legislation were exhaustively listed in the Constitution (as summarized in Tables 3 and 4).

After these events, the Constitutional Court further interpreted the requirement for a qualified majority in several decisions (Constitutional Court Decisions no. 26/1992, 4/1993, 53/1995, 1/1999, 31/2001). There are two important elements in these decisions. First, although the Court stated that “in order to provide governability”, the two-third laws only had to cover the main/major rules of the given area, if once some issue was regulated by a two-thirds law, it could no longer be modified with a normal law. Since it is arbitrary what constitutes a “major element”, in practice, two-third laws began to cover many minor rules.<sup>19</sup> Reviewing the list of parliamentary votes where two-third majority is necessary,<sup>20</sup> will show many issues which are not even listed in the Constitution, but since they affect already-accepted two-thirds laws, they also require the same two-thirds majority.

Second, the Court made an interesting observation concerning the function of this rule. The Court said the following: “two-thirds majorities are not only important due to procedural reasons. The function of this rule is to *provide a broad consensus* between the representatives”. (Constitutional Court Decision no. 5/1990) This idea is a normative expectation, but it does not address whether the consensus is actually provided or how the consensus is created.

The question to be posed here is this: is consensus reached in practice in the long term? Table 5 provides the data on the actual acceptance rates of two-thirds majority laws. Here, the time frame is based on the cabinet cycles following the changes of prime ministers. This was done because in 2009, changing the prime minister also meant a change in the structure of the governing parties, leading to a minority government by the Hungarian Socialist Party, supported from the outside by the liberal Alliance of Free Democrats. The table shows (1) the number of bills initiated in each period, (2) the number of two-thirds bills voted for by the governing majority, (3) the number of two-thirds bills voted for by the opposition parties, and (4) the amount of two-thirds majority bills which were not accepted.

The table only consist those bills which were actually put in the agenda and voted for. In the case of these types of laws, acceptance rates are actually higher than in the case of normal laws.<sup>21</sup> Obviously, if a government does not have a supermajority, it will only put a two-third majority law on agenda if (1) it discussed the law and made an agreement with the opposition beforehand, or (2) if it wants do make a

**Table 5 Legislative Data on Qualified Majority Legislation (1998–2010)**

Government cycle/ name of prime minister	Number of bills initiated	Voted for by the majority of governing parties	Voted for by most of the opposition	Not accepted (number and percentage)
1998–2002 (Orbán)	57	57	42	15 (26% )
2002–2004 (Medgyessy)	40	38	32	8 (20% )
2004–2009 (Gyurcsány)	52	48	31	22 (42% )
2009–2010 (Bajnai)	6	5	3	3 (50% )

Source: author's calculations.

policy declaration in front of the general public. The reasons of the opposition may be the same.<sup>22</sup>

Table 5 shows that government could pass two-thirds laws with worsening rates. From the failure of 26% of these bills between 1998 and 2002, the rate of failure reached almost 50% by 2009. The first years of the transition (1990–1998) are not considered here because at that time there was a necessity to come up with new laws in every area.

The growing lack of consensus is not illustrated only by qualified majority laws. Legislative data is also partly available on the acceptance of normal (50% majority) laws. These show that opposition parties have voted for normal legislation at declining rates over time (Ilonszki and Jáger 2008: 128). Thus, it can be concluded that consensus between government and opposition on certain policies has become harder and harder, until, in 2010, the cycle was broken by the supermajority government of the Young Democrats. This government completely gave up on building consensus, and created legislative acts without any kind of consensus seeking.

Did this happen because the two-third majority rules lack flexibility? If we accept that the two-third rule is simply too inflexible, there remain two problems which cannot be solved. First, in transitional Hungary, these rules were widely regarded as the local incarnation of international standards, the institutions of consensual democracy, the model which dominated Western European countries. Although the inflexible rules may in fact have been the result of circumstances, most Hungarian political scientists, journalists and liberal intellectuals also understood them as a matter of rational choice (Körösényi 1998, Kukorelli 1995). They were regarded as the most reasonable constraints against the majority's despotic power and as processes leading to consensus on important issues. Briefly, many of experts regarded the two-thirds rules as a tool for providing consensual democracy. Also, it is not necessary that rules requiring consensus make more conflict. In other countries, for example, proportional electoral rules have led to fragmented party systems (Lijphart 1998: 110–132) without causing serious conflicts or initiatives to change the rules. In fact, there has almost always been political stability. Thus, we can state that effects of rules always depend on the context. And while in the early 1990's the Hungarian rules better fulfilled their function, later they

declined. However, no one can answer the question of why exactly these rules were more accepted and followed in the early 1990's then later (not only before 1998, but also before 2004). The only thing which changed is that the political culture became more and more adversarial until the point when one political side gained a supermajority and re-wrote the rules for their own benefit. They did not abolish the two-thirds rule, but in fact, expanded it to new topics.

