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**A HYBRID JUDICIARY IN A HYBRID REGIME: A CASE
STUDY ON HUNGARY**

Etienne Hanelt and Attila Vincze

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M U N I

Masaryk University, Faculty of Law
Veveří 70, Brno 611 70
Czech Republic

Abstract

Hybrid regimes occupy a middle ground between democracies and autocracies. We argue that the same applies to their rule of law. Just as hybrid regimes maintain the façade of democracy, they sustain judiciaries that seemingly mirror those of a functioning *Rechtsstaat*. This is paradigmatically shown in Hungary, a case tightly integrated into international organisations such as the European Union and the Council of Europe. Due to constitutional and international demands for judicial independence, informal means are used to exercise control over judges. Building on interviews with Hungarian judges, we propose that the influence over the judiciary is divided among three institutions: the Supreme Court (Kúria), the National Judicial Office, and the Constitutional Court. The institutions and their leaders are incentivised to compete for resources and influence, checking each other at the expense of a *de facto* independent judiciary. The institutions are constantly redesigned based on their efficacy and reliability and due to external constraints, resulting in an ebb and flow of their power and influence. We conclude that hybrid regimes can maintain the appearance of the rule of law by delegating and incentivizing control over the judiciary. They thereby escape measurement, maintain plausible deniability, and evade international pressure.

Keywords

judiciary, judicial independence, hybrid regime, Hungary, rule of law, patronage

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A HYBRID JUDICIARY IN A HYBRID REGIME: A CASE STUDY ON HUNGARY

Etienne Hanelt and Attila Vincze¹

*‘Our prime minister’s concept is to have two strong people
in every area, preferably hating each other, and then it’s cool.’²*

1. Introduction

Hungary has been the first EU country to leave the group of democracies.³ The European Parliament⁴ used the label of a “hybrid regime of electoral autocracy”, while Way and Levitsky⁵ called Hungary a “prime example of a competitive authoritarian state”. Defining of these hybrid regime types is that they mirror the institutions of electoral democracy, yet these institutions are hollowed out. Democratic rules of the game are violated with such regularity and sobriety as to “create an uneven playing field between government and opposition”⁶. Diamond⁷ has pointed out the role of a feeble and diminishing rule of law as an enabler of “democratic regression”.

In a case study on Hungary, we argue that Orbán’s hybrid regime also features a “hybrid *Rechtsstaat*”. An independent, accountable, effective and efficient judicial system is a necessary, if not sufficient, condition for the rule of law. While Hungary has largely maintained *prima facie* independent judicial institutions, they are undermined in practice. This article adds to a corpus of literature that looks at how Viktor Orbán obtained control of the judiciary despite constitutional and international constraints. While others have looked at the failings

¹ Authors listed in alphabetical order. The research leading to this article has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (INFINITY, grant agreement no. 101002660). We are grateful for the feedback we received from the participants of the Nuffield Early Career Workshop in Socio-Legal Studies, 16 June 2023 at the University of Oxford.

² An interview with a politician, P01HU. With respect to further references to research interviews, the abbreviations used signify: J – judge, P – politician, L – lawyer, E – expert, HU – Hungary. Particular interviews are also distinguished by numbers.

³ Freedom House (2020). NATIONS IN TRANSIT 2020: DROPPING THE DEMOCRATIC FAÇADE, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf (last accessed on May 30, 2023).

⁴ European Parliament (2022). EXISTENCE OF A CLEAR RISK OF A SERIOUS BREACH BY HUNGARY OF THE VALUES ON WHICH THE UNION IS FOUNDED, P9_TA(2022)0324.

⁵ Lucan A. Way and Steven Levitsky. ‘How Autocrats Can Rig the Game and Damage Democracy’. WASHINGTON POST (Jan. 4, 2019), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/> (visited on Nov. 27, 2019).

⁶ Steven Levitsky and Lucan A. Way. ‘The Rise of Competitive Authoritarianism’. 13(2) JOURNAL OF DEMOCRACY 51 (2002), at 53.

⁷ Larry Diamond. ‘Democratic Regression in Comparative Perspective’. 28(1) DEMOCRATIZATION 22 (2020).

of international bodies, especially the EU⁸, and the institutional changes undertaken in Orbán's Hungary⁹, we look at the on-the-ground operation of the judicial system.

This article contributes to the literature in three ways. First, other than most international studies¹⁰, we widen the scope from the common emphasis on Hungary's constitutional court to incorporate the regular judiciary. While this narrow focus is understandable, it misses most of the judiciary and, with it, most of the cases. The Constitutional Court works differently than the ordinary courts. It deals with high profile cases and has a tighter control of its docket. Furthermore, fifteen constitutional judges can be more easily hand-picked than two-and-a-half-thousand ordinary judges, who deal with the bulk of the caseload. Because they cannot be controlled directly, some shrewdness is required. This opens the question of how to influence the judiciary to ensure that it pleases the government, while allowing it to deny any control plausibly.

Secondly, we describe informal mechanisms to control the judiciary, focusing on co-optation, especially through patronage networks deployed by the Fidesz government and the behavioural microfoundations of their success in the Hungarian case. We provide an explanation of why this particular method was chosen and how it succeeds in controlling the judiciary and in avoiding adverse reactions from the international community.

⁸Ulrich Sedelmeier. 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession'. 52(1) JCMS: JOURNAL OF COMMON MARKET STUDIES 105 (2014); Daniel R. Kelemen. 'The European Union's Authoritarian Equilibrium'. 27(3) JOURNAL OF EUROPEAN PUBLIC POLICY 481 (2020); Daniel R. Kelemen. 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools'. 45(2) JOURNAL OF EUROPEAN INTEGRATION 223; Laurent Pech and Kim Lane Scheppele. 'Illiberalism Within: Rule of Law Backsliding in the EU'. 19 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 3 (2017); Carlos Closa 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance'. 26 (5) JOURNAL OF EUROPEAN PUBLIC POLICY 696 (2019); Carlos Closa. 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU'. 42(4) INTERNATIONAL POLITICAL SCIENCE REVIEW 501 (2021); Carlos Closa and Dmitry Kochenov eds. REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (2016); András Jakab and Dmitry Kochenov eds. THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE (2017); Kim Lane Scheppele. 'The Treaties without a Guardian: the European Commission and the Rule of Law' 29(2) COLUMBIA JOURNAL OF EUROPEAN LAW 93 (2023).

