



# The Backlash to European Constitutionalism

-why we should not embrace the identitarian counterwave

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- STRUCTURE OF THE TALK
- CURRENT STATE OF AFFAIRS IN BRUSSELS IN THE ROL CRISIS
- THE WAVE THEORY OF CONSTITUTIONALISM
- NEW THIRD WAVE IN EUROPE: IDENTITARIAN CONSTITUTIONALISM
- - > USING THE LAW TO 'DE-CONSTITUTIONALIZE' AND CLAW BACK POWER TO THE EXECUTIVE BY CAPTURING THE COURTS
- WHAT NOW?

# How to be 'though' on rule of law during a war?





# Are we in an emergency situation which should dispense with former principles?

- Poland: 1.86 million refugees
- Hungary: 273.000 refugees



Two dilemmas for the Commission: release the recovery funds and/or apply the new RoL-mechanism?

- Michael Meyer-Resende (author and HR activist in EU-observer):

“The rule of law crisis should be fought as if there is no Russia, and Russia should be fought as if there is no rule of law crisis”.

# The Commission does seem to be on retreat

- A) The European Commission is preparing to release 36billion euro recovery funds for Poland "within a matter of weeks"
- **EU wartime unity more important than rule of law.**
- Condition: the so-called 'disciplinary chamber' needs to be dissolved
- BUT: is that enough?



B) The use of the new Rule of Law mechanism to protect the budget will also (most likely) be postponed



# The EU wants to protect the budget (RoL mechanism) - this includes judicial independence at the MS level

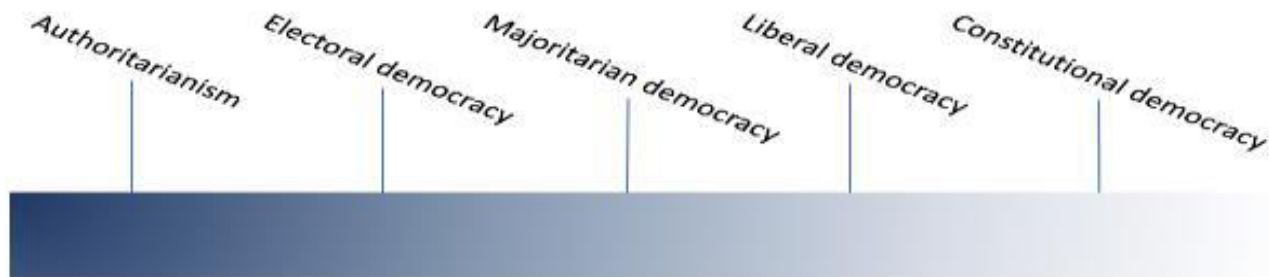
- If there is no judicial independence national courts will not be able to uphold European law (sometimes against the will their own MS)
- Or enter into a dialogue with the CJEU via art.267
- Currently judges in Poland are prosecuted by the illegal disciplinary chamber in the Supreme Court and for upholding EU law and referring cases
- Similar things have happened in Hungary
- In July CJEU rules that the chamber (and the muzzle law) had to be suspended
- The Polish CC (captured) in 2021 rejected EU law supremacy (7 October)
- Poland was fined 1 mill euro per day in fines by the CJEU (27 oct)





# The wave theory of constitutionalism or 'de-constitutionalization'

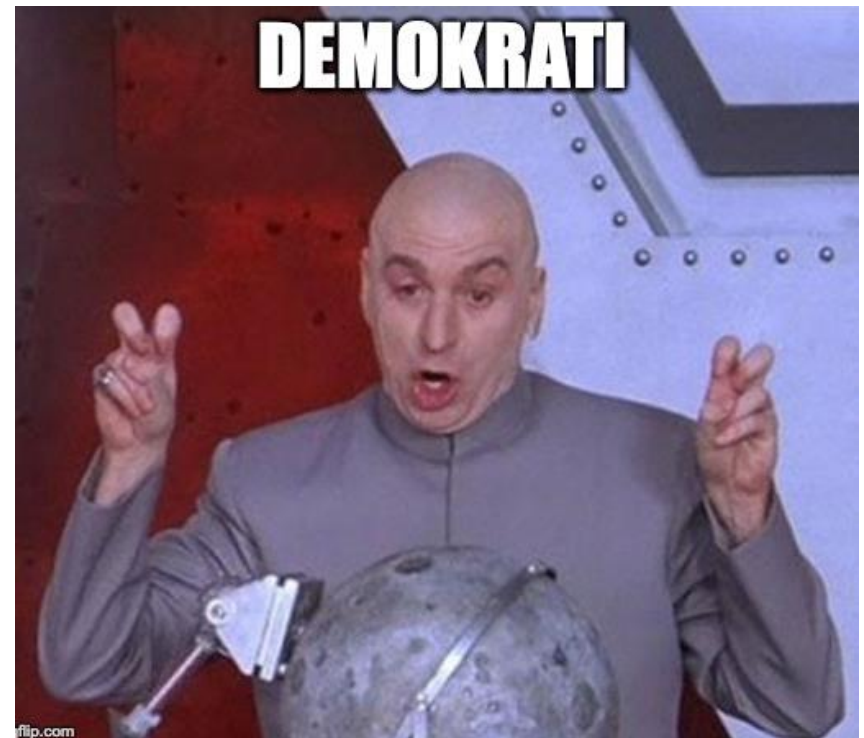
- **First wave** - adoption of judicial review, human rights, and strong domestic courts at the national level keeping a check on parliaments after the atrocities of the Second World War.
- **The second wave** was the growing use of international norms as a higher law within national constitutional orders sometimes triumphing national sovereignty and parliaments (international law, ECtHR, ECHR, EU-Law).
- NOW: **the 'third wave' of 'de-constitutionalisation'**
- In this third wave **national courts and governments have started to *exercise judicial review of international governance* which they find challenging national constitutional identity and some see as undemocratic.**



# But what is an illiberal 'democracy' and does it make sense?

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- Abuse of constitutional identity to undermine democracy but not eliminate an 'image of constitutionalism'
- **Autocratic legalism** - >
- Where the law and the majority/constitution is used to gradually destroy democracy
- This cannot be captured by ordinary indicies of democracy



# Identitarian or illiberal constitutionalism

- How does it work?
- Kim Lane Scheppele: Autocratic legalism – destroying democracy by using the law, political majorities, constitutional courts.