Thus, it is not even completely accurate to say that elites disliked the two-third majority rule, since they broadened its scope after 2010. The present Hungarian system may look consensual for the opposition, but majoritarian for the government. That is, it is possible to say that the two-third rules did not fulfill their function. And if rules don't fulfill their most important function, then we may say that we cannot talk about a strong rule of law. What happened is that the political elites became more and more polarized, and accepted their opponents less and less. The same can be said about the political elites' relationship with the Constitutional Court.

#### **4.2. The Treatment of the Constitutional Court: the Case of Compliance with the Decisions on Legislative Obligation (1990–2010)**

Judicial review is one key element of the contemporary understanding of rule of law. It has had a huge impact not only in Hungary, but courts and judicial review have also affected important social and political issues in several countries (Tate-Vallinder 1997). This happened first in the United States (for decisions inducing social changes, see McKeever 1997), but later in other countries like Germany (party finance, see Vanberg 2005: 143) or South Korea (impeachment, see Ginsburg 2004: 7). However, in these more consolidated democracies, there have been no initiatives to restrict the jurisdiction of the courts, as there has been in Hungary since 2010, where the Court's authority has been radically restricted.<sup>23</sup> There were not many public discussions and debates about this point, and the governing parties only legitimized it by declaring an extraordinary state due to state debt and the budget deficit.

As was seen in the case of the interpretation of qualified majority rules, the Hungarian Constitutional Court is a very important and powerful counterbalance to majority rule. It was always regarded as a cornerstone in Hungary's transition and from the viewpoint of the rule of law. As the Court's first president stated, the "Constitutional Court could transform the great political-ideological debates of the transition into problems of constitutional law and thereby neutralize them" (Sólyom 2001: 689). In the 1990s, the Court was regarded as "one of the most powerful Constitutional Courts of the world" (Elster 1992: 22), not only because of its activism, but also because of its broad jurisdiction (Law no. 32 of 1989 concerning the Constitutional Court of the Hungarian Republic, Article 2(1)). In order to file a petition, there was no need to have a legal interest or harm in the case of abstract norm control. There was no need for professional legal representation, nor need even to be a natural person, and even legislative inactivity ("omission of legislation") could be subject to judicial review. Thus, it is important to know whether these decisions have been followed by the members of

parliament.

The usual interpretation of the Court's activity in the literature is based on the "conventional knowledge" that the Court was activist in the first nine years of its operation, between 1990 and 1999 (Dupré 2003). This is mostly because of the independent personality of its first president. After this, the Court is mostly regarded as abandoning activism (Scheppelle 2005).

