Controlling the Narrative: Hungary's Post-2010 Strategies of Non-Compliance before the European Court of Human Rights

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Focus of the literature on the European West, overlooking the marginalised European Central-East – Assumption of all illiberal states equally resisting international courts – Hungary's unique subtle push-back against the European Court of Human Rights compared to overt resistance against the European Court of Justice – Empirical analysis of original data – Three strategies to control the narrative of compliance – Status signalling to avoid international and domestic political repercussions – Friendly settlements and unilateral declarations as means of avoidance – Disguised non-compliance to convey bona fides – Negative narrative to subvert public opinion – Explaining state behaviour through rationalism and constructivism – Complementing constructivism with the identitarian counterwave in recently-emerged illiberal states – EU membership as a constraint – Illiberalism as fuel for Hungary's resistance against the Strasbourg Court

Introduction

The rise to power of Victor Orbán's right-wing populist coalition in 2010 has gradually transformed Hungary's constitutional identity from a young liberal democracy to an increasingly illiberal state.[1] This shift first surfaced in domestic

[1]Drinóczi and Bień-Kacała claim that only Hungary and Poland are true illiberal regimes in Europe. They find that, compared to other regimes that may be described as non-liberal (encompassing all regimes that are broadly speaking anything less than liberal), illiberal regimes are a hybrid

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structural changes, where the government managed to institutionalise its illiberal values that now permeate the entire state apparatus, including the captured highest courts.[2] By embedding these values into a new Fundamental Law, the government carefully crafted Hungary's identity around the state's national history, particularly around the memory of injustices linked to foreign occupation.[3] In turn, scholars note that the state became dismissive of international authority as the representative of 'Western liberal values' that is often associated with the imagery of a foreign oppressor. This most notably surfaced in its attitude toward the EU and its Court of Justice, which became popular targets of the state's criticism, followed by resistance to the rules they establish.[4] Surprisingly, however, the sporadic cases of criticism have never been as intense nor have they resonated as loudly in the government's attitude toward the other European court, the European Court of Human Rights. Contrary to claims in the literature, Hungary has never directly confronted the institution in its dialogue, not even in cases that have not been (and simultaneously do not seem likely to be) successfully implemented.[5]

Whilst one might ascribe this to the state's indifference toward the subsidiarity-based Strasbourg Court, this does not seem to be the case. Quite the contrary – as evident from the Committee of Ministers' official webpage, Hungary complies with 75% of its rulings and from a statistical perspective seems as ordinary a Council of Europe member as any.[6] In this respect, the new member states (i.e. those joining the Council after the 1990 expansion), like Hungary, on average comply with 75% of Court judgments.[7] Hungary consistently reports on planned remedial measures to the Committee of Ministers as the Court's

between modern authoritarianism found, for instance, in Russia and Turkey and fully liberal democracies: T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022) p. 17-21, 35, 37.

[2]J. Petrov, 'The Populist Challenge to the European Court of Human Rights', 18 *International Journal of Constitutional Law* (2020) p. 476.

[3]On Hungary's identity *see* Drinóczi and Bień-Kacała, *supra* n. 1, p. 49-54.

[4]G. Szakacs and K. Than, 'Hungary to Defy EU Court Ruling over Migration Policy, Orban says' *Reuters*, 21 December 2021, https://www.reuters.com/world/europe/hungary-defy-eu-court-ruling-over-migration-policy-orban-says-2021-12-21/, visited 17 March 2023.

[5]As claimed by Eszter Polgári, discontent with the Court is limited to the public and the press and never escapes the domestic context: E. Polgári, 'Hungary: Gains and Losses, Changing the Relationship with the European Court of Human Rights', in P Popelier et al. (eds.), *Criticism of the European Court of Human Rights Shifting the Convention* System (Intersentia 2017) p. 295 at p. 304. Though in its correspondence with the Court after the case of *Baka* Hungary disagreed with the ruling, it nevertheless called for a balanced dialogue.

[6]Calculated from the ratio between closed and open cases published on HUDOC.EXEC.

[7]V. Fikfak and U. Kos, 'Slovenia – An Exemplary Complier with Judgments of the European Court of Human Rights?', 40 *Pravna Praksa* (2021) Special Edition at p. 2.

supervisory body, participates in its meetings and pays a very high percentage of just satisfaction awards.[8] Furthermore, the state regularly discusses the implementation of the Court's judgments domestically.[9] In fact, the European Convention on Human Rights and the Court's case law have been mentioned in parliament four times more often after 2010 than in the previous era, with such references coming from both the ruling and the opposition parties.[10]

This, however, reveals only part of the story. If we exclude from Hungary's compliance record alternative instruments, namely friendly settlements and unilateral declarations, since the incentive structure of the Strasbourg Court allows states to be largely (arguably even completely) in control of whether and when they are concluded, Hungary's compliance rate drops to 67%.[11] Even more, if we focus merely on compliance with leading cases – the important precedent decisions that constitute the basis for remedial measures and are thus the focus of the Committee's supervision – Hungary's compliance record settles at a final 46%.[12] In this respect, interviews with domestic stakeholders reveal that since 2010 Hungary has rarely taken any substantive steps toward implementation, especially in high-profile and politically sensitive cases (cases relating to mega-politics identity questions),[13] and – what is more – it often simply copies and repeats its previously submitted measure reports, offering no actual developments.[14]

There is an obvious dissonance between the international statistical image, suggesting a solid compliance rate and an honest effort to comply, and the domestic reality, where a significant share of important Court judgments remains unimplemented. Based on this, this paper reveals that rather than directly confronting the Court, Hungary in 2010 began employing subtler, but arguably equally

[8]According to data published on HUDOC.EXEC by autumn 2021 Hungary paid 88% of its compensation awards.

[9]As is evident from parliamentary discussions, the Hungarian parliament annually discusses Implementation notes of the Ministry of Justice on implementation of the Court's judgments.

[10]Polgári, *supra* n. 5, p. 298.

[11]As derived from HUDOC.EXEC, excluding alternative instruments there are 550 leading and repetitive cases, with 369 successfully closed.

[12]As of the autumn of 2021, there are 94 leading cases against Hungary. 42 leading cases were closed, whilst 52 remain open. If we include alternative instruments, Hungary's leading cases compliance is only 5% (42 of 830 closed cases). Similarly, the European Implementation Network finds that Hungary in fact has one of the worst leading cases implementation records in the EU: EIN and DRI, *Justice Delayed and Justice Denied: Non-Implementation of European Courts' Judgments and the Rule of Law* (Democracy Reporting International 2022) p. 46.

[13]E. Voeten, 'Populism and Backlashes against International Courts', 18 *Perspectives on Politics* (2020) p. 407.

[14]Interview with representatives of Hungarian Helsinki Committee on 10 March, 2022 and interview with a representative of the Hungarian Civil Liberties Union on 24 March, 2022.

harmful, strategies of non-compliance aimed at appeasing both international and domestic audiences.[15] This, I suggest, allows it to simultaneously keep its benefits from the EU membership that depend on (a certain degree of) European Court of Human Rights compliance and at the same time instil domestic legitimacy[16] into an illiberal regime by quietly resisting international authority. Such a sail between the proverbial Scylla and Charybdis (compliance and resistance) fuels Hungary's endeavour to control the narrative of compliance, which, to avoid international and domestic political repercussions, the state deems to work better with a silent face-off and an effort to maintain an average compliance rate rather than overt pushback.

By deconstructing Hungary's post-2010 strategies the paper seeks to, first, describe how the particular phenomenon of an illiberal shift fuelled the state's unique attitude toward the Court, and second, understand why this came about. Relying on original data that involves several pieces of information on all 1,105 adverse Court rulings ever rendered against Hungary, the paper offers an empirical contribution to existing compliance theories, which, by observing state behaviour from a static lens, seem to be limited in explaining implications of identity shifts in recently emerged illiberal states. In particular, the Hungarian case shows a clear contrast between its previous liberal and post-2010 illiberal eras and allows for studying the effects of Hungary's identity shift, facilitated by a more than 12-year long rule of the illiberal government. This offers exceptional hindsight into the precise effects of states' illiberal shifts on their (non)compliance with international human rights courts' rulings, uncovering also the potential reasons behind such behaviour. Understanding the process may offer insight for cases beyond Hungary, and – given that illiberalism seems to be on the rise worldwide – potentially even beyond Europe. Second, whilst the existing compliance literature deconstructs in detail the particular behaviour of European liberal democracies (the European West), it generalises the behaviour of illiberal states (stereotypically positioned in the marginalised European Central-East) and – as a default – considers them equally resistant to all international authority. Focusing on Hungary, the paper on the contrary unravels how particular circumstances shape unique strategies that such states pursue in different contexts. Third, and connected to this, the paper examines the concept of a subtle pushback against the Court, which due to its concealed nature is largely overlooked in typical backlash studies.

