

Beyond Theory. Understanding Rule of Law Narratives from Their Empirical Context

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As outlined in Chap. 2, we consider actors as highly relevant for the development of the rule of law. They are embedded in their respective contexts, and while their institutional environment influences their actions it does not predetermine them as they can selectively re-interpret institutions. This assumption has far-reaching consequences for our research design. It implies that abstract theories of political action and narratives cannot fully predict or explain rule of law narratives in all cases. It also implies that factors potentially relevant for rule of law narratives in our cases may have been overlooked by theories developed in light of other countries or regions. If we take these implications seriously, we need to move beyond existing theories and be open to new and potentially relevant information about the cases. Moreover, we need to be aware of the context to adequately comprehend what speakers in parliament were referring to (explicitly or implicitly) in the particular setting (cf. Smith-Walter and Jones 2020).

This chapter, therefore, introduces the dynamics in parliaments, legislation around the rule of law (as potential occasions to refer to it), the experiences with an independent judiciary and linkages to the European level during our period of investigation, 1990/1992 to 2021.¹ Based on empirical studies on the countries, we consider four aspects to be potentially relevant for analysing rule of law narratives which complement the general theoretical framework outlined in Chap. 2.

Firstly, party ideologies might be less relevant to rule of law narratives than conventional approaches in comparative politics suggest. Parties are relevant for the recruitment of MPs. However, the party systems have often changed, parties have split and merged, and due to a lack of internal coherence the official party labels often were (and are) not suitable to adequately capture what party members think. Due to power shifts within and between parties, personnel turnover in parliaments

¹In line with our assumption that actors influence which facets, events and ‘legacies’ of the past they address, we refrain from presenting a separate history of the rule of law in our five countries. In this respect, our study is primarily interested in whether and how actors refer to national specifics, not whether these specifics existed historically.

was high and this might have hampered socialisation into a party ideology. In some cases, the parties were more stable in organisational terms, but their positions changed considerably over time, such as in Hungary. Also, adjectives used to describe party positions, such as ‘populist’ or ‘anti-elitist’, often seem too broad to capture differences within and across parties.

Secondly, conflicts over the post-1989 political developments and the consequences of institutional choices during the transition have endured and intensified since the 2010s. This might also have influenced both how actors referred to the rule of law and the discourse coalitions. Lustration/vetting and privatisation measures, for example, were contentious and not universally supported. In Poland, even the adoption of the 1997 constitution lacked broad public support. In all five countries, successive governments adjusted and readjusted the legal frameworks, and these reforms resulted in winners and losers. Only temporarily were these conflicts overshadowed by the widespread desire to join the EU, which required political stability and the adoption of numerous laws to comply with the EU legal framework.

Thirdly, there were struggles between politicians and judges that only partly conform to the patterns and rationales described in the general literature on the rule of law. Some of the struggles were rooted in the post-1989 transition and its consequences, centring around limited legal certainty, contradictions in law and the frequent legal readjustments and the power shifts described above. Others emerged in the context of EU accession. Judges used their new scope for action provided by parliamentary legislation and invoked the principle of judicial independence to protect themselves from criticism. Politicians tried to use legislation to protect themselves from the judiciary and to reform a self-protecting judiciary.

Fourthly, the post-1989 transformation and EU accession caused massive power shifts between the political realm and other spheres, e.g. the judiciary, and between the national and European levels. These processes were accompanied by “competition over the authority to create the structured framework of policy creation and implementation” (Grzymala-Busse and Jones Luong 2002, p. 537). The 1989 revolutions centred on empowering the people and their representatives in parliaments, which initially gained importance for designing democratic institutions. However, their scope for action was quickly constrained—not only by judicial review (which theory adequately takes note of), but also in favour of rapid EU accession. Prior to EU accession, it was mainly the executives, experts and EU actors who formulated the numerous reforms. Later, politicians were bound by the legal obligations of the EU and other organisations which they had voluntarily joined. For sense-making and narratives related to the rule of law it may also be relevant to note that in the 1990s the Council of Europe and the EU, which played important roles in domestic processes concerning the rule of law, did not have a clearly spelled-out rule of law concept. They developed it incrementally during the period of investigation, but not always in a coherent manner. Linkages to both organisations are also more complex than suggested by media coverage, and the degree of conflict with the countries under study differed. All this might have affected how politicians relate to the rule of law in general and rule of law institutions in particular.

In the following, we present and discuss these developments and their potential implications for rule of law narratives in more detail. We start with the dynamics in the parliaments (Sect. 3.1) and proceed by looking at the three waves of rule-of-law-related legislation since 1989 as occasions to refer to the rule of law (Sect. 3.2). In Sect. 3.3, we provide information on the judiciary and the struggles between courts and politicians and in Sect. 3.4, we turn to the Council of Europe and the European Union.

3.1 Actor Dynamics in Parliaments and the Relevance of Rule of Law Issues for Party Competition

In the decades since 1989, parliaments in the countries under study have experienced considerable dynamics in terms of membership and parties. Political conflicts have varied over time and nationally. Especially in the 1990s, the number of parties competing for seats was high, parliaments were fragmented, and the political forces in parliament, the individual MPs, party positions and coalition formats changed frequently. At the same time, party institutionalisation was low, partisan loyalty limited, and many parties were umbrella organisations around one or a few personalities with agendas that were fluid and difficult to grasp. Defections to other parliamentary groups were common (Kopecký 2004; Ghergina et al. 2018, p. 3). These dynamics might have limited the impact of parties on the narratives used in the parliaments during this time.

Since the second half of the 1990s, the number of parliamentary parties and changes in parliamentary factions have decreased in all countries (Semenova et al. 2013).² One reason for this was that new rules made it more difficult “for an MP to leave a party and/or to set up a completely new party” (Kopecký 2005, p. 367). Parties stabilised and “distinct parliamentary cultures, settled institutional structures and parliamentary routines” (ibid.) emerged. Opposition parties enjoyed relatively strong parliamentary rights everywhere, especially in the committees, while government parties controlled the agenda of plenary debates more strongly than before (von Steinsdorff 2011, p. 186ff). The stability has declined since the 2010s. Partly as a result of these dynamics and the ambiguity of party positions, most states have seen changes of government before the end of the term and shifts in the electorate over the three decades.

Majorities in parliaments also changed. In the transition phase starting in 1989/90, democratic reformers gained influence almost everywhere,³ but only in the Czech Republic did they dominate politics. The first changes of government took

²Nevertheless, there were still party defections, and in the Czech Republic party discipline was poor, with dissenting votes even on important decisions. Party groups in Poland and Slovakia were less stable than in the other three states (Kopecký and Spirova 2008).

³In Romania, however, there was an opposite trend, with post-communist and nationalist forces dominating until 1996 when a conservative-civic coalition replaced them.

place from the mid-1990s onwards. In the second decade after 1989, new parties entered the parliaments and after EU accession, elite-critical (social) conservative forces such as the Polish PiS gained importance, striving to strengthen national structures and majoritarian politics. Such a programme had already been popular in Slovakia in the 1990s under Vladimír Mečiar, where it was, however, strongly linked to the unique process of building an independent nation state. From the 2010s, the new conservative governments in Poland and Hungary and other populist parties have gained electoral support with appeals to community sentiment, redistributive measures in response to previous ‘neoliberal’ governments, and criticism of the ‘corrupt’ political class (Kucharzyk 2010, p. 8; Karolewski and Benedikter 2017, p. 526).

Changes in political majorities and the high turnover of MPs might have hampered the emergence of stable frames of the rule of law that seem plausible for established systems (Chap. 2). Given the risks and uncertainties associated with a political career under these circumstances, some MPs might have been interested in seeking professional and financial security outside politics or they might simply have been less focused on political issues, thus following an economic rather than ideological rationale for action.⁴ Likewise, the sometimes high dynamics of political personnel, the presence of conflicts related to the former system and old elites, and a less pronounced left–right competition influenced the composition of coalitions. This might have made rule-of-law-related calculations of parties or of government and opposition forces different from those described in Chap. 2 as typical assumptions in party theories.⁵

Looking at the countries individually, **Hungary**—once a frontrunner of democratisation—has long been among the countries in the region with stable parliamentary parties.⁶ Many important steps towards democracy and a market economy were made during a centre-right coalition composed of the Hungarian Democratic Forum (MDF), the Independent Smallholders, Agrarian Workers and Civic Party (FKgP) and the Christian Democratic People’s Party (KDNP), elected in 1990 but voted out after four years. In 1994, the communist successor party Hungarian Socialist Party (MSZP) won 54 per cent of the seats with 33 per cent of the votes. Seeking greater legitimacy for the budget cuts required by the dire economic situation and trying to appease foreign investors, it formed a coalition

⁴Such an effect could occur, although introducing state subsidies for parties is often seen as an instrument to diminish parties’ propensity for patronage and corruption (Ghergina et al. 2018, p. 12).

⁵In systems with high volatility and parliamentary fragmentation, parties calculate how they could form a government in the future and pursue their interests differently than in other parliaments. Similarly, under these conditions, which promote high career uncertainty and sometimes minor differences in party positions, MPs may be more inclined to switch to another party or parliamentary group than in established party systems with less volatility and fragmentation. These factors can reinforce each other’s effects.

⁶See Lendvai and Major (2021, p. 466f.) for a detailed overview of the party dynamics and different cabinets since 1990.

government with the Alliance of Free Democrats (SZDSZ). It was in sharp contrast to Poland and Czechia that the former democratic opposition entered a coalition with the post-communists. Towards the end of the 1990s, two opposing and highly polarised camps of parties emerged, with roughly equal strength. On the one hand, the MSZP with a social-democratic-liberal programme, on the other hand, the Hungarian Civic Party (formerly Alliance of Young Democrats, Fidesz), a party that had started with centre-left positions, then shifted to liberal and later conservative-national positions.⁷ From 1998 to 2002, Fidesz led a coalition government with MDF and FKgP. Afterwards, the MSZP together with the SZDSZ took over again until 2010. The proportion of re-elected, thus experienced MPs has been very high since the late 1990s. In 2010, however, Fidesz won a landslide electoral victory. This was mainly due to a leaked speech by the MSZP leader stating that the party had lied to the people for years. While the long-time ruling party MSZP dramatically lost influence, a new force, the nationalist Movement for a Better Hungary (Jobbik) entered parliament with 12 per cent of the seats. Since 2010, Fidesz with its conservative list partner KDNP has become the hegemonic political force. The opposition has remained heterogeneous and split.

Like in Hungary, the party system in the **Czech Republic** was relatively stable for a long time. The main parties, the liberal-conservative Civic Democratic Party (ODS) and the centre-left Czech Social Democratic Party (ČSSD), governed alternately. However, there were no antagonistic blocs. This was because, in addition to the left–right conflict, there was a cleavage related to the former system and the Communist Party remained unreformed (which was a national peculiarity in the region). This cleavage meant that the Communist Party was not accepted as a coalition partner and the ČSSD had to cooperate with centre-right parties to be able to form a government. In consequence, it faced opposition from both the left and the right. Both ODS and the ČSSD cooperated with two junior coalition partners each or formed a tolerated minority government.⁸ While the ODS governed from 1992 to 1997 and 2006 to 2013, the ČSSD led governments from 1998 to 2006 and 2014 to 2017. From 2017 to 2021, it was in government as a junior coalition partner. Like in Hungary, many MPs had been re-elected to parliament since the late 1990s, but the situation has changed considerably since 2010. The political conflicts now also revolved around the interpretation of the political developments since 1989. There had already been government crises before (e.g. in 2002 to 2006, 2006 to 2009 or in 2013), but now there was a more substantial change in the party system (Balík and Hloušek 2020). The ODS massively lost support and the new party Action of

⁷It has to be noted that the agendas of many parties were and still are rather vague. Fidesz, for example, presented no election manifesto in 2014, 2018 and 2022 (Bos 2022).

⁸Among the small coalition partners was the Christian and Democratic Union—Czechoslovak People's Party (KDU-ČSL), which therefore formed part of many governments. From 1998 to 2002, the ODS tolerated a ČSSD minority government in return for concessions regarding policy and appointments. The lines between government and opposition typical for parliamentary systems were blurred in this way. In 1996, the ČSSD had already tolerated a minority government of the ODS and two other parties, but without support for its legislative work.

Dissatisfied Citizens (ANO) led by Andrej Babiš emerged. It was often described as a business-firm party without an ideological foundation, seeking to win votes with anti-corruption and anti-establishment rhetoric (Hájek 2017). Legitimised by strong voter support, the new party became part of a ČSSD-led government (2014 to 2017) and led a minority coalition government itself between 2017 and 2021. A complete change of government followed in 2021 when no less than five centre-right parties formed a counter-coalition under Petr Fiala (ODS). All these changes have, of course, been reflected in changes in the composition of parliament.