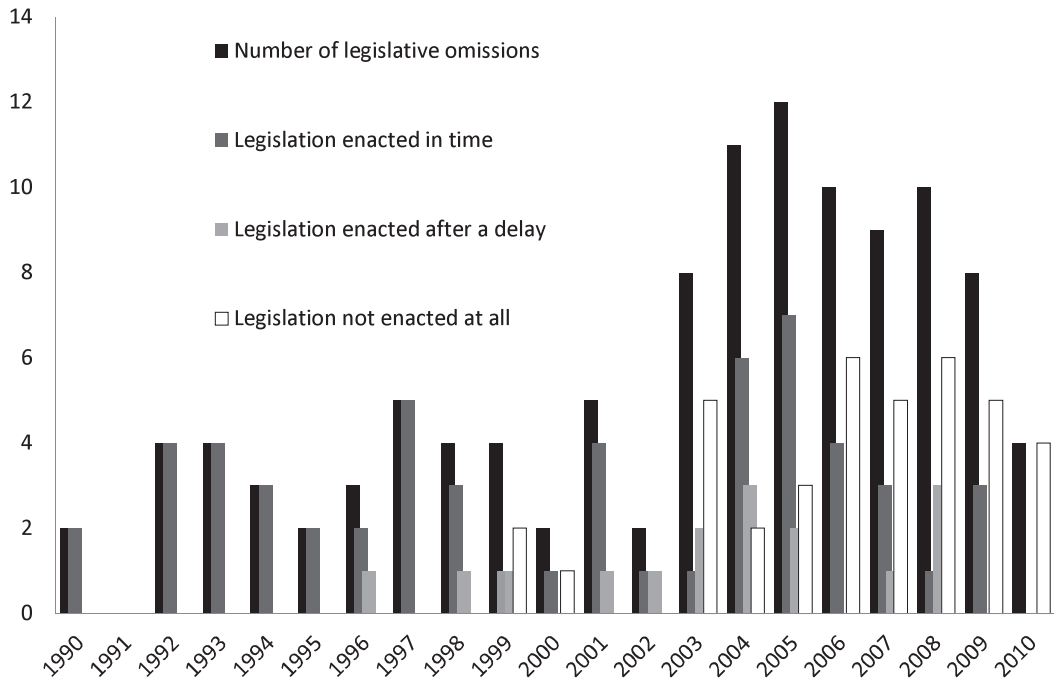
Still, we shall see below that in the early period, there was more acceptance of the decisions and actual compliance with them by political elites. The most important decisions were born in this first period. No serious effort was made to put any pressure on the Court and their decisions were basically followed. For some reason, it was easier for the political elites to accept the Court's decisions in the early 1990's. There has been no fundamental change in the society or the economy since this period. Thus, the problem cannot be explained without referring to the decline in the respect toward the rulings. If the 1990's brought compliance, why is that the 2000's could not?

In public speeches and plenary sessions, members of both the governing parties and the opposition talk about the Constitutional Court with the highest respect. Only some very radical right-wing party leaders have criticized the influence of the Court.<sup>24</sup> The cabinet only criticized the Court in a very few sensitive decisions—in 1996 and in 2008<sup>25</sup>—but no one considered the restriction of its authority. In the 1996 case, the governing parties even had the necessary two-thirds majority required to amend the law concerning the Constitutional Court. Nevertheless, they did not exercise their legislative power, unlike after 2010. This also shows that the authority of the Court has been highly reduced compared to the early 1990s.

Although declarations about the Court seem to show full compliance, it is important to go beyond the words and try to find an indicator for the actions of the political elites concerning the Court. Here, the author proposes a method to assess the change in the Court's authority. In Hungary, the Constitutional Court has the power to declare "legislative inactivity" or "omission of legislation" to enact a certain law. If the Court declares legislative inactivity, it issues an obligation to the National Assembly to create a certain law. In this case, the Court also gives a deadline. The standard formula for this kind of decision is that "the Constitutional Court notifies the National Assembly that it has failed to exercise its legislative power concerning a certain issue and thereby has created an unconstitutional situation. The Court requests that the Assembly propose a proper legislative act before the following deadline". (Constitutional Court Decisions no. 35/1992 and no. 66/2002)

There is no sanction for missing the deadline. For this reason, examining the National Assembly's reactions to this kind of decision can show how legitimate the Court actually is in the eyes of the representatives. If the Court is more respected, the required laws may be legislated in time. If, however, the Court's judgments are ignored in practice, the required legislation may not be born at all. One can wonder if there is any kind of tendency in the reactions to this type of decision. Although the judicial review of legislative inactivity is unique in itself, it is not the main problem between

**Figure 1 Parliament’s Responses to Constitutional Court Decisions concerning Legislative Inactivity and Obligation for Legislation (1990–2010)**



Source: author’s own compilation.

the political elite and the Constitutional Court. Legislative inactivity rules are only used here as an indicator of compliance with the Court’s decisions.

Figure 1 shows the result of this enquiry. It consist (1) the number of Constitutional Court decisions declaring legislative omission, (2) the number of times the parliament acted in time and created the required legislation by the deadline, (3) the number of times the parliament created the required legislation after a delay, and (4) the times when the required legislation was not created at all.

