

the opposition—viewed the court as one of the institutional guarantees that would protect them in case the other side would win a decisive victory in the first elections, and the court was therefore equipped with a vast number of competencies.<sup>31</sup> The court's design<sup>32</sup> is particular in several regards, but for the purpose of this paper, I only mention the so-called *actio popularis*: the abstract, de-individualized constitutional complaint. This feature means that everybody (even foreigners) can appeal to the court to declare a certain law invalid on the ground that it violates the Hungarian constitution. This eliminates all barriers created by the conditions of *standing* required by other constitutional courts and, of course, it puts the court right in the centre of legislative politics. Almost every major legislative project in connection with the regime change ended up at the Constitutional Court.

The Court began its work on January 1, 1990, even before the first democratic parliament was elected. It was the first new institution of post-Leninist Hungary, and it began its work immediately. The victorious coalition of the conservative Hungarian Democratic Forum (MDF) with the small Christian Democrats and the Smallholders' party were quite surprised to find out what a constitutional court is capable of doing. In fact, the court showed little respect for what they had expected to be a system of parliamentary sovereignty. It has, for example, struck down the death penalty, against the opinion of the overwhelming majority of the population and probably also of legislators.<sup>33</sup> It found fault with the conservative government's restitution plans, which included giving land that had been taken by the Communists, back to the peasants.<sup>34</sup> It also became the centre of attention in a conflict between the prime minister and the president, the so-called "media war." After the constitutional court had ruled against the government, the far-right wing of the MDF mobilized demonstrations against, among other things, this decision in the streets of Budapest. This attempt to put public pressure on the court, however, failed after huge counter-demonstrations showed that the public was not going to tolerate this kind of politics.<sup>35</sup>

Two decisions were especially controversial: when the government introduced a measure to punish those responsible for atrocities during the 1956 revolution by changing the statute of limitations, the court thwarted these plans. In its decision, the court declared that Hungary was a "Rechtsstaat" and that in a Rechtsstaat, it

<sup>31</sup> Scheppele, "The Accidental Constitution," above n. 7; John W. Schiemann, "Explaining Hungary's powerful Constitutional Court: A Bargaining Approach," *Archives européennes de sociologie*, 42 (2001), pp. 357–390.

<sup>32</sup> For details see Sólyom and Brunner (eds.), above n. 13; Spuller, above n. 13.

<sup>33</sup> Tibor Horváth, "Abolition of Capital Punishment in Hungary," *Journal of Constitutional Law in Eastern and Central Europe*, 3 (1996), pp. 155–160.

<sup>34</sup> Péter Paczolay, "Judicial Review of the Compensation Law in Hungary," *Michigan Journal of International Law*, 13 (1992), pp. 806–831.

<sup>35</sup> Elemér Hankiss, "Die Zweite Gesellschaft," in S. Kurtán (ed.), *Vor der Wende* (Wien: Böhlau 1993), pp. 83–104.

was not possible, for reasons of legal security, to retroactively expand the statute of limitations.<sup>36</sup> When, in 1994, the conservatives experienced a crushing defeat at the polls and the Ex-Socialists (MSzP) and the Social-Liberals (SzDSz) formed a new governing coalition, the court did not loosen its firm control of the legislative. The socialist-liberal government watched with disbelief how the tables were turned on them. In the so-called “Bokros-package” decision, which annulled austerity measures that had been designed by finance minister Bokros to restore a balanced state budget, the court ruled that parts of the hastily enacted austerity laws violated the principle of legal security. This decision was a shock to the government, since it lost around a third of the savings already earmarked for the next budget. It sharply criticized the court but nevertheless complied. The court allowed for similar measures to take effect some months later, but still insisted that legal security was a constitutional value which could not be abridged by political or economic considerations.<sup>37</sup>

