

10 The rise and fall of constitutionalism in Hungary

Gábor Halmai

In this chapter, I describe the elements and possible reasons for Hungary's recent transition from a liberal to an illiberal democratic system, and will attempt to explain both the unique and the more typical features of this change. I use the term 'constitutional counter-revolution' to describe the Hungarian constitutional restoration.¹ At the same time, my view is that the illiberal turn, which significantly weakened the rule of law safeguards instituted by the 1989–1990 constitutional process, has not resulted in the restoration of either the single-party state or police state structures. I think that the Hungarian constitutional system after 2010 is better characterized as a kind of 'democradura', rather than as a dictatorship.²

Let us first discuss the characteristics of the constitution-making process both in 1989 and in 2010.

Revolutionary/non-revolutionary vs. sovereign/post-sovereign constitution-making

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all at the same time.³ Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law'-document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only sealed the comprehensive amendment to the Constitution, which went into effect on the anniversary of the revolution, and which has since been the basic document of the 'constitutional revolution'.

Revolutionary constitutions – exemplified by the models of the American and French Revolutions – establish an entirely new order rather than merely constraining the reigning power in place.⁴ In the order created by such constitutions all forms of exercising public power require an immanent justification, which is provided by the new constitution. The new constitution determines the form and substance of the sovereign exercise of power, and in so doing, it liquidates the previous political order; in other words it severs continuity. The establishment of a new political order is associated with the concept of 'democratic *constituent*

power’, which designates the people as the subjects of the founding act. This legality manifests itself in democratic procedures and emerges subsequently as the basis for the constitution’s legitimacy. This explains why most constitutions only make provisions concerning the amendment of the existing document, while they are silent on the formal requirements of its comprehensive revision, not to mention the adoption of a new constitution. The Spanish Constitution and the constitutions of some states of the U.S. are exceptions to this general observation, since they also regulate the possibility and procedures of a revision. Another exception is the German Grundgesetz of 1949, which, in its Article 146, holds out the prospect of its own replacement by a new constitution to be adopted following German reunification (as we know, ultimately, this promise went unfulfilled in 1990: the six new federal states joined the Federal Republic within the framework of the Grundgesetz). Similarly, the preamble of the comprehensive constitutional amendment act of 1989 in Hungary also promises the adoption of a new constitution. Nevertheless, even though in the Hungarian case, formally speaking, no new constitution was adopted in 1989 – though substantially speaking it did – academic literature qualifies this act not as an amendment or revision, but as a ‘constitutional revolution, or new founding’.⁵ However, this procedure is called ‘chaste constitution-making’ by some academics.⁶

The non-revolutionary tradition seeks to legalize an existing system of government. In the case of the German and British constitutional evolution, which may be regarded as the prototypes of this model, it also strives to constrain royal powers by adopting a new constitution. In contrast to the revolutionary tradition that establishes a new order, the non-revolutionary tradition that seeks to reshape power arrangements does not necessarily require democratization. In fact, democratization may be counterbalanced by strong judicial review, as in England, or by the powers of a constitutional court, as in Germany. But those constitutions that are, in a political sense, non-revolutionary need not even necessarily aim to transform the existing power arrangements. It is conceivable that a new constitutional order is established while the previous power structures continue to prevail. According to Ran Hirschl, the constitutional developments in 1982 in Canada, in 1990 in New Zealand, between 1992 and 1995 in Israel, and indeed, the UK’s situation following the adoption of the Human Rights Act in 1998, are precisely such instances of ‘no apparent transition’. In these cases the constitutional reforms are neither concomitants of a political-economic transition nor the outcome thereof.⁷

Taking into account the revolutionary/non-revolutionary dichotomy, we can conclude that the constitution-making in Hungary in 1989 can be substantively characterized as a revolutionary act, since it produced a new political order, even though neither the roundtable, which drafted the comprehensive amendment to the old constitution, nor the communist parliament, which rubber stamped the draft, can be considered as a democratic constituent power. Therefore, using the sovereign/post-sovereign binary categories, it was certainly a post-sovereign constitution-making, both procedurally and due to the promise of a new constitution, also substantially.