As it can be seen, there has been a tendency to disregard the Court’s decisions issuing legislative obligation, shown by the ratio of the first (blue) to the fourth (yellow) bars. This tendency becomes more and more significant with subsequent governmental cycles. From almost perfect compliance between 1990 and 1998, the governments fell below 30% compliance by 2010. It is possible to blame the Court for noncompliance due to very short deadlines (typically, the end of the year) given in its decisions. However, the beginning of the 1990’s was characterized by a huge legislative burden because of the necessary amendments and new laws for the transition. Thus, the early governments seem to have cared more about the Court’s opinions.

At the same time, if we look at the types of legislation that was not created, it is easy to observe that they were the most politicized laws, which require two-third majority decisions, or they were in the interest of neither the opposition nor the governing parties. Legislative rules concerning elections

and referenda are often delayed or not even created.<sup>26</sup> On the other hand, small procedural rules which require amendments to politically neutral laws or have only minor significance get preference in the legislative plans of the government.

As with the case of the two-third majority laws, there is no good explanation for the change in declining compliance except one: political life became more polarized (Körösiényi 2012). This polarization happened between the parties, but if the parties deny each other's legitimacy, then they may begin to blame those rules which benefit the other or give recognition to the rights of the other. This led to a situation where, as former cabinet members put it, "[keeping the opposition away from power] is the only purpose which has absolute priority"<sup>27</sup> and "we were acting as if we were governing, but in reality, we did not have any concept".<sup>28</sup> Under these circumstances, motivations for good governance and obedience of the law weakened a great deal.

## 5. Conclusion

As outlined above, one important interpretation of the rule of law—which may be one of its most common in connection with politics—is that rule of law means the liberal constraints on democracy. If this is the case, then rules and institutions protecting minority rights are its core elements. In Hungary, Qualified majority legislation is regarded as a protection of the minority. The same applies to the Constitutional Court. Judicial review is one major way to "enforce" the rule of law as it is understood internationally.

We could observe from the parliamentary records that although rule of law is used with several different meanings and contexts, almost 50% of these invocations refer to the limitations on the governing party and the state. Because of this, the author examined the relationship of the Constitutional Court and the counter-majority rule of the qualified majority laws. Concerning the two-thirds majority laws, it was found that their passage rates declined, also exemplifying the more confrontational political culture. Concerning the Constitutional Court, it was found that over time, the Parliament began to ignore its decisions imposing legislative obligations on them.

In contrast with this, Hungary was regarded in the early 1990's as a success story of "consensual democratization" and democratic consolidation (Körösiényi 1998). This democratization was declaratively based on the rule of law, a negotiated revolution, and legislative amendments.

Also, the Hungarian model was regarded as an example of "consensual democracy" advocated by Lijphart (1999). This is the common model of liberal democracy on the European continent and includes several institutional features showing the direction of consensus among actors (a proportional electoral system, judicial review, coalition governments, executive—legislative balance of power). In consensual democracy, there are more barriers against the concentration of power. On the other hand, in the majoritarian model, power is easily concentrated (executive as president, single-member

electoral districts, sometimes a lack of judicial review). It does not mean that majoritarian democracy lacks the rule of law, but it is not regarded as being based on formal legal limits. For example, when a Hungarian scholar asked British constitutional lawyers about what could be done if the governing party changed the rules of governance for its own benefit, the British response was simply “they would not do so” (Jakab 2014). This way of thinking looks very alien to both Eastern European and developing countries.

The main problem, also showed by this anecdote, is to what extent do the consensual or counter-majoritarian elements depend on obedience to formal rules (the rule of law) or conversely result from historical and cultural developments? This broad question is beyond the scope of this paper. What this paper could do, on the other hand, is to point out that the in Hungarian case elites devoted effort to creating formal rules, presuming they would be obeyed and they would fulfill their function.

However, it can also be stated that while legal institution building was very advanced in the early 1990s in Hungary, afterwards, the country experienced a lack of success in several areas, including corruption, economic growth, relative poverty, and human rights. In the 2000’s, political life became very polarized. All these happened before the new post 2010–12 system, which is often accused of having authoritarian tendencies (Bugarcic 2014). Probably, the Hungarian case shows again that formal institution building is not enough given a lack of broader cooperation and consensus covering some substantive issues. The general conclusion we may draw from the Hungarian case concerning rule of law is that relying too much on formal rules, and abandoning consultation and informal consensus seeking, may hinder both effective policy making and democratic consolidation. Whether formal rules (or institutions) will function properly and fulfill their function depends on the elements of political culture. These elements can be general lessons or implication concerning the relationship between the rule of law and politics. Of course formal rules give several incentives, but these may change depending on the changes in the social and political environment.