Why was the Hungarian Constitutional Court so strong in the first years of its existence? The government or parliament could have simply ignored the rulings, as it did with some low-visibility orders by the court to create certain laws within a specific time limit.<sup>38</sup> While it was unlikely that politicians would try to reinstate the death penalty—Hungary’s membership in the Council of Europe and its prospective membership in the EU effectively prohibited this option—on other issues the compliance of the mostly hostile legislature is quite striking. After all, it suffices to look to its neighbour country Slovakia, where the autocratic prime minister Vladimir Meciar and the parties in his coalition government bullied judges and ignored many important rulings.<sup>39</sup> Not to speak of the already mentioned Russian case or the developments in Kazakhstan, where the President simply deleted the court from the constitution in 1995.<sup>40</sup>

To be sure, there is a way of explaining this phenomenon in the language of interests. The so-called “International Socialization Theory” argues that it is rational for elites to take over normative commitments of the regional environment

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<sup>36</sup> Gábor Halmai and Kim Lane Scheppele, “Living Well is the Best Revenge: The Hungarian Approach to Judging the Past,” in A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN: University of Notre Dame Press 1997).

<sup>37</sup> Füzér, “Wirtschaftlicher Notstand: Konstitutionalismus und Ökonomischer Diskurs im Postkommunistischen Ungarn,” in Boulanger (ed.), *Recht in der Transformation* (Berlin: Berliner Debatte Wissenschaftsverlag 2002), pp. 173–195.

<sup>38</sup> András Sajó, “Educating the Executive: The Hungarian Constitutional Court’s Role in the Transition Process,” in J. J. Hesse, G. F. Schuppert and K. Harms (eds.), *Verfassungsrecht und Verfassungspolitik in Umbruchsituation* (Baden-Baden: Nomos 2000), pp. 229–242. Some of this “disobedience” can be explained by the inability of parliament to agree on the required new legislation.

<sup>39</sup> Schwartz, above n. 6, Chapt. 5.

<sup>40</sup> Schwartz, “Defending the Defenders of Democracy,” *Transition*, 4 (1997), pp. 80–85.

in exchange for material benefits.<sup>41</sup> If we apply this theory to our case, it predicts that Central Europe elites, interested in being integrated into Western European economic and political structures, will adapt to what they perceive as the reigning norms of “constitutionalism.” Hungarian and Polish elites, who were determined to follow through with European Integration, respected their Constitutional Courts. In Slovakia, Meciar and his cronies, who were running the country using illegal and authoritarian measures, could only lose by the establishment of West European standards, including a strong Constitutional Court. Procházka’s argument goes in a similar direction: the Constitutional Court’s internal power and the corresponding compliance (i.e. lack of *visible* resistance) were used by Hungarian elites as a showcase towards the West, demonstrating the “democratic” nature of Hungary and its competitive advantage.

But this is only half of the story. Why did the Hungarian elite think that the West cared whether they had a strong constitutional court or not? Procházka points out that neither EU nor Council of Europe required accession countries to have a Constitutional Court, even less a powerful one. Why did they think that a constitutional democracy had to put up with such aggressive activism? András Sajó warns against a perspective which relies too much on “legitimacy” to explain the court’s success. He argues that the political elite were too divided to retaliate against the court. The court only ever mobilized a part of the elite, and sometimes a part of the population, against its decisions.<sup>42</sup> But even if we acknowledge that a part of the political elite’s compliance can be explained “instrumentally,” the compliance still remains striking. Stone Sweet’s model helps to explain a further part of the story. Hungarian politics became constitutionalized because the Court became an effective dispute resolution forum, especially in questions of state organization. For example, it had to resolve the ambiguities of the constitution outlining the relationship between the president and the prime minister. The mere existence of the court could avoid constitutional crises which would have arisen from struggles over the “correct” interpretation of the constitution. It was able to preserve its triadic legitimacy by the techniques that Stone Sweet outlines: First of all, it justified its decisions with legal, not political, arguments therefore claiming to be a neutral body above politics. The Hungarian Court solved the “crisis of triadic legitimacy” by offering a jurisprudence based on a on the whole coherent system of principles which made it difficult for political actors to argue that the court was deciding the cases “politically.”<sup>43</sup> The message Chief Justice of the Court László Sólyom

<sup>41</sup> Frank Schimmelfennig, “International Socialization in the New Europe: Rational Action in an Institutional Environment,” *European Journal of International Relations*, 6 (2000), pp. 109–139.