In **Poland**, the party system has been less stable, although for a long time the political scene was “still largely shaped by Solidarity – broadly defined – and the former communist establishment” (Krok-Paszkowska 2001). In the early 1990s, the number of parties in parliament and in government was very high, but a new electoral law then reduced the number of parliamentary parties. A right-wing coalition was only of short duration from December 1991 until June 1992, and from 1993, a post-communist coalition of the Democratic Left Alliance (SLD), now with a social-democratic programme, and the former satellite social-conservative Peasant Party (PSL) succeeded in returning to power with almost two thirds of the mandates (based, however, on only one third of the votes). The more heterogeneous post-Solidarity centre-right forces were almost not present in parliament but strategically formed *Solidarność Electoral Action* (AWS). AWS won the 1997 elections and governed together with the liberal *Unia Wolności*, which left the coalition in June 2000. In 2001, the SLD post-communists and the Peasant Party took over again, now together with the social-democratic *Unia Wolności* and the PSL (until March 2003). In this time, a raft of scandalous revelations involving politicians and officials from the SLD “were felt to exemplify the corrupt and cronyistic network that had allegedly colonised Polish capitalism and led to calls for more radical lustration and revelation of former communist security service networks as a means of breaking this corrupt nexus”, as Szczerbiak (2017, p. 328) notes. In this climate, the social-conservative Law and Justice Party (PiS), which had emerged in 2001 from AWS,⁹ won the elections in 2005 with its vision of a “state of Solidarity” and a new, fourth Republic.¹⁰ It was supported by the conservative Self-Defence of the Republic of Poland (SRP) and the League of Polish Families (LPR). In all legislative periods so far, more than half of the MPs had been elected for the first time. In 2007, an alliance between the liberal-conservative Civic Platform (PO), a split from *Unia Wolności*, and the Peasant Party (PSL) took over. Over 90 per cent of MPs now had experience of at least one political position, especially in local or regional politics (Semenova et al. 2013, p. 295).¹¹ The liberal phase ended in 2015 with PiS winning

⁹It stood above all for a law-and-order policy, welfare state, a Europe of nations, robust state-owned enterprises, the renationalisation of the media, stronger control of the judiciary and against networks of former regime supporters.

¹⁰Kucharzyk (2010, p. 8f.) characterised PiS as a populist party and mentioned economic inequalities, corruption and xenophobic nationalism as driving forces of populism in Poland.

¹¹It is important to note, however, that on 10 April 2010, the President of the Republic of Poland and a number of high-ranking politicians and state officials died in a plane crash.

the Sejm elections and being able to form single-party governments. This resulted in a new reshuffling of MPs.

In **Slovakia**, nationally oriented populists and conservative-liberal parties alternated in government after 1992. The Movement for a Democratic Slovakia (HZDS) was the strongest political force until the mid-2000s. It had seceded from the 1989 opposition movement Public against Violence (VPN) and formed the governments from 1992 to 1998. Among the most important political conflicts were the economic left–right cleavage, the attitude towards the Catholic Church’s role, and the question of treatment of ethnic minorities, especially the Hungarians. Like with other parties, HZDS’s party profile was ambiguous and changing and de facto determined by its party leader Vladimír Mečiar. Many Slovak parties declined to cooperate with HZDS because of Mečiar’s authoritarian style, his informal networks and alleged linkages to organised crime (Leška 2013, p. 76ff.; Sect. 3.2). In 1998, a large and heterogeneous government coalition succeeded in replacing HZDS in government under a conservative prime minister, Mikuláš Dzurinda (SDKÚ). From 2002 to 2006, he led a government more narrowly composed of liberal-conservative parties. The successor party to the communists, the Party of the Democratic Left (SDL), which was a vocal opponent of Mečiar’s rule in the 1990s, gradually lost electoral support after joining the predominantly right-wing Dzurinda cabinet. It later merged with Direction—Social Democracy (Smer), a party founded in 1999 by Robert Fico, a former SDL member. Smer was critical towards neoliberal reforms of the second Dzurinda cabinet and strongly pro-European and progressive. In 2006, it won nearly one third of the votes and formed a coalition with HZDS and the nationalist SNS. After a short phase of a multiparty coalition led by the conservative-liberal SDKÚ-DS to circumvent the strongest party (2010–2012), Smer formed the first single-party government (2012–2016). From 2016, it led a heterogeneous coalition with Most–Híd (a party also addressing the Hungarian minority), Siet’ and the Slovak Nationalist Party (SNS). Since the 2000s, several liberal anti-establishment parties have emerged, for instance Freedom and Solidarity (SaS), often linked to prominent businesspeople. In 2011, Ordinary People and Independent Personalities (OLaNO) was founded with an anti-elite and anti-corruption profile and conservative positions, and formerly relevant parties lost electoral support. In 2020, OLaNO won a quarter of the votes and ruled a coalition with three centre-to-right parties, but the cabinet collapsed (Mesežnikov and Gyárfášová 2018; Sekerák and Němec 2023).

Romania differed from the other states in several points. Here, the former communist ruling party vanished but reappeared under the name of National Salvation Front (FSN). Former communist cadres had carried out a ‘revolution from above’ by appropriating the political discontent of street protest and by temporarily incorporating dissidents. The communist (and FSN) successor Social Democratic Party (PSD) succeeded in remaining a key actor since 1989, now with a social-democratic programme. Other parties were marked by constant reshufflings and formed around single personalities and their networks, and not around clear

manifestos.¹² PSD governed from 1992 to 1996, from 1994 together with the nationalist Romanian National Unity Party (PUNR) and Greater Romania Party (PRM) and the neo-communist Socialist Labour Party (PSM). The party changes meant a relatively constant turnover of over 50 per cent of MPs until the 2000s (Semenova et al. 2013, p. 294). Since many parties were small and gained little electoral support, PSD could only be ousted from government by forming a heterogeneous alliance. This occurred for the first time in 1997 when the Christian Democratic National Peasants' Party (PNȚ-CD), the Democratic Party (PD, with an ambiguous profile), the National Liberal Party (PNL), the Democratic Alliance of Hungarians in Romania (UDMR) and the Romanian Social Democratic Party (PSDR) formed a coalition. However, PSD came back in 2000—until 2004 with the support of the Conservative Party (PC) and PSDR. As can be seen, there was again no clear leftist coalition profile. In 2005, another upheaval against PSD led to a cabinet ruled by the PNL with various parties. From 2009/10, the Democratic Liberal Party (PD-L) ruled the government, but in 2013 PSD returned to power, now together with the PNL and PC. Technocratic governments were in office from 2015 to 2017, followed again by a PSD-led coalition, now with the Alliance of Liberals and Democrats (ALDE). In 2020, the PNL, which in the meantime had merged with the PD-L and was now more conservative, governed first alone, then in coalition with the emphatically pro-European Save Romania Union (USR) and UDMR.

Generally, across all countries, former communists were mainly active in the communist successor parties and other left parties after 1989. Former dissidents were mainly found among conservative, Christian democratic and liberal MPs (Semenova et al. 2013, p. 287). The proportion of first-time MPs was consistently very high in the 1990s and fell towards the end of the decade, when it still amounted to 40 per cent or more (Semenova et al. 2013). In Romania, where the proportion of professional politicians was particularly low (Semenova et al. 2013, p. 291), politicians facing a high risk of not being renominated or re-elected often looked for a second source of income (Iancu 2022).

In all countries, rule-of-law-related issues were relevant for party competition. From the early 2000s, and especially after EU accession, frustration with the results of reform policies and integration into the EU grew in many countries (e.g. for Poland Cichocki 2012). A major concern was the considerable gap in living conditions between the East and the West that persisted despite all efforts. Another matter of concern was a perceived state capture by political elites, i.e. clientelist entanglement with business networks (Koryś and Tymniński 2016; Mesežnikov and Gyárfášová 2018; Klíma 2020; Dvořáková 2020; Naxera 2013; Ágh 2014), and the persistence of old elites in the public sphere (O'Dwyer 2006; Horne 2009). Even in

¹²From 1991 a 'government of national unity' was formed that was still dominated by FSN but included other parties as well (Mișcoiu 2022). The FSN then faced several splits, e.g. of the reform wing Democratic Party (PD). Through several intermediate steps, some former FSN members founded the Party of Social Democracy in Romania (PDSR) and later the Social Democratic Party (PSD).

the two states with a ‘pacted transition’, Hungary and Poland, the exclusive style of the first post-1989 years was criticised as having squandered social trust (Puchalska 2005). Public discussions centred around the topic that former security service and other functionaries had preserved much of their networks and informal channels (Polish: *układ*) and it was argued that they had used them to maintain de facto power even beyond politics and elections, e.g. in business (Szczerbiak 2016).

In all countries, the economic context favoured grey zones of legality in the second decade of post-1989 transformation. According to Karolewski and Benedikter (2017, p. 522), “after 1989, basically all Polish governments used state agencies and state enterprises for cronyism and politico-economic clientelism”. Hungary was described as “a hostage of various informal groups, accessible only to selected social and family groups over which there is no public control” (Avbelj 2017, p. 281) and with legal enforcement favouring partisan political interests (Rupnik and Zielonka 2013). For the Czech Republic, economic policy corrections, party funding scandals, a pact between government and opposition (the ‘opposition agreement’) and other controversial events in the 1990s impacted on the attitudes towards politics (Linek 2010). In Romania and Slovakia, allegations of corruption were relevant for party competition, and anti-corruption measures were also used as an instrument to combat opponents.

The parties that had governed in the first decade of transition were often blamed for clientelism, political cronyism and corruption, or at least they were not expected to solve the problems. Support for post-communist or social-democratic parties decreased in Poland and Hungary—in Poland, it virtually collapsed—and some centre-right parties disappeared from parliaments. At that time, only a few former dissidents were still engaged as MPs (Semenova et al. 2013, p. 287). Parties whose public appearance focused on criticism of the phenomena mentioned above and who promised to bring politics closer to the interests of ‘ordinary people’ gained strength. From their point of view, the people were given too little attention by politicians despite formal democratisation. These included newly founded parties such as PiS in Poland, ANO in the Czech Republic or OĽaNO in Slovakia, but also parties that had previously only briefly held government responsibility, such as Fidesz in Hungary.

Unlike in Poland and Hungary, the constellation of parliamentary forces in the other three countries diverged. In Slovakia, centre-left parties gained more support, with a peak in the parliament elected in 2012. From 2006 onwards, Smer-SD repeatedly led cabinets in Bratislava. Despite its pro-welfare state rhetoric, the party de facto pursued “fairly strict austerity policies with occasional ‘social packages’”, and “unlike Western social democratic parties the leaders of Smer-SD are prone to using national and populist appeals” (Malová 2017, p. 1). In the Czech Republic, social democrats and communists still earned every third mandate in the second decade after transition but did not move towards open cooperation. In Romania, the fragmented and unstable conservative-liberal government coalitions were criticised for the poor socio-economic situation and austerity measures, and after EU accession significantly more voters than in the other countries opted for programmatically leftist parties, with as many as 72.6 per cent in 2012. However, in

the subsequent parliamentary elections, the share fell sharply to under half of the seats (2016) or just over one in four mandates (2020).

Since around 2010, nationally oriented, communitarian and plebiscitary sentiments, which had been present but less visible before, have become stronger, especially in Hungary and Poland (Blokker 2020; Stroschein 2019; Enyedi and Linek 2008). This was mirrored by the composition of the parliaments. Electoral dynamics made some parties disappear from parliaments that had previously mobilised large shares of the vote and had been relevant for political debate and decision-making, even in the apparently stable countries like Hungary and Czechia. In the Czech Republic, for example, the leftist parties lost considerable support in the 2017 elections and disappeared from parliament in 2021. In contrast, an existing party (Fidesz, Hungary) or a new one (ANO, Czechia) received substantial electoral support.

Corruption and patronage have continued to be important issues in party competition, with parties repeatedly accusing each other of such practices. ‘Integrity politics’ was also used as a weapon against political opponents (Kiss and Székely 2021), but parties could be successful despite such accusations. For instance, Smer-SD in Slovakia held power for many years thanks to its popularity. However, their “murky relations with oligarchs and high levels of corruption” formed part of the public perception of the party (Malová 2017, p. 1). Another example is ANO, which won the Czech parliamentary elections in 2017, despite allegations of the misuse of EU subsidies against its leader and former finance minister Andrej Babiš (although these related to the period before he entered politics). Romania’s PSD also performed strongly despite allegations of corruption and patronage (Iancu 2018).

Since around 2010, the governing parties often set goals for more effective governance, promising to strengthen the nation state, the middle class and national ownership in the economy and the media.¹³ PiS and Fidesz presented an illiberal agenda but argued that they strive to foster democratisation and to ‘finish’ the 1989 system change (Szczerbiak 2017). The Czech and Slovak ruling parties did not openly adhere to illiberalism; ANO’s declared goal was to organise the state in a more efficient way as well as the fight against corruption (Havlík and Hloušek 2020).

While political scientists and media mostly focus on parties and their patterns and dynamics as described above, the professional background of MPs might also be relevant for rule of law narratives. It differed considerably across countries. In Czechia, according to an analysis for 1992–2006, almost two-thirds of the MPs had a university degree in natural sciences. It was more than half in Romania, in Poland 41.5 per cent (1991–2007) and in Hungary just over one in three. On the other hand, almost half of the MPs in the Budapest parliament had a degree in humanities, 40.9 per cent in Poland, 31.9 in Romania and 23.7 in Czechia. Law was less widespread as a degree. Only in Hungary and Poland did about one in five MPs have a law degree, which was substantially higher than in the other countries

¹³On Fidesz promoting these goals in collaboration with think tanks, foundations and other party-affiliated organisations, see, for instance, Tóth (2012), p. 148 and Buzogány and Varga (2021).

(Semenova et al. 2013, p. 289). However, this law degree had mostly been earned before 1989 when rule of law issues, if at all, had been taught in a socialist perspective.

3.2 Occasions to Debate the Rule of Law in Parliaments: 3 Waves of Rule-of-Law-Related Legislation

The legislation that shaped rights, legal structures and the judiciary during our period of analysis can be roughly divided into three waves (cf. Piana 2010). These waves may be reflected in the narratives on the rule of law (Chaps. 5 and 6).

The first wave of legislation, from 1989 to the mid-1990s, was embedded in the democratisation project. The constitutional, legal and judicial transition included lustration and restitution, as well as changes to criminal law. In the second wave, which began in the second half of the 1990s,¹⁴ politicians revised numerous legal provisions in response to perceived deficiencies of the laws passed during the early 1990s and prepared for EU accession. Again, lustration played a role, and the fight against corruption gained importance as an officially declared concern of many politicians. The third wave began around 2005¹⁵ after the countries had joined the EU (with Romania joining in 2007). It started in 2006 in Czechia and Slovakia, in 2007 in Romania, in 2010 in Hungary and 2015 in Poland, mirroring the dramatic changes in the party composition of parliaments during that time (Sect. 3.1). During this phase the countries diverged in terms of the content of the reforms and the actors involved. In Czechia, Romania and Slovakia, corruption continued to be an important issue. In Hungary and Poland, politicians justified reforms by referring to flaws in post-1989 development, while many observers have identified these two countries as “obvious cases of backsliding” (Dimitrova 2010, p. 137).