## Notes

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- 1 The report of the European Commission for Democracy through Law (2011) criticizes the treatment freedom of speech and religion. Krugman (2014) regards the new electoral rules “legal, but not fair”, while Fukuyama (2012) criticizes the way power is exercised
- 2 For example, by the case studies in Higley-Lengyel (2000) and Best-Higley (2010) with one exception
- 3 British rule of law (Dicey 1885), French constitutionalism and *Etat de Droit* (Pech 2004) and German *Rechtsstaat* (Jellinek 1920)
- 4 Referring to the whole justice sector, as in the UN HCHR (2006) report
- 5 The author did not include the reactions to a speech or responses to a call in his calculations. For example, if one member of opposition parties referred to the [neglect?] lack of the rule of law by the government, the governmental response to this call was not considered.
- 6 Author’s own translations
- 7 Records of the Hungarian National Assembly, 1997 05 12, page 32999.



- 8 Records of the Hungarian National Assembly, 2004 04 27, page 22609.
- 9 Records of the Hungarian National Assembly, 1998 11 10, page 2719.
- 10 See: <http://news.bbc.co.uk/2/hi/europe/5358546.stm>
- 11 Records of the Hungarian National Assembly, 1999 11 12, page 14259.
- 12 Records of the Hungarian National Assembly, 2004 05 25, page 24067.
- 13 Records of the Hungarian National Assembly, 2001 10 16, page 35404.
- 14 See Medvedev on the rule of law in Hendley (2009: 340)
- 15 See Xi Jinping on the rule of law: <http://www.economist.com/news/leaders/21629383-xi-jinping-invoking-rule-law-thats-risky-him-and-good-china-china-legal>
- 16 See Park Chung Hee on the rule of law in Kim and Vogel (2011: 129)
- 17 The Constitution of the Republic of Hungary, 2/A. §, 7. §, 19. §, 19/A. §, 19/D. §, 20. §, 20/A. §, 24. §, 24/B. §, 25. §, 28/B. §, 30. §, 31. §, 32/A. §, 32/B. §, 32/C. §, 35. §, 35/A. §, 40/A. §, 40/B. §, 44/C. §, 48. §, 50. §, 57. §, 58. §, 59. §, 60. §, 61. §, 62. §, 63. §, 65. §, 68. §, 69. §, 70/C. §, 70/H. §, 71. §, 76. §
- 18 Although new topics were added gradually after 2010, the list was finalized in 2012.
- 19 In 1999, the government tried to amend some sections of two-thirds laws with 50 % majority, stating that the given elements are “not essential parts”. This was turned down by the Court in Decision no. 1/1999.
- 20 Available at <http://www.parlament.hu/szavazasok-elozo-ciklusbeli-adatai>
- 21 In 2000, the biggest governing party and the biggest opposition party voted together in the 47% of laws. In 2005, this ratio was reduced to 35% (Ilonszki and Jáger 2008: 128)
- 22 In some cases, a parliamentary committee or an individual representative initiates two-thirds majority legislation; in these cases, the possibility of acceptance usually depends on the specific situation.
- 23 Under the Basic Law (2012), the Court cannot review the constitutionality of financial laws
- 24 In 1995, radical right-wing representatives attacked the Court, accusing it of exceeding its power and forcing its liberal views on the majority of the society. They regarded the Court’s activism as antidemocratic. Other parties’ reactions to these criticisms were harsh: both governing and moderate opposition parties defended the Court.
- 25 In both cases, the Court had issued decisions which had serious consequences for the state budget and, thus, the economic policies of the government. See Sajó (1996)
- 26 For example, the parliamentary representation of national and ethnic minorities or the new legislative rules were not created until the new Basic Law.
- 27 <http://www.168ora.hu/hetilap/gyurcsany-kormany-nb-iii-megyei-kispadosokkal-20148.html>
- 28 <http://nol.hu/archivum/archiv-417593-228304>

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