[15]Orbán himself describes this as a 'peacock dance' where mere cosmetic changes are adopted in response to the EU's criticism to continue a political agenda while appearing acquiescent: M. Mos, 'Ambiguity and Interpretive Politics in the Crisis of European Values: Evidence from Hungary', 36 *East European Politics* (2020) p. 267 at p. 271, 272.

[16]I refer to descriptive legitimacy that asks whether relevant audiences accept the relevant authority: D. Bodansky, 'Legitimacy in International Law and International Relations', in J. Dunoff and M. Pollack (eds.), *Interdisciplinary Perspective on International Law and International Relations: The State of the Art* (Cambridge University Press 2010) p. 231.

Before delving into the study, a few preliminary remarks are necessary. The paper borrows the basic assumption of international relations that state identity crucially shapes its behaviour.[17] To understand the notion of 'identity', the paper applies the approach of Doreen Lustig and Joseph Weiler, adopting its loose perception. Accordingly, it encompasses a state's constitutional identity, which informs its political identity, its constitutional values and its approach to fundamental rights.[18] It also includes what Lustig and Weiler term 'other additional "identitarian" aspects of the polity' which involve the state's national identity, formed by the nation's collective and unique history and culture.[19] Furthermore, the paper focuses on secondary compliance, which – in contrast to the primary compliance with underlying international norms – studies states' respect for the Court rulings addressing violations of such norms.[20] In this respect, I understand compliance as a formal closing of a case before the Committee of Ministers after the Court's supervisory body is content with states' reports on adopted remedial measures, submitted internationally. On the other hand, the study differentiates between compliance and implementation, namely an actual change in states' behaviour following successful domestic incorporation of reported measures in their legal systems.[21] Accordingly, strategies of non-compliance addressed in this paper relate to evasive tactics of (illiberal) states to limit the impact of Court judgments,[22] pursued either in an international or a domestic setting, depending on the target audience. In this respect, the literature currently sees illiberal states as hybrid regimes between constitutional democracies and full autocracies.[23] The paper approaches their study and the study of their implications for human rights descriptively, thereby avoiding normative implications.[24]

[17]M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1988) p. 887 at p. 902.

[18]D. Lustig and J. Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective', 16 *International Journal of Constitutional Law* (2018) p. 315 at p. 340-341.

[19]Ibid., p. 340, 357-364.

[20]D. Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance', 13(2) *Journal of International Dispute Settlement* (2021) p. 16.

[21]D. Hawkins and W. Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights', 6 *Journal of International Law and International Relations* (2008) p. 35.

[22]A. von Staden, *Strategies of Compliance with the European Court of Human Rights: Rational Choice within Normative Constraints* (University of Pennsylvania Press 2018) p. 208.

[23]Drinóczi and Bień-Kacała, *supra* n. 1, p. 35, 37.

[24]Although the research of illiberal regimes brings their understanding of human rights to the fore, its demasking, according to Pierre Bourdieu and Luc Boltanski, may render reality inacceptable: Y. Dezalay and M.R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', 8 *Annual Review of Law and Social Science* (2012) p. 433 at p. 436.

The paper proceeds as follows. By relying on my original dataset, I first deconstruct the three post-2010 strategies of Hungary's non-compliance to describe precisely how it engages in controlling the narrative of its European Court of Human Rights compliance. Then, I investigate why Hungary pursues these strategies by applying rationalist and constructivist theories of state behaviour to Hungary's specific circumstances. Finding that the two theories are static and thus fall short in explaining the implications of states' (political) change, I build on the constructivist notion of state identity by complementing it with Doreen Lustig and Joseph Weiler's notion of the third wave of constitutionalism, which I refer to – in Marlene Wind's words – as an identitarian counterwave.[25] After this, I conclude.

The how: Hungary's post-2010 strategies of non-compliance

In his study of states' strategies of compliance with the European Court of Human Rights, Andreas von Staden finds that among today's liberal democracies in Europe non-compliance with the Court's judgments is politically non-viable and as such almost irreconcilable.[26] This limits states' freedom of choice to deciding merely upon the extent to which each judgment is complied with. Courtney Hillebrecht in this respect notes that states face a 'spectrum of compliance obligations', which allows them to 'pick and choose the parts of the rulings with which they want to comply'.[27] She emphasises that although it is rare for states to comply with judgments in their entirety, their tendency – as she further refers to Darren Hawkins and Wade Jacoby – is to comply at least partially.[28] Based on this, liberal democracies engage in rational calculations, aimed at minimising any domestic changes necessary to still bring about compliance, which underpins what von Staden terms as strategies of minimising the impact of the Court's rulings.[29]

Whilst, according to the above scholars, compliance of liberal democracies relates to respecting at least a minimum of *each* European Court of Human

[25]M.Wind, 'The Backlash to European Constitutionalism. Why We Should Not Embrace the Identitarian Counter Wave', 3 *Groupe d'etudes geopolitiques* (2021).

[26]von Staden, *supra* n. 22, p. 39. States may, however, still threat international courts with non-compliance: C.J. Carrubba et al., 'Understanding the Role of the European Court of Justice in European Integration', 106 *American Political Science Review* (2012) p. 214; A.S. Sweet and T. Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override', 106 *American Political Science Review* (2012) p. 204.

[27]C. Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change', 20 *European Journal of International Relations* (2014) p. 1100 at p. 1102, 1108.

[28]Ibid.

[29]von Staden, *supra* n. 22, p. 206, 208.

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Rights judgment, a different concept seems to apply to non-liberal states (including but not exclusively limited to illiberal states).[30] The literature notes in this respect that the standard of acceptable behaviour seems to be loosened by such states advocating for their own perception of (inter)national values and norms, thereby indeed involving compliance but also potential non-compliance. Informed by these considerations, Mikael Madsen et al. in their typology of non-compliant behaviour in backlashing states add another two types of non-compliance to partial (non)compliance: limited non-compliance, relating to particular subsets or content of particular cases; and systemic non-compliance, exceeding sporadic forms of non-compliance in repetitive cases.[31] Indeed these strategies are reflected in non-liberal states' non-compliance practices before the Court.

Yet, whilst the typical backlashing strategies are inherently overt, my empirical analysis reveals that Hungary seeks to pursue subtler pushback techniques, which seem to have received less attention in the literature. In this respect, scholars so far agree that compared to overt pushback, its subtle counterpart conveys less clear messages of disagreement to international and domestic audiences and that because of its covert nature, it remains uncertain whether it may cause larger systemic consequences.[32] Yet, whilst subtle pushback, as its name suggests, indeed fails to signal defiance, I find that it may nevertheless send a different message. International relations literature terms this a 'status signal' for projecting states' preferred image to international and domestic audiences.[33] By deflecting its

[30]As described in *supra* n. 1, academia considers illiberal regimes a hybrid (sub-) category between authoritarianism as the most radical expression of a non-liberal regime and fully democratic regimes. For example, Ausra Padskocimaite notes that the Russian Constitutional Court formally allowed non-compliance with the Strasbourg Court's rulings in cases of their 'inconsistency' with the Constitution: A. Padskocimaite, 'Assessing Russia's Responses to Judgments of the European Court of Human Rights: from Compliance to Defiance', in R. Grote et al., *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar Publishing 2021) p. 140. In 2021 a similar approach was adopted by the Polish Constitutional Tribunal. Furthermore, Eszter Polgári and Boldizsár Nagy note that Hungary regularly seeks to circumvent compliance, including by ignoring transnational courts' rulings: E. Polgári and B. Nagy, 'The Chances of Observing Human Rights in an Illiberal State: Diagnosis of Hungary', in Grote et al., *supra* n. 30, p. 96.

[31]M. Madsen et al., 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) p. 197 at p. 211.

[32]A. Hofmann, 'Resistance against the Court of Justice of the European Union', 14 *International Journal of Law in Context* (2008) p. 258 at p. 271; A. Dyevre, 'Domestic Judicial Defiance and the Authority of International Legal Regimes', 44 *European Journal of Law and Economics* (2017) p. 453 at p. 458.

[33]X. Pu, *Rebranding China: Contested Status Signaling in the Changing Global Order* (Stanford University Press 2019) p. 16-33.

attention, the state is able to circumvent international scrutiny, which may, especially when combined with other strategies such as subverting the public perception of the international court, undermine its domestic authority over time.

