



# Vanishing Rights: Social Rights in the Illiberal Constitutionalism of Hungary and Poland

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## Abstract

*The weakening of the protection of civil and political rights constitutes one of the essential characteristics of illiberal constitutionalism in Hungary and Poland. In this piece, I analyze whether the same applies to social rights and attempt to establish the political purpose that determined this approach. To do this, I study the social policy pursued in Hungary and Poland, as well as the changes that were made or planned to be made to the constitutional orders of Poland and Hungary concerning social rights and their consequences. I argue that the constitutional protection of social rights in Poland, despite generous social transfers instituted, has not been strengthened. In fact, the weakened independence of the Constitutional Tribunal has contributed to lowering their level of protection. Meanwhile, a deterioration can be observed in Hungary, resulting from the adoption of and subsequent amendments to the Fundamental Law, combined with the erosion of the independence of the Constitutional Court. Social policy, which has served as a tool for gaining and maintaining power in Hungary and Poland, has also driven the approach to social rights under illiberal constitutionalism in both countries.*

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There is a popular saying about the traditional kinship and brotherhood between Poles and Hungarians.<sup>1</sup> This historical connection has been recently reflected in the similar, hostile attitude toward the rule of law and democracy on the part of the Hungarian and Polish right-wing illiberal governments formed by populist parties: Law and Justice (PiS) in Poland and Fidesz in Hungary. The process of dismantling democracy and the rule of law by these “brothers in crime,” as well as its consequences, has been a frequent topic of discussion in the field of constitutional law and European law for many reasons. The entrenchment of changes introduced in the Polish and Hungarian legal systems is particularly important as PiS and Fidesz won two and four successive consecutive parliamentary elections, respectively. Ultimately, in Poland, the populists lost power in 2023.<sup>2</sup>

The research conducted up to now has discerned several similarities between Poland and Hungary when these parties are in power,<sup>3</sup> which Tímea Drinóczi and Agnieszka Bień-Kacala call “illiberal constitutionalism.”<sup>4</sup> From the human rights perspective, undoubtedly, the common element that characterizes illiberal Hungary and Poland is the systematic undermining of civil and political rights and freedoms. In particular, we observe in Hungary and Poland the decline of freedom of speech, freedom of assembly, privacy rights, and minority rights (especially for LGBT+ persons and migrants). Accompanying this has been a weakening of institutional guarantees for the protection of human rights. In this regard, András Sajó has correctly pointed out that the demise of human rights in illiberal regimes is facilitated by the erosion of protection mechanisms, especially independent institutions such as constitutional courts, a process “that results from the regime’s need to concentrate unlimited and unchecked power in the leader’s hands.”<sup>5</sup>

These processes enable populists to govern more effectively, especially by pitting society against specific groups, like LGBT+ persons and migrants, and to entrench themselves. At the same time, the ability of political opponents, journalists, and civil

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<sup>1</sup> In English:

Pole and Hungarian — two brothers,  
good for saber and for glass.  
Both courageous, both lively,  
May God bless them.

<sup>2</sup> Note that in the election held on October 15, 2023, Law and Justice, in power in Poland since 2015, despite winning the biggest share of the vote—35%—lost power to the opposition coalition. See “Polish Parliamentary Elections 2023,” <https://sejmsenat2023.pkw.gov.pl/sejmsenat2023/en>.

<sup>3</sup> See Wojciech Sadurski, *A Pandemic of Populists* (Cambridge: Cambridge University Press, 2022); Gábor Halmai, “The Making of ‘Illiberal Constitutionalism’ With or Without a New Constitution: the Case of Hungary and Poland,” in *Comparative Constitution Making* (Northampton: Edward Elgar Publishing, 2019): 302–323; Adam Holesch and Anna Kyriazi, “Democratic Backsliding in the European Union: the Role of the Hungarian-Polish Coalition,” *East European Politics* 38, no. 1 (2022): 1–20, <https://doi.org/10.1080/21599165.2020.1865319>.

<sup>4</sup> The form of government created by these parties in Poland and Hungary has been referred to in the literature by various terms. In this paper, without getting into discussion on how to properly define this form of government, I will rely on Tímea Drinóczi and Agnieszka Bień-Kacala, who define it as “Illiberal Constitutionalism.” On its characteristics, see Tímea Drinóczi and Agnieszka Bień-Kacala, “Illiberal Constitutionalism: The Case of Hungary and Poland,” *German Law Journal* 20, no. 8 (2019): 1140–1166, <https://doi.org/10.1017/glj.2019.83>.

<sup>5</sup> On reservations about this term, see Mark Tushnet, “The Possibility of Illiberal Constitutionalism,” *Florida Law Review* 69, no. 6 (November 2017): 1367–1384, <https://scholarship.law.ufl.edu/flr/vol69/iss6/1>.

<sup>5</sup> András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy*, (Cambridge University Press, 2021), p. 233.

society organizations to counteract them is heavily abridged.<sup>6</sup> Drinóczi and Bień-Kacała have found this antagonizing of society against certain groups to be one of the foundational aspects of the so-called “illiberal vision of human rights” adopted in illiberal Hungary and Poland.<sup>7</sup> The second constitutive element of this vision is the perception of society as combing both individualism and an emerging majority that holds more communitarian views. Therefore, one can ask whether this second element contributes to strengthening the protection of social rights. Or has it been treated in the same, instrumental way as civil and political rights, along with many other legal norms, under illiberal constitutionalism in Poland and Hungary?<sup>8</sup> If so, this raises the question of the political purpose behind such an approach to social rights. These are the questions I will try to answer in this article.<sup>9</sup>

Interestingly, the approach to social rights in the illiberal constitutionalism of Poland and Hungary has not received as much attention in legal scholarship as that to civil and political rights.<sup>10</sup> Nonetheless, this does not mean that social rights have not been analyzed at all. Some aspects of social rights protection, mainly those related to the rule of law crisis, such as lowering the retirement age for judges, along with more general issues like changes to pensions, have been under scrutiny.<sup>11</sup>

To answer these research questions, I will examine both constitutional regulation of social rights, the practice of its application, and the social policies implemented by these countries. Yet a caveat needs to be made here: I have decided to leave economic rights outside the scope of this analysis. This does not mean, however,

6 In the well-known and cross-sectional Human Freedom Index, published by the Cato Institute and the Fraser Institute, Poland's and Hungary's position has been dropping consistently, from 27 in 2014 to 47 in 2023, and from 28 in 2010 to 65 in 2023, respectively. Vázquez, Ian, Fred McMahon, Ryan Murphy, and Guillermina Sutter Schneider. “Human Freedom Index 2023.” Human Freedom Index, December 19, 2023, p. 296–297, 186–187. See also: Eduard Nazarski, “SIM Peter Baehr Lecture: Shrinking Space for Civic Space: The Countervailing Power of NGOs,” *Netherlands Quarterly of Human Rights* 35, no. 4 (2017): 272–281, <https://doi.org/10.1177/0924051917738871>; Gábor Halmi, “Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary,” *Law & Ethics of Human Rights* 14, no. 1 (2020): 97–123, <https://doi.org/10.1515/lehr-2020-2013>; Wojciech Sadurski, “Populism and Human Rights in Poland,” *Human Rights in a Time of Populism: Challenges and Responses* (2020): 60–80, <https://doi.org/10.1017/978108751551.005>; Wojciech Sadurski, *Poland's Constitutional Breakdown*, (Oxford: Oxford University Press, 2019); Adam Płoszka, “Shrinking Space for Civil Society: A Case Study of Poland,” *European Public Law* 26, no. 4 (2020): 941–960, <https://doi.org/10.54648/euro2020072>.

7 Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, (Routledge, 2021) p. 132.

8 The instrumental approach to the law in the illiberal constitutionalism of Poland and Hungary is rightly pointed out by Paul Blokker, “Populism as a Constitutional Project,” *International Journal of Constitutional Law* 17, no. 2 (2019): 536–553, <https://doi.org/10.1093/icon/moz028>.