On the other hand, procedurally, the 2011 Fundamental Law wasn't a revolutionary act, since it was enacted on the basis of the constitution-making rules of the 1949/1989 constitution, with the exception of the special provision of the house rules. However, there was also a new rule incorporated into the constitution in 1994, which required a four-fifths majority for the decision concerning the preparation of a new constitution. Substantially, the new Fundamental Law of Hungary can be treated as revolutionary, as it introduced a new, illiberal type of constitutional system, instead of the liberal constitution of 1989. Even Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim at producing a liberal constitution. He said:

In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual? According to my recollection, more than 80 percent of the people responded by saying that they wanted to live in a world where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there.⁸

Because of this intention of the government to change the liberal democratic political order, I describe this constitution-making as counter-revolutionary.

Instead of a 'revolutionary/non-revolutionary' dichotomy, Andrew Arato distinguishes between sovereign and post-sovereign constitution making. By sovereign, he means a constitution-making process conducted by parliament, while the essence of the post-sovereign model is that constitution-making power is not concentrated in a single body or an organ specially constituted and authorized for the purposes of constitution-making, but that each of the organs involved in constitutional politics are bound by laws.⁹ According to Arato, the roots of this new form of constitution-making reach back as far as the American Revolution, as well as the post-WWII constitutional processes in France and Germany; its renaissance can also be observed in the 1970s in Spain, in the regime transitions in Central and Eastern Europe in the late 1980s and early 1990s, and in South Africa in the mid-1990s. A basic feature of the process – especially in the latter cases – is the two-step constitution-making, which features intervening free elections and the use of a provisional constitution. Another basic feature is that the principle of constitutionalism does not extend to the final product only, but also to the process whereby the constitution is adopted. Arato believes that where

this model is consistently applied, it could be a viable democratic alternative to revolutionary constitution-making, which often results in dictatorships. Where the second step fails to take place, however, this omission can easily doom the entire constitutional process.

In post-communist countries, Arato recognizes three models of constitution-making. The earliest, possibly too early, constitution-making took place in Bulgaria and Romania, where the Parliaments that were created as a result of democratic elections were given the rights of a constituent assembly, as had been the case in France (the National Constituent Assembly between 1789 and 1791) and in Weimar (in 1918). Meanwhile, in the Czech Republic and Slovakia after the dissolution of Czechoslovakia in 1992, constitution-making was carried out by democratically elected legislative bodies, but without the classification of a constituent assembly. The cases of Hungary and Poland represent a third type of constitution-making, where the process was started by an illegitimate conventional legislature whose task was to approve a text that had been agreed upon by the state-party and the new democratic movements before the democratic elections.

Using this dichotomy, which assesses the substance and the process together, the 1989 ‘pacted’¹⁰ constitution-making in Hungary was designed as a two-step post-sovereign process, the first step being an interim constitution prepared by the National Roundtable Talks and enacted by the illegitimate parliament, followed by a final constitution sometime after the first democratic elections. However, the country has failed to produce a final constitutionalist constitution, even though in the second, center-left-dominated, freely elected parliament, the governing coalition of the socialist MSZP and the liberal SZDSZ alone had constitution-making powers. Therefore, in the context of Hungary, Arato spoke of partial failure in 2010.¹¹ In 2011, he argued that the adoption of the Fundamental Law was a move against post-sovereign constitution-making.¹² Altogether, we can argue that the new constitution is a result of a sovereign process.

In 1989, Fidesz and Viktor Orbán together with SZDSZ (the Alliance of Free Democrats) played a crucial role in avoiding a kind of semi-presidential system with a former communist president by not signing the agreement of the National Roundtable and by initiating a successful referendum on the process to elect the president. Following Fidesz’s election victory in 2010, many argued that Orbán was willing to introduce a presidential system in order to concentrate power in the hands of the presidency. Others claimed that Orbán would not want a presidential system since he prefers a system containing checks and balances against the executive.¹³ Proponents of Fidesz, such as Béla Pokol, argued that Fidesz’s new constitutional system envisages the Westminster parliamentary model, in which the ‘winner takes all’ and where the principle of the unity of power prevails. In my view, the Westminster model also works with checks and balances, even if different from that of a presidential system. Therefore one cannot treat Fidesz’s new constitutional system as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.¹⁴ The institutional arrangement of this model is best embodied by the British doctrine of parliamentary sovereignty, which does not entail the usual institutional

elements of a dualist democracy, such as strong judicial review. By contrast, the new Hungarian constitutional system has kept these institutional arrangements, such as the Constitutional Court, but deprived them of their power. They also kept the mixed electoral system, but made it more majoritarian.