<sup>42</sup> Sajó, *op. cit.* n. 38, p. 226.

<sup>43</sup> Alexander Schmitt, “Die Rolle der Verfassungsgerichte im verfassungspolitischen Transformationsprozess in Polen, Ungarn und Russland,” *Jahrbuch für Ostrecht*, 43 (2002), pp. 31–52.

incessantly voiced in the decisions of the court, in interviews, and articles, was that the court's reasoning could not be ad-hoc or arbitrary (and therefore political), but based on a coherent system of principles.

But again, this can only be a partial explanation, because there is no reason to believe that the Slovak Court, for example, could not have functioned the same way. Its decisions were prudent, and based on constitutional principles just as much as other more successful courts in the region.<sup>44</sup> To be sure, as Procházka points out, the legalistic reading of the constitution and the great delays in its decisions did not make the Slovak court an effective check on the Meciar government comparable to the Hungarian court.<sup>45</sup> But I argue that without looking at the elites to which the court's claim to legitimacy is directed, we cannot explain what happened in the post-Communist "judicial review" game. In Hungary, the Kádár-regime had undergone a slow legalization and rationalization of power in the late seventies and eighties.<sup>46</sup> Communist ideology had lost the little legitimation it might have gained after the 1956 uprising. On the other hand, the peculiarity of Hungarian socialism is the extensive exposure of its scientific and economic elite to Western ideas. Its critical intelligentsia was not thrown in jail, but rather sent off to the West to study or do research and upon its return was either co-opted into the system or simply left alone. Chief Justice László Sólyom, for example, spent long periods of time in Germany like many of his colleagues in the first court.<sup>47</sup> The reformers inside the party shared with the opposition the belief that Hungary should become a "Rechtsstaat", a state ruled by law, long before the advent of democracy.<sup>48</sup> To be sure, there was a wide gap in what "Rechtsstaat" meant specifically for the regime and for the opposition. But for both, the "law" became an important legitimating device. Similar developments could be witnessed in Poland,<sup>49</sup> but certainly, such a consensus was missing in the Slovak case.<sup>50</sup>

<sup>44</sup> See Karel Vodicka, "Das Slowakische Verfassungsgericht im Transformationsprozess," in C. Boulanger (ed.), *Recht in der Transformation* (Berlin: Berliner Debatte Wissenschaftsverlag 2002), pp. 195–216.

<sup>45</sup> Procházka, *op. cit.* n. 6, Sections 3.4 and 4.4.

<sup>46</sup> Ágnes Zsidai, "Legitimität Kraft Legalität. Funktionswandel des Rechts in Ungarn," *Zeitschrift für Rechtssoziologie*, 17 (1996), pp. 249–258.

<sup>47</sup> Georg Brunner and Herbert Küpper, "Der Einfluß des Deutschen Rechts auf die Transformation des Ungarischen Rechts nach der Wende durch Humboldt-Stipendiaten: Das Beispiel Verfassungsgericht," in Holger Fischer (ed.), *Auswirkungen der deutsch-ungarischen Wissenschaftsbeziehungen*, forthcoming.

<sup>48</sup> Antal Örkény and Kim Lane Scheppele, "Rules of Law: The Complexity of Legality in Hungary," *International Journal of Sociology*, 26 (1997), pp. 76–94.

<sup>49</sup> Klaus Ziemer, *Polens Weg in die Krise: eine politische Soziologie der "Ära Gierek"* (Frankfurt am Main: Athenäum 1987), p. 414.

<sup>50</sup> On (missing) elite consensus in post-communist societies, see J. Higley, J. Pakulski, and W. Wesolowski (eds.), *Postcommunist Elites and Democracy in Eastern Europe* (London: MacMillan 1998).