9 This research on which this article is based was funded in whole by the National Science Center, Poland, grant number: 2022/47/D/HS5/01784. The author would like to express his gratitude for comments on an earlier version of this article to Gábor Halmi, Gábor Mészáros, Jan Denka and to anonymous reviewers. All errors are my own.

10 This is particularly evident in the comprehensive study of illiberalism in *Routledge Handbook of Illiberalism*, edited by András Sajó, Renáta Uitz, and Stephen Holmes, where economic and social rights in illiberal regimes are not explicitly addressed, although naturally some references to the importance of social conditions under illiberalism can be found in this book.

11 See: Gábor Halmi, “The Early Retirement Age of the Hungarian Judges,” in *EU Law Stories Contextual and Critical Histories of European Jurisprudence*, eds. Fernanda Nicola and Bill Davies (Cambridge University Press, 2017): 471–488, <https://doi.org/10.1017/9781316340479.024> and Petra Bárd and Anna Sledzinska-Simon. “On the Principle of Irremovability of Judges Beyond Age Discrimination: Commission v. Poland.” *Common Market Law Review* 57, Issue 5 (2020): 1555–1584, <https://doi.org/10.54648/cmla2020747>.

On the broader Hungarian context, however, see: Andrew Arato and Gábor Halmi. “Economic constitutionalism, the Challenge of Populism and the Role of the Constituent Power,” in *Economic Constitutionalism in a Turbulent World*, eds. Achilles Skordas, Gábor Halmi, and Lisa Mardikian, (Edward Elgar Publishing, 2023), pp. 87–108, <https://doi.org/10.4337/9781789907575.00012>

On differences in labor laws, see also: Tamás Gyulavári and Łukasz Pisarczyk, “Populist Reforms in Hungary and Poland: Same Song, Different Melodies,” *International Journal of Comparative Labour Law and Industrial Relations* 39, no. 1 (2023): 49–70, <https://doi.org/10.54648/ijcl2023004>.

that I underestimate the importance of economic rights (particularly property rights) and the need to analyze the approach to them in Polish and Hungarian illiberal constitutionalism, which undoubtedly deserves separate study. In this piece, I have decided to focus on social rights, as the Polish and Hungarian populists, despite many similarities characteristic of right-wing populism, differ significantly in terms of social policy, especially with regard to social transfers and their importance for gaining and maintaining power. This raises the question of whether this difference has translated into differences in their approach to the constitutional protection of social rights.

This article has the following structure. In section two, I will discuss social policy relevant to the realization of social rights in the illiberal constitutionalism of Poland and Hungary. The purpose of that section is to identify its major features rather than provide a detailed description. Then, in section three, to better understand constitutional changes made in the period of illiberal constitutionalism (or the lack of need for them), I will discuss the constitutional regulation of social rights in Poland and Hungary before the populists came to power. In later sections, I will analyze the approach to social rights in the illiberal constitutionalism of Poland and Hungary. The subject of analysis will be both constitutional regulation—changed in Hungary following the adoption of a new Constitution in 2011 (section five)—and drafts of a new Constitution in Poland, which has not been adopted (section seven). In sections six and eight, I will analyze selected rulings of the constitutional courts. In selecting the cases to be analyzed, I have sought those that best illustrate the approach to social rights under illiberal constitutionalism. The article concludes with an answer to the posed research questions.

## **Social Policy in the Illiberal Constitutionalism of Hungary and Poland**

Without consideration of social policy, understanding the change in the approach to social rights that took place in the illiberal constitutionalism of Poland and Hungary is difficult for at least two reasons. First, social policy is key to realizing social rights and, in principle, should be based on constitutionally protected social rights. Second and more importantly, in this regard, the populists in Poland and Hungary have exploited wide-ranging socioeconomic issues to gain and maintain power.<sup>12</sup> In many ways, they have challenged existing economic and social paradigms.<sup>13</sup> The following subsections identify the most important features of the social policies pursued during the period when Poland and Hungary were governed by the populist PiS and Fidesz.

### *Hungary: The Revival of Neoliberalism*

In Hungary, social issues were of some importance to the initial electoral success of Fidesz—Viktor Orbán came to power fighting austerity measures enacted by the previous socialist government in the aftermath of the 2006 deficit crisis and the 2008 global financial crisis—but of little importance to the party's subsequent ability

12 See: Mark Tushnet and Bojan Bugarić, *Power to the People Constitutionalism in the Age of Populism*, (Oxford University Press, 2022), pp. 81–104.

13 For this reason, the economic and social policies pursued by illiberal Hungary and Poland are the subject of many academic studies and reports. In this regard, see in particular: Mitchell A. Orenstein, and Bojan Bugarić, "Work, Family, Fatherland: The Political Economy of Populism in Central and Eastern Europe," *Journal of European Public Policy* 29, no. 2 (2022): 176–195, <https://doi.org/10.1080/13501763.2020.1832557>. Jakub Tomášek, "The Welfare States of Hungary's Fidesz and Poland's Law and Justice: Explaining the Surprisingly Divergent Trajectories," *Europe in Question Discussion Paper Series at LSE* No 181/2023; István Benczes and Joanna Orzechowska-Wałaszka, "Governing the Economy Under Populist Rule: The Cases of Hungary and Poland," *Problems of Post-Communism* (2024): 1–15, <https://doi.org/10.1080/10758216.2023.2301085>.

to remain in power. The Orbán government's economic and social policies can be described as neoliberal, with a focus on the middle and upper classes rather than on the poor.<sup>14</sup>

This focus was manifested, for example, in a decrease of the corporate tax rate to a record low of 9% (in 2017) and a cancellation of progressive taxation in favor of a 16% flat income tax (in 2011). The government pursued a rather conservative fiscal policy and tried to support foreign investment. The ability of trade unions to act was circumscribed, as were workers' rights, especially after the adoption of a new Labor Code in 2012. A 2018 amendment to the Labor Code, popularly referred to as the "slave act,"<sup>15</sup> further weakened workers' rights by raising the annual limit on overtime from 250 to 400 hours while allowing employers to pay for overtime work within a period of three years.<sup>16</sup> In contrast to this general neoliberal line, the renationalization of public utilities, banks, and the pension system was carried out.<sup>17</sup> With regard to the latter, the Hungarian government took the radical step of nationalizing private pension assets and eliminating the private pension pillar without broad public debate or compensation. The changes to the pension system also included the elimination of early retirement pension schemes.<sup>18</sup>

Fiscal policy did not entail broader social transfers. Significantly, Orbán has explicitly declared a move away from the "welfare state" and toward a "workfare state."<sup>19</sup> This new model is intended to promote working people, limiting access to social benefits and disability pensions. The Road to Work program, which was originally introduced by the socialist government in 2009 and made receiving social security benefits conditional on performing compulsory public labor, was toughened by the Orbán government, including setting wages below the minimum rate. At the same time, the social benefits of people who refused to participate in Road to Work were significantly reduced.<sup>20</sup> A clear sign of Hungary's departure from the welfare state model is

14 A broad analysis of the socioeconomic determinants of Orbán's electoral success is presented in Gabor Scheiring, *The Retreat of Liberal Democracy: Authoritarian Capitalism and the Accumulative State in Hungary*, (London: Palgrave, 2020); Eva Fodor, *The Gender Regime of Anti-Liberal Hungary*, (Palgrave Pivot, 2022); see also Bermond Scoggins, "Identity Politics or Economics? Explaining Voter Support for Hungary's Illiberal FIDESZ," *East European Politics and Societies* 36, no. 01 (2022): 3-28, <https://doi.org/10.1177/0888325420954535>; and Dorottya Szikra, "Welfare for the Wealthy," *The Social Policy of the Orbán Regime*, Friedrich Ebert Stiftung Budapest Analysis, Budapest 2017, <https://library.fes.de/pdf-files/bueros/budapest/14209.pdf>.

15 Palko Karasz and Patrick Kingsley, *What Is Hungary's 'Slave Law,' and Why Has It Provoked Opposition?* The New York Times, December 22, 2018.