In Hungary, I argue, this is reflected in its three strategies that control the narrative of compliance, which surfaced in my mixed-methods analysis of the original dataset. I use mixed methods to triangulate, complement and develop findings of each individual method, seeking to obtain as comprehensive an image of Hungary's behaviour as possible. In particular, the study underlying the following section consists of the international and domestic image of Hungary's compliance process.[34] The international part of the analysis on one side relies on the original dataset comprised of several pieces of information collected from HUDOC (the Court and the Committee of Ministers' official database) on all 1,105 of Hungary's adverse Court rulings since the first ruling in 1997.[35] The study employs a descriptive and inferential statistical analysis to understand Hungary's general behaviour in the process of Ministers' supervision. On the other side, the international part includes a qualitative analysis of all documents on each case published on HUDOC.EXEC by several different actors, including the Hungarian government, non-governmental organisations and the Committee itself. The second part of the study looks beyond the international by focusing on the domestic context. Here, I rely on a national legal expert to collect and correctly understand every piece of information we could find on each Court ruling, including by looking into records of parliamentary sessions and its various committees, state officials' statements and different ministerial webpages. We also investigated all media outlets that have ever reported on any of the cases, non-governmental organisations' reports and statements and domestic scholarly works. Informed by the findings of the quantitative and qualitative analysis, I also supplemented the data with semi-structured interviews with representatives of the department under the Hungarian Ministry of Justice entrusted with the implementation of the Court's rulings, different non-governmental organisations and domestic scholarship.[36]

[34]The quantitative part studies all cases, whereby the 94 leading judgments offer qualitative insight into official follow-up documents. The study of domestic context looks beyond leading cases, but is predominately limited to notorious cases, as only those receive domestic attention.

[35]Several mitigating measures account for shortcomings of information on HUDOC : first, the analysis is based on all, instead of a sample of cases; second, inconsistent information was added manually; and third, included are only cases rendered until the autumn of 2021 to allow for subsequent documentation to be fully entered in HUDOC.

[36]Interviewing Hungarian state actors proved to be a notoriously difficult task, as they would generally refuse to participate. For this reason, the study is limited to an interview with the representative of the Hungarian Human Rights Department. The Hungarian civil society is more generous in this respect, so far allowing me to interview representatives of two non-governmental organisations and one domestic scholar. The interviewing process in Hungary is still ongoing.

Avoidance

The first strategy relates to a striking increase in Hungary's use of alternative instruments (friendly settlements and unilateral declarations) after 2010, which, according to my analysis, today represent more than 50% of all of its cases before the Court.[37]

In the broader context, this increase coincides with significant structural changes within the Court's system in the first decade of the 2000s.[38] The system was then overflooded with systemic and repetitive cases stemming predominately from the new Council of Europe member states, which called for potential solutions.[39] Consequently, the Court's Registry first began facilitating the use of alternative instruments in cases of a systemic or repetitive nature which clearly indicated that there was a violation, which was later institutionalised with the 2010 entry into force of Protocol 14 to the Convention.[40] Today, every application filed at the Court is mandated to enter a 12-week friendly settlement phase, which makes settlement of all types of cases preferable to all Court proceedings.[41]

Although scholars raise several concerns in this respect,[42] the use of alternatives is generally perceived as legitimate since it in principle benefits all involved parties: the Court's system is relieved of repetitive cases and is thus able to invest its resources in more important (precedent-setting) cases; states avoid often burdensome adverse judgments, their naming and shaming effect and – due to lower monetary obligations entailed in alternative instruments – get away with cheaper compensations;[43] and the applicant gets financial redress faster and with more certainty.[44] There is also a safety pin installed in this regard: the Court acts as

[37]Sceptics might argue that alternative instruments do not relate to compliance. Yet, given that they can be used to avoid precedent Court judgments, which, as the most important cases, are crucial for the study of compliance, they may fit into the category.

[38]H. Keller et al., *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, (Oxford University Press 2010) p. 15; L. Glaz, 'Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant', 25 *Maastricht Journal of European and Comparative Law* (2018) p. 607 at p. 608.

[39]Glaz, *supra* n. 38, p. 608.

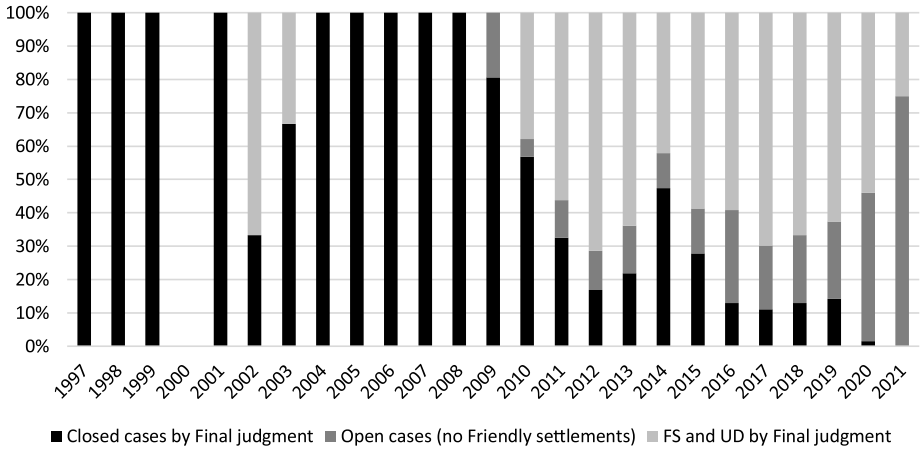
[40]Keller, *supra* n. 38, p. 15, 17; Glaz, *supra* n. 38, p. 608.

[41]V. Fikfak, 'Against Settlement before the European Court of Human Rights', 20(3) *International Journal of Constitutional Law* (2022) p. 942 at p. 952; J. Gavron, 'Strasbourg Court's New Non-Contentious Phase – a Tax on Lawlessness', *Strasbourg Observers,* 14 November 2019, https://strasbourgobservers.com/2019/11/14/strasbourg-courts-new-non-contentious-phase-a-tax-on-lawlessness, visited 17 March 2023.

[42]O. Fiss, 'Against Settlement', 93 *Yale Law Journal* (1984) p. 1073; Fikfak, *supra* n. 41.

[43]Compensation awards received in settlements are as much as 10-20% lower than in Court proceedings, in some countries even 20-25% lower: Fikfak, *supra* n. 41, p. 963.

[44]C. Jenart and M. Leloup, 'Separation of Powers and Alternative Dispute Resolution before the European Court of Human Rights', 15 *EuConst* (2019) p. 247 at p. 249.



Graph 1. cases categories in % per year of final decision/judgment.

a watchdog by accepting only alternative instruments that meet the Convention standards, which generally also means that they are limited to less severe violations such as violations of a fair procedure (Article 6 of the Convention) and personal property violations (Article 1 of Protocol 1).[45]

This seems to have resonated well in Hungary. My analysis shows that whilst the state concluded only four settlements before 2010, it settled an additional 527 and issued 25 unilateral declarations out of total 1,105 cases after that year. This in sum corresponds to 50% of its cases before the Court, which – to compare – is 26% more than other new Council of Europe members and 42% more than the old member states.[46] To better imagine Hungary's increased use of alternative instruments after 2010, Graph 1 depicts chronologically the share of Hungary's alternative instruments (mid-grey boxes) contrasted against the trends of its closed (dark boxes) and open cases (light-grey boxes). Whilst in this regard in 2010 the ratio between successfully closed cases that were initially rendered in Court proceedings and alternative instruments amounted to 55% and 40% respectively, this ratio shifted after that year. In its peaks in 2012 and 2017 alternative instruments jumped to striking 70% of all decisions against Hungary, whilst closed 'ordinary' cases represented only 10-15% of all cases.

If the difference between pre- and post-2010 era cases depicted above already seems striking, the graph reveals only a part of the story. Veronika Fikfak in this

[45]H. Keller and D. Suter, 'Friendly Settlements and Unilateral Declarations: An Analysis of the ECtHR's Case Law after the Entry into Force of Protocol No. 14', in S. Besson (ed.), *The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives* (Forum Europarecht 2011) p. 55 at p. 87.

[46]Fikfak, *supra* n. 41, p. 964.