⁹ Gábor Attila Tóth ed. CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW (2012); Miklós Bánkúti, Gábor Halmai and Kim Lane Scheppele. 'Disabling the Constitution'. 23 (3) JOURNAL OF DEMOCRACY 138 (2012); Attila Vincze and Marton Varju. 'Hungary The New Fundamental Law'. 18 (3) EUROPEAN PUBLIC LAW 437 (2012); János Kornai. 'Hungary's U-Turn: Retreating from Democracy'. 26(3) *Journal of Democracy* 34 (2015); Péter Krekó and Zsolt Enyedi. 'Orbán's Laboratory of Illiberalism'. 29(3) JOURNAL OF DEMOCRACY 39 (2018); Kriszta Kovács and Kim Lane Scheppele. 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland — and the European Union'. 51(3) COMMUNIST AND POST-COMMUNIST STUDIES 189 (2018); Kim Lane Scheppele. 'How Viktor Orbán Wins'. 33(3) JOURNAL OF DEMOCRACY 45 (2022).

¹⁰ Tímea Drinóczi and Agnieszka Bień-Kacała. ILLIBERAL CONSTITUTIONALISM IN POLAND AND HUNGARY: THE DETERIORATION OF DEMOCRACY, MISUSE OF HUMAN RIGHTS AND ABUSE OF THE RULE OF LAW (2021); András L. Pap. *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (2018); Zoltán Sente and Fruzsina Gárdos-Orosz, eds. *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (2018)

Thirdly, we rely on unique and novel data. To our best knowledge, apart from an NGO report¹¹, our article is the first study that uses interviews with Hungarian judges and experts familiar with the judiciary as a source of evidence. This allows us to add insights and nuance to existing accounts of judicial (in-)dependence in Hungary and explain why rather soft versions of control succeeded in Hungary, without triggering larger opposition, whereas larger resistance was met by governments in Poland¹², Romania¹³, and Israel¹⁴.

This article proceeds in the following way. In the next section, we situate our study in the literature and provide a theoretical and conceptual framework of the “hybrid *Rechtsstaat*”, an overview of the main institutional changes of the Hungarian judiciary, and an explanatory framework based on co-optation, especially through patronage. In section 3, we briefly set out our methods and data collection. Section 4 provides the empirical account of patronage networks in the Hungarian judiciary which dominate the judicial bureaucracy. Section 5 concludes.

2. The Hybrid Judiciary

Hybrid regimes became most relevant after the end of the Cold War as many closed autocracies around the world broke down. This was famously hailed as “the third wave of democratization”¹⁵. However, in the following years, it became clear that many of the countries got “stuck” during the regime transition. They adopted institutions of democratic countries, but not democracy itself. They held elections and allowed the opposition to stand but made sure that these elections were neither entirely free nor fair. Scholars hence faced a discussion about “democracy with adjectives”¹⁶, such as “illiberal democracy”¹⁷. Some felt that these “democracies with adjectives” were too charitable labels and masked the Poodle’s core: that they were authoritarian regimes in nature.

Hence Levitsky and Way¹⁸ thought of the regime type of “competitive authoritarianism”, defined as “civilian regimes in which formal democratic institutions exist and are widely

¹¹ Amnesty International Hungary (2020). FEARING THE UNKNOWN: HOW RISING CONTROL IS UNDERMINING JUDICIAL INDEPENDENCE IN HUNGARY, EUR 27/2051/2020, <https://www.amnesty.org/en/documents/eur27/2051/2020/en/> (last visited on May 23, 2023).

¹² Claudia-Y Matthes. ‘Judges as activists: how Polish judges mobilise to defend the rule of law’. 38(3) EAST EUROPEAN POLITICS 468 (2022).

¹³ Raluca Bercea and Sorina Doroga. ‘The role of judicial associations as informal actors in the prevention of rule of law decay in Romania’. GERMAN LAW JOURNAL (forthcoming).

¹⁴ ECONOMIST (2023). ‘The day of Judgment: Proposed legal reforms could be dire for Israel’, <https://www.economist.com/middle-east-and-africa/2023/02/16/proposed-legal-reforms-could-be-dire-for-israel> (last visited on May 23, 2023).

¹⁵ Samuel P. Huntington. THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1993).

¹⁶ David Collier and Steven Levitsky. ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’. 49(3) WORLD POLITICS 430 (1997).

¹⁷ Fareed Zakaria. ‘The Rise of Illiberal Democracy’. 76(6) FOREIGN AFFAIRS 22 (1997).

¹⁸ Levitsky and Way, *supra* n. 6 ; Steven Levitsky and Lucan A. Way. COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010).

viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents. [...] Competition is thus real but unfair"¹⁹. Hence, democratic institutions are more than a façade in these regimes, yet the playing field is systematically tilted, leading to an unfair advantage for the incumbent. Such regimes are "hybrid" as they combine elements of democracy and autocracy.²⁰ Recently, Yeung²¹ has shown that masquerading as democracies works internally: citizens of authoritarian states overestimate the level of democracy in their countries. Levitsky and Way²² explained regime trajectories with three factors: linkage to and leverage of the (liberal, democratic) West, and the organisational power of competitive authoritarian regimes. Since liberal democracy stood for a while normatively uncontested, countries that had close links to them were pushed towards the imitation of democratic institutions.

More recently, attention turned to the threat emanating from the deterioration, regression, backsliding, eroding or decaying of democracies. This phenomenon is driven by "executive aggrandizement" of elected governments²³ and is "incremental in nature"²⁴. Existing democratic institutions are undermined and hollowed out, yet persist in their general form. While backsliding leads to a reduction in the quality of democracy, it does not always end in a regime-type change and democracy's abolition. Lührmann and Lindberg²⁵ have pointed to the "legal facade" that contemporary cases of such backsliding states exhibit, while Lauth²⁶ has explored the role of law in the legitimization of authoritarian rule. This features prominently in the contributions by constitutional and public law scholars who have engaged in the discussion. Scheppele²⁷ described a method of "autocratic legalism", Dixon and Landau²⁸ one of "abusive constitutional borrowing". Common to these accounts is the tacit acknowledgement of the backsliders' need to escape international scrutiny, which they do by following abusive legal tactics.