<https://www.nytimes.com/2018/12/22/world/europe/hungary-slave-law.html>

16 See a detailed analysis of the changes in Hungary's labor law introduced by the Orbán's government: Sara Hungler, "Labor Law Reforms After the Populist Turn in Hungary," *Review of Central and East European Law* 47, no. 1 (2022): 84-114, <https://doi.org/10.1163/15730352-bja10063>.

17 Noemi Lendvai-Bainton and Dorota Szelewa, "Governing New Authoritarianism: Populism, Nationalism and Radical Welfare Reforms in Hungary and Poland," *Social Policy & Administration* 55, no. 4 (2021): 559-572, <https://doi.org/10.1111/spol.12642>.

18 Dorottya Szikra, "Democracy and Welfare in Hard Times: The Social Policy of the Orbán Government in Hungary Between 2010 and 2014," *Journal of European Social Policy* 24, no. 5 (2014): 490-492, <https://doi.org/10.1177/0958928714545446> See also: István Dedák and Noémi Fiser, "Pension reforms in Hungary: have they gone too far?," *Journal of Pension Economics & Finance* (2024): 1-16, <https://doi.org/10.1017/S1474747224000052>.

19 See: Prime Minister's Speech at the Chatham House, London, October 9, 2013, <https://2010-2014.kormany.hu/en/prime-minister-s-office/the-prime-ministers-speeches/prime-minister-s-speech-at-the-chatham-house>.

20 Zsuzsanna Vidra, "Hungary's Punitive Turn: The Shift From Welfare to Workfare," *Communist and Post-Communist Studies* 51, no. 1 (2018): 73-80, <https://doi.org/10.1016/j.postcomstud.2018.01.008>; See also Nicole VT. Lugosi, "Radical Right Framing of Social Policy in Hungary: Between Nationalism and Populism," *Journal of International and Comparative Social Policy* 34, no. 3 (2018): 210-233, <https://doi.org/10.1080/1699763.2018.1483256>; István Hoffman, Bevezetés a szociális jogba, A munkaügyi és társadalombiztosítási Ba szak hallgatói részére (Budapest 2015).

the adoption in late 2022 of an amendment to the Law on Social Administration and Social Care, which came into force on January 1, 2023. It redefined the state's responsibility for providing social care to the individual, emphasizing that everyone is responsible for himself or herself. When an individual cannot take care of himself or herself, the duty to assist him or her is placed on the family, then on the local government, and only as a last resort on the national government.<sup>21</sup>

It is worth adding that some social support measures have been introduced by the populists in Hungary, such as an income tax exemption for mothers who have given birth to at least four children, an extension of the length of universal childcare leave from two to three years, and continuation of early retirement for women who have made pension contributions for 40 years or longer (despite the elimination of the possibility of early retirement in principle). However, these measures aimed to increase fertility rates rather than support those in need.<sup>22</sup>

The indicated changes in social policy, some of which challenged Europe-wide social policy paradigms, were met with resistance at the EU level. They contributed, among many other things, to the initiation of Article 7 of the Treaty on European Union against Hungary.<sup>23</sup> The resolution of the European Parliament, which initiated the procedure, pointed out the short duration of unemployment benefits in particular. They were found to provide inadequate guarantees of social assistance and access to essential services and adequate housing for all. Also mentioned was the restriction, and in some cases prevention, of the exercise of the right to strike.

#### *Poland: An Era of Social Transfers*

Contrary to Hungary, the populists' rise to power in Poland was accompanied by a strong emphasis on social issues. Social policy played an important role in Poland during the 2015 election campaign and subsequent races. Law and Justice promised several social transfers, which were then effectively implemented.

Among the benefits introduced in 2016, just after the election, was Family 500+, which consisted of parents receiving a tax-free PLN500 per month, about €100, for each child. Other social transfers were introduced before the next election in 2019: In 2018, an annual benefit for parents of children related to the beginning of the school year was implemented, followed in 2019 by an annual additional pension (initially one, then two) granted to pensioners.

The changes in social policy have clearly served as a tool of election campaigns, the best example of which is raising the amount of the flagship Family 500+ child support benefit to PLN800 per month (about €180) in July 2023, a few months before the 2023 October election. Interestingly, the entry into force of this change was postponed until January 1, 2024, which, however, did not prevent PiS from

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21 Article 2 of Act III of 1993 on social administration and social care modified by Act L of 2022.

22 Eva Fodor, "More Babies for the State: the 'Carefare' Regime of Anti-liberal Hungary," *New Labor Forum* 31, no. 1 (2022): 34-41, <https://doi.org/10.1177/10957960211062460>.

23 European Parliament resolution of September 15, 2022, on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), C 125/463. On this procedure see: Laurent Pech, "Article 7 TEU: From 'Nuclear Option' to 'Sisyphian Procedure'?", in *Constitutionalism under Stress*, eds. Uładzislau Belavusau and Aleksandra Gliszczynska-Grabias (Oxford University Press, 2020): 157-174, <https://doi.org/10.1093/oso/9780198864738.003.0011>.

promoting the increased amount during the election campaign.<sup>24</sup> The same was true of a new benefit called Family Care Capital (*rodzinny kapitał opiekuńczy*). It amounted to a total PLN12,000 per child payment for the second and subsequent children aged between 12 and 35 months in a household, independent of family income. It was introduced in 2022 with the 2023 election in mind.

These social transfers were tailored to specific constituencies: the elderly (the traditional PiS electorate), who, along with two additional pensions, received additional subsidies to cover medicines; large families (the main beneficiaries of the Family 500+ program); and to some extent young people, who also received some tax relief.<sup>25</sup> Instead of targeting the most needy, they were universal (granted regardless of income). The best evidence of the political nature of these social transfers was the socially resounding 40-day occupation of the parliament building by people with disabilities (and their carers), who unsuccessfully demanded an increase in benefits granted to them.<sup>26</sup>

Another important instrument of PiS social policy represented hikes to the minimum wage, another realized election promise from the 2019 campaign. The minimum wage amount of PLN2,250 per month in January 2019 was hiked to PLN3,600 per month on July 1, 2023 (just before the election).<sup>27</sup> This was similarly universal, targeting the same groups of constituents. The same goes for the comprehensive tax reform in 2021, referred to as the “Polish Deal,” which included an increase of the tax-free base amount (from PLN8,000 up to PLN30,000).<sup>28</sup>

Finally, apart from social transfers, the reversal of Poland’s 2012 pension reform, which had raised the retirement age to 67 for both genders, was crucial for the populists’ rise to power in Poland. Before this 2012 reform, the retirement age was 60 for women and 65 for men. In the 2015 election campaign, the populists announced the reversal of the reform, which they successfully carried out in 2017.<sup>29</sup> The issue of pensions has also acquired an ideological dimension. In 2016, a so-called “repressive law” (*ustawa represyjna*) was enacted to further reduce the pensions of people

24 See press on the Polish government’s website: Family picnic in Tychy: Prime Minister Mateusz Morawiecki on the future of Poland and Polish families, 29 July 2023 <https://www.gov.pl/web/primeminister/family-picnic-in-tychy-prime-minister-mateusz-morawiecki-on-the-future-of-poland-and-polish-families>.

25 For an analysis of the socioeconomic determinants of PiS electoral success, see: Wojciech Sadurski, *Poland’s Constitutional Breakdown*, (Oxford University Press, 2019), p. 175–177; See also Radosław Markowski, “Creating Authoritarian Clientelism: Poland After 2015,” *Hague Journal on the Rule of Law* 11 (2019): 111–132, <https://doi.org/10.1007/s40803-018-0082-5>; Noemi Lendvai-Bainton and Dorota Szelewa, “Governing New Authoritarianism: Populism, Nationalism and Radical Welfare Reforms in Hungary and Poland,” *Social Policy & Administration* 55, no. 4 (2021): 559–572, <https://doi.org/10.1111/spol.12642>.