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respect highlights that in order to comprehend an overall image of actual cases settled, one needs to distinguish between the absolute number of reported settlements and the absolute number of actual applications contained therein, since several victims with similar applications may appear before the Court and may thus be joined in one claim.[47] Applying this to Hungary, the number of all applications that ended in settlement in reality amounts to 2,899, which is more than five times the number of all cases that ended in an adverse judgment in Court proceedings. Similarly, the number of claims joined into the 25 unilateral declarations in reality amounts to 88 individual petitions.

Keeping this in mind, scholars offer several alternative explanations for why states settle, warning that instead of being legitimate, alternative instruments can strategically be used to avoid the Court and its domestic impact. As noted by Madsen et al., states may deliberately settle cases to minimise the domestic impact of its rulings.[48] Furthermore, Fikfak claims that settlement can halt petitions, which has two potential implications. First, alternative instruments allow states to hide a substantial and systemic domestic problem.[49] This holds especially true for Marc Galanter's repeat players, namely experienced states who account for the fact that they would participate in many similar future Court proceedings.[50] They have the means necessary to strategise on whether to settle or enter Court proceedings, as they may well be concerned about the possible precedential value of a judgment that would necessarily affect the outcome of future proceedings.[51] In turn, if states avoid precedent-setting judgments, they also avoid addressing domestic issues that require bringing about often costly domestic change.[52] Second, scholars find that alternative instruments can hardly be rejected by victims, which – by the incentive structure of the Court's system facilitating their use – allows states to be in full control over whether and when to enter Court proceedings.[53] In fact, unilateral declarations can even institutionally be concluded against applicants' will, which makes them an appealing target for

[47]Fikfak, *supra* n. 41, p. 954.

[48]Madsen et al., *supra* n. 31, p. 209.

[49]Fikfak, *supra* n. 41, p. 973.

[50]M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law & Society Review* (1974) p. 95 at p. 97; L. Lederman, 'Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements', 75 *Notre Dame Law Review* (1999) p. 221 at p. 256; G. Priest and B. Klein, 'The Selection of Disputes for Litigation', 13 *Journal of Legal Studies* (1984) p. 1 at p. 28.

[51]The Court relies heavily on its past cases: Y. Lupu and E. Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', 42 *British Journal of Political Science* (2011) p. 413 at p. 416.

[52]von Staden, *supra* n. 22, p. 61.

[53]V. Fikfak et al., 'Settlement Architecture: Victims' Perception of Friendly Settlements in European Human Rights Law' (forthcoming).

states' threats that if they refuse to settle, a unilateral declaration would be pursued instead.[54] Accordingly, both instruments enable states to play a numbers game: they can strategise whether to avoid or enter Court proceedings, which makes adverse judgments (and thus violations) disappear from their official records, as well as effectively preventing applicants from bringing complaints to the Court.

A critic might nevertheless argue that Hungary's use of alternatives is a legitimate consequence of the incentive structure of the Court's system, rather than an avoidance strategy. The challenge in this regard is to disaggregate the causal effect of the 2010 illiberal shift in Hungary from the causal effect of Protocol 14, which entered into force in the same year. There are three empirical arguments to support the strategy argument.

First, the analysis of a broader European Court of Human Rights context reveals that by settling on average 50% of its cases after 2010, Hungary is an outlier even among new Council of Europe members. There are only two states, namely North Macedonia and Serbia, who settle more frequently.[55] Generally, existing empirical studies reveal that despite the institution facilitating their use, the majority of member states only rarely engage in alternatives to Court proceedings.[56] Whilst the new members settle up to 24% of cases, Fikfak finds that the old member states settle three times less often, in only 8% of their cases. In fact, several states, Switzerland for instance, settle only exceptionally, arguing that their default position is to 'defend the position of national authorities' before the Court.[57]

Second, by arguing that it represents an established practice in Hungary, the use of alternatives is frequently expected from the government by members of parliament. For instance, the government's plan to settle was discussed at the annual parliamentary committee in 2013 addressing a systemic issue of excessive length of judicial proceedings. There, the State Secretary assured that the government agrees with Court's rulings and would settle future cases stemming from the issue.[58] Another example followed the 2012 *Faber* and *Tatar and Faber* cases, where the Court found a violation of Article 10 in fining the applicants for an unannounced protest in front of the parliament.[59] At the 2013 meeting, one parliament member queried why settlements were not concluded in pending similar cases, as this is Hungary's established practice 'in cases where the government

[54]Keller et al., *supra* n. 38, p. 103.

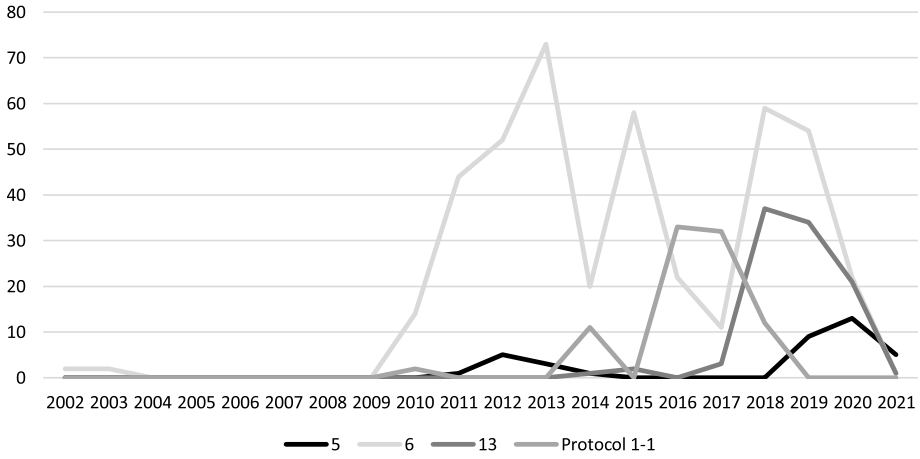
[55]Fikfak, *supra* n. 41, p. 966.

[56]Fikfak, *supra* n. 41, p. 965.

[57]Ibid.

[58]Minutes of the Parliamentary Committee on Constitutional Affairs, Justice and Home Affairs (4 March 2013).

[59]ECtHR 24 October 2012, No. 40721/08, *Faber* v *Hungary*, ECtHR 12 September 2012, No. 26005/08, *Tatar and Faber* v *Hungary*.



Graph 2. Convention article violations by year of concluded alternative instruments (frequencies of violations below 11 are omitted from the graph).

feels that they concern violations of rights in their entirety'.[60] It seems from this that, irrespective of the underlying violation, Hungary strategically avoids entering Court proceedings where the existing issues are anticipated to inevitably generate future adverse judgments.

Third, the content of alternative instruments reveals Hungary's endeavour to avoid the Court in areas outside the usual contexts of less severe procedural and property violations that could – if alternative instruments were not concluded – be subject to important precedent-setting judgments. To imagine this more clearly, Graph 2 depicts chronologically the nature of violations underlying all of Hungary's concluded alternative instruments.

This shows that in 2018 – the same year that the Court increased its scrutiny over the issue of unlawful and excessively long pre-trial detentions – the state began concluding alternative instruments in areas of more severe violations, namely issues of personal liberty and security enshrined in Article 5 of the Convention (grey line). Hungary settled 7 such cases in 2019, 13 in 2020 and 5 such cases in 2021.[61] Although these numbers may seem far from striking, the overall number of complaints entailed in these settlements in fact amounts to as many as 169 individual applications. In addition to their quantity, the issue lies also in their context. Namely, in 2018, when such settlements began, the Court

[60]Minutes of the Parliamentary Committee on Human Rights, Minorities, Civil and Religious Issues (4 June 2013).

[61]Two unilateral declarations were issued in this respect (2012, 2014).

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deliberated on applying the pilot-judgment procedure to address a potential systemic issue of unlawfulness and excessive length of pre-trial detentions, persisting in Hungary since 2013.[62] While highlighting a high number of complaints, the Court ultimately deemed the pilot-judgment procedure unnecessary at that stage.[63] Nevertheless, it left the door open for a re-deliberation, noting that one of the relevant circumstances for identifying systemic issues is also the number of similar complaints accumulated in the Court's docket over a period of time.[64] Given that 169 applicants had already complained of the same issue in just three years, Hungary's strategy to settle seems to be the only factor preventing the Court from re-deliberating the pilot-judgment procedure, which would set a precedent[65] for future cases.

From this, it is apparent that Hungary has profited from the European Court of Human Rights' incentive structure, encouraging alternative instruments. This has ultimately allowed the state to be fully in control of whether to enter or avoid Court proceedings. In the long run, such avoidance of Court's jurisdiction and denial of its power to set precedential binding judgments may also lead to a diminishment of the Court's authority in Hungary.