Consequently, the new Hungarian constitutional system does not fit into any of the models of government, all of which are based on a different concept of separation of powers. The more traditional models of government forms are based on the relationship between the legislature and the executive. For instance, Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while that of the second being the continental European parliamentary and U.S. presidential systems.¹⁵ Giovanni Sartori discusses presidentialism and semi-presidentialism, as well as two forms of parliamentarism – namely, the premiership system in the United Kingdom, *Kanzlerdemokratie* in Germany, and the assembly government model in Italy.¹⁶ Besides the Westminster and U.S. separation of powers systems, Bruce Ackerman uses the constrained parliamentarism model as a new form of separation of powers, which has emerged against the export of the American system in favor of the model of Germany, Italy, Japan, India, Canada, South Africa, and other nations, where both popular referendums and constitutional courts constrain the power of the parliament.¹⁷ Hungary between 1990 and 2010 belonged to the consensual and constrained parliamentary systems, close to the German *Kanzlerdemokratie*. But the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints on parliamentary power, and the system has since moved towards an absolute parliamentary sovereignty model, without the cultural constraints of the Westminster form of government. Not to mention the fact that in the last few decades, the traditional British model of constitutionalism has also changed drastically with the introduction of a bill of rights by left-of-center governments (and opposed by right-of-center opposition parties) in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004), and the State of Victoria (2006). Unlike the traditional commonwealth model of constitutionalism, this codified bill of rights limits legislation, even though the legislature still enjoys the final word.

The biggest change to the absolute parliamentary sovereignty system occurred in the United Kingdom after 1998, and some even talk about the ‘demise of the Westminster model’.¹⁸ The greatest deviation from the system of unlimited parliamentary sovereignty was the introduction of judicial review. In just over two decades, the number of applications for judicial review nearly quadrupled to over 3,400 in 2000, when the Human Rights Act of 1998 came into effect in England and Wales.¹⁹ The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention on Human Rights. This does not allow U.K. courts to strike down, or ‘disapply’, legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility (under section 4.2). It is then up to the government and Parliament to decide

how to proceed. In this sense, the legislative sovereignty of the British Parliament is preserved. Some academics argue that, although as a matter of constitutional legality, Parliament may well be sovereign, as a matter of constitutional practice it has transferred significant power to the judiciary.²⁰ Others go even further to argue that although the Human Rights Act of 1998 is purported to reconcile the protection of human rights with the sovereignty of Parliament, it represents an unprecedented transfer of political power from the executive and legislature to the judiciary.²¹

Besides the commonwealth countries mentioned, a similar new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994, contains a ‘notwithstanding’ provision, similar to the Canadian law. This new model of commonwealth constitutionalism is based on a dialogue between the judiciary and the parliament.²² However, comparative constitutional studies conclude that parliamentary sovereignty tends to be increasingly restrained, either legally or politically, and that the last few decades have witnessed a narrowing scope for the exercise of traditional constituent power conceived as unrestrained, as the sign of the ‘will of the people’, even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.²³ In contrast to these new trends, in the Hungarian constitutional system, the parliamentary majority decides every single issue without any control mechanism, as the independence of both the ordinary judiciary and the Constitutional Court has been liquidated.

Explanations of Hungary’s backsliding to illiberal democracy

Since the new constitutional order has weakened checks and balances and guarantees of fundamental rights, the new Hungary (not even a Republic in its name anymore) cannot be deemed a liberal democracy.

The main reasons for the turn of constitutionalism are as follows:

- (a) Historically, in Hungary, as in other East-Central European countries, there were some unexpected moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it. First, between the 1860s/’70s and the end of the 19th century; second, after WWI, except in Hungary, where the short liberal democratic period led by Mihály Károlyi was soon followed by the red terror of commune, and white terror of the right wing. The third such short moment occurred after 1945, especially in Czechoslovakia and Hungary until the communist parties’ take over in 1948. And fourth, after 1989, when liberal democracy again seemed to be the ‘end of history’.²⁴

Some elements of a representative system existed before World War II, after Governor Horthy consolidated his regime, with strong nationalism and anti-Semitism, and without any kind of human rights culture. According to the political theorist István Bibó, who also served as Minister of State in the government of