26 For more see Natalia Pamula and Magda Szarota, “‘Symbiotic Citizenship’ and a Struggle for the Right of Life as Frames for Interpreting the 40-day Disability Protest in the Polish Parliament” in *Rethinking Disability and Human Rights*, Eds. Inger Marie Lid, Edward Steinfeld, Michael Rembis (London: Routledge, 2023): 94–99. Paweł Kubicki, Rafał Bakalarczyk, and Marek Mackiewicz-Ziccardi, “Protests of People with Disabilities as Examples of Fledgling Disability Activism in Poland,” *Canadian Journal of Disability Studies* 8, no. 5 (2019): 141–160, <https://doi.org/10.15353/cjds.v8i5.569>.

27 See more: Marek Naczyk and Edgars Eihmanis, “Populist Party-producer Group Alliances and Divergent Developmentalist Politics of Minimum Wages in Poland and Hungary,” *Competition & Change* (2023): 1–18, <https://doi.org/10.1177/10245294231213417>.

28 Mateusz Gajda, “The Impact of the Polish Deal on Labour Market,” *Revue de droit comparé du travail et de la sécurité sociale* 4 (2022): 202–203, <https://doi.org/10.4000/rdctss.4780>.

29 For more on pension reforms in Poland, see: Marek Szczepański, Joanna Ratajczak-Leszczynska, Kamila Bielawska, Joanna Rutecka-Góra and Sylwia Pińkowska-Kamieniecka, “Poland: A pension system under constant (re) construction,” in *The Evolution of Supplementary Pensions 25 Years of Pension Reform*, eds. James Kolaczowski, Michelle Maher, Yves Stevens and Jakob M. Werbrück (Edward Elgar Publishing 2022): 229–256.



who worked in the state security apparatus of the Polish People's Republic (such a reduction had already been carried out once before).

Poland, like Hungary, has become the subject of Article 7 of the Treaty on European Union procedure. The difference, however, is that social policy issues did not form the basis for this in the case of Poland and PiS.<sup>30</sup>

To conclude, the social policies of Poland and Hungary have some similarities, mainly their pro-family orientation, which is part and parcel of the conservative agenda pursued by the populists in these countries. Yet significant differences emerge when the cases of Poland and Hungary are analyzed. The latter has adopted a largely selective redistribution policy, boosting middle-class and relatively well-off families, while the former has pursued a more universal welfare regime by pushing through a series of social transfers that do not target the poorest parts of society.<sup>31</sup> Notwithstanding this difference, social policy has served the populists in Hungary and Poland as a key tool for gaining and maintaining power. This, as we will see, has been confirmed in the illiberal constitutionalism of Poland and Hungary, which will be discussed below.

### **Social Rights and their Constitutional Protection in Poland and Hungary Before Illiberal Constitutionalism**

The discussion of the protection of social rights in the illiberal constitutionalism of Poland and Hungary should be preceded by some remarks on the state of affairs before the populists came to power in Hungary (up to 2010) and in Poland (up to 2015). This will give us the point of reference for the new approach adopted by the populists.

The Hungarian (pre-2011) and Polish (still-in-effect) constitutional orders were relatively similar with regard to social rights. The 1949 Hungarian Constitution (significantly amended in 1989, taking effect on October 23, 1989),<sup>32</sup> as well as the 1997 Polish Constitution,<sup>33</sup> contained a wide range of economic and social rights. The adoption of relatively broad lists of social rights, characteristic of the Central and Eastern European constitutions endorsed after 1989, was essentially the legacy of communism. The societies of the countries that bore the hardships of economic transition and, at the same time, were accustomed to certain social benefits in the communist period expected their demands to be addressed by the new democratic constitutions.<sup>34</sup>

30 See European Parliament resolution of September 17, 2020, on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)).

31 It is worth noting in this context that in 2015–2023, Poland's Gini coefficient was decreasing. See:

<https://data.worldbank.org/indicator/SI.POV.GINI?locations=PL>

However, a full analysis of the effects of Law and Justice's social policies, as noted in the introduction, is beyond the scope of this piece.

32 Act XX of 1949 of the Constitution of the Republic of Hungary. By Act XXXI of 1989 nearly 100 provisions of the 1949 Constitution were changed, including those related to social rights.

33 The Constitution of the Republic of Poland of April 2, 1997, published in Journal of Laws No. 78, item 483.

34 Wojciech Sadurski, *Rights Before Courts A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, (Dordrecht: Springer, 2005): 253. See also András Sajó, "Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court," in: *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, ed. Pilar Domingo (Aldershot/Burlington: Ashgate, 2006): 83–106; Wiktor Osiatynski, "Rights in New Constitutions of East Central Europe," *Columbia Human Rights Law Review* 26, no. 1 (Fall 1994): 111–166, <https://doi.org/10.1017/CBO9780511808333>; Gabor Halmi, "Separation of Power—Social Rights—Judicial Review. The Polish and Hungarian" in *Constitution-making process*, ed. Mirosław Wyrzykowski, (Warsaw: 1998) 83–96.



The social rights formulated by the Polish and Hungarian constitutions had great ambitions, a particular example of which is the right to health care. The 1949 Hungarian Constitution proclaimed the right for all those living in Hungary “to the highest possible level of physical and mental health.”<sup>35</sup> The Polish Constitution, although it proclaimed the right to health care for every person in Poland, also formulated a specific guarantee of “equal access to health care services, financed from public funds, [that] shall be ensured by public authorities to citizens, irrespective of their material situation....”<sup>36</sup> At the same time, the constitutions of Hungary and Poland, in general, did not draw clear boundaries between the social rights that are enforceable and those that are not enforceable by the courts during the constitutional review process.<sup>37</sup>

Precisely because of the wording of these constitutions with regard to social rights, a great deal of importance in defining their actual content has fallen on the constitutional courts. Interestingly, the constitutional courts of both countries have adopted a minimalist approach to the enforcement of social rights in principle, limiting the possibility of enforcing them in court.<sup>38</sup>

As the Hungarian Constitutional Court stated in its early jurisprudence:

Social rights are implemented both by the formation of adequate institutions and by the rights of individuals to have access to them, which rights are to be specified by the legislature. In a few exceptional cases, however, individual rights have a direct bearing on certain social rights to be found in the Constitution.<sup>39</sup>

Yet this approach did not prevent the Constitutional Court from examining social welfare legislation adopted by parliament from a different angle. In perhaps one of its most famous cases, the Constitutional Court declared as unconstitutional changes to Hungary’s social security system on the grounds that they violated the principle of legal certainty and the property rights inherent in some entitlements.<sup>40</sup> It also emphasized the legislature’s great freedom in making laws that govern the implementation of social rights.<sup>41</sup>

35 Article 70D of Act XX of 1949.

36 Article 68.2 of Act XX of 1949.

37 W. Sadurski, *Rights Before Courts A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, (Dordrecht: Springer, 2005): 284.

38 See: in relation to Hungary: Renata Uitz and Andras Sajo, “A Case for Enforceable Constitutional Rights? Welfare Rights in Hungarian Constitutional Jurisprudence,” in *Justiciability of economic and social rights: experiences from domestic systems*, ed. Coomans Fons (2006): 97–128, and in relation to Poland see Marcin Wójcicki, “The History and Current Development of Social Rights in Poland,” *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, 2014: 477–531.

39 Hungarian Constitutional Court Decision 28/1994 (V. 20.) para 29(b). All decisions of the Hungarian Constitutional Court to which references are made in this paper are available on the Constitutional Court’s website “Constitutional Court Of Hungary,” <https://hunconcourt.hu>. See also Decision 21/1994 (IV. 16.), in which the Court has stated that: “The right to work as a subject right must be distinguished from the right to work as a social right, and especially the latter’s institutional aspect, namely the State’s duty to engage in an appropriate employment and job-creation policy.” See also: Decision 32/1991 (VI. 6.) AB. In that decision, the Court explicitly excluded the possibility of interpreting from Article 70/E the guarantee of a secured income or a minimum standard of living.