¹⁴In four countries, this wave started with electoral changes. In Czechia, it began in 1997/1998 when the Social Democrats came to power after the fall of the Klaus government and early elections. In Poland, it began in 1997 when a conservative-liberal government was established. In Hungary, it started in 1998 with the first Fidesz-led government. In Slovakia, it also started in 1998 when the elections ousted Vladimír Mečiar from power. In Romania, the wave began in 1999 when the Işărescu cabinet took office after the CDR coalition with the Democratic Party and PSDR and UDMR/RMDSZ had fallen apart. Elections took place in 2000.

¹⁵In Czechia, this wave ended with the Social Democrats-led cabinet, under which EU accession was achieved. In Hungary, it ended with Fidesz coming back to power in 2010 because the legislative period before differed much less from the pre-EU accession legislative term than this caesura. In Poland, the second wave also included a brief conservative-right turn after EU accession with the PiS-LPR-Samoobrona government from 2005 to 2007. This government initiated a new lustration law and the establishment of an anti-corruption bureau. While it would also be possible to end the wave in 2007, we prefer to include the legislative period under the PO-PSL liberal-conservative coalition (until 2015) because the policy did not change remarkably during that time but was followed by a caesura with PiS gaining power in 2015. In Slovakia, the wave began with the end of the pro-European centre-right governments of Dzurinda, under which EU accession was achieved. In Romania, it began with EU accession.

In the **first wave of legal restructuring** from 1989/90 onwards, the drafting of new constitutions or amendments to old ones was crucial. Democratic reformers sought to introduce free elections, pluralism, fundamental rights and the separation of powers, as well as economic liberalisation. The overarching aim was to empower people by granting them individual rights against the abuse of state power, thus making them real citizens. The acquisition of national sovereignty through detachment from the Soviet Union was seen as an essential prerequisite. The strong orientation towards the nation state, which was widespread throughout the region, therefore did not collide with the aspiration to ‘return to Europe’ (von Beyme 1994, p. 124ff., 144). Since reform-oriented parts of old political forces also supported these ideas in response to public pressure, the commitment to the rule of law as a constitutional principle was quickly adopted everywhere and in all countries with hardly any public debate.

As mentioned in the introduction, several constitutional specifics in East Central Europe were introduced in reaction to the pre-1989 arbitrary exercise of power. They included a detailed charter of fundamental rights, rule of law safeguards and entrenched constitutional review (Albi and Bardutzky 2019). In all constitutions, the rule of law was mentioned in tandem with other principles of equal importance, above all democracy (all five), but also social justice (Poland, Romania) or human and civil rights (Czechia).¹⁶ In Poland,¹⁷ Hungary and Romania, an ombudsman as a parliamentary protector of individual rights was also established. The new constitutional features were introduced but not fully elaborated. In general, MPs—often new to politics—were strongly involved as legislators in this phase. Even though governments were very influential—e.g. they introduced the draft constitutions in Czechia and Slovakia—ministries were described as having played a somewhat less important role for legislation than in established democracies (Ágh 2002, p. 48).

Apart from these general commonalities, the concrete measures and policies differed. In Hungary, democratisation took place without adopting a new constitution. The socialist constitution was revised between autumn 1989 and spring 1990 and thus before the first free elections. The revisions codified the roundtable agreements between representatives of the old and new forces, which the young

¹⁶“The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice” (Art. 2 Constitution of Poland); “The Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens” (Art. 1 [1] Constitution of the Czech Republic); “The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion” (Art. 1 [1] Constitution of Slovakia); “The Hungarian Republic is an independent, democratic state governed by the rule of law” (Art. 2 [1] Constitution of Hungary); “Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed” (Art. 1 [3] Constitution of Romania).

¹⁷In 1987, the ombudsman was introduced by a legislative act. With the 1997 constitution, it was constitutionalised.

Fidesz party did not agree to because it wanted broader democratisation (Elster et al. 1998, p. 70ff.; Pogány 1993, p. 339).

In Romania, due to its overwhelming majority the post-communist National Salvation Front did not face substantial opposition in parliament and could design a new constitution primarily according to its own ideas. The main contention pertaining to the state form (monarchy or republic) had been settled previously. Hence the bicameral parliamentary structure, the semi-presidential form of government and presidential powers were decided in the Constituent Assembly with only minimal debate. In key constitutional controversies, the majority prevailed (Göllner 2022; Hein 2013; Gallagher 2008, p. 89ff.; Blokker 2017, p. 447f.; Lungu 2002, p. 403). The constitution also borrowed from foreign constitutions, e.g. in the fundamental rights section (Iancu 2019, p. 1049), and stipulated a high formal hurdle for constitutional amendments. It was not only endorsed by the parliament but also in a referendum. Seventy-seven per cent approved it in 1991, with a turnout of 66 per cent (Adamovich 2004, p. 240).

In Czechoslovakia, the Federal Assembly failed to agree on a new constitution—not even in the form of a small constitution (Kahl 1994, p. 51ff.). Instead, it made numerous amendments to the 1960 constitution and other regulations with constitutional quality (Slapnicka 1991).¹⁸ The structure of the federation and the relations between government, parliament and president remained subject of controversies. Slovak Prime Minister Vladimír Mečiar initially aimed for a confederation, but in 1992, he and Czech Prime Minister Václav Klaus agreed on the separation of the republics as of 1 January 1993 (Elster et al. 1998, p. 71ff.).

In Slovakia, the parliament adopted the declaration of sovereignty in July 1992 and the constitutional proposal of Mečiar's government on 1 September 1992.¹⁹ It was solemnly signed after a heated two-day parliamentary debate.²⁰ The new constitution contained a charter of fundamental rights and mainly the ideas of the majority party (Kahl 1994, p. 51ff.; Elster et al. 1998, p. 74). As for its content, some prominent Slovak legal experts criticised the “*étatist* and paternalist ambitions, the authoritarian tendencies, the nonfunctional ties among the organs, and the general obsolescence of the approved concept” of the constitutional text (Holländer 1992).

The Czech constitution, adopted shortly after, differed from the Slovak one. The legislature had particularly debated the division of powers. The shared idea of returning to the 1920 Czechoslovak constitution helped to ease tensions between the government and the opposition. Prime Minister Klaus and two of the government

¹⁸They concerned the fundamental rights, the competences of the Federation and the constituent republics, the establishment of the constitutional court and the introduction of referendums.

¹⁹Since 1990, some Slovak politicians had already tried several times to adopt a Slovak constitution based on a federal constitutional provision from 1968 that allowed national legislative bodies to do so.

²⁰Neither of the two political parties representing the Hungarian minority supported the new constitution since it did not guarantee minority rights as collective rights. The Christian Democratic Movement voted against it, arguing that its entry into force on the date of publication would clash with the still-valid federal constitution (Stein 1997).

parties (ODS and ODA) were against the incorporation of the already existing (federal) Charter of Fundamental Rights and Freedoms into the new Czech constitution. However, to mobilise the votes from the opposition necessary for the adoption of the constitution, they agreed to declare the Charter as part of the Czech ‘constitutional order’, meaning that these rights were indirectly constitutionalised. In contrast to the Slovak case, the new constitution was adopted without a solemn ceremony and entered into force after the Czechoslovak federation was legally dissolved (Stein 1997).

In Poland, the parliament laid the foundations for democracy and the rule of law by amending the socialist constitution. The first freely elected, extraordinarily fragmented and polarised parliament could not agree on a new document or a Charter of Fundamental Rights.²¹ The ‘small constitution’ of 1992 was de facto an amendment of the socialist constitution and the fundamental rights of the socialist constitution remained in force (Sajó 1995, p. 144; Kahl 1994, p. 41ff.). In the following years, constitutional questions raised “an ever more ferocious debate” (Blokker 2020, p. 344). A post-communist coalition compromised with Unia Wolności across the parliamentary government–opposition line about a new full-text constitution. While there was large support in the Sejm for the constitution (including centre-right and post-communist forces), relevant Solidarność forces were not involved in the compromises because of the effects of the electoral law.²² The new constitution was endorsed by 53 per cent in the subsequent referendum. Although the referendum did not meet the minimum threshold of 50 per cent of eligible voters for validity, the constitutional court endorsed the result (Gönenç 2002, p. 132ff.; Górski 2014).

Despite the shared references to democracy and the rule of law and comprehensive fundamental rights sections, no country adopted a specific Western constitutional model after 1989 (Elster et al. 1998, p. 80). The sets of rights and the institutions differed. There were now unicameral (Hungary, Slovakia) and bicameral parliaments (Czechia, Poland, Romania), as well as purely parliamentary systems (Czechia, Hungary, Slovakia) and premier-presidential systems, which ensure “that the cabinet depends only on assembly confidence”, yet provide “certain powers to a popularly elected president” (Shugart and Carey 1992, p. 7; Poland, Romania). Some constitutional courts were strong, as in Hungary, while in Poland²³ and

²¹ In the autumn of 1990, the parliament, still with the Communist PZPR as the strongest party, determined a two-thirds parliamentary majority and a referendum as a legal prerequisite for adoption. The next parliament confirmed this procedure as constitutional law (Elster 1991, p. 463, 1993, p. 212).

²² In the parliament elected in 1993—the second freely elected one—the successor party to the former state party, the SLD, and the PSL, the successor to the former satellite Peasant Party, held almost two-thirds of the seats, although their share of the vote had been only one-third. The Solidarność successor parties—mainly centre-right—did not found an electoral platform and thus received only a small number of mandates, which changed in 1997 when the constitution was already adopted.

²³ In Poland, this was the case until 1999 for decisions of the constitutional court determining the lack of compliance of a statute or a part of a statute with the constitution.

Romania, qualified parliamentary majorities could overrule constitutional court decisions (Malová and Haughton 2002, p. 115).

The decision makers enshrined the rule of law in the new or amended constitutions before they agreed on legal provisions on elite change to deal with the authoritarian past. Later, they adopted lustration laws to minimise the influence of old elites on the young democracies by keeping incriminated representatives of the previous regime out of public positions. These laws were controversial and some of them, or parts of them, were annulled by constitutional courts (for an overview, see Nalepa 2010, p. 3; Sect. 3.3). That is one of the reasons why the elite change remained incomplete.²⁴ Already in 1991, Czechoslovakia had passed a far-reaching and detailed lustration law. After the split of the federation, the Czech parliament modified the law in 1993 after the constitutional court had partially objected to it. In Slovakia, Prime Minister Mečiar wanted to abolish the Czechoslovak lustration law but was stopped by his coalition partners (von Beyme 1994, p. 188). In Hungary, the parliament passed a lustration law in 1994, which affected a relatively wide range of people but with almost no sanctions (Williams et al. 2005, p. 37).²⁵ Poland was the last country in the region to adopt a lustration law. Bills for more extensive lustration measures had failed to gain majorities, partly due to the ‘thick line’ (*gruba kreska*) agreed upon by Solidarność and the communists in 1989, or they were stopped by the constitutional court. A moderate lustration law adopted in 1997 was “directed solely at those individuals with links to the communist-era security services”, without automatic effects (Szczerbiak 2002, p. 567f.; see also Williams et al. 2005, p. 36f.). In Romania, initiatives from civil society to ban mid-level and leading communist politicians and members of the political police Securitate from running for democratic office were unsuccessful. Lustration regulations were particularly modest and sparsely implemented (Halmai 2007; Petrescu 2007).

Although many other legislative changes were carried out relatively smoothly, the transition to a new system in many areas was associated with a loss of political control and, in some cases, a dismantling of the state. The new democratic institutions were fragile (Malová and Haughton 2002). Given the extensive need for new regulations with the temporary continuation of old legal norms, legal gaps, contradictions or ambiguities also around the government system, conflicts between constitutional bodies, political instabilities and deficits in administrative efficiency

²⁴In the Czech Republic, for example, about 30 per cent of the functionaries were still former communists in 1996 (Srubar 1998, p. 29). In addition, because of the protection of fundamental rights, the lustration laws were only allowed to apply to selected public areas and types of incrimination, which is why former functionaries were able to make perfect use of the knowledge and skills they had acquired in the old system in the areas that were exempt and had favourable starting conditions (Sterbling 2003; von Beyme 1994, p. 208).

²⁵In 1997, then socialist Prime Minister Gyula Horn, for example, remained in office after being sanctioned by the vetting committee for having received secret police reports and having been a member of a counter-insurgency squad in 1956 (Williams et al. 2005, p. 38). As David (2006) argued, the accommodation of the elite in Hungary was relatively successful because collaborationists were widely spread across all political parties.

occurred everywhere (de Raadt 2009; Beichelt 2001; Göllner 2022). New informal political practices and rules deviated from the legal texts. In some cases, such informal practices even helped to enable action and decisions in an environment which constrained the functioning of the new legal framework (e.g. Malová 2001). In other cases, they simply undermined the effectiveness of the law.