Disguised non-compliance

The second strategy resembles the type of behaviour that the social work literature describes as disguised non-compliance. The term was coined by Peter Reder et al., who noted the behaviour of abusive parents who resist undertaking required changes by instead working towards creating a false impression of cooperation to mask their own intentions.[66] Such behaviour effectively deflects the attention of the intervening body, neutralises its authority and returns the relationship to the status quo.[67] Legal and public administration academia traced similar patterns in what they term as symbolic or creative compliance,[68] whereby states

[62]ECtHR 19 June 2013, No. 43888/08, *XY* v *Hungary*. The Court deliberated on applying a pilot procedure in ECtHR 26 September 2018, No. 21786/15, *Lakatos* v *Hungary*.

[63]*Lakatos*, ibid., paras 86-89.

[64]Ibid., paras 86, 91.

[65]A. Frese, 'The Practical Construction of Precedent in the Jurisprudence of the European Court of Human Rights', in A. Frese and J. Schumann (eds.), *Precedents as Rules and Practice* (Nomos 2021) p. 41.

[66]J. Leigh at al., 'Disguised Compliance or Undisguised Nonsense? A Critical Discourse Analysis of Compliance and Resistance in Social Work Practice', 9 *Families, Relationships and Societies* (2020) p. 269 at p. 271-272.

[67]P. Reder et al., *Beyond Blame: Child Abuse Tragedies Revisited* (Routledge 1993) p. 108.

[68]Agnes Batory identifies several methodological challenges when studying symbolic compliance, which are overcome by studying a variety of different sources. The paper adopts the same approach: A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', 94 *Public Administration* (2016) p. 685 at p. 686, 687.

offer 'merely rhetorical lip service to formal obligations' or adopt 'intentionally perfunctory measures that are only intended to mask a government's true intention not to comply'.[69] In this context, I find that Hungary engages in two types of attention-deflecting behaviour, intended for an international audience. Both serve as a tool for portraying continuous work towards the implementation of Court rulings, reflected through regular submissions of measure reports and cooperation with the Committee of Ministers.

The first type of deflecting behaviour is autocratic legalism.[70] This phenomenon relates to non-liberal governments seeking to benefit from the superficial appearance of democracy and legality, whilst in fact they are circumventing and abusing the constitutional and (inter)national legal constraints.[71] For example, as a consequence of the illiberal coalition obtaining a parliamentary majority in 2010, and maintaining a supermajority ever since 2014, the Hungarian government is able to change any law at will, no matter what its (often formalistic) substance. My interviews with Hungarian non-governmental organisations suggest that this proves useful when Court judgments require legislative amendments, which, although void in substance, can swiftly be adopted without any meaningful domestic deliberation.[72] According to the interviewees, this leads to over-codifying a specific field, whereby Hungary 'plays a game' of how far it can go to simultaneously pursue its own agenda and stay within the boundaries of the law.[73]

In particular, the interviews point to three areas where Hungary pursued such strategy, namely life sentences without parole (the *Laszlo Magyar* case), loss of church status of minority religion communities (the *Magyar Keresztény Mennonita Egyház and others* case) and police ill-treatment cases (thr *Gubacsi* case). The analysis of my empirical data reveals that out of 65 leading cases rendered after 2010, in its implementation reports to the Committee of Ministers, Hungary cited 27 legislative remedial measures: 10 of these rely on existing legislation, whilst in 17 new legislation was adopted. Among those, seven

[69]von Staden, *supra* n. 22, p. 44.

[70]K. Scheppele, 'Autocratic Legalism', 85 *The University of Chicago Law Review* (2018) p. 545 at p. 550. Due to its liberal legacy the state, at least in a formal sense, remains a constitutional democracy. Although interpreted in a thin and formalistic sense, the rule of law remains enshrined in Art. B of the Fundamental Law.

[71]Ibid., p. 547. States seem to employ this strategy also in the Luxembourg Court context to circumvent undesirable rulings: C.J. Carrubba et al., 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', 102 *American Political Science Review* (2008) p. 435 at p.439.

[72]Interview with representatives of the Hungarian Helsinki Committee and Hungarian Civil Liberties Union.

[73]Ibid.

cases – including all three cases pointed out in the interviews – were subject to non-governmental organisations' follow-up, indicating a gap between compliance and implementation. Indeed, all three areas highlighted in the interviews raised concerns of (inter)national stakeholders.[74] They point out the shortcomings of adopted legislation, such legislation avoiding the real issue at hand as well as it being merely an ineffective 'cosmetic change'.[75] For instance, following the *Laszlo Magyar* case, where the Court condemned the lack of possibility of parole in Hungarian life prison sentences, the Committee of Ministers even expressly noted Hungary's swift legislative amendment before finding it insufficient because it made life sentences *de jure*, but not *de facto* reducible.[76]

Interviews further suggest that Hungary employs another type of deflecting behaviour: the state regularly submits to the Committee reports that contain copy and pasted parts of previous reports already submitted in the case (referred to as 'copy-paste reports'). The aim of this is to conceal the lack of actual progress in the implementation of the judgment.[77] My dataset[78] reveals a striking resemblance between general measure reports in particular cases, especially in politically sensitive cases, and minimal[79] to no progress throughout the years of supervision. These cases – all of them remain open under Ministers' supervision – concern Roma applicants,[80] prisoners serving a life sentence,[81] forcibly retired former judges[82] and state surveillance victims.[83] For example, in 2016, the case of *Baka* addressed Hungary's constitutional amendment that resulted in the premature termination of the mandate of the former President of the Hungarian

[74]ECtHR 28 September 2011, No. 44686/07, *Gubacsi* v *Hungary*; ECtHR 13 October 2014 73593/10 *Laszlo Magyar* v *Hungary*; ECtHR 8 September2015, No. 70945/11, *Magyar Keresztény Mennonita Egyház and others* v *Hungary*; ECtHR 6 June 2016, No. 37138/14, *Szabó and Vissy* v *Hungary*.

[75]See also NGO Rule 9 observations in these cases.

[76]CM Notes of 1318th meeting, (DH) - H46-11 *László Magyar Group* v *Hungary*, June 2018.

[77]Interview with representatives of the Hungarian Helsinki Committee.

[78]Among 94 leading cases, 65 were rendered after 2010. Follow-up documentation was submitted after each of them, whereas only 18 cases were ultimately closed. Accordingly, 47 cases remain open, whilst non-government organisations problematised 10 such cases. In this respect, 7 out of these 10 cases were brought before the Court by victims of a specific status, indicating political sensitivity.

[79]Interviewees claim that the government merely changes and adds new statistical data along with information, irrelevant for the particular case.

[80]ECtHR 29 April 2013, No. 11146/11, *Horvath and Kiss* v *Hungary* follow-up documentation 2014-2022. The government filled reports with statistical information. There are no discussions on the issue in the parliament.

[81]László Magyar follow-up documentation 2015-2019. The government added new suggestions on how the Court should decide in future cases.

[82]ECtHR 23 June 2016, No. 20261/12, *Baka* v *Hungary*.

[83]Szabo and Vissy follow-up documentation 2017-2021. The government maintained it would amend the legislation, with no actual progress.

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Supreme Court. Although Hungary seemingly proceeded as usual after the ruling by first paying the just satisfaction award and later submitting several reports on planned or adopted remedial measures, a comparison of those reports from 2017-2022 (especially those submitted in 2021 and 2022) reveals their (textual and semantic) similarity, but no actual developments. Indeed, Hungary maintained throughout the supervision process that the violation was an isolated incident.[84] This is surely not the case, given that the constitutional amendment that changed the nature of professional requirements for the position itself fails to comply with the rule of law.[85]

Building the narrative for a domestic audience

The third strategy relates to Hungary's seeking to build its own narrative about the Court to subvert the opinion of the domestic audience. In this respect, though academia only recently started investigating the field, scholars so far agree on two points. First, curbing public opinion plays a role in delegitimising international adjudication.[86] Second, public opinion is moveable and as such a popular target of resisting governments' strategies to embed criticism of international tribunals into the regular mainstream domestic discourse, public life and politics.[87] This has several implications. By seeking to influence public opinion, governments on the one hand wish to mobilise the public against the Court to decrease the costs of non-compliance and, by amplifying backlash, of a potential exit from the institution.[88] On the other hand, to gain popularity and domestic public support populist governments increasingly rely on speaking against international courts by picturing them as 'tools' of 'liberal elites' that seek to enforce their preferences over the 'will of the people'.[89] By conceiving and pushing forward a negative narrative about the institution they take issue with, governments seek to strengthen their domestic legitimacy and thus facilitate citizens' belief that their

[84]Compare Action report discussed at 1411th meeting, (DH), September 2021 and Action report discussed at 1428th meeting, (DH), March 2022. *See also* Rule 9.2 at 1428th meeting, (DH), March 2022.