40 Hungarian Constitutional Court Decision 43/1995 (VI. 30.) See also comments on this (and a whole series of Hungarian Constitutional Court decisions, including the most famous, concerning the so-called Bokros package, in the case of 45/1995 (VI. 30.) AB): Andras Sajo “How the Rule of Law Killed Hungarian Welfare Reform.” *East European Constitutional Review* 5, no. 1 (Winter 1996): 31–41; Kim Lane Scheppele, “A Realpolitik Defense of Social Rights,” *Texas Law Review* 82, no. 7 (June 2004): 1921–1962.

41 Hungarian Constitutional Court Decision 32/1998 (VI. 25.) AB.

The Polish Constitutional Tribunal adopted a similar approach, deciding that a careful review of a specific constitutional provision is generally required in each case to determine whether or not the beneficiaries of the actions taken by public authorities in the area of economic and social rights are also the subjects of the right to demand specific actions for their benefit; a careful review is also required to determine the legal form of those actions.<sup>42</sup> Nonetheless, the case law of the Polish Constitutional Tribunal also includes the opposite view, whereby social rights may be violated by public authorities, in which case they may be the basis for a constitutional complaint in the following three special situations:

- 1) whenever the legislature has applied means that may not lead to the implementation of a constitutional goal;
- 2) whenever a statute restricts a citizen in such a manner that it violates the essence of the law;
- 3) whenever the statutory legal regulation does not take account of the minimum right delineated by its essence.<sup>43</sup>

The Polish Constitutional Tribunal has, on many occasions, expressed the view that evaluation of the purposefulness and appropriateness of parliamentary decisions in the field of social rights is beyond its competence, which includes constitutional review of laws passed by the legislature. The Constitutional Tribunal stated that it is the duty of the parliament to select the most appropriate solutions (in social and economic terms) and that the parliament bears political responsibility for the manner in which it uses its lawmaking powers. Consequently, the Tribunal's evaluation is limited only to cases where the legislature has overstepped its regulatory powers in a manner that violates the Constitution<sup>44</sup>.

The approaches of both courts to social rights has not translated into absolute freedom for the government and parliament to regulate them. On some occasions, the constitutional courts have delivered judicial decisions on the unconstitutionality of certain laws relevant to the realization of social rights.<sup>45</sup> This observation is quite important in the context of the legal changes concerning the status of constitutional courts introduced in the illiberal constitutionalism of Hungary and Poland. Both governments, in slightly different forms, have engaged in packing of the constitutional courts. In both cases, limiting the independence of the constitutional courts was one of the first actions taken by the government after it had come to power.

In the case of Hungary's Constitutional Court, Fidesz has decided to move away from the previous model of selecting judges on a nonpartisan basis to selecting them itself, since it has a "constitutional majority." Shortly after the 2010 election, Fidesz decided to fill two vacant seats in this way, and another four were created by

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42 Judgment of the Constitutional Tribunal of July 2, 2002, Case No. U 7/01, Published in: OTK ZU 2002, no. 4A, item 48. All judgments of the Polish Constitutional Tribunal to which references are made are available on the website of the Constitutional Tribunal. The judgments are available in Polish at <https://ipo.trybunal.gov.pl/>.

43 Judgment of the Constitutional Tribunal of May 14, 2001, Case No. SK 1/00, OTK ZU 2001, no. 4, item 84.

44 This view was first formulated in the judgment of the Constitutional Tribunal of November 20, 1995, Case no.: K 23/95, OTK 1995, Vol. II, item 33, p. 121, and was repeated on numerous occasions thereafter. See, for example: Constitutional Tribunal judgment of December 11, 2006, Case No. SK 15/06, OTK ZU 2006, No. 11A, item 170, para. 44; judgment of September 12, 2000, Case No. K 1/00, OTK ZU 2000, no. 6, item 185, para. 44; judgment dated October 21, 1998.

45 See especially two judgments concerning the right to housing: Hungarian Constitutional Court Decision 42/2000 (XI. 8.) AB. and the Polish Constitutional Tribunal judgment of April 4, 2001, Case No. K 11/00, OTK ZU 2001, no. 3, item 54.

increasing the number of sitting judges on the Constitutional Court from 11 to 15. At the end of 2013, the ruling party thus gained a majority on the Court.<sup>46</sup>

In the case of Poland, court-packing became possible due to an earlier unsuccessful attempt just before the 2015 parliamentary election by the outgoing parliamentary majority. In addition to selecting three judges, which the outgoing parliament had the right to do, it mandated two additional judges to be chosen by the parliament of the next term. However, the selection of these two judges was challenged by the Constitutional Tribunal itself. The populists who then came to power selected these two judges and (unlawfully) another three to replace the already-duly selected judges.<sup>47</sup> Judges selected by PiS obtained a majority in the Constitutional Tribunal in 2017.

In the jurisprudence of these courts since then, one observes a friendly attitude toward the government's actions, not to say more strongly that their rulings serve as the basis to legitimize government actions.<sup>48</sup> This has significantly affected the status of social rights by enabling the governments to implement them (or not) at the statutory level in a manner essentially devoid of constitutional review. This argument will be further developed in the following sections.

### Hungary: The Fundamental Law and the Negation of Social Rights

The Orbán government's approach to social policy found its expression in the new Constitution, adopted in 2011, after the 2010 election, when Fidesz and the Christian Democratic People's Party gained the two-thirds majority required to change the Constitution. The new constitution was called the Fundamental Law.

The adoption of the Fundamental Law led to a qualitative change in terms of constitutional regulation of social rights: Social rights have ceased to be "rights." Instead, the Fundamental Law formulates a series of programmatic norms defining the principles of state policy. Referring back to the right to health care, which under the 1949 Constitution was formulated in an extremely ambitious manner, the Fundamental Law states: "Everyone shall have the right to physical and mental health." Other social rights were formulated in a similar vein. The right to social security, and more specifically, the nature and extent of social measures, has been

46 See for more detail: Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele. "Hungary's Illiberal Turn: Disabling the Constitution." *Journal of Democracy* 23, no. 3 (2012): 138–146. <https://doi.org/10.1353/jod.2012.0054>; Attila Vincze, "Wrestling with Constitutionalism: the Supermajority and the Hungarian Constitutional Court." *ICL Journal* 8, no. 1 (2014): 86–97. <https://doi.org/10.1515/icl-2014-0105>.

47 See for more detail: Wojciech Sadurski, *Poland's constitutional breakdown*, (Oxford University Press 2019); Mirosław Wyrzykowski, "Antigone in Warsaw" in: *Human rights in contemporary world. Essays in Honour of Professor Leszek Garlicki*, ed. Marek Zubik (Wydawnictwo Sejmowe, 2017): 372–437; Aleksandra Kustra-Rogatka, "An Illiberal Turn or a Counter-Constitutional Revolution? About the Polish Constitutional Tribunal Before and After 2015," in *Courts and Judicial Activism under Crisis Conditions* Policy Making in a Time of Illiberalism and Emergency Constitutionalism ed. Martin Belov (Routledge, 2021): 100–124.

48 In relation to the Hungarian Constitutional Court, see: Zoltán Sente, Fruzsina Gárdos-Orosz, "Judicial Deference or Political Loyalty? The Hungarian Constitutional Court's Role in Tackling Crisis Situations," in *New Challenges to Constitutional Adjudication in Europe*, eds. Zoltán Sente and Fruzsina Gárdos-Orosz (Routledge, 2018): 89–110; Nóra Chronowski, Ágnes Kovács, Zsolt Körtvélyesi, Gábor Mészáros, *The Hungarian Constitutional Court and the Abusive Constitutionalism*. MTA Law Working Papers 2022/7; Gábor Halmai, "Coping Strategies of the Hungarian Constitutional Court Since 2010." *Verfassungsblog* (2022). <https://doi.org/10.17176/20220927-230915-0>. In relation to the Polish Constitutional Tribunal, see: Wojciech Sadurski, "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler," *Hague Journal on the Rule of Law* 11 (2019): 63–84. <https://doi.org/10.1007/s40803-018-0078-1>; Adam Ploszka, "It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional." *Hague Journal on the Rule of Law* 15, no. 1 (2023): 51–74. <https://doi.org/10.1007/s40803-022-00174-w>.

linked to “the usefulness to the community of the beneficiary’s activity” (Article XIX (3)).