Imre Nagy during the Hungarian revolution of 1956, pre-World War II Hungary was a prime example of a 'deformed political culture', where

nationhood had to be made, re-fashioned, fought for and constantly protected not only from the predations of imperial powers but also from the indifference and fluctuating sense of national identity as a part of the people themselves.²⁵

During the 1920s and 1930s, when Hungary had a far-right government that flirted seriously with fascism, Miklós Horthy governed not only as admiral without a sea, but also as a regent without a king. Horthy relied for some of his authority on his public reverence for the Holy Crown, with which he associated himself whenever possible. He also organized a major national celebration for the Crown in 1937 and took full propaganda advantage of touring the country with the Crown in an open train. While he himself could not claim the title of king, he appeared, nonetheless, in the place of a king governing the country with a toxic mix of nationalism, xenophobia, and disrespect for basic legality and constitutionalism. This means that Hungary had never before had a democratic system, similar to the one of the Third Republic between 1990 and 2010.

Social psychologists in Hungary claim that Hungarian history is full with failures which is also reflected in the national anthem,²⁶ therefore the self-image of Hungarians is basically negative.²⁷ Hungary was on the losing side of both World War I and World War II. The victim narrative claims that the country has always been a noble and helpless victim of the malevolent forces of history, for instance by the Trianon Treaty of 1920, in which Hungary lost two-thirds of its territory. The fact that the right-wing governments elected by Hungarians voluntarily joined the losing side, and that Hungary was responsible for a lot of wrongdoings, for instance for the speedy deportation of more than half a million Hungarian citizens of Jewish origin to Auschwitz, has been never mentioned.²⁸

The many historical fiascos since the middle ages caused a feeling of inferiority in the sense of Adler, which made it necessary looking for a father figure within the meaning of Freud's father complex. These 'Führers', such as Rákosi, Kádár, and also Orbán in the post-WWII history of the country were able to treat the members of society like their children, and this parent-child transaction made it possible for PM Orbán since 2010 to manipulate people with his government's very effective campaigns through the loyal media and convince them to follow his lead sometimes even against their best interest.²⁹ The signs of such a parent-child transaction was, for instance, Orbán's attitude towards the paramilitary far right Hungarian Gárda promising them a slap in the face, or treating all their critics as paid agents of enemy powers. This can also be a part of the explanation of why the majority of Hungarians identified herself with the government's attitude during the refugee crisis. The description of this phenomenon of despotic protectors of the people against their fears goes back to Plato's 'The Republic', in which he warned that a 'towering despot' will inevitably rise in any democracy

to exploit its freedoms and seize power fomenting fear and representing himself as the protector, just like Orbán did during the refugee crisis.³⁰

- (b) Even though the transition to democracy in Hungary was driven by the fact that a large share of the population gave high priority to freedom itself, one of the legacies of the mild version of socialism with the toleration of private businesses, relative social security, and no unemployment in the Kádár-regime ('the happiest barrack in the camp') from the 1960s onwards, was that people expected the new state to produce speedy economic growth, with which the country could attain the living standards of neighboring Austria overnight, without painful reforms. In other words, one can argue that the average Hungarian pursued the West in 1989, though not so much in terms of the Western economic and political system, but rather in terms of the living standards of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, saying that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.³¹ This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment.
- (c) According to some arguments, the prospects for democracy in Hungary (and the other newly independent states of Central and Eastern Europe) following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, as well as the loss of civic constitutionalism, civil society, and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism.³² This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.³³ In other words, this view suggests that legal constitutionalism falls short, reducing the constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.³⁴

The concept of civic or participatory constitutionalism is based on 'democratic constitutionalism' (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to 'counterdemocracy' (Pierre Rosenvallon), as well as robust institutional linkage of civic associations and citizens with formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, and the elite

disdain for participatory institutions. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.³⁵

(d) In addition, two initial failures of the 1989 constitutional changes also contributed to Fidesz's ability to change the entire constitutional system after its electoral success in 2010. One of them is the disproportional election system, which translated the 53 percent vote share into 68 percent in 2010 and 45.5 percent into 67 percent of the seats in Parliament in 2014. The other failure was the unchanged two-thirds rule for making and amending the constitution.