Capturing courts has two rationales: first, it removes checks and balances on executive and legislative power; second, captured courts can be turned into tools of the government to legitimise reforms, enact changes under the guise of judicial independence that would be

¹⁹ *Ibid.*, at 5,

²⁰ Larry Diamond. 'Thinking about Hybrid Regimes'. 13(2) JOURNAL OF DEMOCRACY 21 (2002).

²¹ Eddy S. F. Yeung. 'Overestimation of the Level of Democracy Among Citizens in Nondemocracies'. 56(2) COMPARATIVE POLITICAL STUDIES 228 (2023).

²² Levitsky and Way (2010), supra n. 18.

²³ Nancy Bermeo. 'On Democratic Backsliding'. 27(1) JOURNAL OF DEMOCRACY 5 (2016)

²⁴ Stephan Haggard and Robert Kaufman. 'The Anatomy of Democratic Backsliding'. 32(4) JOURNAL OF DEMOCRACY 27 (2021), at 28.

²⁵ Anna Lührmann and Staffan I. Lindberg. 'A Third Wave of Autocratization Is Here: What Is New about It?' 26(7) DEMOCRATIZATION 1095 (2019), at 1104.

²⁶ Hans-Joachim Lauth. 'Legitimation autoritärer Regime durch Recht'. 11(2) ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 247 (2017).

²⁷ Kim Lane Scheppele. 'Autocratic Legalism'. 85(2) THE UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018).

²⁸ Rosalind Dixon and David Landau. ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY (2021).

otherwise politically costly, and punish opponents. In other words, the judiciary fulfils the typical functions of courts in authoritarian states.²⁹ In doing so, the *Rechtsstaat* also changes into a “hybrid *Rechtsstaat*”. The *Rechtsstaat*, is more than simple legalism, as the rule *of* law is more than rule *by* law.³⁰ A thick concept of the idea contains further normative elements beyond legality, like certainty, consistency, separation of powers and access to effective legal remedies provided by an independent judiciary.³¹ We focus our contribution on this last aspect. This is without prejudice to the other factors, where similarly large problems could be identified in Hungary. In such a hybrid *Rechtsstaat*, the judicial institutions resemble reasonable and independent ones but are undermined in practice by a complex web of informal institutions competing with the formal ones and turning them inside out (Helmke and Levitsky 2004; Lauth 2000).³² Yet in the hybrid *Rechtsstaat*, the formal rules remain more than a façade.³³

Our case study is Hungary, a post-communist country that joined the European Union in 2004 and was then regarded as a democratic “frontrunner” in the region³⁴ irrespective of the fact that the judiciary had many severe shortcomings³⁵. The memberships in the EU and Council of Europe are some restraints of backsliding resulting in an “externally restrained hybrid regime” for Hungary.³⁶ Especially important for our topic is the understanding of Article 19 of the Treaty on European Union (TEU) as a substantive benchmark of judicial independence in the Member States.³⁷

2.1 Orbán’s judicial reforms

The Hungarian judiciary before 2010, and especially the country’s Constitutional Court, were well-regarded internationally. Nevertheless, some authors were critical about the state of the Hungarian judiciary before³⁸ and quantitative research raises questions about the supposed

²⁹ Tom Ginsburg and Tamir Moustafa. *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008).

³⁰ Jeffrey Jowell. ‘The Rule of Law and its Underlying Values’. In *THE CHANGING CONSTITUTION* (Jeffrey Jowell and Dawn Oliver eds., 2011); Brian Z Tamanaha. *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

³¹ Jowell, 2011, *supra* n. 30; Peter M. Huber. ‘Der Rechtsstaat’. In *HANDBUCH DES VERFASSUNGSRECHTS* 383 (Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz eds., 2021.)

³² Gretchen Helmke and Steven Levitsky. ‘Informal Institutions and Comparative Politics: A Research Agenda’. 2(4) *PERSPECTIVES ON POLITICS* 725 (2004); Hans-Joachim Lauth. ‘Informal Institutions and Democracy’. 7(4) *DEMOCRATIZATION* 21 (2000).

³³ Hans-Joachim Lauth. ‘Legitimation autoritärer Regime durch Recht’. 11(2) *Zeitschrift für Vergleichende Politikwissenschaft* 247 (2017).

³⁴ Freedom House, *supra* n. 3, at 2.

³⁵ Zoltán Fleck. *BÍRÓSÁGOK MÉRLEGEN I-II* (2008).

³⁶ András Bozóki and Dániel Hegedűs. ‘An Externally Constrained Hybrid Regime: Hungary in the European Union’. 25(7) *DEMOCRATIZATION* 1173 (2018).

³⁷ Matteo Bonelli and Monica Claes. ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary’. 14(3) *EUROPEAN CONSTITUTIONAL LAW REVIEW* 622 (2018); Mathieu Leloup, Dmitry Kochenov, and Aleksejs Dimitrovs. ‘Opening the Door to Solving the Copenhagen Dilemma? All Eyes on Repubblica V II-Prim Ministru’. 46(5) *EUROPEAN LAW REVIEW* 692 (2021).