Regulatory gaps and legal grey zones in the political and economic reforms, as well as the uncertainties of the future exercise of political offices, also promoted the emergence or strengthening of patronage networks, corruption and a shadow economy. In the post-1989 period, attempts at state capture or patronage occurred everywhere (Innes 2014; Hellman et al. 2000). However, corruption varied among the countries studied. In Romania, political and economic corruption was particularly pronounced (Vachudova 2009, p. 45ff.; Gallagher 2008). Slovakia was also criticised in this respect (Rhodes 2001). Its trajectory in the 1990s was often compared to the South-East European countries due to the “disrespect for the principles of constitutionalism, a tendency to centralize executive power, and movement towards the establishment of a powerful, oligarchic, property-owning class” (Szomolányi 2004, cf. Duleba 1997). The granting of amnesty to his people by Prime Minister Vladimír Mečiar, at that time exercising presidential powers due to the vacancy of the post of head of state, became symbolic of the highly personalised majority rule abusing legal instruments for their own power interests.²⁶

From the mid-1990s onwards, the consequences and side effects of the transition became visible. Often this was accompanied by changes in government. A large part of the parliamentary work in many countries now consisted of amending the legal texts that had been introduced before (von Steinsdorff 2011, p. 179).

In contrast to the first wave of post-1989 legislation, actors in the **second wave of legal and judicial transformation** did not assume the task of building new institutions and legislation paving the way to democracy and a market economy. From the second half of the 1990s, they concentrated on preparing for EU accession by changing many regulations as required by the EU. One goal of the EU legal advisors was to give the judiciary more powers and institutional autonomy to ensure that it could enforce the EU *acquis* even if it conflicted with national laws (Parau 2015, p. 409f.).²⁷ Accordingly, the judiciary and the constitutional courts were strengthened, and their autonomy massively increased (Piana 2017; Issacharoff

²⁶The legal act, which was later labelled Mečiar amnesties, was an abolition, i.e. an order not to initiate or to terminate a criminal prosecution for the thwarted referendum in 1997 (here it concerned mainly Mečiar's interior minister Gustáv Krajčí) and for the kidnapping of the son of the President of the Republic in 1995, where everything indicated that the Slovak secret services were involved (here the main suspect was their chief Ivan Lexa). Soon after Mečiar was removed from power, a number of attempts began to repeal these controversial decisions in a constitutional manner, which was only achieved in 2017 (see Mazák and Orosz 2018).

²⁷The advisors were legal or administrative experts who had little knowledge of the national contexts and little understanding of how suitable certain legal concepts and operational logic were to the given environment. This factor and the low consideration of stability, coherence, generalisability and enforceability of law were criticised by some scholars and practitioners (Mendelski 2016, p. 371f.; Gaul 2002).

2015; Parau 2013). The competence of the constitutional courts to make the final, binding decision on the constitution's interpretation was promoted by the European Commission and the Council of Europe. They also strongly recommended the establishment of judicial councils as self-governing bodies²⁸ as well as specialised legal and, in particular, judicial training (Parau 2015; Kosař 2017). Ensuring judicial accountability, by contrast, was not a goal (Bobek and Kosař 2017, p. 185).

In Czechia and Slovakia, the institution of an ombudsperson was introduced in 1999 and in 2001 respectively. In both countries, this was related to their EU accession. There was also a drive for consistent, efficient case law. In this context, all countries realised judicial reforms that had previously been planned but never implemented. For example, in 2002, the Czech Parliament passed a law on administrative jurisdiction, which, among other things, established the supreme administrative court already provided for in the 1993 constitution. It was not always clear to what extent the individual regulations really resulted from EU requirements. According to Piana (2017), the winners of the first wave of legislation used their better starting position to expand their influence in the second wave even further or at least to protect it from restrictions.

It was to the advantage of governing majorities that there was little political dissent in the parliaments over North Atlantic integration. In several countries, conflicts between the parties, the government and the opposition were recurrent. Nevertheless, the common desire for rapid accession to the EU and other international treaties overshadowed unresolved questions about the direction and form of democracy, disputes between constitutional bodies and problems of transformation (Bos 2022; Lorenz and Formánková 2020; Lorenz and Mariş 2022; Lorenz and Dalberg 2023). Even the qualified majorities needed for constitutional amendments, which were otherwise difficult to obtain, were achieved to enable EU accession.

The rush to prepare for accession narrowed the scope for negotiations (Toshkov 2012). Many legislative reforms were introduced without much parliamentary debate and lawyers played a prominent role in the drafting of laws (Grzymala-Busse and Innes 2003; Kosař and Spáč 2021, p. 112; Bobek and Kosař 2014; Malová and Haughton 2002, p. 112). This contradicted the post-1989 tendency to weighting (democratic) politics higher than law (Sadurski 2006, p. 47). One of the causes of the "court-centred, rights-based, and depoliticised account of constitutional democracy" could have been the lack of understanding of how constitutionalism works in Western democracies (Bugaric 2015, p. 235f.). Critics argue that the institutional transfer did not occur in a critically reflective way, but within the tradition of legalism, meaning that a positivist perception of law as a body of text dominated as opposed to the idea of law as an embodiment of particular values (Krygier and Czarnota 2006).

Parallel to the pre-EU accession changes in the early noughties, some parliaments adopted new lustration regulations. New parties in several countries took up arms

²⁸The institution of the judicial council does not exist in all old EU member states and in the countries where it was in place it does not take the form that was promoted.

against corruption and what they viewed as clientelist networks of old and new elites. Such measures not only affected the political arena, but various “public, quasi-public and even private economic positions” in the cultural and economic spheres (Horne 2009, p. 364f.). They reacted to the mentioned “public frustration” about the perceived continued privileging of the former communist elites in science, economy, politics and media and the weak “institutional capacity and integrity of public and quasi-public institutions” (Horne 2009, p. 365). In Poland, the new conservative-liberal majority in parliament established an Institute of National Remembrance (Instytut Pamięci Narodowej) which, inter alia, gave access to the communist security service files to researchers and journalists (Szczerbiak 2017, p. 328). In Slovakia, free access to files was now guaranteed by law. In Hungary, the parliament extended lustration to media professionals and granted access to files to the general public in 2003 (Halmai 2007).

In Romania, these developments began later. Initially, the Romanian regulations on corruption did not meet the EU standards—despite a constitutional amendment in 2003 that created provisions for an independent judiciary and for combating political corruption (Iancu 2022). As a result, Romania (like Bulgaria) was not admitted to the EU together with the other candidate countries in 2004. After a change of government in 2004, the new centre-right coalition planned comprehensive institutional and personnel changes to increase the independence and accountability of the judiciary as demanded by the EU. Reforms of the criminal code, a new National Anticorruption Directorate, and measures against corruption in the political realm were parts of the programme. Many legal amendments were adopted due to EU conditionality, including the Law on the Status of Judges and Prosecutors, the Law on the Organisation of the Judiciary and the Law on the Superior Council of Magistracy (Iancu 2022; Coman and Dallara 2012; Selejan-Guțan 2016). Justice Minister Monica Macovei faced severe resistance from senators and MPs of all parties (including her own coalition) and was called on to resign. In 2007 she was dismissed. The EU supported the anti-corruption reforms and allowed Romania to enter the Union in 2007, but due to persistent problems with corruption and organised crime, it established a new Cooperation and Verification Mechanism for regular monitoring in this area even after accession (CVM, 2006/928/EC).

The **third wave of legal and judicial reform** began in the years after EU accession (in Hungary in 2010 and in Poland 2015) and was accompanied by a change in the composition of parliaments. In this phase, there was a general tendency to review previous reforms that had been made before EU accession and to slow down EU-related policy transfer. In the words of Dimitrova (2010, p. 137), “Slovakia and Poland abolished their newly created Civil Service Authorities, the Czech Republic postponed implementation of civil service reform [...], and Poland slid down to the bottom of the European Commission’s transposition scoreboard.” At the same time, there were two different foci of new discussions and measures supported by legislation—one mainly political and one more corruption-oriented. These discussions were heated and the measures very controversial.

In Hungary and Poland, legal and judicial reforms were based on *political* arguments. Here, the procedural aspects of the post-1989 system change and the

question of whether it met the interests of the ‘ordinary citizens’ received more political attention. Influential actors who were not elected by the people—e.g. the judiciary, media, civil society, partly foreign companies or the European Commission—were viewed more critically. Fidesz-KDNP used its constitutional majority in parliament to systematically transform the system through a new constitution, constitutional amendments and various cardinal laws that can only be changed by two-thirds majorities. PiS, by contrast, had a more coherent ideology, but not a constitutional majority to be able to realise it straight away. The reforms affected, inter alia, the appointment of judges to leading positions in the judicial sector (Sect. 3.3) and the constitutional courts (Poland, Hungary), the general structure and organisation of the judicial system (Hungary) as well as the dismissal of judges (Hungary) or new provisions to sanction judges by disciplinary law (Poland).²⁹

More precisely, the Hungarian Fidesz revived its old thesis of an “unfinished system change” (Bozóki 2008, p. 213). Starting in 2010, the party used its two-thirds majority in parliament (together with its partner KDNP) to adopt a new constitution that is similar to the old one but places national and Christian values at the centre of state action (Tóth 2013). The new constitution also affected the election of the constitutional judges, the composition of the judiciary and its leadership (see Sect. 3.3). The constitutional court was led “away from being part of the governance landscape linked to the legislature to that of part of the judiciary” by limiting its review powers, abolishing the constitutional appeal (*actio popularis*) and annulling the validity of its previous rulings (Tatham 2017, p. 356). In 2018, a separate administrative jurisdiction was established. The supreme administrative court, like the Kúria, the existing Supreme Court, is responsible for ensuring more consistency of case law (Kovács and Scheppele 2018). Further reforms weakened potential counterweights to the parliamentary majority, for example by amending the laws on elections, party financing, independent media and NGOs. All this was done by legal means (Scheppele 2019; Priebe and Lorenz 2015; Bos 2022).³⁰

Similarly, PiS in Poland used its new majority in both chambers of parliament since 2015 to work on a ‘good turn’ (*dobra zmiana*) (Solska 2018). In order to restore what it saw as society’s lost trust in the courts, PiS wanted to ‘decommunise’ them, i.e. remove leftist judges or people who had been supporters of the communist system from their posts. At the same time, they wanted to increase ‘democratic control over judges’ and make them more accountable.³¹ Like the outgoing Civic Platform (PO)-PSL government, which before the elections had unconstitutionally amended the law on the election of the constitutional court to allow for the

²⁹In Hungary and Czechia, the minister of justice can initiate disciplinary proceedings (CoE [Council of Europe] 2018).

³⁰In other countries, illiberal tendencies were also found in ANO, Smer and PSD, but these parties acted more pragmatically or technocratically and they could not always assert themselves due to the coalition and veto structures (Havlík and Hloušek 2020).

³¹This was how the Polish government explained the reforms to the Council of Europe (CoE 2017, p. 8ff.).

appointment of two more constitutional judges in addition to the three regular ones, PiS passed legislation to do so. In a dispute with the constitutional court over the interpretation of the law on the election of constitutional judges—PiS considered three appointments made by the previous parliament invalid—it changed its procedures and competences by law.³² It also amended the laws on the judicial council and the selection procedure for the president of the Supreme Court following annulments by the constitutional court and it tightened disciplinary rules in the judicial sector. The parliament made new appointments to critical judicial posts possible by lowering the retirement age for judges, among other things. Indirectly, they could now be politically influenced through the newly established election of judges in the judicial council by parliament. In addition, the minister of justice began to lead the public prosecutor's office (Kovács and Scheppele 2018).

In contrast to the political arguments used in Poland and Hungary, in Romania and Slovakia legal discussions and judicial reforms were argued to fight corruption and clientelist networks. Here, the measures for more independence of the judiciary from politics introduced under EU conditionality were critically re-evaluated. According to some observers, they had given the courts too much influence (Smilov 2006; Parau 2013, 2015) and excessively reduced their political accountability (Mungiu-Pippidi 2010; Coman 2014; Bobek 2007, p. 112). Full self-administration of the sector was viewed critically (Bobek and Kosař 2014). Reforms followed since the mid-2000s. Government majorities of different political orientations attempted to enable court packing through legislative amendments (Iancu 2022); judicial reforms were carried out, and anti-corruption bodies were established or reshaped. While new reforms were officially legitimised by the fight against corruption in the judiciary and other sectors, opponents criticised that the reforms were used by political parties to discredit political opponents or judges, instrumentalised by “empowered but unchecked reformers” for their own goals (Mendelski 2020, p. 120) or to restrict the independence of the judiciary in general (for Romania Vachudova 2009, p. 52f., 58; for Slovakia Bojarski and Stemker Köster 2011).

In Romania, the matter became the subject of profound domestic conflicts. PSD-led social-democratic-liberal coalitions launched controversial counter-reforms to the previous reforms of the judiciary, leading to struggles between the branches of government. Since 2012, PSD governments have proposed bills to exempt politicians from punishment or to raise the threshold for corruption. They have also sought to reshape the distribution of competences in judicial matters. The conservative president Traian Băsescu (2004–2014) tried to stop the counter-reforms. This led to impeachment proceedings initiated by PSD and ALDE politicians in response. The government, the parliament and the president each tried to overstep their respective competences to achieve their political goals, and the constitutional court repeatedly intervened. Klaus Iohannis, who succeeded Băsescu in 2014, questioned constitutional court decisions which contradicted his

³²The amendments concerned, among other things, the quorum for decisions of the constitutional court, the period within which it may review laws for their constitutionality, the order of review, and the designation of the constitutional court leadership.

views. He accused the constitutional court of unconstitutional behaviour, repeatedly resubmitted legislative amendments which the court was to validate, and even turned to the Venice Commission of the Council of Europe in this matter.