The present and future of liberal democracy in Hungary

The current Hungarian constitutional system constitutes a new, hybrid type of regime, between a full-fledged democracy and a dictatorship. Even when there is a formal written constitution, a dictatorship is not a constitutional system. Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as William J. Dobson argues in his recent book, *The Dictator's Learning Curve*, 'today's dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were'.³⁶ What happened in Hungary is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal democracy is functioning. Hungary became an illiberal democracy, which was the openly stated intention of PM Orbán.³⁷ In this illiberal democracy, the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited. Also, as in many illiberal democracies, fundamental rights are listed in the new Fundamental Law, but the institutional guarantees of these rights are endangered through the lack of independence of the judiciary and the Constitutional Court.

As many scholars noted, there is an incredible range of nondemocratic, non-authoritarian regimes and their relationship with each other and democracy is often imperfect and unclear. Countries in this 'grey zone' inspired a lot of concepts, which were created to capture the mixed nature of these regimes. Steven Levitsky and Lucas A. Way introduced the term 'competitive authoritarianism' for a distinctive type of 'hybrid' civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents.³⁸

In the democratic changes of the post-1989 East-Central Europe, Jacques Rupnik describes three main trajectories: a) the Central European trajectory is characterized by the consolidation of democracy; b) in the Balkans, democratic

transition derailed because of nation-state building; and c) in post-Soviet Eastern Europe (Ukraine, Caucasus), ‘hybrid regimes’ à la Levitsky-Way has emerged.³⁹ In a more recent publication, Rupnik also emphasizes the differences of these trajectories as a consequence of their different political culture originating in the Christian or Orthodox culture. He claims that countries with an Orthodox culture (Greece, Romania, Serbia, Bulgaria) have more difficulties accepting traditional liberal democracy, which means that – also considering the experiences of the Arab Spring – instead of Fukuyama’s ‘end of history’ approach we should reconsider Huntington’s ‘clash of civilizations’ scenario.⁴⁰

Let me clarify the paradox of Orbán’s alleged defense of Christianity from the ‘Muslim hordes’ and the Orthodox culture of Hungary. In a speech on 26 July 2012, Orbán explained why authoritarianism is needed to deal with Hungarians: ‘*Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way* [GH: than compulsion or force].⁴¹ This assessment is very similar to that of Imre Kertész, the Nobel laureate in literature, who argued that Hungary’s ill fate stemmed from her inability to choose between Asia and Western Europe.⁴² In other words, Christianity and religion in general serve as reference point that Orbán’s right-wing populism uses instrumentally. Fidesz turned from a liberal party in the early 1990s with a militantly anti-clerical view from the mid-90s into a conservative party turning to an openly positive stance towards religion. Religion, however, was never understood as a significant part of its identity, but rather played a purely instrumental role in Fidesz’s political strategy, even after they joined the center-right party family of the European parliament, the European People’s Party (EPP).⁴³ Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of ‘two Hungaries’: the Western Christian, and the Eastern pagan, tribal one.⁴⁴ Orbán once voiced his conviction that the Turul bird, a symbol of ancient Hungarians, is the image into which Hungarians are born, ‘the symbol of a national identity of living’.⁴⁵ This means that Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate religion. In this respect, Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the national religion (‘nemzetvallás’) played a crucial role. Another proof of Christianity being instrumental for Orbán is that the marriage rate is the lowest in East-Central Europe. The difference between Hungary and the deeply Christian Poland, in particular, is especially telling. Hungary’s marriage rates are typical of the least religious countries in Europe, which is what the statistics on church attendance also show.⁴⁶ One can also have doubts about the seriousness of Christianity considering the fact that when Orbán listed the illiberal regimes he admires from Singapore through China, Turkey, and Russia, all of them are either non-Christian or Orthodox.

Considering its new constitutional system, and its behavior in the refugee crisis, which trajectory Hungary is following right now? As in electoral democracies, a formally competitive election with competing parties was held in

April 2014; however, Fidesz needed to strengthen the disproportionality of the election system, to introduce a unique winner compensation, and gerrymandering, which favored the governing party to regain its two-thirds majority. Even though we cannot say that the outcome of this election was determined by the election rules only, we also do not know how much election fraud Fidesz would have used if its simple majority would have been in danger. The Budapest municipal elections held in October 2014 proved that they are ready to engage in fraudulent practices.⁴⁷

In this respect, the hybridity of Hungarian constitutionalism differs from the 'managed democracy' of Putin's Russia, where failing competing parties and candidates, and the results of parliamentary and presidential elections cannot be deemed as uncertain.