To be sure, this does not mean that a strong constitutional judiciary was the inevitable result. “Rechtsstaat” is not the same as “Constitutionalism”, and its relationship with judicial review is, I would argue, one of the historical developments rather than a theoretical logic. Legal positivism is hard to reconcile with judicial review in its modern form—that is, including basic rights. But in an environment of uncertainty and constitutional courts as institutions being largely unknown, this difference was not noticed. The Constitutional Court claimed to interpret “the law”, in this case, the constitutional law. And no Hungarian politician from the mainstream of the political elite was prepared to openly advocate “illegal” measures such as defiance of Constitutional Court. The only exception was the extreme right which openly advocated the abolition of the Constitutional Court. But they never gained significant influence.

The final piece of the puzzle could be that of “Europe,” and here I come to Kim Scheppele’s argument. She has conducted interviews with parliamentarians whose legislative projects had been frustrated by the veto of the constitutional court. Asked why they accepted the sweeping judgements of the court, instead of relying on their own interpretation of the constitution, many of them reacted with surprise—how should they have not accepted given that a strong constitutional court was part and parcel of European constitutionalism. Scheppele argued that the Constitutional Court half relied on, half constructed itself, a “national imagery.” This imagery was half “nationalist.” It referred to a 19th century myth still alive in Hungarian collective memory, of a 1000-year-old constitutional tradition. According to Scheppele, this myth provided a resource for the legitimacy of post-transition Hungarian judicial constitutionalism. But it was also “European” as it referred to the idea, widespread among Hungarian intellectuals and policy-makers, that Hungary had always belonged to Europe and was currently “returning” to it. According to Scheppele, Europe was seen as the base of liberal Constitutionalism, and having a powerful court was part of being “European.”<sup>51</sup> To be sure, rational choice theorists of all flavours will be quick to point out that we should not really believe these parliamentarians. Their answers might be nothing other than rationalizations of the motives that Procházka has pointed out in his comparative study: in the race to be first entrants to the European Union any argument might do. I would not dismiss the sceptics’ allergy against cultural explanations since it represents a healthy antidote against Huntingtonian simplifications. But as Max Weber has taught us, arguments based on ideas, culture, or history can be made in a more sophisticated manner.

And in this case, there are a couple of indicators that Scheppele has pointed out as an interesting cultural phenomenon. As put forward by many authors, the idea of the “Europeanness” of Hungary has a long history.<sup>52</sup> The image of Europe

<sup>51</sup> Scheppele, “Imagined Europe,” above n. 8.

<sup>52</sup> See, for example György Ránki and Attila Pók (eds.), *Hungary and European Civilization* (Budapest: Akadémiai Kiadó 1989) and György Borsányi et al., “Zwischen Zwei

has not been static, but has changed with the geo-political context. Europe was always a model for Hungarian intellectuals and a source of culture and advancement, favourably compared to their, half-feudal and under-industrialized country. However, after the end of the First World War (WWI), when Hungary lost two-thirds of its territory in the Treaty of Trianon, Europe was, for Hungarians, equated with the victorious *entente* resented as being responsible for its plight. After WWII, however, this image began to shift. During Soviet domination, “Europe”, and especially “Central Europe,” was a source of identification used to contrast Hungarianness from “Eastern Europe”, meaning, the Soviet Union and its culture. This sentiment was shared among Hungarian, Polish, and Czechoslovak dissidents.<sup>53</sup>

Again, some of these developments can be found in other East Central European nations as well. There is nothing inherently “European” in a strong Constitutional Court—they only appear in a few model countries such as Germany. The Scandinavian countries do without such a court, and Britain still maintains parliamentary supremacy.