The large number of corruption cases and the proceedings surrounding them “generated not only a discourse on good practices in politics but also (...) a critical discourse against anticorruption, leading to the denial of the possibility of reconciling anticorruption with the rule of law or individual rights and freedoms” (Iancu 2018, p. 417). The intra-parliamentary anti-corruption consensus collapsed when the anticorruption measures became most effective (*ibid.*). Since 2018, PSD has again planned legislative changes concerning the judiciary, a decriminalisation of corruption and an amnesty to offenders. President Iohannis reacted in 2019 by launching a constitutional referendum that was supposed to prevent the planned option of amnesties in corruption offences as well as emergency orders by the government in the area of criminal offences, punishments and judicial organisation. Legal readjustments followed, and after the change of government in 2020 the new government launched counter-reforms (Göllner 2022; Iancu 2022; Venice Commission 2018; EC 2018). In line with Poland and Hungary, in Romania too the independence of the judiciary and the constitutional court was attacked and there were attempts at restricting their competencies. These attacks caused significant protest and mobilisation from judges and prosecutors in 2013–2015 and in 2017–2019, but as this contestation of government policies was not unanimous, it left a divided body of judiciary (Puleo and Coman 2024).

In Slovakia, legislative efforts since 2010 have also focused on fighting corruption, including in the judicial sector. The parliament, under a Smer government, amended the constitution in 2014 to allow mandatory background checks on judges and judicial candidates based on information from the Slovak National Security Agency. However, the constitutional court stopped the reform. In 2020, following high-profile allegations of corruption against the ‘Kočner network’ and the murder of an investigative journalist, the parliament passed extensive legislative amendments concerning the composition of the judicial council, the establishment of a supreme administrative court, constitutional court procedures, the retirement age for judges, asset declarations for judges and the removal of judicial immunity from the constitution. Criminal cases against judges, politicians and business people backed up these measures for more robust control of judges’ actions.

Czechia shared some similarities with the other countries, albeit to a limited extent. Here, legislation was amended to clarify the competences of the courts, which also helped to resolve political conflicts. President Václav Klaus actively used vetoes, e.g. against an anti-discrimination law, or opposed certain positions supported by the EU. On the 20th anniversary of the Czech Republic in 2013, he declared a comprehensive amnesty, covering also cases of severe economic crime and corruption with a penalty of up to ten years’ imprisonment, which had been pending for more than eight years. According to Klaus, the amnesty was supposed to ease the burden on the prosecution authorities. Although the amnesty was endorsed by the prime minister, it came as a surprise. The Senate (the only organ authorised to do so) began impeachment proceedings against Klaus which were stopped by the

constitutional court, which declined to consider the case because Klaus's term of office had expired. His successor Miloš Zeman (centre-left party SPOZ), a former prime minister (1998–2002), who was the first head of state that was directly elected, decided to test the limits of the presidential powers, including interventions in the judiciary.

3.3 Experiences with an Independent Judiciary: Post-1989 Reforms and Conflicts

An independent judiciary is a fundamental element of most rule of law concepts. Therefore, to comprehend rule of law narratives, it is crucial to understand how it has been implemented in practice. As will be demonstrated below, during a first wave of rule of law legislation, the parliaments in all five countries under study explicitly granted the judiciaries and judges independence from politics. The strengthening of the judiciary was widely accepted, although some politicians occasionally complained in the 1990s about individual judicial decisions or an overly powerful or activist judiciary. In the late 1990s a second wave of reforms significantly strengthened the self-governance of judges (Sect. 3.2). Political controversies arose over the influence of courts and judges in leading positions. However, the conflicts varied in intensity and motivation, and did not correspond clearly with the waves of legislation. Since 2010 politicians in some countries have attempted to limit judicial independence, officially to increase accountability and to curb judicial overreach, corruption and clientelism. In response, judges have established new judicial organisations that are more politically active. They have also engaged in on- and off-bench mobilisation at national and European levels (Matthes 2022; Doroga and Bercea 2023). These reforms and the surrounding conflicts will be discussed in greater depth in the following.

In socialist times, the power to appoint and dismiss judges was formally vested in the parliament (Czechoslovakia, Hungary, Romania) or in the Council of State, officially subordinate to parliament (Poland). De facto it was under control of the ruling party or its executive office (Bobek 2015). With the post-1989 transition, professional judges in Czechia, Hungary, Poland and Romania were appointed on a permanent basis by the president, after nomination by different bodies of judicial self-regulation or, in Czechia, by the minister of justice.³³ The new or reformed constitutions stipulated the impartiality of judges³⁴ and the independence of judges

³³In Slovakia, the parliament continued to elect judges for four-year terms with a tenure-track option, but with a 2001 constitutional amendment it followed the model in the neighbouring states.

³⁴It is mentioned in the Czech and Slovak constitutions or operationalised in specific requirements. For example, judges were not allowed to belong to a party or political movement or to engage in political activity (§50 [3] Constitution of Hungary of 1949, Art. 145a Constitution of Slovakia since 2001; Art. 178 [3] Constitution of Poland; Art. 37 [3] Constitution of Romania). Sometimes, they were not allowed to hold public office or mandate (Romania, Slovakia, Hungary) or to engage in entrepreneurial or other economic activity.

(Czechia, Poland, Romania, Slovakia, Hungary) or courts (Czechia, Poland, Slovakia). The most comprehensive provisions regarding judicial independence were enshrined in the 1997 Polish constitution.³⁵ In Hungary, too, judges were granted “extensive autonomy” compared to other European countries (Kühn 2010, p. 186; Kovács and Lane 2018).³⁶ At the same time, their decisions were bound by law (as interpreted by courts).

Despite these changes, the judicial personnel largely remained the same.³⁷ Most judges in ordinary courts had started their careers in the old system, where their rulings had contributed to stabilising the regime (Bobek 2015; Sajó and Losonci 1993, p. 322). People close to the regime before 1989 usually served in higher positions. The high retirement age of 70 in Hungary, Poland, Romania and (from 2002) in Czechia combined with the requirement of many years of service in the judiciary as a prerequisite for filling higher positions ensured that ‘old judges’ had a long-term influence.³⁸ They often stood for a positivist perception of the law (Zirk-Sadowski 2006; Krygier and Czarnota 2006). The continuity of judges was particularly strong in Romania (Iancu 2022), Hungary (Kosař 2013, p. 253) and Slovakia. ‘Old judges’ also filled many positions in the Czech Republic and Poland (Wagnerová 2003, p. 163, 170; Bodnar 2010, p. 34; Sabados 1998, p. 234ff.), while judges in top positions in these two countries were replaced as a result of lustration measures (Beers 2010, p. 37).

In Poland (1989) and Romania (1991/2004³⁹), and later in Hungary (1997) and Slovakia (2001), parliaments introduced judicial councils for key administrative decisions. They were composed of judges and sometimes also politicians.⁴⁰ Court presidents played a significant role in issues related to the judiciary and, in Romania

³⁵ Art. 178–181, 186, 195–196, 199–200 of the Constitution of Poland.

³⁶ According to Kaminski and Nalepa (2006, p. 391f.), the former communists who negotiated the transition were interested in creating a strong judiciary and establishing a constitutional court for slowing down the system change and saving themselves from retroactive justice (also Verdery 2012, p. 71).

³⁷ When judges and prosecutors switched to private-sector legal services, this was due to low wages and a simultaneous sharp increase in cases to be handled (Kosař 2013, p. 254; Kühn 2010, p. 181).

³⁸ In Slovakia, the President of the Republic was empowered to dismiss a judge who has reached the age of 65 on the proposal of the judicial council. From 2021 (based on a constitutional amendment adopted in 2020), 67 is the automatic retirement age. In Czechia, a similar provision as in Slovakia before 2021 was in place, but in 2002, 70 years was installed as the automatic retirement age by an amendment of the law on judges.

³⁹ While the Superior Council of Magistracy (CSM) was enshrined in Art. 132–133 of the constitution in 1991, only in 2004 did a proper law on the CSM enter into force (317/2004). In the meantime, the most important functions and jurisdictions of the CSM were inserted as Art. 133–134 in the amended constitution of 2003.

⁴⁰ Since 1990, the formal procedures of appointment and promotion of judges have been frequently changed in connection with changes in government and EU accession.

and Slovakia (even after 2001), the ministries of justice as well⁴¹ (Coman and Dallara 2012, p. 837f.; Parau 2015, p. 427; Iancu 2022). In Czechia, despite repeated efforts to establish an independent institution of judicial self-government, the model emphasising the role of the minister of justice in organisational and appointment issues has persisted (Vachudova 2009, p. 45f.; Hein 2013, p. 326f.; Němec 2023).

For public-law matters, all five states established constitutional courts. The constitutional judges were and are elected by the parliament (Hungary), its first chamber (Poland, Romania 1/3) or second chamber (Romania 1/3), or appointed by the president (Czechia, Slovakia, Romania 1/3). In Czechia, the Senate must consent to the candidate proposed by the president. In Slovakia, the parliament nominates twice as many candidates as the president has to appoint. Only in Hungary did the election of constitutional judges require a two-thirds majority of MPs. This made it a matter of political debate, with the opposition being able to prevent the election of constitutional judges (CoE 1997, p. 7, 48). In most countries, the newly appointed constitutional judges were law scholars (Kühn 2010, p. 195) who had not belonged to the ruling parties in the former regime (Kosař 2013, p. 253).⁴² Only in Romania did appointed constitutional judges often have close ties to political parties or were former politicians with offices and mandates, contrary to the spirit of the constitutional text (Selejan-Guțan 2012, p. 330; cited in Göllner 2022). This was because in Romania (and Slovakia), the clear majority constellation in the transition period helped the governing parties to actively shape the composition of the constitutional court.⁴³ Importantly, in all countries except Romania, there have been situations where political actors have been able to fill almost all or a large number of constitutional judge vacancies at once.⁴⁴

The strengthening of the judiciary after 1989 was also reflected in the increased number of court cases (Kühn 2010, p. 179f.), which boosted the courts' relevance in resolving conflicts. The adoption of legislative changes while some old provisions continued to exist led to legal conflicts and increased the need for interpretation by

⁴¹ During the 1990s in Romania, both PSD and the Romanian Democratic Convention introduced appointment rules that indirectly allowed them or the Ministry of Justice to influence the composition of the courts and replace people in top positions who had played an important role under the previous government (Iancu 2022). For Slovakia, Čuroš (2021, p. 1274) observed that ministers of justice claimed to depoliticise the judiciary, but all tried to “fight politicization with their candidates as court presidents”.

⁴² In Czechia, the first generation of constitutional judges included several former members of the parties in power at the time of their appointment, plus two former members of the Communist Party (CoE 1997, p. 42).

⁴³ Also, in 2005, the Romanian court was “staffed mostly by former socialist politicians who took the side of the Socialist Party” (Lach and Sadurski 2008, p. 223).

⁴⁴ It happened, for instance, in Hungary in 1998/99 (nine positions), regularly in Czechia (2003–2005 twelve vacancies, 2013–2015 fourteen, in 2023 seven), or Slovakia (for instance in 2019–2020 ten judges). This was due to the combination of three factors: the simultaneous filling of all judge positions of the constitutional courts when the court was established, the equal term of the judges' office and the lack of an upper age limit. Moreover, enlargements of constitutional courts allowed ruling majorities to fill additional posts and thus to influence their composition. This was the case in Poland in 1997 and Slovakia in 2001 (with three additional judges in each case).

the courts. The ordinary courts interpreted laws in a rather formalistic manner, i.e. in continuation of the judicial practices of the late socialist period (Kühn 2004, Kühn 2010, p. 179; Cserne 2017, p. 23; Ajani 1995; Fogelklou 2002). This meant that even though judges applied the legislation enacted after 1989, they did not take into account the values and overall intentions associated with them but had “a purely instrumental attitude towards them” (Zirk-Sadowski 2006, p. 306; also Mańko 2017, p. 78f.). Nevertheless, most of the rulings of ordinary courts went unnoticed by the public and have not been systematically researched (Cserne 2017).⁴⁵

More public attention was paid to the new constitutional courts (Schwartz 2000; Procházka 2002; Sadurski 2002). They interpreted the new or revised constitutions extensively, leading observers to speak of “excessive” judicial activism (Sadurski 2008). Mobilised by diverse plaintiffs,⁴⁶ they “have established themselves as powerful activist players” (Konciewicz 2017, p. 295; Sadurski 2008). In many cases, their rulings were decisive for clarifying fundamental rights, constitutional issues, matters of elite selection (in the form of lustration-related case law), private property, the handling of transitional justice and other topics of particular importance. Especially the broad fundamental rights catalogues which listed rights but typically did not define them in detail were clarified through judicial interpretation by constitutional courts.⁴⁷ Since the decisions of the constitutional courts differed from the formalist decisions of the ordinary courts, the latter often ignored them in Romania (Gutan 2024, p. 567; Tănăsescu and Selejan-Guțan 2018, p. 420).

In Poland, in the absence of a new constitution until 1997, the Constitutional Tribunal created a quasi-constitutional framework (Safjan 2017, p. 376). It developed a concrete interpretation of the principle of the rule of law, as well as certain rights and freedoms (Diemer-Benedict 1998, p. 206f.). It also established principles for legislation and had to decide in the repeated conflicts between directly elected presidents and prime ministers elected by the Sejm (Krok-Paszkowska 2001). The “main grounds for declaring unconstitutionality” were the violation of the rule of law, the right to a fair trial, the principle of proportionality and the exceeding of the powers conferred upon the executive (Biernat and Kawczyńska 2019, p. 746).⁴⁸ In

⁴⁵There are only a few analyses for the selected countries, periods and court branches, e.g. Matczak et al. 2010.

⁴⁶In Hungary, Art. 32(a)(3) of the constitution stipulated “that ‘anyone’ could challenge the constitutionality of any active legal norm in Hungary” (*actio popularis*), leading to thousands of petitions by citizens (Scheppele 2003, p. 222) and virtually leaving it up to the judges as to what they wanted to decide (Boulanger 2006, p. 277).

⁴⁷Bobek and Kosař (2017, p. 404) argues that in the post-1989 period, the new constitutional courts demanded “for the judges to do (on the level of judicial method) essentially the same as what the Communist Party asked them to do before in the Stalinist period: To interpret the old Communist laws in the light of new values, disregarding their text”, which has caused reluctance with the more seasoned judges in the other courts.