The social policy of the Orbán government was entrenched by the new regulation of social rights. The particular expression of this is Article O, which stipulates that “Everyone shall be responsible for himself or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities,” which is worth considering in the context of the controversial 2022 amendment to the Law on Social Administration and Social Care, as described above. A second such example is the provisions that secure early retirement for women and other pro-family regulations. The former were provided by Article XIX (4), the second sentence of which states: “An Act may lay down the conditions for entitlement to state pension also with regard to the requirement for stronger protection for women”; the latter through Article XV (5), which states: “By means of separate measures, Hungary shall protect families, children, women, the elderly, and those living with disabilities.”

A special sort of confirmation of the secondary status of social rights under the Hungarian Fundamental Law is the limit on challenging the compliance of any law with social rights. According to Article 37 (4) of the Fundamental Law, the Constitutional Court’s authority to rule on the constitutionality of key public finance laws is significantly restricted: When government debt exceeds 50% of gross domestic product, the Court may review how these acts comply with the Fundamental Law but exclusively in connection with limited civil and political rights, and may annul these acts if they are found to be in violation of those rights or procedural requirements.<sup>49</sup> The consequence is a situation in which public finance laws, crucial to social rights, are constitutionally removed from the control of the Constitutional Court. It is also important to note that the Fundamental Law has limited to a few state organs the possibility of initiating ex-post abstract norm control, excluding individuals from this procedure.<sup>50</sup>

Interestingly, the indicated limitation on the Constitutional Court’s competence was introduced initially through a 2010 amendment to the 1949 Constitution, abolishing popular action even before the adoption of the Fundamental Law.<sup>51</sup> This regulation was subsequently included in the Transitional Provisions, adopted in connection with the entry into force of the Fundamental Law. The Transitional Provisions provide that the provision of Article 37 (4) of the Fundamental Law is to be applied temporarily.<sup>52</sup> Eventually, after the adoption of the Fourth Amendment to the Fundamental Law, it became a permanent element of the constitutional order.<sup>53</sup>

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49 This solution has twice been criticized by the Venice Commission. See: Opinion 720 / 2013 on the Fourth Amendment to the Fundamental Law of Hungary adopted by the Venice Commission at its 95th Plenary Session (Venice, June 14–15, 2013). Also: Opinion no. 614/2011 on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary adopted by the Venice Commission at its 86th Plenary Session (Venice, March 25–26, 2011).

50 See Article 24.2.c. of the Fundamental Law.

51 Such a restriction of the Constitutional Court’s competence has been the subject of criticism from the Venice Commission: Opinion no. 614/2011 on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary adopted by the Venice Commission at its 86th Plenary Session (Venice, March 25–26, 2011), par. 54.

52 See Article 27 of the Transitional Provisions to the Fundamental Law (December 31, 2011) of Hungary, which provides that: “Article 37(4) of the Fundamental Law shall be applicable to Acts of Parliament published in the period when state debt exceeded half of the Gross Domestic Product even when the state debt no longer exceeds half of the Gross Domestic Product.”

53 This was criticized—again—by the Venice Commission in the Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, June 17–18, 2011), CDL-AD(2011)016-e.

This new regulation of social rights protection should be read with the transitional provision that renders invalid previous decisions issued by the Constitutional Court in the period before the Fundamental Law came into effect.<sup>54</sup> Although this provision was meant to render invalid the Constitutional Court's decisions that were issued after Fidesz came to power whereby the Court limited the power of the populists, it also applies to the case law on social rights characterized above.

### **The Hungarian Constitutional Court's Approach to Social Rights Under the Fundamental Law**

The adoption of a Fundamental Law that qualitatively changes the constitutional protection of social rights has been reflected in the jurisprudence of the Hungarian Constitutional Court. In theory, the new regulation of social rights did not have to lead to a decrease in the level of protection of an individual's social interests, as they were protected by the Constitutional Court, mainly with reference to other constitutional values, such as dignity, legal certainty, and the property rights inherent in some entitlements. This line reemerged in the first decisions of the Hungarian Constitutional Court issued after the new Constitution came into force, when the Court had yet to be fully packed by the Fidesz government.

Among the most famous rulings from that time was the decision from July 16, 2012.<sup>55</sup> In this decision, the Court challenged one of the Orbán government's first and most important measures employed against judges—lowering the retirement age for judges on ordinary courts from 70 to 62, which was designed to replace some of the presidents of courts of different instances. The Court ruled by a 7:7 vote that lowering the retirement age for judges was unconstitutional. The court again based its reasoning not on the right to social security but rather on the guarantee of independence and irremovability of judges.<sup>56</sup>

An even more emblematic example is the Constitutional Court's November 2012 decision on the constitutionality of an amendment to the Misdemeanor Act whereby living permanently in public areas was criminalized. In other words, the Court ruled on the criminalization of homelessness. It found the given legislation unconstitutional because the law prohibited homelessness as a status, meaning it violated the human dignity of people who could not afford a place to live, and because the law did not meet rule of law requirements, i.e., legal certainty.<sup>57</sup>

In its reasoning, the Court rightly pointed out that for homeless people, living in a public space is a crisis created by various pressures and rarely the result of a conscious, considered, and free choice. Homeless people have lost their homes and have no means of finding housing; they are forced to live in a public space, the only space open to all, for lack of a real alternative. Punishing them for this is therefore incompatible with the Fundamental Law. Homelessness, in the opinion of the Constitutional Court, is a social problem the state must address by social administration and social security, not by punishment.

54 See Article 5 of Closing and Miscellaneous provisions of the Fundamental Law.

55 Hungarian Constitutional Court Decision 33/2012 (VII.17.) AB.

56 See for more: Kim Lane Scheppele: "How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part I," *Verfassungsblog* 2012, <https://doi.org/10.17176/20170509-104907>.

57 Hungarian Constitutional Court Decision 38/2012. (XI. 14.) AB.

On the circumstances leading to this judgment and its reception in Hungary, see: Attila Láposy and István Ambrus, "Decision 38/2012. (XI. 14.) AB – Homelessness" in *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court, 30 Case Studies From the 30 Years of the Constitutional Court (1990 to 2020)*, eds. Kinga Zakariás and Fruzsina Gárdos-Orosz, (Nomos2022):211–226.

In reaction to this judgment, the Fourth Amendment to the Fundamental Law in 2013 was adopted. Among other things, this reversal of the Constitutional Court decision authorized both the national legislature and local governments to declare homelessness unlawful. The Fourth Amendment added the following section (3) to Article XXII of the Fundamental Law: “In order to protect public order, public security, public health, and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal.” Finally, the Seventh Amendment of the Fundamental Law was adopted, which concluded the process of criminalizing homelessness.

In this new legal order, the Constitutional Court—now fully packed by Fidesz—ruled again on the provisions of the Misdemeanor Act that reintroduced the criminalization and imprisonment of homeless persons. This time, the Court came to the conclusion that the given legislation is in line with the Fundamental Law, including the rule of law requirements and the principles of freedom, nondiscrimination, and dignity.<sup>58</sup> Because of the amendments to the Fundamental Law, the Court did not consider the standard outlined in the previously described decision to be applicable. In its reasoning, the Court found that exercising constitutional rights is inseparable from performing constitutional obligations and obeying constitutional prohibitions. The right to self-determination and autonomy of action is not to extend to breaching a prohibition under the Fundamental Law, choosing conduct prohibited in the Fundamental Law, or committing a minor offense. The Court came to the conclusion that, in line with the values of the Fundamental Law, no one has the right to be destitute or homeless; this is not part of the right to human dignity.

A particular illustration of the shift in the Constitutional Court’s approach to social rights is the decision in the case concerning changes to the pension system.<sup>59</sup> In this case, the Court ruled on the constitutionality of the government’s decision to abolish the possibility of early retirement for certain state employees (e.g., policemen and soldiers), introduced with retroactive effect. This case created an opportunity for Constitutional Court judges to follow the path outlined by their predecessors before the adoption of the Fundamental Law—seeking protection of social rights through other constitutional values, as seen in the case law of the 1990s. The Court did not take this opportunity, however, clearly outlining a different approach to social rights.