³⁸ Fleck *supra* n. 35; Zoltán Fleck. ‘Judicial Independence in Hungary.’ In *JUDICIAL INDEPENDENCE IN TRANSITION* 793 (Anja Seibert-Fohr ed., 2011).

powers of the Constitutional Court³⁹. Since Viktor Orbán came to power in 2010, his government has radically changed the institutional setup of the country through legislation and constitutional changes. Many levers were pulled to bring the Constitutional Court, the Supreme Court, and the ordinary judiciary under control. A particular feature of these changes is their fluidity: the “reforms” never stopped. The system was continuously reconfigured, a strategy aptly described as “constitutional tinkering”.⁴⁰

One of the first targets of government attacks was the Hungarian Constitutional Court, which was defied up to the point the government was capable of capturing it.⁴¹ Its powers were curbed drastically in fiscal matters⁴², and the appointment procedure for judges and that of the Court’s president was amended to give the Fidesz majority more leeway⁴³. In 2011, four judges were added to the bench, which enabled a gradual capturing of the court by spring 2013.⁴⁴ The new Fundamental Law narrowed access to the court by way of abolishing the “*actio popularis*” procedure, and abolished the possibility of challenging laws without individual concern.⁴⁵

The government also renamed the Supreme Court to “Kúria” and dismissed the sitting president and vice-president of the Court. The president’s dismissal was found to be contrary to the ECHR.⁴⁶ The European Court of Human Rights (ECtHR) did not reinstate him to his position showing that the Court was ill-equipped to handle structural rule-of-law-abuses.⁴⁷

Besides these early and quick attacks on the two apex courts of Hungary, the government also tried to bring the judiciary-at-large under control. Its principal method was the introduction of a National Judicial Office (NJO) with a president that received vast powers of judicial administration and responsibility for the administration of the justice system. Parliament elected Tünde Handó as the first president, a judge who also was the wife of the prominent

³⁹ Kálmán Pócza, Gábor Dobos and Attila Gyulai. ‘The Hungarian Constitutional Court: A Constructive Partner in Constitutional Dialogue’. In CONSTITUTIONAL POLITICS AND THE JUDICIARY: DECISION-MAKING IN CENTRAL AND EASTERN EUROPE 96 (Kálmán Pócza ed., 2019).

⁴⁰ András Körösenyi, Gábor Illés and Attila Gyulai. THE ORBÁN REGIME: PLEBISCITARY LEADER DEMOCRACY IN THE MAKING chapter 4 (2020).

⁴¹ Mirosław Wyrzykowski and Michał Ziółkowski. ‘Illiberal Constitutionalism and the Judiciary’. In ROUTLEDGE HANDBOOK OF ILLIBERALISM 517 (András Sajó, Renáta Uitz and Stephen Holmes eds., 2021).

⁴² Kriszta Kovács and Gábor Attila Tóth. ‘Hungary’s Constitutional Transformation’. 7(2) EUROPEAN CONSTITUTIONAL LAW REVIEW 183 (2011) at 192-194.

⁴³ Pócza, Dobos and Gyulai, *supra* n. 40, at 97; Kovács and Tóth, *supra* n. 43, at 193; Kriszta Kovács and Kim Lane Scheppele. ‘The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union’. 51(3) COMMUNIST AND POST-COMMUNIST STUDIES 189 (2018), at 191.

⁴⁴ Zoltán Szente. ‘The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014’. 1 CONSTITUTIONAL STUDIES 123 (2016); Kovács and Scheppele, *supra* n. 44.

⁴⁵ Vincze and Varju, *supra* n. 9, at 452.

⁴⁶ Attila Vincze. ‘Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary’. 21(3) EUROPEAN PUBLIC LAW 445 (2015), at 448.

⁴⁷ David Kosař and Katarína Šipulová. ‘The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law’. 10(1) HAGUE JOURNAL ON THE RULE OF LAW 83 (2018).

Fidesz politician József Szájer.⁴⁸ She had far-reaching influence on appointing, promoting, demoting, and disciplining judges. Her initial powers to transfer individual cases to other courts were internationally criticised and eventually rolled back.⁴⁹ An Act of Parliament lowered the retirement age of judges from 70 to 62 years, enabling to remove 274 mostly senior judges and court presidents from office and, consequently, to appoint new ones.⁵⁰ Under pressure from the Venice Commission, the Council of Europe, and the European Commission, the Hungarian government reverted some reforms but that did not affect the new appointments. A reform of the judiciary in 2019 widened the powers of the Chief Justice to micromanage the docket of the Kúria, and a trusted person (András Varga Zs.) was selected from outside of the judiciary to exercise those powers.

2.2 Repression, co-optation and patronage

While institutional changes help to understand the potential for undermining judicial independence in Hungary, they do not sufficiently explain the functioning of the judiciary. With an onslaught of changes to all branches of Hungary's judiciary and a continuous reconfiguration of the institutions and their powers vis-à-vis each other, we argue that it is necessary to look deeper at the functioning of the hybrid judiciary.

Recent research has paid renewed attention to informal institutions⁵¹ as part of Hungary's backsliding and how informality helped evade the EU⁵². Vincze looks at how combinations of "gatekeeping", "channelling" of cases and the application of "carrot and sticks", together with the existence of "emergency breaks", allow the government to obtain favourable outcomes in judicial decisions.⁵³

Comparative politics scholarship has established "three pillars of stability" of authoritarian regimes, which are "legitimation, repression, and co-optation".⁵⁴ In this paper, we look at

⁴⁸ Joshua Rozenberg. 'Meet Tünde Handó'. *The Guardian* (Mar. 20, 2012), <https://www.theguardian.com/law/2012/mar/20/tunde-hando-hungarian-judges> (last visited on Feb. 9, 2023).

⁴⁹ Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele. 'Disabling the Constitution'. 23(3) JOURNAL OF DEMOCRACY 138 (2012), at 143; Venice Commission (2012). OPINION ON ACT CLXII OF 2011 ON THE LEGAL STATUS AND REMUNERATION OF JUDGES AND ACT CLXI OF 2011 ON THE ORGANISATION AND ADMINISTRATION OF COURTS OF HUNGARY, OPINION 663/2012, CDL-AD(2012)001, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e), at 12.

⁵⁰ Gábor Halmai. 'The Early Retirement Age of the Hungarian Judges'. In EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471 (Fernanda Nicola and Bill Davies eds., 2017)

⁵¹ David Kosař, Marína Urbániková and Katarína Šipulová. 'Informal Judicial Institutions – Setting the New Agenda in Legal Scholarship'. GERMAN LAW JOURNAL (forthcoming).

⁵² Edit Zgut. 'Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland'. 14 (2-3) HAGUE JOURNAL ON THE RULE OF LAW 287 (2022).