The democratic backsliding of Hungary has been demonstrated by many independent ratings. According to Freedom House's *Nations in Transit* ratings, Hungary has weakened more since EU accession than any other member state, with the largest declines in 2010 and 2011. In 2012, Hungary was downgraded both for its electoral process and by losing its 'free' status regarding media freedom – the only country to do so. With downgrades in civil society and local democratic governance in 2012, Hungary's overall democracy score is edging closer to the barrier between consolidated democracies and those classified as 'semi consolidated', a category that includes Bulgaria, Romania, and the better-performing Balkan states.⁴⁸ By the end of 2013, Hungary's democracy score was one full point worse on the 1–7 scale than in 2004, when the country entered the EU. In the 2015 *Nations in Transit* report, which reflects the period 1 January through 31 December, in 2014 Hungary was expelled from the category of 'consolidated democracy regimes' and classified as 'semi-consolidated' due to the worsening of its scores in electoral process, civil society, independent media, local democratic governance, judicial framework independence, and consequently its overall democracy score deteriorated from 2.96 to 3.18.⁴⁹ Also, Demos concluded that Hungary was a significant 'backslider' on the dimensions of electoral and procedural democracy, the rule of law, and fundamental rights and freedoms and, worryingly, it scored poorly with respect to citizens' attitudes towards democracy. It was also the poorest performer among EU member states on the measure of active citizenship. Overall, Greece and Hungary emerge as the most worrying backsliders on measures of a healthy democracy.⁵⁰

The attitudes of citizens towards democracy lead us to one of the very reasons for the backsliding. Besides the more means-based, institution-focused elements of an ordinary liberal constitutional democracy in Hungary mentioned earlier, the end-based sociopolitical elements of the term, namely the cultural patterns as reflected both in general and in specific behavior, are lacking. In other words, in Hungary there is no, and never has been, a strong normative commitment to democracy on a behavioral and attitudinal level; therefore, a broad and deep legitimization of constitutional democracy has not been achieved. This means that the significant political actors, at both the elite and mass levels, are not convinced

that the liberal democratic regime is the right and appropriate one for the society, better than any other realistic alternative they can imagine.

The major question regarding the future of Hungary is whether democracy and liberalism should go hand in hand, as is the case in the Western world, including the European Union, of which Hungary is currently a member. As with citizens in any other nation-state, Hungarians certainly have the right to oppose joint European measures on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process, unlike the constitution-making that took place in 2011, when Hungary's leaders neglected to consult the people on their opinions about the very nature of the constitution. There are still a significant number of people who either consider themselves as supporters of liberal democracy, or at least represent views which are in line with liberal democracy.⁵¹ Liberal or not, the country's next constitution cannot be the exclusive product of elite-driven negotiations. If Hungarians ultimately opt for a non-liberal democracy, as Prime Minister Viktor Orbán publicly insisted first in the summer of 2014, and a year later during the refugee crisis, they must accept certain consequences, including parting from the European Union and the wider community of liberal democracies.

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The described democratic backsliding in Hungary demonstrates that the institutional framework is a necessary but not sufficient element of a successful democratization. Behavioral elements, among them political and constitutional culture, are as important as institutions. The other lesson of this case study is on the one hand that the very definition of democracy is changing, and it is not necessarily liberal, and on the other hand the borders of democratic, authoritarian, or dictatorial regimes are blurred, and there are a lot of different hybrid systems, including the current Hungarian one.⁵² Another important aspect of these developments is that, due to a new cold war situation, democratic societies are not only influenced exclusively by the liberal democratic West. The behavior of the Hungarian government, an admirer of Putin's authoritarian Russia, partly supported by the other East European countries during the refugee crisis has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy, and also that membership of the European Union is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately, the refugee crisis also strengthened illiberal democracies all over Europe (Russia and Turkey), and in the case of Hungary, and later of Poland – which from the end of 2015 very much followed the Hungarian playbook to destroy constitutional democracy – even inside the EU. This in spite of the fact that the EU has the authority either to use infringement actions because of the systemic violation of EU laws and principles or to trigger Article 7 of the Treaty. Instead of using Article 7, however, Brussels introduced a very cautious pre-Article 7 mechanism called the Rule of

Law Framework,⁵³ and started it only later and exclusively against Poland. The possible reason of why the EU was not quite ready to sanction Hungary first and foremost is that the governing Fidesz party delivers votes to EPP, the largest faction in the EP. In this way, EU institutions have proven their lack of capacity to enforce compliance to common values of constitutionalism in a Member State.