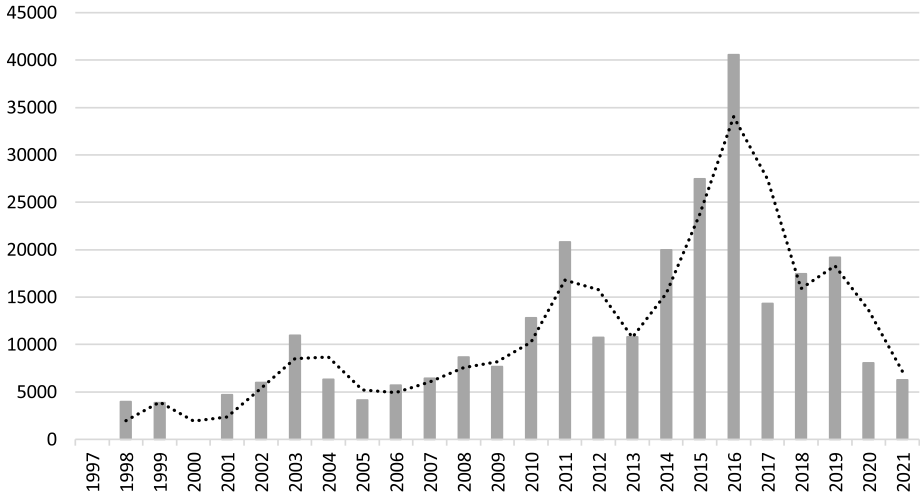
[85]*Baka*, *supra* n. 82, paras. 117, 121.

[86]Voeten, *supra* n. 13, p. 409; C. Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge University Press 2021) p. 159, 166.

[87]Hillebrecht, *supra* n. 86, p. 166; K.J. Alter and M. Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison', 22 *The British Journal of Politics and International Relations* (2020) p. 563 at p. 567, 568.

[88]H. Smekal and N. Tsereteli, 'Reforming to Please: A Comprehensive Explanation for Non-Exit from the European Court of Human Rights', 17(4) *EuConst* (2021) p. 664 at p. 671; E. Voeten, 'Public Opinion and the Legitimacy of International Courts', 14 *Theoretical Inquiries in Law* (2013) p. 411 at p. 418; Madsen et al., *supra* n. 31, p. 205.

[89]Voeten, *supra* n. 13, p. 408, 411; Hillebrecht, *supra* n. 86, p. 56.



Graph 3. average compensation per judgment year (€).

government is better than the (inter)national alternatives and thus deserves obedience.[90]

Against this backdrop, my interviews suggest that public opinion about the Court in Hungary is (and stays) relatively good.[91] Even the government in this regard notes that 'the opportunity to turn to the European Court of Human Rights in Hungary is well known', indicating also that people often resort to the Court for justice.[92] Interviews further reveal that Hungarian non-governmental organisations use this knowledge for strategic mobilisation of citizens to pursue mass litigation, which would make culminated compensation sums more costly for the state.[93]

Although analysis of the Court's compensation awarded to Hungarian applicants throughout the years (*see* Graph 3) reveals that the Court after 2010 indeed increased the average amount per judgment compared to the previous era, my linear regression models reveal that this represents no incentive for Hungary's speed or likelihood of compliance.[94] With the average compensation rising from €7,580.50 before 2010

[90]Finnemore and Sikkink, *supra* n. 17, p. 903; Hillebrecht, *supra* n. 86, p. 159-162.

[91]Interview with a Hungarian scholar at the Central European University on 10 May 2022.

[92]Interview with the representative of Hungarian Human Rights Department under the Ministry of Justice on 1 March 2022.

[93]Interview with representatives of the Hungarian Helsinki Committee.

[94]I considered time to compliance (days) and likelihood of compliance (dummy variable as open or closed) separately as dependent variables, compensation award as the independent variable and several other variables (e.g. violation type, classification of the case as leading, etc.), as control variables. Award was never statistically significant ($p>0.05$).

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to €19,649.40 after that year, the state after 2010 takes more than twice as long to comply with a judgment (3.6 years) than before (1.5 years).[95]

The increased awards, however, may have led to another move by the government. In anticipation of a potential (further) rise in monetary compensations (stemming both from European and potentially domestic courts giving force to European judgments), the government set the scene to 'counterbalance' the effects of these judgments.[96] In 2013 the state proposed an amendment to the Fundamental Law, in which it included a provision that set legislative basis for an *additional* tax on the Hungarian people.[97] The tax would be introduced when Hungary incurred a payment obligation by (inter)national court judgments in an amount that exceeded the quantum dedicated for such payments in the state budget.[98] Effectively, therefore, if the Strasbourg Court or domestic courts implementing its judgments were to increase the just satisfaction amounts or find Hungary in violation more frequently, the costs of compliance with these judgments would be borne by the Hungarian taxpayer. The provision raised concerns in the Venice Commission, which emphasised that it may lead to an aversion against European courts due to the financial burden on the Hungarian citizens.[99] They would in turn blame such institutions instead of the state which – as the perpetrator of violations – triggered payment obligations in the first place.[100] Although the provision was later excluded from the final text, it reveals that Hungary is well aware of how the financial burden of compensation awards can resonate domestically and damage the reputation of the Court.

Another example of building a domestic narrative relates to what Eszter Polgári terms 'double talk'.[101] According to Polgári, the government often speaks against the Court to the Hungarian public and the press, whilst its representatives nevertheless support (often formalistic) legislative amendments addressing the judgments behind closed doors. Unlike direct confrontation with the Court, this type of criticism does not reflect in the state's dialogue with the institution but is limited strictly to the domestic context. My analysis reveals in this respect that representatives of

[95]This excludes the unexecuted judgments of the pre-2010 term, which further delay Hungary's post-2010 pace of compliance.

[96]The Background Document insists that to introduce the Euro, unexpected expenses due to national or European court decisions need to be counterbalanced: Venice Commission Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 17 June 2013, p. 28.

[97]Polgári, *supra* n. 5, p. 304.

[98]Ibid., p. 305.

[99]Ibid.

[100]Venice Commission, *supra* n. 96, p. 30.

[101]Polgári, *supra* n. 5, p. 298, 403. Interview, *supra* n. 91.

the government were critical toward the Court after cases addressing Roma issues,[102] prison overcrowding,[103] indiscriminate criminalisation of the display of totalitarian symbols,[104] expulsion of asylum-seekers,[105] and life-sentences without parole. This undermining of the Court, however, had no implications for the actual remedial measures that were ultimately reported to the Committee of Ministers. For example, after the Court condemned Hungary's criminalisation of totalitarian symbols at peaceful demonstrations in the 2008 *Vajnai* case, one of the government's representatives referred to the European Court of Human Rights judges in the media as 'idiots' who in their ignorance of Hungary's specific historical context 'think it is an acceptable thing and part of the freedom to have someone demonstrate with the red star'.[106] Nevertheless, a decision of the Constitutional Court that annulled the contested legislative basis set into motion a legislative procedure, which resulted in the parliament agreeing to amend domestic legislation.[107]

The why: rationalist and constructivist theories in light of the identitarian counterwave

To explain why states comply with international rulings, academia has for decades relied on two strands of theories – rationalism[108] and

[102]ECtHR 29 April 2013, No. 11146/11, *Horvath and Kiss* v *Hungary*. Orbán spoke against the Court in several radio broadcasts, whilst in 2014 the Parliament adopted Act number CV of 2014 amending Act number CXC of 2011 on national public education.

[103]ECtHR 14 April 2012, No. 15707/10, *Istvan Gabor Kovacs* v *Hungary*. 'Prime Minister Viktor Orbán on the Kossuth Radio programme "Good morning, Hungary"', The Prime Minister's speeches, 23 January 2020, https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-on-the-kossuth-radio-programme-good-morning-hungary-20200117, visited 17 March 2023.

[104]ECtHR 8 July 2008, No. 33629/06, *Vajnai* v *Hungary*.

[105]ECtHR, 21 November 2019, No. 47287/15, *Ilias and Ahmed* v *Hungary*. B. Horváth, 'A Fidesz felszólította a kormányt, hogy ne fizessék ki a Helsinki Bizottságnak, amit az európai bíróság megítélt a számukra', *444*, 31 March 2017, https://444.hu/2017/03/31/a-fidesz-felszolitotta-a-kormanyt-hogy-ne-fizessek-ki-a-helsinki-bizottsagnak-amit-az-europai-birosag-megitelt-a-szamukra, visited 17 March 2023.