⁵³ Attila Vincze. 'Schrödinger's Judiciary: The formality at the service of informality in Hungary'. GERMAN LAW JOURNAL (forthcoming).

⁵⁴ Johannes Gerschewski. 'The Three Pillars of Stability: Legitimation, Repression, and Co-Optation in Autocratic Regimes'. 20(1) DEMOCRATIZATION 13 (2013); Hans Lueders and Aurel Croissan. 'Wahlen, Strategien autokratischer Herrschaftssicherung und das Überleben autokratischer Regierungen'. 8(3-4) ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 329 (2014); Carsten Schneider Q. and Seraphine F. Maerz. 'Legitimation, Cooptation, and

Hungary's judiciary from the angle of "soft" repression as well as co-optation, especially through patronage. The system is based on co-optation of judges through patronage networks and the implicit threat of repressive measures against obstreperous judges.

"Patronage" is a form of clientelism; the two terms are sometimes used interchangeably.⁵⁵ Patronage is often used specifically for the use of state resources by the patron to gain support from and reward their client.⁵⁶ In this case study, we use the term patronage narrower, namely as the exchange of *judicial* jobs for loyalty. Demonstrations and anticipation of loyalty are the prerequisites to appointment or promotion. Furthermore, given that Orbán's government is willing to continuously "tinker"⁵⁷ with the institutions, power and competencies flow between people and institutions in line with whether they fulfil the expectations set in them. This further ensures that the patron's wishes are respected. Rather than putting all the eggs in one basket, the government diversifies risk by fostering competition between clients.

We maintain that the judiciary in Orbán's Hungary is controlled indirectly and direct interferences are although not excluded – and in extreme cases exercised – they are very often not necessary. The pressure is diffuse and is reinforced by the role of judges, who know the expectations set in them and the possible consequences of violating them. Judiciaries are bureaucratic environments and the preferences internalised by judges shape their set of conceivable courses of action, which limits behavioural choice.⁵⁸

Figure 1 illustrates the process under investigation. It starts with the backsliding government's wish to control the judiciary. It chooses informal methods of control. Top jobs within the judiciary and judicial administration are distributed strictly according to loyalty, not qualifications. These leaders use their own patronage system to diffuse their commands and administrative measures to influence the judiciary. Furthermore, they act as checks on and compete with each other. Depending on their efficacy and loyalty, they receive more or less powers.

Repression and the Survival of Electoral Autocracies'. 11(2) ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT 213 (2017).

⁵⁵ Allen Hicken. 'Clientelism'. 14(1) ANNUAL REVIEW OF POLITICAL SCIENCE 289 (2011).

⁵⁶ *Ibid.*, Susan C Stokes. 'Political Clientelism'. In THE OXFORD HANDBOOK OF POLITICAL SCIENCE 648 (Robert E. Goodin ed., 2011).

⁵⁷ Körösenyi, Illés and Gyulai, *supra* n. 41.

⁵⁸ Ezequiel A. González-Ocantos. SHIFTING LEGAL VISIONS: JUDICIAL CHANGE AND HUMAN RIGHTS TRIALS IN LATIN AMERICA (2016).

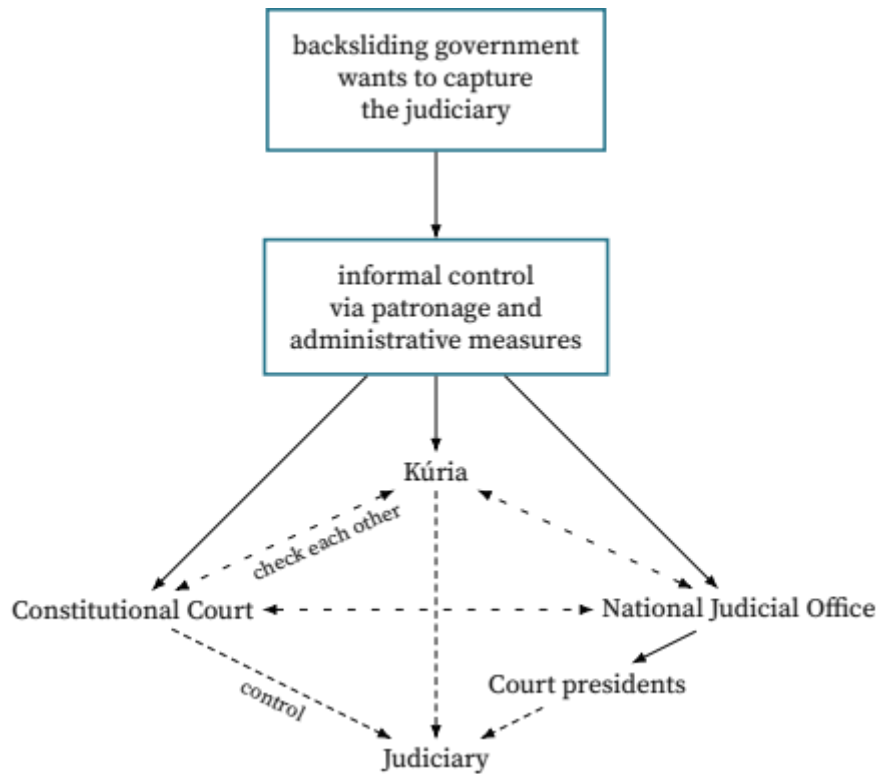


Figure 1: The Hybrid Hungarian judiciary

3. Methods and Data

We are motivated to describe and explain mechanisms of informal government control of judiciaries in hybrid regimes. However, informal institutions such as patronage networks escape valid measurement due to their unwritten and not directly observable nature. A qualitative case study approach is useful for an exploration of the mechanisms. It comes, however, at the cost of a narrower scope. In particular, the special, deeply integrated position of Hungary in the European Union is unique for competitive authoritarian regimes, and reduces the applicability of our finding to other cases.