But what might have differentiated Hungary from Poland or the Czech Republic was the extent to which Hungarians were willing to submit to the imagined European standards. Elémér Hankiss writes about public attitudes at the beginning of the 1990s: “[It] was enough to utter the magic words DEMOCRACY, MARKET ECONOMY, EUROPE—words that resounded all around the country and everybody was happy.”<sup>54</sup> While people did not associate the Court with market economy, ironically both “democracy” and “Europe” turned out to be symbolic resources for the court. Thus, damaging this picture in international opinion by attacking the court was out of the question. And even if some MPs within the coalition parties of the first and second parliament harboured thoughts to lash out against the court, the Prime Ministers would stifle any plan in this direction.

#### 4. “DEMOCRATIC COURTOCRACY”?

I have already pointed to the “confusion,” in the public sphere (which in Hungary is basically the Budapest public sphere) of positivist legalism and constitutionalism, which helped the court to established its authority. In a later paper, Scheppele points to a different confusion: between democracy and constitutionalism. According to Scheppele:

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Ufern: Wandlungen des Ungarischen Europabildes,” in Bundeszentrale für politische Bildung (ed.), *Europabilder in Mittel- und Osteuropa* (Bonn: Bundeszentrale für politische Bildung 1996), pp. 139–156.

<sup>53</sup> See the well-known essay by Timothy Garton Ash, “Mitteleuropa?,” in S. R. Graubard (ed.), *Eastern Europe . . . Central Europe . . . Europe* (Boulder: Westview Press 1991), pp. 1–22.

<sup>54</sup> Elemér Hankiss, “Imponderabilia. The Formation of Social Conscience and the Government,” in C. Gombár, E. Hankiss, L. Lengyel and G. Várnai (eds.), *Balance. The Hungarian Government 1990–1994* (Budapest: Korridor 1994), p. 35.

one way to see the other meaning of democracy—as a set of substantive commitments directed to policy and not just as a set of procedures for getting there—was in daily conversation (not with lawyers, but with others). It was common in the 1990s for Hungarians to say that something was “undemocratic” when it violated basic rights.<sup>55</sup>

Scheppele’s claim that “courts can sometimes be more democratic than legislatures” (thus the subtitle of her paper) is instructive in this respect. She identifies democracy not with a formal distribution of decision-making power to the legislature, but as a “set of substantive commitments” and the possibility of participation in the political process. According to her, the Hungarian constitutional court became a forum for the general population. Whenever the government and the political parties often looked “like the communist-era government in the way they treated the citizenry (claiming laws should be applied retroactively, tampering with the media, picking out favourites for special treatment, picking out enemies for deprivations of rights)”, the people could address all their complaints to the court by way of the *actio popularis*, and the “court sprung into action.”

However sympathetic one might be towards the jurisprudence of the Hungarian Constitutional Court, it seems to over-stretch the concept of democracy to characterize the “courtocracy” of the early 1990s in Hungary. The *actio popularis* was basically a petition system, which left the judges with broad discretion as to what they wanted to decide. One basic element of a democratic arrangement, it seems to me, is accountability. This was not present in this system—the judges could not be recalled by the electorate for their decisions. Moreover, this is not how the judges themselves viewed their role. They did not think of themselves as serving the majority of the day, or even be the correctors of individual grievances. Their task, as they saw it, was to re-establish the “majesty of the law” in times of turbulence and short-sighted political passions. On the other hand, many people who put their trust into the Constitutional Court<sup>56</sup> did not so because of its democratic pedigree, but—as Holmes had sarcastically noted—probably because they yearned for an all-powerful institution, which would restore order and stability in the midst of chaotic and frightening social change.

For the purpose of my argument, it suffices to note that in Hungarian political discourse, the tension between democratic parliamentarism and constitutional adjudication was not urgently felt. There were few public critics of the court until late

<sup>55</sup> Scheppele, above n. 12.