[106]L. Károly, 'Jogtalan fogva tartás, megalázó bánásmód – Magyar bukták Strasbourgban', *NOL*, 15 May 2015, http://nol.hu/belfold/20130515-jogtalan_fogva_tartas_megalazo_banasmod-1386523, visited 17 March 2023.

[107]R. Uitz, *Nemzetközi Emberi Jogok És a Magyar Jogrend. Jakab András–Gajduschek György Szerk: A Magyar Jogrendszer Állapota* (MTA Társadalomtudományi Kutatóközpont 2016) p. 186-187.

[108]Rationalist theories encompass both realist and liberal theories that share a commitment to utilitarian explanations of behaviour: P. Katzenstein et al., 'International Organization and the Study of World Politics', 52 *International Organization* (1998) p. 645 at p. 646; J. Brunnee and S. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law* (2000) p. 19 at p. 31-32.

constructivism.[109] Whilst the rational school focuses on states weighing the costs and benefits of non-compliance to pursue maximum (economic) utility of their actions,[110] constructivism sees the motives behind compliance in an interplay of internalised normative behaviour and states' identities shaping their interests.[111] Although the theories have historically divided scholarship, many academics today believe that they are complementary.[112] For instance, in his hybrid model, von Staden complements the logic of rationalism with constructivism to study compliance of European liberal democracies where, he claims, the idea of non-compliance with the Court's judgments seems almost irreconcilable.[113] In this context, he finds, liberal states rather focus on minimising the impact of judgments by offering the least burdensome remedial measures that still satisfy the minimal requirements of the ruling. He explains this as states' rational choice within normative constraints, where the obligation to comply with adverse Court judgments 'restricts the spectrum of legally permissible choices available to states, without [...] eliminating choice altogether'.[114]

Less, however, has been written in this respect on illiberal states. In their realm, non-compliance indeed seems less irreconcilable. In fact, in cases like Hungary, where the shift to an illiberal populist regime continues to be supported by the majority of voters,[115] one would expect non-compliance with international norms and values to be even a politically pursued option. Yet, the specific set of circumstances makes Hungary's attitude toward the Court unique. In a similar vein, as scholars study liberal states' compliance strategies, I initially approach the study of Hungary's behaviour by marrying rationalism and constructivism. However, to understand the implications of its 2010 *shift* to illiberalism, I suggest that the constructivist notion of a static state identity should be complemented by findings on the consequences of illiberal states' political change on the international regime. In this respect, Lustig and Weiler's notion of an identitarian counterwave seems appealing as it explains this exact process. I explain this in more detail below.

[109]Newer approaches introduce a behavioural theory: Peat, *supra* n. 20.

[110]Finnemore and Sikkink, *supra* n. 17, p. 889, 910.

[111]Brunnee and Toope, *supra* n. 108, p. 30.

[112]Finnemore and Sikkink, *supra* n. 17, p. 888-889, 909-911; D. Beach, 'Why Governments Comply: An Integrative Compliance Model That Bridges the Gap between Instrumental and Normative Models of Compliance', 12 *Journal of European Public Policy* (2005) p. 113.

[113]von Staden, *supra* n. 22, p. 39.

[114]Ibid., p. 28, 30.

[115]Assuming that the Hungarian election has indeed not been tampered with.

Rationalism and the benefits of Hungary's EU membership as the incentive for compliance

Derived from economics, rationalism argues that compliance is a result of states' rational weighing of instrumental costs of compliance against the potential costs of non-compliance.[116] Accordingly, when deciding how to act, states engage in means-end calculations to maximise their utilities and efficiency, whereby they typically pursue material interests.[117] These calculations can, however, be manipulated by other actors through mechanisms that Andrew Guzman identifies as the three R's of compliance – namely reputation, reciprocity and retaliation – which increase the cost of violations and may facilitate cooperation.[118]

Unlike the Luxembourg Court, which imposes sanctions, the Strasbourg Court relies on the legitimacy of its rulings to persuade states into compliance, along with a possibility of potential political pressure from other states that takes place at the Committee of Ministers' meetings.[119] Due to this absence of sanctions, non-compliance with the Strasbourg Court's rulings seems to have no direct financial costs, which, at first glance, makes the rational compliance pull weak. Yet, though indirect, there is another mechanism of pressure that contributes to compliance with its rulings in the EU part of Council of Europe members – an EU membership.[120] Scholars note in this respect that the EU plays a sustaining as well as a constraining role in Hungary.[121] As concerns sustaining, Hungary is a net beneficiary of EU's cohesion policy.[122] In 2014-2020 the state was projected to receive up to 3.69 per cent of its gross national income from the EU cohesion fund, which fuelled nearly all of its national resources for the national development policy.[123] These monetary benefits, scholars agree, make the costs of a potential voluntary exit of Hungary from the EU extremely high.[124]

By facilitating the protection of fundamental human rights, the EU on the other side acts as a political and, more recently, even a legal constraint on Hungary's attitude toward the Strasbourg Court. In this respect, Hungary's potential systemic non-compliance or, ultimately, an exit from Council of Europe,

[116]Beach, *supra* n. 112, p. 114.

[117]Finnemore and Sikkink, *supra* n. 17, p. 910; Brunnee and Toope, *supra* n. 98, p. 31.

[118]von Staden, *supra* n. 22, p. 28; A. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford Scholarship Online) p. 211.

[119]C. Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', 13 *Human Rights Review* (2012) p. 279 at p. 281.

[120]Interview, *supra* n. 14.

[121]A.Bozóki and D.Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', 25 *Democratization* (2018) p. 1173.

[122]Ibid., p.1181.

[123]Ibid.

[124]Smekal and Tsereteli, *supra* n. 88.

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could represent a 'serious and persistent breach' of EU's fundamental principles enshrined in Article 2 of TEU.[125] The state can in principle not be expelled from the EU, but systemic non-compliance with the Court's rulings could potentially trigger political sanctions under Article 7 TEU.[126] Although less straightforward, the EU's Rule of Law Mechanism might have recently introduced legal repercussions also for European Court of Human Rights disobedience under the threshold of systemic non-compliance. Namely, after Hungary's non-compliance with several Luxembourg Court judgments as well as high-profile Strasbourg Court judgments was considered in all the 2020, 2021 and 2022 EU Commission's Rule of Law Reports,[127] the state today faces an application of the Rule of Law Conditionality Regulation. This makes acquiring common EU funds conditional on Hungary's respect for the rule of law (which seems to entail compliance with Strasbourg Court judgments as one of the institutional issues related to Hungary's checks and balances), in which case the EU could potentially freeze Hungary's €6.14 billion yearly share from the EU budget.[128]

This seems to have three types of implications for Hungary's rational calculations. First and more broadly, its EU membership prevents Hungary from weighing to the side of authoritarianism and thus to the realm of systemic human rights violations existing, for instance, in Russia and Turkey.[129] This makes Hungary's constitutional position stable and corresponds to what Hungarian academia describes as constitutional illiberalism, deriving its power from the illiberal Fundamental Law.[130] Second, the fear of EU sanctions does indeed create a rational Strasbourg Court compliance incentive, but it is due to a relatively high threshold where only systemic non-compliance triggers sanctions, only of limited power. As my interviews uncover, this reflects in Hungary taking no issue with low-cost judgments (such as isolated violations) that have little or no actual and political implications, where the costs of compliance are insignificant compared to

[125]Bozóki and Hegedűs, *supra* n. 121, p. 1179.

[126]Assuming that systemic non-compliance passes the threshold of a serious breach of values in Art. 2 TEU, required by Art. 7 TEU to initiate the 'nuclear option', ultimately allowing for a suspension of a state's voting rights. Yet, this is unlikely, since any EU member may veto the decision.

[127]2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, 30 September 2020; 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, 20 July 2021; 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, SWD(2022) 517 final, 13 July 2022.

[128]J. Liboreiro, 'Rule of Law: What Happens after Brussels Triggers the Conditionality Mechanism against Hungary?', *euronews*, 6 April 2022, https://www.euronews.com/my-europe/2022/04/06/rule-of-law-what-happens-after-brussels-triggers-the-conditionality-mechanism-against-hung, visited 17 March 2023.

[129]Bozóki and Hegedűs, *supra* n. 121, p. 1173.