This article relies on sixteen semi-structured interviews that were conducted in Hungary from June 2022 until June 2023. This includes active and former judges from different instances, a politician and other experts with inside knowledge of the judiciary. Interviews were conducted online via video calling software, recorded, transcribed and translated. Recent research has shown that online remote interviews and face-to-face interviews result in transcripts with little differences in substantive codes.⁵⁹ During the data collection, efforts were made to reach out to different sides, however it is unlikely that the sample reflects the full range of views, and might be skewed more towards critical perspectives. While we do not claim representativeness for our sample, it reflects diversity vertically (tiers of courts), horizontally

⁵⁹ David R. Johnson, Christopher P. Scheitle, and Elaine Howard Ecklund. 'Beyond the In-Person Interview?' 39(6) SOCIAL SCIENCE COMPUTER REVIEW 1142 (2021).

(regions) as well as in terms of gender composition. Ethical permission for the study was granted by Masaryk University Ethics Committee. Participants gave written consent to the interviews. We pseudonymised the interviews and took extra efforts to protect the participants. This is a critical duty when conducting research in authoritarian settings. Hence, we do not disclose further information about the court at which participants work or the exact date of the interview.

4. The hybrid judiciary in practice

4.1 Loyalty and trust: handpicked key actors

Our respondents reinforced that the key actors were appointed on the basis of deep personal trust. The first president of the NJO was described as somebody “really coming from the inner circle”⁶⁰ and “it was common knowledge that on Sunday afternoons Anikó Lévai [Viktor Orbán's wife] and Tünde Handó got together, because they had been good friends since their university days, and Viktor [Orbán] was also there”⁶¹. Handó was expected to control the whole judicial system⁶², achieve big organisational reforms to water down judicial self-governance⁶³, and to centralise powers in her hands⁶⁴. This included also the central training of law clerks, which, as one judge said, served to establish personal bonds with the future generation of judges⁶⁵. The personnel changes were made at the same time the judiciary was reorganised⁶⁶. Handó had also privileged access to the government: “she could ask for anything – legislative changes, money – and she got it straight away”⁶⁷.

Nonetheless, after her attempt to outpower the National Judicial Council (a judicial self-governing body with some oversight over her) failed, she became a liability, and the political leadership’s trust in her faded away. Thus, her access to resources was cut back and she was parachuted to the Constitutional Court ahead of the expiration of her term of office⁶⁸.

Trust in his loyalty also preceded the appointment of a new Chief Justice of the Kúria in 2019. András Varga Zs.’s “was always very, very close to Fidesz, always was very supportive of the Fidesz party”⁶⁹. In order to make him eligible for the position, a special legislative amendment was necessary, making this “a very obvious political appointment”⁷⁰. He “seems to be fulfilling a mission, and this mission is not about raising the Kúria to a higher professional standard, but

⁶⁰ J05HU.

⁶¹ J09HU.

⁶² J05HU.

⁶³ J04HU.

⁶⁴ J04HU.

⁶⁵ J04HU.

⁶⁶ J04HU.

⁶⁷ J05HU.

⁶⁸ J05HU.

⁶⁹ J01HU.

⁷⁰ J04HU.

about something completely different, about dismantling the Kúria”⁷¹. Varga Zs. once openly admitted that those who dominate the courts, dominate the law, and those who dominate the law have the power. This struggle for domination is between the national judiciary and the supranational one.⁷² This was said “to demonstrate his loyalty” towards the government.⁷³ Similarly to Tünde Handó, he also got special powers in 2019 by institutionalising a new extraordinary remedy, a law uniformity complaint. This enables specially-created Law Uniformity Chambers that are presided over by the President or the similarly trusted Vice-President to review and to annul any decisions of the Kúria.⁷⁴ This was his “brainchild”⁷⁵, which he received to control the courts.⁷⁶ As the government’s attempt to control the whole judiciary via the NJO resulted in too many scandals, it realised that it suffices to control the apex courts.⁷⁷ As one judge puts it: “during the last 5 or 10 years there has been no change in the organisation, no change in the powers of the Kúria and the NJO, there has only been one change of person: [a] new President of the Kúria and a new President of the NJO. During the previous 9 years, we had a very strong NJO and a grey Kúria. Now we have a very strong Kúria and a grey NJO”.⁷⁸

A very similar trust and personal bond can be seen in the case of the new President of the Constitutional Court. The Court was dismantled after the landslide victory of Fidesz in 2010⁷⁹ and rebuilt after Tamás Sulyok was appointed as its president in 2015. He was “a not really very renowned farmer's association lawyer”⁸⁰ and became a judge of the Constitutional Court and later its President. Nonetheless, he had close connections to the then Minister of Justice, and was described to be devoted to him, wanting to prove himself.⁸¹ Which he did: the whole Constitutional Court, during several years, “hardly ever made a ruling [...] that was any surprise to the Minister of Justice, and none that was even unpleasant for the Minister of Justice”.⁸² Sulyok is known to allocate all the politically important cases to himself.⁸³ He proved his loyalty, by backing the government in politically highly sensitive migration cases and introduced a limitation on the primacy of EU law, which the government could not achieve by political means, contrary to the black letter of the constitution. The Constitutional Court has been redesigned to rubber stamp governmental policy and to check on the Kúria. For this

⁷¹ J05HU.

⁷² András Zs. Varga. SPEECH HELD AT THE JOINT COMMEMORATION OF THE CONSTITUTIONAL COURT AND THE CURIA ON THE 800TH ANNIVERSARY OF THE PUBLICATION OF THE GOLDEN BULL IN SZÉKESFEHÉRVÁR (Apr. 25, 2022), <https://www.youtube.com/watch?v=Z7VXuUmOtsw&t=3406s>.

⁷³ J05HU.

⁷⁴ J02HU; J05HU.

⁷⁵ J05HU.

⁷⁶ J05HU.

⁷⁷ J05HU.

⁷⁸ J05HU.

⁷⁹ Attila Vincze. ‘Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court’. 8(1) VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 86 (2014).

⁸⁰ P01HU.

⁸¹ P01HU.

⁸² P01HU.