⁴⁸It also prevented the provision in the draft 1997 constitution that the constitutional ruling must be confirmed by parliament (Safjan 2017, p. 379). While the active role of the Tribunal was frequently criticised (Blokke 2020, p. 342), other observers argued that it has been restrained because the Sejm could overrule its decisions in certain cases by a two-thirds majority (Procházka 2002, p. 86), a situation that changed slightly with the 1997 constitution (ibid.: 95).

Hungary, the powers of the constitutional court were much more extensive. Under its chief justice László Sólyom (1990–1998) the court established an “open and creative interpretation” of the constitution (Safjan 2017, p. 376) and began to “aggressively challenge the legislature about new legislation” (Boulanger 2006, p. 265) with an “unprecedentedly high annulment rate” (Sajó 1995, p. 256).⁴⁹ Other constitutional courts were less powerful.⁵⁰

The constitutional courts’ jurisdiction was relevant for sensitive political issues, including lustration, retroactivity, elections and EU accession. The constitutional courts in Czechoslovakia and its successor states Czechia and Slovakia, as well as in Poland and Hungary, repeatedly ruled relevant parts of lustration laws unconstitutional, allowed checks and clearances only for a narrow range of positions and individuals and rejected more general regulations (Nalepa 2010, p. 3). This was because of the structural problems of the rule of law for coming to terms with past political injustice described in Sect. 3.3.⁵¹ To name a few other sensitive decisions, the Slovak Constitutional Court ruled several times on retroactive legal norms and declared that they can be constitutionally acceptable under certain conditions. It also repeatedly ruled Prime Minister Mečiar’s attempts to reduce the influence of the opposition unconstitutional.⁵² The Polish Constitutional Tribunal interpreted the result of the 1997 referendum on a new constitution as valid, even though the 1995 Referendum Act stipulated a 50 per cent turnout for a referendum to be valid (Górski 2014). It also repeatedly ruled on abortion (Bucholc 2022).

⁴⁹ Mainly due to the *actio popularis* it was involved in almost all issues in politics and, arguably, “practically ran Hungary” through the 1990s (Scheppelle 2003, p. 222). While Sajó (1995, p. 257) notes “bitter criticism of the Court in Parliament”, Boulanger (2006, p. 278) argues there were “few public critics of the court” until the late 1990s. Studies on constitutional adjudication in Hungary, but also in Czechia and Romania, suggest that the legislator’s room of manoeuvre was not too heavily constrained (Kuti 2019; Šípulová 2019; Pócza et al. 2019; Pócza 2021).

⁵⁰ In Romania, until 2003 a two-thirds majority of both houses of parliament could overturn decisions of the constitutional court based on abstract review and taken before a legislative act had been promulgated (Brunner 1992, p. 548; Lach and Sadurski 2008, p. 222). In Czechia and in Slovakia there were sometimes months-long vacancies in the constitutional courts, restricting the courts’ ability to decide. In Czechia, this was, for example, because of conflicts between the president and the Senate over new appointments from 2003 onwards (Pospíšil 2020, p. 137).

⁵¹ The Polish Constitutional Tribunal held that lustration measures may only relate to protection against human rights violations or a blockade of the democratisation process and must be limited in time. This was done with reference to the principle of the democratic rule of law and the fundamental rights. In Czechia, Slovakia and Romania, the constitutional courts upheld the (narrower and weaker) lustration laws (David 2000, p. 409; Nalepa 2010, p. 3; Kosář 2008, p. 468f.). In the 2000s, provisions in new lustration laws were repealed in Hungary in 2005, in Poland in 2007 and in Romania in 2008 (Halmai 2007; Horne 2009, p. 360) but upheld in Czechia in 2003 and in Poland in 2001 (Nalepa 2010, p. 3). In Poland, the General Assembly of Voivodeship and Appellate Courts did not nominate enough candidates to the panel that was supposed to examine the credibility of lustration statements, thus undermining respective measures (Grajewski 2007; Szczerbiak 2002).

⁵² Between 1994 and 1998 the court ruled 16 times against the Mečiar government, which responded with attempts to undermine the court’s prestige (Lach and Sadurski 2008, p. 226).

All constitutional courts were receptive to their countries' EU accession but to varying degrees reserved the right to be the ultimate guardian of the constitution and fundamental rights (Bříza 2009; Přibáň 2017; Bobek 2015; Koncewicz 2017; Tatham 2017).⁵³ EU accession was also a milestone for ordinary courts. They received the "revolutionary new competence" (Połtorak 2017, p. 227; also Koncewicz 2017, p. 296; Kühn 2010, p. 179) to assess the compatibility of national law with EU law and to directly refer cases to the ECJ and ask for an interpretation of the EU provision in question.⁵⁴ Some courts referred substantially to relevant EU and constitutional law (Matczak et al. 2010, 2017; Połtorak 2017, p. 225) while others did not (Maňko 2017, p. 94).

Since around 2000, several occasions have led politicians to pay closer attention to the role of the judiciary. For example, judicial boards often opposed further judicial reforms (Bobek and Kosař 2017, p. 166) while at the same time, mechanisms of judicial recruitment were not without problems.⁵⁵ However, the concrete relations between politics and the judiciary varied across countries. In Czechia, courts repeatedly blocked judges' salary cuts (Ústavní soud 2003) and in 2006, the president of the Supreme Court successfully challenged her dismissal by the president before the constitutional court.⁵⁶ While there were no other such cases, President Klaus considered the mentioned decision by the constitutional court "a dangerous shift in our post-1989 system from a parliamentary democracy to a judicial autonomy not limited by anything, which does not exist anywhere in the world in this way" (Loužek 2006). In this climate, all parties in the Czech parliament opposed more judicial autonomy. In 2015, the government ignored the outcome of the appointment process for the vice-president of the Supreme Court and dissolved the commission to

⁵³ Bobek and Kosař (2017, p. 413) distinguishes a "wait and see" tactic of Hungary's constitutional court, a "re-assertion of its own habitat" in Poland and "a rather explicit and belligerent tone" of the Czech constitutional court.

⁵⁴ In a few cases, this had far-reaching consequences. For example, in Czechia, the supreme administrative court did not accept a judgment of the constitutional court in a case related to pensions and referred the issue to the ECJ to assert its own legal position, but the constitutional court ignored the ECJ's opinion (Šlosarčík 2023).

⁵⁵ The selection of judges tended to replicate existing personnel (for Slovakia see Spáč 2020) or was "opaque, non-transparent, and prone to nepotism" (for Czechia see Bobek 2015). In Czechia and Romania, "personal contacts" were mentioned by many judges as relevant for "hiring and promotion decisions" (Beers 2010, p. 44). In Romania and Slovakia, "political connections" were also important (Beers 2010, p. 44; Spáč et al. 2018). This was particularly evident in the person of Štefan Harabin, who held important positions in the judiciary and politics and made personnel decisions (Čuroš 2021, p. 1249, 1269; Bojarski and Stemker Köster 2011).

⁵⁶ Based on a clause in the Law on Courts, Klaus had complied with the recommendation of the minister of justice. The constitutional court interpreted the corresponding power in the Law on Courts as an inadmissible interference in the independence of the judiciary and thus as unconstitutional (Kühn 2010, p. 188f.). Shortly after, the president of the Supreme Court also successfully defended herself against a disciplinary action brought by the minister of justice.

create a judicial council (CoE 2016, p. 22, 29). However, there was no general political interference in the judiciary (Němec 2023⁵⁷).

More systematic attempts to increase political control over the judiciary continued in Romania (although under a new coalition government) and started in Slovakia. In both countries, governments invoked the fight against corruption and clientelism as the reason for various measures, including the creation and filling of additional judgeships in high courts (Romania), disciplinary innovations (Slovakia) or anti-corruption measures (Slovakia, Romania).

In Romania, the anti-corruption strategy of the conservative-liberal government has heavily influenced the judiciary since 2004. Alongside legislative changes, Justice Minister Monica Macovei, a former human rights and democratisation activist backed by the Democratic Party (PD), directed a large-scale campaign against corrupt judges (and politicians and civil servants). Her measures to force top judges to retire and to change the appointment rules for judges helped younger cohorts rise to top positions and set in motion “a hidden and comprehensive process of lustration” (Iancu 2022). In order to accelerate elite change in the judiciary, since 2005 magistrates can retire after 25 years of service irrespective of their age. Following the adoption of a law in 2004, complaints and investigations against judges, who continued to enjoy no immunity, could lead to lengthy suspensions by the judicial council without pay (Iancu 2022). Macovei, who had the backing of President Băsescu, faced severe resistance from some, especially old-aged judges, while a good part of the younger cohort supported her programme. Essentially, the Macovei reforms remained in force for some time, despite two parliamentary initiatives in 2007 and 2012 to oust President Băsescu from office. In 2017, when PSD returned to government, it specifically targeted the anti-corruption prosecution agency (DNA) for alleged abuse of state powers. Under Liviu Dragnea, the PSD government created a specialised department within the Public Prosecutor’s Office for the investigation of crimes committed by judges and prosecutors (SIJ), which remained ineffective due to determined opposition from some judges, prosecutors and legal activists (Iancu 2022).

In Slovakia, the government attempted in 2000 to dismiss the president of the Supreme Court. Since then, there have been repeated judicial reforms under different governments aimed at either removing or installing specific groups of judges. In 2009, “a considerable number of court presidents were removed in a relatively short time by two successive ministers of justice” by legal means⁵⁸ (European Commission 2014, p. 4). The Smer-led government extended the competences of the judicial council while its outgoing minister of justice was appointed the president of the Supreme Court, automatically assuming the role of the chairman of the judicial

⁵⁷ In 2019, the parliamentary subcommittee on justice dealt with the alleged attempt by high-ranking aides of President Miloš Zeman to trade the power to appoint judicial officials for favours in certain court proceedings. The Senate initiated a procedure of removing Zeman from office based on this allegation.

⁵⁸ In Slovakia, the minister of justice could dismiss court presidents and vice-presidents without the persons concerned being able to take legal action against it.

council. In this capacity, he initiated disciplinary measures against judges who had criticised him (Kosař and Spáč 2021; Bobek and Kosař 2017, p. 191). After the 2010 election, a new right-wing government attempted to reduce the influence of the president of the Supreme Court and the judicial council on the judiciary (Spáč et al. 2018); however, after Smer returned to power in 2012, the judiciary “continued to experience troubling government influence” (Učeň 2018; Láštík 2019).⁵⁹ Following the 2020 elections, a new right-wing government used a corruption scandal in the judiciary (which led to the detention of several judges, including the vice-president of the Supreme Court) as an opportunity to push for major judicial reforms, for instance the creation of the supreme administrative court, a modification of the appointment process for constitutional court judges, and the redrawing of the judicial map (Čuroš 2023).

In contrast to Slovakia and Romania, new measures in Poland (2005–2007 and since 2015) and in Hungary since 2010 were more clearly linked with specific parties and their declared political aim to dismantle ‘political networks’ in the judiciary.

In Poland, under a PiS-LPR-Samoobrona government in 2005–2007 the parliament curtailed the independence of the courts, blaming them for “the high level of criminality and general disorder in the country” (Bodnar 2010, p. 36). Legislative amendments to the law on ordinary courts (June 2007) threatened the independence of the judiciary—giving the minister of justice the power to move judges without their consent and to appoint court presidents. Legal amendments of the constitutional court (changing the term of its president and others) were not adopted because of new elections. Also in 2007, for the first time in history the president of Poland refused to appoint all persons nominated by the NCJ as judges to several courts.

In Hungary, the new Fidesz-KDNP coalition adopted transitional provisions for the new constitution, which linked the end of the Supreme Court’s term of office to the introduction of the Kúria to influence the composition of the courts. It also passed the new Law on the Organisation and Administration of the Courts, which stipulated that to chair the Kúria one must have served as a judge in Hungary for at least five years. Under this law, then President of the Supreme Court and (by virtue of his office) Chairman of the National Council of the Judiciary András Baka became ineligible (Cannoot 2016).⁶⁰ The parliament also limited the competences of the constitutional court and lowered the retirement age from 70 to 62 years, forcing 10 to 15 per cent of the judges (274), many of them in top positions of the courts, immediately out of their job (Kovács and Scheppele 2018; Halmai 2017, p. 471).⁶¹ Increasing the number of constitutional judges by three allowed four new appointments to be made by the two-thirds parliamentary majority of Fidesz-KDNP.

⁵⁹In 2019, Robert Fico, a former three-term prime minister from Smer, made an unsuccessful attempt to become a constitutional judge and eventually the president of the constitutional court. This episode well documents the importance of control of the judiciary for the ruling parties.

⁶⁰Baka appealed to the European Court of Human Rights against the premature termination of his mandate brought about by the reforms (Kosař and Šípulová 2020).

⁶¹The ECJ condemned the sudden retirement, but the most prominent former office holders did not return to their positions (Kovács and Scheppele 2018).

Thus, in spring 2013, most of the incumbent constitutional judges had been appointed by the government parties. Moreover, constitutional judges could now serve as ordinary judges, which allowed the 2020 parliament to elect Fidesz supporter Zsolt András Varga to become president of the important Kúria.

Conflicts resurfaced in Poland in 2015, when two successive governments tried to push through further candidates in addition to regular appointments to vacant posts on the constitutional court bench. Civic Platform (PO) tried to do so before the election, PiS afterwards. Months of tug of war between the new PiS majority and the constitutional court followed, some of whose rulings PiS ignored. In 2016, judges elected by PiS and those close to it were in the majority in the constitutional court (Kobyliński 2016). The parliament adopted several judicial reforms, including a lowering of the retirement age for judges. As a result, approximately 10 per cent of all positions of Polish judges becoming vacant in 2018, including many top positions in courts and one third of the posts (27 judges) in the Supreme Court. A new chamber with expanded judicial review powers and a new disciplinary chamber at the Supreme Court were established to further upset the power relations in the judiciary. The judicial council was replaced by new judges elected by parliament. This allowed for political influence or, as PiS argues, more democratic legitimisation. Furthermore, lay judges⁶² elected by the Polish Senate became part of the new chambers (Kovács and Scheppele 2018).