“a governing technique, which often goes unnoticed and unrecorded, hiding backsliding in judicial robes”.

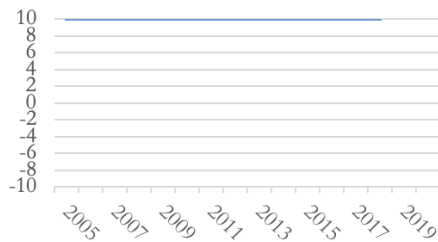


It cannot be detected by those monitoring institutions we normally use to detect backsliding: Freedom House, Polity, V-dem

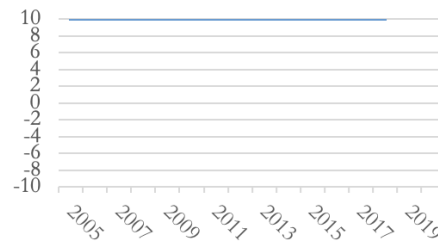




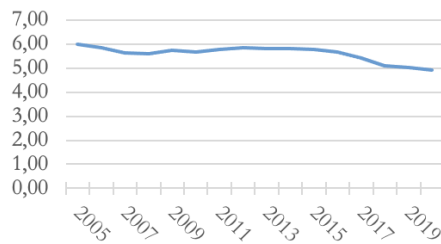
Polity5: Poland



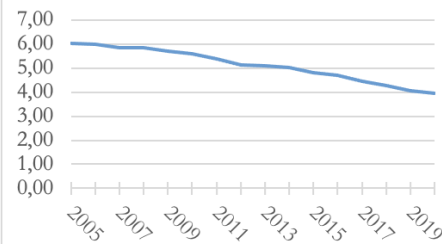
Polity5: Hungary



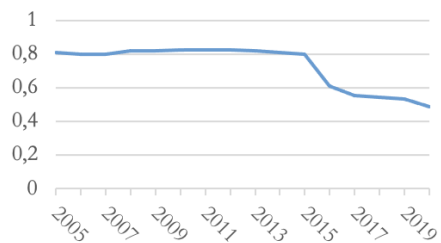
Freedom House: Poland



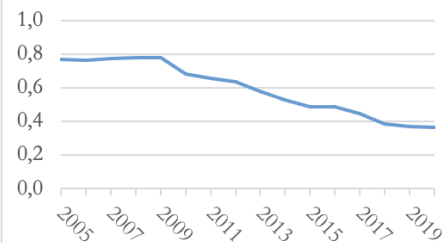
Freedom House: Hungary



V-Dem: Poland



V-Dem: Hungary



If we cannot detect it – we cannot stop it



# Will autocrats rule the new world order?





If we seek to protect the Rule of Law and liberal democracy abroad – should we not also protect it at home?





# Thanks!

# Slide with text and picture

- When inserted, your picture will automatically be centred in the picture holder
- You can reposition the picture within the picture holder by using the crop tool (right click on the picture)





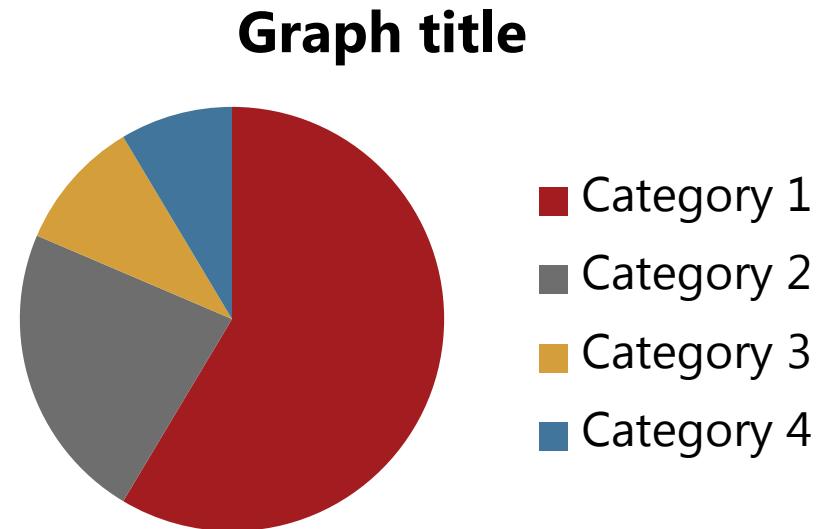
# Slide with large picture





# Slide with text and graph

- Graph is generated from a datasheet
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# Section divider



Label with space for short  
text





Label with space for  
bullet points

- Example with bullet points
- No punctuation usually needed in bullet points
- Third bullet point
  - Second level bullet point
    - Third level bullet point



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Prediction is very difficult,  
especially if it's about the  
future.

Niels Bohr

**Research** Forskning

**Education** Uddannelse

**Exchange of  
knowledge** Forsknings-  
formidling