⁸³ J02HU.

purpose a special complaint was established enabling public bodies to seek remedy against final decisions of the Kúria.⁸⁴

4.2 The lower levels of the patronage system

The Chief Justice of the Kúria, the Head of the NJO and the President of the Constitutional Court are the most visible political operators. They, in turn, maintain their own patronage networks of closely trusted persons. In particular, they need the cooperation and assistance of the presidents of the county courts (törvényszék) and the upper courts of appeal (ítélőtábla), because “the ideas of the national judicial office can be implemented through [them]”⁸⁵. One judge called them “prefects” of the NJO.⁸⁶ Their appointment required active management by the NJO, using barely legal tactics such as annulments of calls for application, leading to some controversy.⁸⁷ These activities also show that the successful candidates are rewarded for their loyalty.⁸⁸ These interferences often discouraged others from applying next time.⁸⁹

Nevertheless, patronage within a large organisation does not always succeed to deliver the expected results. This is where incentives come in. If the court presidents are co-operative with the Head of the NJO they are rewarded: their court gets better equipped and they receive better remuneration.⁹⁰ Several judges reported that these court presidents were close allies and friends of the former Head of the NJO.⁹¹ The new one has no such personal network, but it is claimed that “it doesn't matter that Tünde Handó is a constitutional justice, she continues to pull the strings very skillfully from the background”.⁹²

Several judges describe the organisational structure by feudalistic analogies⁹³ and highlight the role of personal trust between the former president of the NJO [Tünde Handó] and a close ring of her friends⁹⁴. One of them even speaks of “oaths of allegiance”⁹⁵ necessary to obtain managerial positions. At one occasion Handó openly explained whom she prefers to select for a job: “My personal principle is that I prefer to entrust the community for six years to those who have already done and proved themselves without a position”.⁹⁶ The person mentioned

⁸⁴ Vincze, *supra* n. 54.

⁸⁵ J03HU.

⁸⁶ J09HU.

⁸⁷ J01HU; J04HU; J09HU.

⁸⁸ J01HU; J04HU; J09HU.

⁸⁹ Erika Pálmai. ‘Ennél pikánsabb per nemigen volt még magyar bíróságon’. HVG. (Oct. 7, 2017), https://hvg.hu/itthon/20171007_hando_tunde_vasvari_csaba_per_birosag_obh_orzagos_birosagi_hivatal.

⁹⁰ J08HU.

⁹¹ J09HU; J02HU; J04HU.

⁹² J09HU; similarly J04HU.

⁹³ J06HU; J05HU.

⁹⁴ J08HU; J07HU; J09HU; J01HU.

⁹⁵ J09HU.

⁹⁶ Pálmai *supra* n. 90.

in that sentence was promoted from a first instance court to become the president of an Upper Court of Appeal under unusual circumstances.⁹⁷

Persons closely connected to the former president of the NJO became high-flyers⁹⁸, and they are seen as her proxies, who were expected to do the politically sensitive work for the president, such as keeping “problematic” judges under control. For example, the National Judicial Council was made inoperable by forcing its members to resign, and reportedly “the local administrative leaders played a decisive role in this resignation, and they literally blackmailed, intimidated and threatened – not in writing, but verbally – the members of the National Judicial Council”.⁹⁹ Nonetheless, judges also claim that those trusted persons receive protection from the president of the NJO. They face no consequences whatever scandal may arise.¹⁰⁰ One former judge explained: “anyone who has not done this government a favour is worthless. And those who did favours should be rewarded. And those who went against it should be punished”.¹⁰¹

The same was said about the new President of the Kúria: “He thinks only in terms of persons and he pays everybody off, so he pays off the bad and the good”.¹⁰² When Varga Zs.’s appointment was proposed, the National Judicial Council – in its non-binding opinion – rejected his nomination.

He has obviously been fighting with the Judicial Council ever since the Judicial Council voted him down by 13 to one. The one who did not vote him down was Darák. Now his wife, Szilvia, is going to be a Kúria judge from September. So he [Varga Zs.] does not forget anything.¹⁰³

One judge explained that she got different assignments and managerial duties (and with them a somewhat higher salary) as long as she remained loyal, but as soon as a conflict emerged between her and the Head of the NJO, all these assignments were cancelled and she was harassed by different administrative measures.¹⁰⁴

4.3 The abuses of administrative measures

The court presidents of the 20 regional courts and 5 upper courts of appeal plus the President of the Kúria have decisive influence on judges’ life.¹⁰⁵ Several judges confirm that there is a

⁹⁷ J04HU.

⁹⁸ J02HU.

⁹⁹ J09HU.

¹⁰⁰ J01HU; J07HU.

¹⁰¹ J04HU.

¹⁰² J05HU.

¹⁰³ J05HU.

¹⁰⁴ J09HU.

¹⁰⁵ J03HU; J07HU; J06HU; J09HU.

professional red line, that the president must not directly intervene in adjudication itself.¹⁰⁶
As one put it:

Professionally, I think the president of the court has no influence, it's a red line that the president has no power to intervene in professional matters [decision-making], but in administrative matters she has almost unlimited powers. The president has a very big role in terms of day-to-day work conditions, and has a very big role regarding the workload of a particular judge, the colleagues she works with, the workplace she gets, the computer equipment she gets, the quality of transcribers, whether she has an assistant or a clerk assisting her, or is allowed to work at home or not and have to be in the courthouse all the time.¹⁰⁷

These decisions are basically discretionary, and there is no remedy against them.¹⁰⁸ Judges,

received bonuses at the end of the year, and this bonus is discretionary decided by the court presidents. And when the [National Judicial] Council wanted to check this and ask for data, the President of the Judicial Office rejected [...] the Judicial Council is not able to get any data because [...], they don't have enough power and they don't have enough support. [...] It's the system, it is really made not to supervise the politically appointed president of the National Judicial Office.¹⁰⁹

While court presidents would not intervene in decision-making directly, their discretionary use of administrative tools is effective. It often happens that formerly granted benefits and allowances such as teaching at a university or work from home are cut back in case of a conflict with the president.¹¹⁰ Interviewees explained that if someone does not have any other ambition than to be a judge at the courtroom and does not need anything from the court president there are no legal ways to influence them, but if they do need something, the president can grant or refuse those allowances at her will¹¹¹ without giving reasons or fearing external control¹¹². Not that the judges were keen for that control: "I do not see any evidence that judges have it in their guts to seek a kind of legal protection".¹¹³

¹⁰⁶ J03HU; J06HU; J09HU.