Judges resisted what they perceived as political interferences in the judiciary. New judges' organisations emerged in Romania,⁶³ Slovakia⁶⁴ and Poland.⁶⁵ Unlike the apolitical professional organisations founded after 1990,⁶⁶ they harshly criticised certain policies as well as colleagues inside the judiciary. In Poland, many judges (and citizens) protested against the PiS judicial reforms, and several judges opposed new regulations, including judges in the Constitutional Tribunal and the Supreme Court. The latter requested preliminary rulings from the European Court of Justice, as did some lower courts and the supreme administrative court (Matthes 2022). In Hungary, the judicial council rejected in 2020 the president of state's candidate for the Supreme Court presidency, a Fidesz loyalist.⁶⁷ In Slovakia, judges refused to

⁶² As mentioned, in all the studied countries there was a tradition of lay judges.

⁶³ These are the Romanian Forum of Judges and the Romanian Union of Judges, both founded in 2007, and the Association of Judges for the Defence of Human Rights, founded in 2019.

⁶⁴ A smaller of these groups branded an "atmosphere of fear" in which a judge was no longer allowed to express a "controversial and provoking opinion" publicly (ZOJ 2010). In 2011, the new organisation *For an Open Judiciary* (ZOJ) emerged (ZOJ 2013; Bojarski and Stemker Köster 2011, p. 77f.).

⁶⁵ They include the judges' association Themis, founded in 2010, and Wolne Sady, founded in 2020.

⁶⁶ The professional organisations in all five countries present themselves as mainly apolitical. These are the Union of Judges of the Czech Republic (SÚ ČR), the Hungarian Judges Association, Iustitia in Poland, the Association of Slovak Judges and the Association of Magistrates of Romania. Around 30 to 50 per cent of the national judges are members of these organisations.

⁶⁷ Later, Zsolt András Varga was nevertheless elected by parliament.

participate in disciplinary panels, thereby undermining their functionality (Mesežnikov et al. 2014, p. 565). In Romania, the Macovei reforms failed due to opposition from senior judges, including those in the constitutional court. Later, there were strikes and protests against the PSD reforms and policies (Iancu 2022).⁶⁸

During this phase of legal mobilisation against political measures related to the judiciary, constitutional courts ruled on several cases concerning legal texts or matters directly related to the judiciary or to themselves. In Romania, for example, the constitutional court repeatedly ruled on planned or adopted judicial reforms—15 times in 2018 alone (Iancu 2022). In Poland, the constitutional court repeatedly annulled judicial reforms adopted by PiS, including the law on the national judicial council and the law on the selection procedure for the president of the Supreme Court. This ended after 2016 when PiS-elected judges were in the majority⁶⁹ (Sadurski 2018; Kovács and Scheppele 2018). In Hungary, too, the constitutional court has not annulled any major parliamentary decisions since it became dominated by judges nominated or elected by the Fidesz majority.

The rule-of-law-related conflicts also resulted in conflicting judgments when the Court of Justice of the European Union ruled that national constitutional court rulings or legal provisions in Hungary, Poland and Romania violated EU law (Połtorak 2017, p. 229).⁷⁰ Domestic courts, including the constitutional courts in Poland and Romania, reacted with rulings stating that the CJEU does not have the authority to decide on certain national provisions.⁷¹ Thus, the relation between national courts and European judiciary became a more “complicated story” (Safjan 2017, p. 379). Since the beginning of these conflicts between the CJEU and national courts, even constitutional courts that had previously been receptive to international law became more hesitant.⁷²

Due to these conflicts large parts of the population of all five countries perceived independence of the judiciary as being threatened by political interference but also

⁶⁸For example, in 2019 the Supreme Council of the Magistracy blocked the appointment of the chief prosecutor in a new special prosecutor’s office for judicial criminal offences set up by PSD.

⁶⁹In 2021, the constitutional court even removed from office the ombudsman who had advocated for the independence of the judiciary and minority rights.

⁷⁰The CJEU formulated criteria for national courts to test the ‘appearance of independence’ of the judiciary, established the primacy of EU law against national regulations for the appointment of judges and recommended overriding national law regarding the legality of chambers and the transfer of judges to other chambers (Matthes 2022, p. 7).

⁷¹In Poland, government-friendly judges of the Supreme Court and among the highest courts “questioned the authority of the CJEU’s decision” and sent the issue to the Constitutional Tribunal (Matthes 2022, p. 8). The same was true for the Romanian constitutional court. It reacted to a decision made by the CJEU on 18 May 2021 on aspects of Romanian justice laws by a judgment on 8 June 2021, which questioned the principle of primacy of EU law (European Commission 2021).

⁷²This was without any growing political influence on its composition and impact, as in Poland or Hungary (Šipulová 2019). The Czech constitutional court, for example, which had initially strongly supported the ECtHR, was said to have “become more assertive and increasingly aware of and willing openly to advance the distinctive Czech constitutional identity” (Kosař and Petrov 2017, p. 616).

by economic and other influences. Most people also agreed that the status and position of judges did not sufficiently guarantee their independence.⁷³ This is in stark contrast to the early post-1989 developments and to the high (formal) standards of protection of the judiciary in the constitutions.

3.4 The European Context: Membership Requirements and an Evolving Rule of Law Framework

The processes described above did not exist in isolation. Accession prospects and membership in the Council of Europe, the European Union, NATO and other organisations⁷⁴ had considerable repercussions on the form and content of legislation and the interpretation of laws. In the early 1990s the Council of Europe experts provided constitutional assistance. Later, in the pre-accession phase the “EU and the European Commission were omnipresent, with “whole ministries (...) transformed in law-writing and law-making institutions, which were rubber stamped by national parliaments” (Micklitz 2017, p. 5) at a “fast and furious rate” (Scheppele 2003, p. 220). The countries fulfilled the membership requirements, adopted EU law, and had to comply with it. Later, as conflicts arose over the rule of law and the question of who should have the competence to identify and remedy rule of law problems in member states, various EU actors and European courts⁷⁵ contributed to developing rule-of-law-related normative frameworks (Coman 2022; Lorenz and Wendel 2023; Priebus and Anders 2023).⁷⁶ Besides, domestic actors intensified and used their relations with European bodies to challenge national policies or court decisions. At the same time the inclusion of national actors in European networks and transnational mobility affected the outlook and action of courts (Cserne 2017, p. 40f.). However, the relations with European organisations varied from country to country. All these developments might have influenced how MPs narrated the rule of law.

⁷³In Czechia and Romania, at best just over half of the respondents in Eurobarometer representative surveys on judicial independence conducted between 2016 and 2021 considered the courts and judges to be independent; in Hungary, Poland and Slovakia the number was much lower. In Czechia, the share increased in a 2023 survey to 65 per cent. The reasons cited for non-independence were interference or pressure from government and politicians but also interference or pressure from economic or other specific interests (e.g. European Commission 2023).

⁷⁴The Organization for Security and Co-operation in Europe is also active in the field of the rule of law. See OSCE ODIHR (2024).

⁷⁵The ECtHR and the CJEU continue to develop their approaches to questions around the rule of law. For example, triggered by individual complaints, “recent caselaw reveals an important shift in the Strasbourg Court’s approach to cases concerning independence and impartiality” (Braithwaite et al. 2021, p. 5).

⁷⁶It was the Venice Commission of the Council of Europe which first elaborated a concept of the rule of law. The EU, which cooperated with the Council of Europe in the matter, referred to this concept but added certain features of democracy. It legitimised this with reference to the EU treaties which name both the rule of law and democracy as foundational values of the Union.

In the early 1990s, the five countries signed the legally binding European Convention on Human Rights and became members of the Council of Europe. Its Venice Commission provided advice on reorganising the legal systems. Soon after, the countries lost the first cases issued by their citizens before the European Court of Human Rights (ECtHR). The ECtHR judgments had a direct impact on pensions and equal opportunities policies, for example. In view of these effects, civil society organisations from the five countries, supported by foreign or transnational actors and partly professionalised through this support, started to systematically and successfully bring cases to the ECtHR to enforce rights (Şerban 2018, p. 186f.; Selejan-Guţan and Rusu 2006).⁷⁷ By 2022, 1541 ECtHR judgments found at least one violation of the European Convention on Human Rights by Romania. For Poland, the number of judgments on such violations was 1057, for Hungary 621, for Slovakia 378 and for Czechia 197 (ECtHR 2023). The ECHR case law went beyond individual cases and required adaptation of the national law (Kosař and Petrov 2017; Bodnar 2014). The countries were also involved in Council of Europe activities by the Group of States against Corruption (GRECO), founded in 1999, and the Council of European Judges, established in 2000.

The application for EU membership was also highly relevant for rule of law issues. Parties across the ideological spectrum broadly supported EU accession in the first decade after the system change (Mair 1997), among them Fidesz (Benoit and Laver 2006).⁷⁸ The motivation for Western integration was not always driven by pronounced cosmopolitanism, a willingness to delegate sovereignty to the EU level, or a deep sympathy for EU legal configurations. At times, it was based on a pragmatic or utilitarian approach. The ‘Europragmatists’ were primarily interested in protecting national sovereignty from Russia, integrating into the global economy through access to the EU’s single market, and receiving extensive financial support from EU funds (e.g. Kopecký and Mudde 2002). Most decision makers considered EU membership as a natural part of transatlantic integration into international organisations such as the Council of Europe, the WTO and NATO, and a partnership with the USA.

Unlike the Council of Europe, which combined “soft conditionality with post-accession monitoring” and membership socialisation, the EU combined hard pre-accession conditionality with soft measures, including twinning (Dimitrova and Pridham 2004, p. 99, 91). Concerning the rule of law, the EU Commission, the twinning activities and, after accession, the European Court of Justice were important, as was the European Parliament and its Civil Liberties, Justice and Home Affairs Committee (LIBE) since about 2010. Political parties coordinated their

⁷⁷ External support was provided to the NGO sector, but also to new parties through their sister organisations. Due to the scarcity of resources in the societies of the five countries, such support could have a strong structuring effect, as it put the actors receiving support in a better position than others. Thus, which issues and actors received support and which did not possibly had a more significant impact than in wealthier societies.

⁷⁸ In Romania, a broad consensus for EU accession emerged since the mid-1990s.

activities horizontally, within the European Parliament or European party families.⁷⁹ Given the party dynamics of the countries under study described above, there were conflicts within party families or the political groups of the European Parliament. Over time, national parties belonged to different European parties or factions. Such party affiliations could stimulate dialogue even in times of dissent between European and national actors.

Since the 1990s, EU actors have progressively formulated normative standards through regular reports and recommendations to be met by the five countries. The EU accession conditions, established by the heads of state and government at the Copenhagen summit, included the political criteria of institutional stability, democratic order and the rule of law, respect for human rights as well as respect for and protection of minorities. The protection of minorities, which was repeatedly called for, was understood primarily in terms of ethnic minorities, especially the Roma (Ram 2003; Sasse 2005). The EU now expected candidate countries to take steps towards protecting minorities which had not been explicitly laid down in EU law before (Schwarz 2010, p. 120).

Over the years, the EU political accession criteria became increasingly comprehensive, including also “the strengthening of state capacity and the independence of judiciaries, the pursuit of anti-corruption measures and the maintenance and strengthening of a whole range of both human and minority rights” (Dimitrova and Pridham 2004, p. 97). Regarding the judiciary, the criteria were based, among other things, on positions on judicial independence that had been developed in the meantime by European judges’ organisations and subsequently presented as standards to the Council of Europe (Venice Commission) and the EU.⁸⁰ Considerable attention was paid to the fight against corruption, especially in public administration. For this reason, Romania was only allowed to join the EU in 2007, after the Cooperation and Verification Mechanism (CVM) had been introduced the year before (Carp 2014, p. 235f.). At that time, most of these measures were not systematically discussed with reference to the rule of law, although the Commission did establish a link between the rule of law and corruption when introducing the CVM.⁸¹

⁷⁹ Likewise, judges were integrated in transnational networks, including the Association of the Councils of State and Supreme Judicial Courts of the European Union (ACA Europe), the European Judicial Training Network founded in 2000, the European Network of Councils of the Judiciary founded in 2004 and the Network of the Presidents of the Supreme Judicial Courts of the European Union, also founded in 2004.

⁸⁰ Accordingly, judges may only be suspended in exceptional cases based on established standards of conduct and in cases of gross violation of the independence, impartiality and integrity of the judiciary. Disciplinary proceedings should be taken up, dealt with and decided on a statutory basis independently of the legislature and the executive by a court or bodies elected by a majority of judges (ENCJ 2015, p. 40ff.).

⁸¹ In 2007, the Commission argued that rule of law “implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption and organised crime” (see <https://eur-lex.europa.eu/eli/dec/2006/928/oj>).

As observers noticed, the EU's approach to certain normative standards has changed over time. Concerning its accession criteria, it "has shifted decisively into areas of substantive democracy", but without "consciously following any clear conception of liberal democracy" (Dimitrova and Pridham 2004, p. 97). Instead, "the commission's thinking evolved in a way that may be described as bureaucratic incrementalism based on the checklist approach" (ibid.).⁸² Progress reports for individual candidate countries regularly assessed the countries' achievements and demanded broader reforms. In 1999, for instance, the Czech Republic was criticised "for failing to make progress with judicial reform", and "the then Zeman government was forced to act fairly promptly to remedy this situation" (ibid.: 106). Once a reform was achieved, "the 'mission accomplished flag' was hung" (Bobek and Kosař 2017, p. 180). At that time, there was no systematic EU-wide monitoring of the state of the rule of law in member states.