<sup>56</sup> In public opinion surveys, the Constitutional Court was consistently the institution with the highest levels of trust, see Dóra Husz, “Intézmények presztízse 1989 és 1998 között,” in S. Kurtán, P. Sándor and L. Vass (eds.), *Magyarország evtizedkönyve, 1988–1998* (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány 1998), pp. 821–829. But the same is true for the Slovak case, see Martin Bútor and Thomas W. Skladony (eds.), *Slovakia 1996–1997. A Global Report on the State of Society* (Bratislava: Institute for Public Affairs 1998).

into its term, which ended around 1999. Their views were unpopular, especially among the liberal press in Budapest, which cheered the court's censures of the conservative government of the first four years. When the socialist-liberal government's legislative projects were equally censured by the court, the practice was too well established already.

The Hungarian public reacted with deep disillusionment and disappointment to the fact that democracy was not how they had thought it would be. László Sólyom's mission to establish the court as the "guardian of the rule of law revolution" succeeded, because the constitutionalism turned out to have higher legitimacy than parliamentarism. Of course, this is neither a full explanation for what happened in Hungary, nor a normative justification. As to the first, I have already mentioned the enormous importance of institutional rules. Without the *actio popularis*, the Solyom-court certainly could not have played the role it has. Had the roundtable negotiations instead implemented a German-type constitutional complaint procedure, the court might have decided a completely different set of questions, or might have gotten involved in a struggle with the ordinary judiciary, just as it has happened in the Czech Republic and, to a lesser degree, in Poland. Equally clear is the impact of judicial personalities. The first Hungarian court was to a very large degree a product of the ambitions and the vision of its first president. Had Géza Kilényi, the candidate of the reform communists, been given the post, we would have seen a very different court.<sup>57</sup>

## 5. CONCLUSION

Mauro Cappelletti has argued that for the "mighty problem" of judicial review—namely the implications of its counter-majoritarian character for the theory of democracy—there "can only be a relative solution, determined by contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, its political structure and processes, and the kind of judges it has produced."<sup>58</sup>

Cappelletti's argument is clearly borne from the case of Hungary. He takes both dimensions of legitimacy into account. While stressing that there is a legitimacy problem with the practice of judicial review, he does not—like many commentators—base this argument on purely abstract considerations. It is, however, important to note that by explaining judicial activism in this way I am not making a general case for "aristocratic" judicial activism in "transitional" times. Jurists are not, as a matter of fact, better suited to decide upon the structural

<sup>57</sup> This is disputed by Procházka, *op. cit.* n. 6, p. 263, who, based on a very structural reading of the situation CEE courts were in, claims that the Courts' jurisprudence would have been very similar even with different judges.

<sup>58</sup> Mauro Cappelletti, *op. cit.* n. 16, pp. 149–150.



dilemmas of (post-Communist or similar) regime changes, such as dealing with the past, property redistribution, welfare reform, and so on.

Let us take a step back from the case of Hungary and reconsider the social science perspective. At the beginning of this chapter, I reviewed empirical theories on the real-world limits of judicial activism, which have, so far, largely concentrated on the interests and ambitions of political actors.<sup>59</sup> In the section on Hungary, I have presented Kim Scheppele's argument on the "European" factor explaining part of the compliance of Hungarian elites towards controversial judicial rulings. I argued that the part of the compliance can be attributed to an abstract appeal of the "Rechtsstaat"—concept (a kind of "impersonal charisma"<sup>60</sup>) among Hungarian elites. Both ideas point in the same direction, that is, cultural dispositions which work as the background in front of which real-world politics occur. As Max Weber writes, in a commonly cited paragraph:

Not ideas, but material and ideal interests, directly govern [human] conduct. Yet very frequently the "world images" that have been created by "ideas" have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest.<sup>61</sup>

Less often cited is the next sentence in which Weber refers to salvation strategies: "From what and for what one wished to be redeemed and, let us not forget, could be redeemed, depended upon one's image of the world." Hungarians, like Poles and Czechs, wanted to be saved from the communist, lawless, "Eastern European" past. But in Hungary, the Constitutional Court also offered to be a "salvatory" institution, one that promised to make Hungary better and more "European", in short: a "normal" country. This offer had been taken up by less-than-democratic attitudes in the Hungarian population. The yearning for an enlightened institution, which oversees the messy politics of the day—a sort of "philosopher-king."