¹⁰⁷ J03HU.

¹⁰⁸ J03HU; J07HU; J06HU; J09HU.

¹⁰⁹ J01HU.

¹¹⁰ J06HU; J01HU; J05HU.

¹¹¹ J06HU.

¹¹² J07HU.

¹¹³ J03HU.

The tolerance for minor mistakes like not keeping deadlines and the use of disciplinary proceedings for infringements very easily coincide with loyalty, sympathy and antipathy between judge and court president.¹¹⁴ The importance of personal relations is especially true for promotion, which can be boosted or hampered by court presidents.¹¹⁵ Although there is an objective point-based system of promotion, many ways to obtain points – e.g. for a study trip abroad, participation at a conference or obtaining further qualifications – require the approval of the court president.¹¹⁶

Many judges concluded that if they are co-operative and make no problems, they can get along¹¹⁷, and if they are helpful they will be rewarded¹¹⁸. Judges are often driven by their career prospects¹¹⁹ and complaints or objections can set them back¹²⁰. Court presidents do not like conflicts and troublemakers at their courts¹²¹, and if judges are too active or recalcitrant, they can always be assigned one or two more complicated cases to keep them busy¹²². Some judges said that court presidents dodge conflicts. If a judge is hard-nosed enough they rather give in.¹²³ Yet court presidents find ways to retaliate later.¹²⁴

Despite these abuses of administrative measures, the judges often support and reelect these abusive leaders:

there is also an element of self-colonisation, where a person whom we don't like is reelected regularly by secret ballot. After an 80% result, I spoke to several people and I said, it is impossible that you did not vote for him, because the number could not have been that high otherwise. And then I hear that there was no one else, and he would have been appointed anyway.¹²⁵

Beside this learned helplessness, a court president buys the loyalty of the most influential judges of the given court who boost the good reputation by chatting to the others and make sure that president gets the right number of votes:

If you know that in six months you will apply for another term as a president of the court, [...] and then you say that there are five people with influence in the court, who are listened to, who can then influence the others. Then you

¹¹⁴ J09HU; J07HU.

¹¹⁵ J03HU; J07HU; J06HU; J09HU.

¹¹⁶ J09HU; J07HU.

¹¹⁷ J08HU; J02HU.

¹¹⁸ J07HU.

¹¹⁹ E03HU.

¹²⁰ J06HU; J08HU.

¹²¹ J06HU.

¹²² J08HU.

¹²³ J02HU; J06HU.

¹²⁴ J06HU.

¹²⁵ J06HU.

pay these five people [e.g. extraordinary bonuses] and then they will do what you expect from them, they will boost your good reputation and make sure that you get the right number of votes at the meeting where the judges give their opinion on your application.¹²⁶

The red line of not interfering directly in judgments has come under pressure since the appointment of the new Chief Justice of the Kúria, who “doesn't respect the rules of the game, the written and unwritten norms”.¹²⁷ “And that's the trouble, that's absolutely the way he thinks. He thinks like a politician. He doesn't think like a judge”.¹²⁸ Several participants reported that he made a judge accountable for a decision.¹²⁹ He yells at judges, “when there is something important that needs to be implemented and he could not manage to get [an important] case for himself”.¹³⁰ He yells if he does not favour a decision¹³¹ and if judges dare not to support a motion he puts forward¹³². Moreover, he openly questions their intellectual and professional capabilities¹³³ or attributes to them political allegiance to the opposition (and in doing so questions implicitly their neutrality)¹³⁴.

A participant reported that Varga Zs. took cases from judges in sensitive matters – like referendums – if they were not ready to write the expected decision.¹³⁵ If that does not work, judges report being pressured to sign decisions¹³⁶ by withholding appointments and promotions or threatening them with assignments to other branches of law (from administrative law to civil law for example)¹³⁷. The judges are rather perplexed how to react. “There was no precedent for this in the past, and judges don't [know how to fight], and that's the great good fortune of this man [András Zs. Varga]. So there really is no opposition and most likely there will not be any”.¹³⁸

5. Conclusion

As an “externally constrained hybrid regime” (Bozóki and Hegedűs 2018), Hungary has been uniquely inhibited from employing too direct modes of control of its judiciary. Orbán had to maintain plausible deniability by keeping the semblance of an independent judiciary and the rule of law. This is what we call a “hybrid Rechtsstaat”. It maintains the form of judicial

¹²⁶ J07HU.

¹²⁷ J05HU.

¹²⁸ J05HU.

¹²⁹ J05HU; J02HU.

¹³⁰ J02HU.

¹³¹ J05HU; J02HU.

¹³² J05HU.

¹³³ J02HU.

¹³⁴ J05HU.

¹³⁵ J02HU.

¹³⁶ J02HU.

¹³⁷ J02HU.

¹³⁸ J05HU.

independence, which is violated with frequency in practice. The regime achieved this with the installation of patronage networks in the Hungarian judiciary that use a combination of formal powers and informal methods to check and control the courts. Critically, no single institution or person is trusted entirely with the task. Instead, powers are continuously “tinkered” with (Körösényi, Illés and Gyulai 2020) to rebalance their powers vis-à-vis each other and the wider judiciary. The regime is extremely adaptive: powers, procedures and influences are constantly rearranged based on a rational political cost-benefit-analysis.

The predominant use of “soft” measures of control in the Hungarian case raises the question why judges did not resist more, as they have in Poland or Romania. Looking at it comparatively, the Hungarian judicial capture was remarkably silent. It became apparent from the interviews that judges have preference for individual gains in terms of career and working conditions over collective ones (judicial independence) and they did not learn how to pursue these objectives or organise themselves. This enabled the government to capture large parts of the judiciary, without having to resort to very obvious and easy to prove violations of judicial independence as, for example, in Poland. This also sheds light on the differences among countries experiencing “democratic backsliding”.

Despite the great interest in the capture of courts in Hungary, academic research thus far had overall, with few exceptions, neglected the ordinary judiciary and not incorporated the views of Hungarian judges from across the judiciary. By using interviews to collect novel data, we fill in the gaps in existing accounts of judicial capture and give nuance to the way the system works in practice.