With EU accession (which did not come with prompt access to the single market and Schengen), conditionality ended. Contrary to the fears of some EU actors, this did not result in delayed transposition of EU directives (Toshkov 2012). However, there were some setbacks in civil service reforms (Meyer-Sahling 2009), with "little progress on corruption and repeated attempts at interference with the work of independent regulatory agencies and boards" (Toshkov 2012). The CVM mechanism for Romania was continued until 2023 due to remaining concerns regarding corruption.

Since 2010 and 2015 respectively, EU actors have paid close attention to developments in Hungary and Poland. Governing majorities in both countries intended to expand the power of elected majorities at the expense of liberal freedoms and to curb the power of courts. They also implemented "economic reforms running counter the recommendations of international financial institutions and the austerity discourse that has prevailed since the global financial crisis" (Rech 2018, p. 338). Besides, there were attempts to stop privatisation and to renationalise major media, banks and other companies, many of which were in foreign hands.⁸³ In some cases, governing majorities also targeted civil rights NGOs supported from abroad (external or international foundations or the EU) to strengthen EU values, as the Hungarian government did in 2017. The government's rhetoric in this context focused on regaining sovereignty and agency and often referred to the interwar period as a

⁸²For a more positive assessment, see Janse (2019).

⁸³According to Toplišek (2020), studies had already found "a far more protectionist and statist orientation in the economic programs of right-wing populist and radical right parties" in Central and Eastern Europe during the post-communist transition (referencing Markowski 1997; Mudde 2007). After the electoral victory of Fidesz-KDNP in 2010 and PiS in 2015, "analyses of the economic policies of the two populist governments have noted elements of left-wing economics (in the case of Poland) and market-constraining state interventionism (in both cases) (see Kornai 2015; Johnson and Barnes 2015; Szanyi 2016; Moses 2017, pp. 147ff.; Miszerak and Rohac 2017; Voszka 2018)." High taxes for sectors dominated by foreign investors were part of this agenda.

post-imperial golden age with institutions based on democracy and the rule of law, and political pluralism.⁸⁴

Opposition to EU initiatives and the recourse to national sovereignty, however, was not limited to Eurosceptics. The ‘Nice or death’ slogan, for instance, “implying that Poland should veto [the] EU constitutional Treaty it had previously helped to negotiate—was uttered in the Polish Sejm by a would-be prime minister from a liberal-conservative party rather than one of the representatives of the hardline Eurosceptics” (Kucharzyk 2010, p. 8). Václav Klaus, in his time as Czech president (2003 to 2013), “was one of the most radical critics of the EU” (Příbáň 2017, p. 334), and also refused to sign the ratification of the Lisbon Treaty, at least without an opt-out from the Charter of Fundamental Rights of the EU.⁸⁵

The conflicts since 2010 varied in style and subject matter and gained an additional dimension with the political dispute over the allocation of migrants in the EU since 2015. All governments of the Visegrád countries which had accommodated migrants from Balkan states or from Ukraine before were unwilling to welcome a substantial number of Muslim asylum seekers from the Maghreb and Middle East. They criticised the EU’s attempts to relocate them outside their countries of arrival as a breach of EU law. An example of the heated disputes in the following years was a ‘national consultation’ in Hungary in 2017, initiated by the Fidesz government to let citizens vote on EU measures it considered harmful, and a broad ‘Stop Brussels’ campaign that accompanied the referendum. However, despite their common opposition to the EU relocation scheme, the EU-related positions of many parties or governments in East Central Europe at that time cannot be classified as exclusively Eurosceptic, as they varied by topic or were fluid (Lorenz and Anders 2021).

In view of conflicts over the rule of law, the European Commission increasingly referred to case law of the European Court of Justice to show that elements of the rule of law had been established early on, e.g. the principle of legality and the principle of legal certainty (1981, 2004), the prohibition of arbitrariness in executive powers (1986, 1989), and the separation of powers (2010).⁸⁶ Additionally, it initiated several infringement proceedings against the Hungarian and Polish reforms criticised for damaging the rule of law (see Anders and Priebus 2021). When launching these

⁸⁴After the First World War, the states in the region were all established on the basis of a constitution, and a spirit of social awakening prevailed, which, however, ended for the most part in the 1930s with a new wave of constitutions (Schmale 2001; Müller 2021).

⁸⁵Klaus and his party ODS had always held a somewhat hesitant, partly Eurosceptic position (contrary to their voters). They were critical of the direction the EU has taken and, prior to accession, they criticised the social democratic government for not negotiating better accession conditions that would have granted more national power. Demanding an opt-out (that was eventually negotiated) enabled Klaus to relieve the pressure on him caused by his refusal to sign the treaty. See also Příbáň (2017), p. 334ff.

⁸⁶See, for instance, the annexes to the communication from the Commission to the European Parliament and the Council concerning the new EU framework to strengthen the rule of law (COM (2014) 158 final).

procedures, its line of reasoning changed over time. For example, the lowering of the retirement age in Hungary (Sect. 3.3) was first brought before the European Court of Justice as a case of age discrimination and later, in the case of Poland, as impairments to the rule of law.

In response to new rule-of-law-related infringement cases the ECJ defined additional elements of the EU rule of law in greater detail, among them judicial independence (Pech and Kochenov 2021). Besides, it stressed the “constitutional significance of the EU’s values” and ascertained “its own jurisdiction in areas where this is not always straightforward” (Van Elsuwege and Gremmelprez 2020, p. 31). To do so, the Court “discovered” in 2018, according to Krajewski (2018a), “a justiciable rule of law clause in Article 19(1) TEU, which enshrines the principle of effective judicial protection before national courts”. This article, which had rarely gained lawyers’ and legal scholars’ attention before, was now used for granting the Court jurisdiction to verify member states’ organisation of the national judiciary. Shortly after, the ECJ allowed for horizontal review of judicial independence by courts of other EU member states (Krajewski 2018b).

In this phase, EU actors, the Council of Europe, its institutions and other organisations also had to position themselves in relation to the increasingly politicised judicial councils and the various new organisations of judges that were actively reaching out to the European level. For example, the Romanian Judges Forum since 2018 has engaged the Venice Commission, GRECO and the ECJ against legislative changes and several rulings of the Romanian Constitutional Court. The Commission took a critical position on the judicial reforms here, although other Romanian organisations—namely the Association of Magistrates of Romania, the Romanian Union of Judges and the Association of Judges for the Defence of Human Rights—defended parts of the reforms⁸⁷ (Iancu 2022; UNJR 2020). In the case of Poland, the European Network of Councils of the Judiciary suspended the membership of the Polish judicial council in 2018 and expelled it in 2021 for not fulfilling its obligation to defend the independence of the judiciary in Poland. Hungary, on the other hand, continued to be represented. Slovakia and Czechia received less attention. For example, the EU Commission reacted relatively late to accusations against the then Czech finance minister and later prime minister Andrej Babiš which first appeared in 2014.⁸⁸

The PiS and the Fidesz governments blamed the EU for exceeding its competences. They further criticised the incoherence and ‘double standards’ vis-à-vis old and new EU members, and a biased, ideologically driven activism

⁸⁷They spoke out in favour of maintaining the newly established Section for the Investigation of Crimes against Justice and against “unprecedented attacks against the Romanian Constitutional Court” and called on the EU Commission to reconsider its position on various infringement procedures against Romania.

⁸⁸He was alleged to have illegally profited from EU subsidies as a businessman before entering politics, and also accused of an ongoing conflict of interest since he still owned a large firm consortium (Agrofert) which also included media outlets. The Commission was pushed by members of the European Parliament to adopt a tougher stance (EP 2018).

against governments that dared to oppose EU asylum and migration policies. To debunk such accusations and to strengthen its own approach, the EU defined its concept of the rule of law with increasing precision and more comprehensively. In 2020 the Commission's definition of the rule of law included the principles of legality, legal certainty, the prohibition of arbitrary exercise of power, effective legal protection, including access to justice by independent and impartial courts, separation of powers, and the exercise of any public authority within the applicable law—i.e. primarily the Council of Europe criteria. These principles must also be in line with the values of democracy and respect for fundamental rights as set out in the EU Charter of Fundamental Rights (with a particular emphasis now placed on LGBTIQ rights) and other legal instruments (EU 2020; European Commission 2021, p. 2).

Since 2010 EU actors have also applied various tools to address the rule of law conflicts. The so-called Article 7 procedure for cases with “a clear risk of a serious breach by a Member State of the values of the EU” (Article 7 TEU), for example, was initiated against Poland in 2017 by the Commission and in 2018 against Hungary by the EP. In the same year, the EU Commission threatened to deny Romania Schengen accession if it did not respect the rule of law, including anti-corruption measures. Pressure from the EU and the Council of Europe led to adjustments in the country's legislative plans.

Since 2020, the European Commission launches yearly rule of law reports covering all member states. The reports start from the assumption that “effective justice systems and robust institutional checks and balances are at the heart of the respect for the rule of law” and deal with the justice system, anti-corruption measures, media pluralism and other institutional checks and balances. This comprehensive approach is based on the argument that “the rule of law requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society” (European Commission 2020, p. 4).

This expanded rule of law concept resulted in a growing number of possible deficiencies. In the first report, Slovakia, the Czech Republic and Hungary were criticised for corruption (European Commission 2020, p. 19).⁸⁹ Hungary, Poland and Romania were also criticised for restricting media freedom.⁹⁰ The Commission had invited many actors to give input for the report, including executives, judges' organisations and civil society actors, but it was not made transparent how exactly these sources were considered in the Commission's assessments. The 2021 rule of law report criticised all five countries under study. In Czechia, it underlined the lack of progress in anti-corruption legislation or its implementation, high-level corruption, problems of media independence and minor deficiencies in the other pillars. For Slovakia it certified progress regarding judicial independence and anti-corruption

⁸⁹ Apart from the former socialist states, deficits were only noted for Malta.

⁹⁰ Problems with media freedom were otherwise only identified in Malta, Greece and Luxembourg.

measures, but problems with corruption, media ownership transparency and the involvement of stakeholders and civil society in the legislative process. Romania was reported to have problems with judicial independence, independent and pluralistic media and the quality of legislation. Hungary and Poland were criticised for problems with judicial independence, limited anti-corruption and anti-clientelism measures, deficient media pluralism and severe problems with checks and balances (European Commission 2021).

More recently, rule of law standards were also defined by ordinary EU legislation. In a regulation adopted in 2020, the EU tied the disbursement of EU funds to complying with specific rule of law requirements and for that purpose also defined the rule of law.⁹¹ This resulted in the first official rule of law definition jointly agreed by the Commission, the European Parliament and the Council. Later the Commission froze the post-Covid support measures for Hungary in 2022, arguing that ineffective prosecutions and problems in public procurement endangered the proper use of funds. With its clear stance, the EU supported member states' opposition forces committed to the rule of law. At the same time, it continued to use soft law and dialogue around the rule of law reports (Bossong 2020).

Despite the broadened approach, many politicians and academics have criticised the EU measures as insufficient and have called for more decisive action (Scheppele et al. 2021). Repeatedly, European Parliament resolutions called the Commission to act. In 2021, the EP sued the Commission before the ECJ for inaction for the first time ever. In 2022, some European judges' associations also seized the instrument of a lawsuit. They challenged the decision to approve Poland's recovery and resilience plan in the General Court of the EU.⁹²

Among the governments of the five countries studied, the PiS and Fidesz cabinets regularly rejected "Brussels" measures as inadmissible interference in domestic affairs. While implementing the minimum requirements of the ECJ decisions they did not fundamentally change their policies (Anders and Lorenz 2021). In addition, they criticised the "undemocratic" EU legal integration, which in their view was dominated by non-majoritarian bodies (ECJ and Commission) and double standards in the evaluation of old and new EU members. They further accused the EU of confusing democracy with a decline in values and loss of national identity. Both governments unsuccessfully challenged the new rule of law mechanism before the ECJ.⁹³ The Polish Constitutional Tribunal also became a relevant actor in the conflicts surrounding the rule of law with the EU. The court, in a composition

⁹¹ While the Czech, the Slovak and the Romanian governments supported the project, representatives of Hungary and Poland rejected it.

⁹² These were the Association of European Administrative Judges, the European Association of Judges, *Rechtlers voor Rechtlers* and the *Magistrats Européens pour la Démocratie et les Libertés* (Reuters 2022).

⁹³ A different interpretation of that money became apparent in the conflict over the conditionality mechanism for the disbursement of EU funds. Prime Minister Viktor Orbán argued that the old EU member states would see them as charity measures while they were actually a legitimate "compensation for the profit that the other EU countries make from us" (Orbán 2020, p. 6).

determined by PiS, ruled in October 2021 that Articles 1 and 2 (which mention the rule of law as one of the EU's core values) and 19 (which defines the powers of the Court of Justice of the European Union) of the Treaty on European Union unconstitutional under Polish law (Constitutional Tribunal case K 3/21).

In sum, the Council of Europe and the EU have played a vital role for processes around the rule of law. While the Council of Europe was the first to define a rule of law concept, the EU used a broader checklist, based on its evolving rule of law framework. Over the course of the last decades the EU has gradually refined the concept of the rule of law, it has regularly commented on developments in its member states and become a crucial point of reference for domestic actors. At the same time, the relations between the countries and the EU vary, as do their domestic politics. The countries under study do not form a coherent regional bloc within or against the EU. Despite their coordination within the Visegrád-4 framework, studies on decision-making in the EU reveal that the Visegrád group "rarely opposes or abstains as a coalition" (Novak et al. 2021, p. 487) and the countries also do not always vote in the same way in the Council on issues relevant to the rule of law, as the vote on the rule of law conditionality revealed.

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