[130]Drinóczi and Bień-Kacała, *supra* n. 1, p. 30, 45.

the high cost of a potential systemic non-compliance.[131] Third, in high-profile cases the stakes of Hungary's cost-benefit weighing seem significantly greater. On one side, potential compliance – in addition to actual costs normally connected to implementation of complex Court cases[132] – also bears political costs, since conforming to 'Western liberal values' could jeopardise the government's political position by challenging its illiberal identity and thus its domestic legitimacy. This is also a common ground, where, I argue below, constructivist explanations of Hungary's behaviour complement rationalism. On the other side, blatant non-compliance with high-profile judgments may, due to their political and legal salience and consequently increased international scrutiny, increase the likelihood of EU sanctions. In this respect, a successful balancing along the spectrum of compliance demands that Hungary control the narrative of compliance, which necessitates the use of the above strategies of non-compliance.

Constructivism and the identitarian counterwave: Hungary's post-2010 illiberal identity as justification for non-compliance

Unlike rationalists, constructivists look beyond a mere pursuit of material utility and seek incentives for state compliance also in other, non-material factors.[133] Constructivism places states' identities at the centre, explaining that they are shaped through states' interaction with cultural-institutional context, which consists of (non)legal norms and several actors in the (inter)national arena.[134] Identities then act as 'generators of interests', which facilitate compliance.[135] Constructivists argue that this allows for predictability of state behaviour since, in principle, state identities and thus their interests remain consistent.[136] Accordingly, compliance over time becomes an 'internalized social practice that makes normative prescriptions for acceptable behaviour, thereby also making behavioural claims upon actors' that cannot be reduced to merely instrumental interests.[137]

[131]In words of non-governmental organisations: judgments that 'the government no longer cares about'.

[132]In addition to compensation awards, states can be required to undertake non-monetary measures, often with significant monetary implications.

[133]Peat, *supra* n. 20, p. 4.

[134]Finnemore and Sikkink, *supra* n. 17, p. 891,894; Katzenstein et al., *supra* n. 108, p. 682; J.G. Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', 52 *International Organization* (1998) p. 855 at p. 897.

[135]Brunnee and Toope, *supra* n. 108, p. 30.

[136]Ibid.

[137]Beach, *supra* n. 112, p. 123.

In practice, an example of this process unfolding in Europe was observed by Lustig and Weiler during what they termed the second wave of constitutionalism.[138] After seeking to restrain the unlimited domestic executive power which spread during World War II in the first wave, states in the second wave began jointly promoting international norms and institutions as the higher law, which in turn poured back into states' national constitutions.[139] This cross-fertilisation was, according to scholars, facilitated particularly because it was already consistent with their own national values and, accordingly, their (liberal) identities.[140] In this general context, Hungary became party to the Convention in 1992 and, accordingly subject to the Court's jurisdiction, as the first state from the post-Communist bloc.[141] The young liberal state was initially strongly dedicated to becoming a Convention-compliant member of the Council of Europe, which it expressed by amending its legislation before accession to meet the Convention standards.[142] Although in the two decades that followed domestic legislative proposals and court judgments only rarely explicitly referred to the Convention and the Court's case law, significant efforts to raise awareness of the Court's rulings and the Convention were made during that period.[143]

Yet, states' identities can change, pulling their interests along, which can have transformative consequences for the system.[144] In this respect – because they rely on predictability – both, rationalism and constructivism fall short in explaining states' identity change as well as its implications for compliance.[145] By unfolding how states' identity shift contributed to the rise of resistance to European courts, Lustig and Weiler's idea of an identitarian counterwave seems to mitigate for this limitation and is able to complement the constructivist idea of a stable state identity. Accordingly, the third (counter)wave in Europe occurred as a reaction to the first two waves.[146] In the context of the 2008 economic and the 2015 refugee crisis,[147] the counterwave emerged because states began taking issue with several challenges of the common international regime, related, for instance, to the legitimacy of (international) judicial review, the focus of human rights on protecting

[138]Beginning in the end of the nineteenth century, continued in the interwar and World War II period, and the period that followed: Lustig and Weiler, *supra* n. 18, p. 325.

[139]Ibid., p. 318, 332.

[140]Ibid.

[141]M. Weller, 'Application of the European Convention on Human Rights in the Hungarian Legal System', 40 *Acta Juridica Hungarica* (1999) p. 105.

[142]Ibid., p. 105.

[143]Polgári, *supra* n. 5, p. 296.

[144]Ruggie, *supra* n. 134, p. 863.

[145]Brunnee and Toope, *supra* n. 108, p. 33.

[146]Lustig and Weiler, *supra* n. 18, p. 319.

[147]Ibid., p. 369.

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an individual against the state instead of emphasising their responsibilities, flattening states' national identities, etc.[148] In reaction, states (particularly their courts) began first, taking back the power to exert control over international governance and adjudication, and second, emphasising national identity as the new standard of reasoning and justification.[149] In this context, illiberal states such as Hungary today seem to call for a reconfiguration of 'internationally mandated' conceptions of human rights to a national view, that preserves their own cultural, social and political identities.[150] By doing so, they detach the perception of human rights from its classical liberal understanding, seeking to transform it into an expression of national identity, which creates tension with the international authority.[151]

This shift affected Hungary's attitude toward the Court, particularly its choice of strategies in an important way. Enshrined in the Preamble of the 2011 Fundamental Law, Hungary today places values such as Christianity, preservation of nationhood and community at the very top of its value system, which sets the tone for its perception of human rights.[152] Accordingly, in their focus on an individual instead of a community and on the liberal 'Western values' instead of the conservative 'true Hungarian values', fundamental rights as required by an international authority seem to differ from the national (that is the government's) perception.[153] This causes friction. In turn, the state refuses to comply, not with all judgments, but, as Erik Voeten terms it, 'only those judgments that fit with pre-existing domestic mobilisation narratives around these mega-politics identity questions'.[154] More specifically, this relates to the politically sensitive Court judgments that touch upon issues where the government sees a collision between the Hungarian national identity and the liberal value system. Yet, whilst maintaining a dialogue with the Court[155] to nevertheless convey the signal to the international audience that it respects the Court's system (here constructivism complements the rationalist view), the state on one side employs a direct strategy of disguising its non-compliance and on the other side a subtler strategy of avoiding Court proceedings, which improves its compliance record and prevents future

[148]Ibid., p. 335-345.
[149]Ibid., p. 357.
[150]Ibid., p. 358.
[151]Ibid.
[152]The Preamble of Hungarian Fundamental Law.
[153]Ibid., p. 36.
[154]Voeten, *supra* n. 13, p. 413.
[155]Interviewees claim that this is a relict of the former liberal democracy. According to them, Hungary remains proud to be the first post-Communist state that joined the Court's system: Interview, *supra* n. 91.

engagement with high-salience cases. This resistance to 'externally imposed values' also fuels the government's endeavour to build its own narrative of the Court domestically. As an external authority, the Court and its 'imposition' of liberal values is, in the government's view, linked to the imagery of historical foreign occupation and is thus illegitimate, whilst the government itself as an embodiment of true 'Hungarian values' is portrayed as the preferred and the only legitimate alternative. In this context, the state seeks the favour of the public by blaming the Court for an increased burden of taxation and by a domestically-confined criticism of the institution.

Conclusion

The paper sought to unravel how and why Hungary, hidden behind its average compliance record, silently faces off the Court. To do so, while simultaneously seeking to benefit from pursuing its own (inter)national interests, the state developed three strategies, aimed at controlling the narrative of compliance. The first one allows Hungary to avoid Court proceedings by concluding alternative instruments, which improves its compliance record, allows it to make adverse rulings – including important precedent judgments – disappear from its official record and prevents applicants from accessing the Court. As a second strategy, Hungary disguises its non-compliance by submitting copy-paste reports on often formalistic legislative amendments, which serves as a status signal to convince the international audience of its persistent work toward implementation. The third strategy aims to subvert public opinion by building a negative domestic narrative about the Court. After unfolding these strategies, the paper set to uncover why – given that the state openly admits its illiberalism and defiance to international institutions – Hungary nevertheless engages with the Court by construing these strategies whilst it does so little to actually implement its (high-profile) rulings. The paper finds the reasons for this in Hungary's specific circumstances. The first is its EU membership, that on the one hand rationally constrains and on the other incentivises it into compliance. The second is a 2010 identitarian illiberal shift that fuels Hungary's resistance to the Court's rulings. Together, the paper concludes, these incentives explain Hungary's (non)compliant behaviour before the Court and the choice of its particular strategies that nurture it.

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