I do not want to stretch the argument too far, since it would require more comparative analysis and empirical proof than I can offer in this short chapter. I would have to (as Scheppele would) present more evidence how the cultural background of Hungary was different from that of, for example, Poland or the Czech Republic, and how this affected the working of their Constitutional Courts. Procházka,

<sup>59</sup> Vanberg, *op. cit.* n. 9, refers to public opinion as a factor in strategic power plays, but he does not explore the cultural background of public sentiment.

<sup>60</sup> On the concept of "charisma" applied to "law", see C. Boulanger, "The Charisma of Law in Times of Transformation. Max Weber's Relevance for Understanding Institutional Change," paper presented at the conference *Law and Society Association and ISA RCSL Joint Meeting*, July 4–7, Budapest.

<sup>61</sup> Hans H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (London: Routledge 1948), p. 280. Had social scientists been attentive to this argument, formulated in the early 20th century, many of the fruitless "rational choice vs. cultural explanation" debates could have been avoided.

in his excellent comparative analysis of the Hungarian, Czech, Slovak and Polish court, points out the differences in legal traditions and notions of parliamentary sovereignty that differentiates the legal cultures of these countries.<sup>62</sup> Also, one cannot overlook the fact that the Hungarian court did not continue to be as powerful as it was in the early nineties, no matter how “European” the Hungarian elite or population felt.<sup>63</sup> Parliamentarians resented the court for its activism, and made sure that the next court would be much tamer.

My point is a different one. Maybe the argument could be rephrased in the context of the debate on “Geography and Democratic Destiny.”<sup>64</sup> The thesis concerning where a country is located and which other countries it has historically been exposed to (through neighbourhood, occupation, colonization, cultural links, etc.) matters for its contemporary democratic development.<sup>65</sup> Due to reasons of historic tradition and exposure, Hungarians felt closer to Europe than Russians, who have for centuries fought an identity battle over whether they were Europeans, Westerners or something else. There were more Hungarians who could travel to Austria and Germany than citizens of, for example, Kazakhstan.<sup>66</sup> Hungarian thinking has been historically influenced by European developments in a much stronger way than elites in countries further in the East. In the more recent past, Hungarian constitutional lawyers did their research mostly in Germany and studied the *Bundesverfassungsgericht*, rather than the Supreme Court. It is true that “European Culture” is an ideological construction that has more to do with exclusion than inclusion—it is usually used to separate “us” and “them”—to differentiate “European civilization” against the “uncivilized” East or West.<sup>67</sup> But no matter how easily scornful analysts might want to deconstruct “Europe” as a myth, it remains a potent myth, and might be viewed as a self-fulfilling prophesy: those, but only those, who imagine being Europeans strongly enough will become Europeans over time.

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<sup>62</sup> Procházka, *op. cit.* n. 6.

<sup>63</sup> See, for unfavourable comparisons of the “Németh”-court with the previous one, K.L. Scheppele, “The New Hungarian Constitutional Court,” *East European Constitutional Review*, 8 (1999), pp. 81–87, and Scheppele, above n. 12.

<sup>64</sup> Laurence Whitehead, “Geography and Democratic Destiny,” *Journal of Democracy*, 10 (1999), pp. 74–79.

<sup>65</sup> See also Jeffrey S. Kopstein and David A. Reilly, “Geographic Diffusion and the Transformation of the Post-Communist World,” *World Politics*, 53 (2000), pp. 1–37.

<sup>66</sup> Regimes matter, of course. There were also more Hungarians studying abroad than Czechs, because the Hungarian regime was much more “liberal” than the Czech.

<sup>67</sup> On the latter, see Europe’s attempt to distinguish itself from the U.S. regarding capital punishment, international conflict, and welfare state ideas.

## **Part III: The Rule of Law**