In this decision, the Court found that there is only one constitutionally guaranteed social benefit: the pension of persons who have reached retirement age. The definition of other social benefits is the competence of the legislature and, to some extent, the government. The Court, in this case, underlined the change in the paradigm of the constitutional protection of social rights. The provision of Article XIX (the constitutional formulation of the right to social security) should, in the opinion of

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<sup>58</sup> Hungarian Constitutional Court Decision 19/2019. (VI. 18.)

See also: Nóra Chronowski and Gábor Halmai, “Human Dignity for Good Hungarians Only: The Constitutional Court’s Decision on the Criminalization of Homelessness,” *Verfassungsblog* 2019, <https://doi.org/10.17176/20190611-165803-0>.

<sup>59</sup> Hungarian Constitutional Court Decision 23/2013. (IX. 25.) AB.

the Constitutional Court, be read together with Article N<sup>60</sup> and Article O.<sup>61</sup> According to the Constitutional Court, this paradigm is intended to be different from that of Article 70/E(1) of the former Constitution, when the state was said to be forced to provide pensions, even at reduced levels, leading to growing indebtedness.<sup>62</sup>

Other provisions introduced in the Fundamental Law to entrench Fidesz's social policies proved essential for Constitutional Court adjudication when an attempt was made to challenge the introduction of early retirement age for women only. The Constitutional Court decided, by referring, among other things, to the aforementioned Article XV (5) and Article XIX (4), to overturn the Curia decision to hold a referendum on equal early retirement rules for men and women. The Constitutional Court held that these constitutional provisions would be undermined if the potential referendum succeeded.<sup>63</sup>

To complete the picture, it is worth mentioning that the Court has not entirely abandoned the practice of referring to constitutional rights other than social rights to protect an individual's social interests in some less controversial cases. For example, the Court held that compulsory contributory social benefits are protected based on property rights.<sup>64</sup>

However, the key difference in the jurisprudence of the Hungarian Constitutional Court with regard to social rights in the era of illiberal constitutionalism versus the time when the Court operated under liberal democracy, in addition to changing the status of social rights in the Fundamental Law, is that politics has become crucial to the protection of an individual's social interests. In other words, it is difficult to imagine a situation in which a politically compromised Constitutional Court would challenge politically important social legislation.

### **Poland: A Changing Approach to Social Rights**

An analysis of the PiS government's approach to social rights is slightly more challenging insofar as the Polish Constitution has not been officially amended or changed. Law and Justice did not obtain the parliamentary majority required to introduce constitutional changes. One might assume that, given the social transfers by which PiS significantly contributed to the realization of social rights, if the governing majority had had the opportunity, it would have strengthened the constitutional protection of social rights. However, this was not the case. As I have argued above, social transfers essentially served to gain and consolidate power. Those transfers, I argue here, were not an indicator of a change in attitude toward the constitutional protection of social rights. Three facts support this argument.

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60 Article N provides that:

- (1) Hungary shall observe the principle of balanced, transparent and sustainable budget management.
- (2) The National Assembly and the Government shall have primary responsibility for the observance of the principle referred to in paragraph (1).
- (3) In performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle referred to in paragraph (1).

61 Article O provides that: Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities.

62 This decision was preceded by Hungarian Constitutional Court Decision No. 40/2012. (XII. 6.) AB and Hungarian Constitutional Court Decision No. 21/2018. in which the Constitutional Court also explicitly identified Article XIX as a state goal and not a fundamental right.

63 Hungarian Constitutional Court Decision Decision 28/2015. (IX. 24.) AB

64 Hungarian Constitutional Court Decision 4/2016. (III. 1.) AB. See also: Hungarian Constitutional Court Decision no. 20/2014. (VII. 3.) AB; Hungarian Constitutional Court Decision 28/2015. (IX. 24.) AB.



First, in 2005, PiS drafted a new Constitution.<sup>65</sup> This draft was revised in 2010.<sup>66</sup> Before the 2015 election, these drafts were removed from the PiS website without a clear explanation.<sup>67</sup> The legal solutions proposed in these drafts with regard to social rights are in line with the social regulation adopted by the Fundamental Law of Hungary. In Article 4 of the first chapter, the drafters defined the most important tasks of Polish internal policy as “implemented through legislation and the comprehensive efforts of public authorities.” Among other tasks, these included the prevention of unemployment, homelessness, and other forms of social exclusion, as well as the formation of conditions for the proper protection of the health of all citizens and their security in old age or in cases of a person’s inability to live independently. This provision, importantly, was not placed in the second chapter containing guarantees of individual rights and freedoms, but in the first chapter that defines the guiding principles of Poland’s political system. The chapter on individual rights and freedoms lacks any regulation of social rights, even as programmatic (aspirational) principles.

Second, although PiS did not have the required constitutional majority to amend the Constitution, in 2017 President Andrzej Duda (from PiS) announced the idea of a constitutional consultative referendum. This referendum remains completely outside of the constitutional amendment procedure set forth in the Constitution.<sup>68</sup> It was argued that this referendum is to precede the official procedure for constitutional amendments in order to give the people a voice. Originally, Duda proposed 15 questions,<sup>69</sup> but only 10 were sent to the Senate, which approves the organization of referendums.<sup>70</sup> Out of the 10 questions, two dealt with broad social issues. The eighth question concerned the constitutional guarantee of the family’s protection, maternity and paternity, the inviolability of the family’s “acquired” rights, such as the benefits of the Family 500+ program, and the entitlement to special health care for pregnant women, children, the disabled, and the elderly. The ninth question concerned the Constitution’s guarantee of special protection for labor as the foundation of the social market economy, as well as special protection of the right to a pension acquired at a statutorily defined age, 60 for women and 65 for men. The Senate, which was at the time controlled by PiS, did not approve the president’s motion to organize this referendum.

The content of the draft Constitution and the referendum questions demonstrates the lack of any real intention to increase the constitutional protection of social rights; rather, it corresponds with PiS social policy, which is essentially focused on families,

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65 Available at: <https://oko.press/images/2017/10/PiS-projekt-konstytucji-2005.pdf>.

66 Available at: <http://niezniknelo.com/konstytucjaPiS2010.pdf>.

67 Press article: Law and Justice removed the draft of its constitution from the web. What the document contains [PL: PiS usunęło z sieci projekt swojej konstytucji. Co zawiera ten dokument], *Gazeta Prawna*, <https://www.gazetaprawna.pl/wiadomosci/artykuly/900647/projekt-konstytucji-piswybory-parlamentarne-2015.html>.

68 See Chapter XII of the Polish Constitution.

69 Oficjalna strona Prezydenta Rzeczypospolitej Polskiej. “The Proposed Constitutional Referendum Questions,” June 12, 2018. <https://www.prezydent.pl/news/the-proposed-constitutional-referendum-questions.36739>.

70 “Prace / Druki / Senat Rzeczypospolitej Polskiej.” <https://www.senat.gov.pl/prace/druki/?nr=933&kadencja=9>.

rather than holistically building a coherent social policy emphasizing the neediest, which should result from an approach respecting and implementing social rights.<sup>71</sup>

Third and finally, the PiS government has not revised previous government policy against ratifying international agreements for the protection of social rights, which would allow individuals to challenge violations of social rights at the international level.<sup>72</sup> The main argument raised by previous governments for not being bound by these international agreements was that Poland was challenging the nature of social rights as nonjusticiable rights. The PiS government did not change this position and used the same argument.<sup>73</sup>

### **The Polish Constitutional Tribunal's Approach to Social Rights Under Illiberal Constitutionalism**

Although the PiS government did not change the Constitution, it took control of the Constitutional Tribunal, as described above. Therefore, the Constitutional Tribunal's jurisprudence may be perceived as an indicator of the approach to social rights under illiberal constitutionalism in Poland. However, a caveat needs to be made here. One of the most serious consequences of limiting the independence of the Constitutional Tribunal was that the Tribunal relatively quickly lost trust in the eyes of the legal community, which translated into a sharp decline in the number of cases referred to the Court. For this reason, the number of judgments issued in general, as well as specific ones in cases involving social rights, is relatively small.<sup>74</sup>

Interestingly, similarly to Hungary's Constitutional Court, at the beginning of illiberal constitutionalism in Poland, a continuation of the line of the pre-2015 Constitutional Tribunal can be observed. This was visible in cases where PiS-selected judges did not hold a majority of the Tribunal judgeships. In this regard, the following case related to the right to housing may serve as an illustration.<sup>75</sup>

The Tribunal issued a judgment concerning the lack of guarantees against eviction "onto the pavement" (that is, no protection from falling into homelessness) for those living in housing granted to them for their work in the structure of state security organs, e.g., the army, police.<sup>76</sup> The Tribunal found that carrying out an eviction cannot be considered acceptable in light of the obligation to respect human dignity. The Tribunal, in this case, also found a violation of Article 75 of the Constitution

71 This argument finds its confirmation in the attitude of the Law and Justice government toward homeless people. The vast majority of the Ombudsman's efforts on behalf of the homeless have gone without an adequate response from the government. See for more detail: Adam Płoszka, "The Illiberal State and Homelessness: the Case of Poland," in *The Routledge Handbook of Global Perspectives on Homelessness, Law & Policy*, ed. Chris Bevan, (Routledge 2024): 188–204.

72 The instruments that Poland has not ratified are: Revised Social Charter of May 3, 1996; the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of November 9, 2007; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of December 10, 2008; the Optional Protocol to the Convention on the Rights of the Child of December 19, 2011; and the Optional Protocol to the Convention of the Rights of Persons with Disabilities of December 13, 2006.

73 See: Adam Płoszka, "Effective International Protection of Social Rights of Polish Nationals. A Contribution to the Debate," in *The right to decent life in the light of the European Convention on Human Rights and other international standards*, (Warsaw 2018):245–255.

74 For a detailed discussion of this topic, see Adam Płoszka, "Strategic Litigation in a Time of Populism: Poland's Experience," *German Law Journal*, 25 (2024): 893–909, <https://doi.org/10.1017/glj.2024.62>.

75 See also Judgment of the Constitutional Tribunal of March 6, 2019, Case No. P 20/16, OTK ZU A/2019, item. 11. The case under review concerned the question of the permissibility of the legislature's use of the mechanism for calculating the base of the universal pension with a deduction of the amounts of early pension collected by insured persons in respect to women born in 1953. The Court found a violation of Article 2 of the Constitution (the rule of law).

76 Judgment of the Constitutional Tribunal of October 18, 2017, Case No. K 27/15, OTK-A 2017, item. 74.

(the right to housing).<sup>77</sup> However, it reaffirmed this provision's programmatic (aspirational) nature and further narrowed its meaning. It concluded that the content of Article 75 makes it possible to determine a certain minimum scope of constitutional guarantees in all spheres indicated therein, inter alia, in the sphere of the obligation to prevent homelessness. In the opinion of the Constitutional Tribunal, an allegation of this provision being violated may be raised only in proceedings called "abstract norm control," i.e., in principle, initiated by state authorities, and only when the legislature did not undertake any actions or create apparent solutions that in practice did not lead to the realization of the constitutional objectives set out in this provision. This, in the Tribunal's opinion, was the case here, because the application of the challenged law led directly to homelessness when, on the contrary, it should have protected against it.<sup>78</sup>

After being fully packed by PiS, the Tribunal also had the opportunity to present its attitude toward social rights when it ruled on the constitutionality of a controversial reform involving the reduction of the amount of police disability benefits for a former officer in the Polish People's Republic. In this case, the Tribunal confirmed the constitutionality of the challenged regulation that reduced the benefits to the minimum subsistence level. In its reasoning, the Tribunal relied on earlier, pre-2015 case law, which gave a great deal of leeway to the legislature in the area of social rights. The Tribunal also pointed out that the constitutional standard stemming from the constitutional right to social security is the operation of a universal pension system, not preferential systems such as public pensions for "those in uniform" or reduced-age pensions, which are not essential to the constitutional right to social security.<sup>79</sup>

Observing the Constitutional Tribunal's general approach to pending cases, where it delivers judgments in accordance with the government's position,<sup>80</sup> it can, therefore, be predicted that there will be no radical change related to social rights protection. This thesis is also confirmed by e-mail correspondence, disclosed by the media,<sup>81</sup> about unofficial meetings between the president of the Constitutional Tribunal and the PiS government at which deadlines for resolving cases involving fiscal spending were discussed. This situation may change slightly with the change of government at the end of 2023 and the loss of power by the populists, to the extent that the Tribunal will be less sensitive to the possible financial consequences of its rulings. Nonetheless, it is difficult in the current political situation—when the president with the right of veto is Duda, who comes from PiS—to imagine quick restoration of the full independence of the Constitutional Tribunal. Even if this comes about, after what is bound to be a close presidential election in the spring of 2025, one can rather expect a continuation of the Tribunal's line of jurisprudence from the time before it was packed by PiS.

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<sup>77</sup> Article 75 of the Polish Constitution provides that:

1. Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.

2. Protection of the rights of tenants shall be established by statute.

<sup>78</sup> Judgment of the Constitutional Tribunal of October 18, 2017, Case No. K 27/15, OTK-A 2017, item. 74.

<sup>79</sup> Judgment of the Constitutional Tribunal of June 16, 2021, Case No. P 10/20, OTK-A 2021, item. 40.

<sup>80</sup> Supra note 45, as well as: Marcin Wołny and Małgorzata Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, (Warsaw: Helsinki Foundation for Human Rights, 2021).

<sup>81</sup> Press article: Jolanta Ojczyk, *Wątpliwa służebność w Trybunale warta miliardy złotych*, [EN: Questionable servitude in Tribunal worth billions of Polish zlotys] July 8, 2022, available at <https://www.prawo.pl/prawnicy-sady/maile-dworczyka-jakie-sprawy-w-tk-uzgadnial.516066.html>.

## **Conclusion**

Despite some similarities in the conservative agenda pursued, the illiberal constitutionalism of Poland and Hungary differs to some extent in their approaches to social policy and, consequently, to social rights.

In the context of social policy, Hungary has adopted a largely selective redistribution policy that aims to support middle-class and relatively well-off families, whereas Poland has pursued a more universal welfare regime through a series of social transfers. Notwithstanding this difference, which resulted from a different determination of the constituency of the ruling parties, social policy in both countries has served as a key tool for gaining and maintaining power. The assumptions underpinning the social policy adopted by Fidesz in Hungary and PiS in Poland have been determinative for the protection of social rights in the illiberal constitutionalism of Hungary and Poland.

In the Hungarian context, those assumptions led to a change in the constitutional status of social rights. Following the adoption of a new Constitution—the Fundamental Law—social rights lost their character of subjective rights and became programmatic (aspirational) rights. This was confirmed by the Constitutional Court, which was packed by the populists. The weakening of the independence of the Constitutional Court, which until the illiberal constitutionalism period played a key role in protecting social rights, has further weakened the level of their protection.

In Poland, the constitutional status of social rights has not changed formally, although the populists, on the one hand, have enacted a series of social transfers and, on the other hand, planned to make changes similar to those in Hungary. In practice, however, the weakening of the independence of the Constitutional Tribunal, like the situation in Hungary, contributed to reducing the constitutional protection of social rights.

Therefore, neither in Poland nor in Hungary (as had been expected, at least in Poland, given the social transfers made) have the government's systematic violations of civil and political rights been compensated through more robust social rights protection. The approach to social rights in the illiberal constitutionalism of Hungary and Poland has been, therefore, similar in nature to that to civil and political rights and freedoms. In other words, social rights under illiberal constitutionalism have been perceived in the same instrumental way as civil and political rights.