Notes

- 1 See G. Halmai, 'From the "Rule of Law Revolution" to an Illiberal Democracy in Hungary', in *Festschrift für Klaus Stern*, Duncker & Humblot, Berlin, 2012; G. Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary', in Benedek *et al.*, *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag, Wien, 2012); G. Halmai, 'Towards an Illiberal Democracy. Hungary's New Constitution', *Eurozine*, 25 January 2012.
- 2 See A. Arato, 'Is There a Dictatorship in the E.U.?' (booksandideas.net, 1 May 2012.). The term was drawn from Guillermo O'Donnell and Philippe Schmitter, who used it to describe certain Latin American regimes in the 1970s and 1980s. In 2011, Arato and I jointly edited an amicus brief for the Venice Commission on the newly adopted Fundamental Law (Z. Fleck *et al.*, 'Vélemény Magyarország Alaptörvényéről' ['Opinion on Hungary's Fundamental Law'], *Fundamentum*, No. 1, 2011). Generally, the similarities between Arato's and my own assessment of the situation extended even to terminology. See G. Halmai, 'I Speak of a "Counterrevolution" in the Dimension of Constitutionality'. 'Beszélgetés Arató András szociológus-politológussal' ['Conversation With the Sociologist/Political Scientist Andrew Arato'], *Fundamentum*, No. 1, 2011.
- 3 The terms 'single' and 'dual' transitions are used by A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991). Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. See C. Offe, *Varieties of Transition: The East European and East German Experience*, New York: MIT Press, 1997.
- 4 This *ex nihilo* constitution-making is referred to as 'revolution-based' by Michel Rosenfeld. See M. Rosenfeld: *The Identity of the Constitutional Subject*, Taylor & Francis, 2009, Chapter 6. Dawn Oliver and Carlo Fusaro in their comparative analysis use another categorization of the birth of new constitutions. They consider the following ways in which new constitutions come into existence: a) granted and patriated constitutions are granted by another state, as happened in the case of New Zealand's constitution in 1852 by the Constitutional Act of the British Parliament, and patriated first in 1947 by the right to amend the 1852 Constitutional Act, and finally by the New Zealand Constitutional Act of 1986; b) independence constitutions, like India's, adopted upon independence in 1948, based on the Constituent Assembly formed for that purpose; c) regime change constitutions of the former communist countries or that of South Africa in 1996; d) post-war constitutions of both Germany and Italy. See D. Oliver and C. Fusaro, 'Changing Constitutions: Comparative Analysis', in Dawn Oliver and Carlo Fusaro (eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, 2011, pp. 381–83
- 5 Cf. S. Holmes & C. R. Sunstein, 'The Politics of Constitutional Revision in Eastern Europe', in S. Levinson (ed.): *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995), p. 285.
- 6 See A. Bozóki, 'Szemérmes alkotmányozás. Rendszerváltás és jogállami forradalom 1989-ben' ['Chaste Constitution-Making. System Change and Rule of Law

- Revolution’], in A. Jakab András & A. Körösnéyi (eds.), *Alkotmányozás Magyarországon és máshol [Constitution-Making in Hungary and Elsewhere]* (MTA TKPTI, Új Mandátum Kiadó, 2012), pp. 202–39.
- 7 See R. Hirschl, *Towards Juristocracy* (Harvard University Press, 2004), pp. 7–10.
 - 8 See A. Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió. <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.
 - 9 See A. Arato, *Constitution Making Under Occupation. The Politics of Imposed Revolution in Iraq*, Columbia University Press, New York, 2009, pp. 59–97. Arato himself indicates that the term was first used by Ulrich Preuss in the context of the roundtable talks in the German Democratic Republic that is East Germany. Cf. Arato (n9) 61.
 - 10 The term is used by Michel Rosenfeld, see M. Rosenfeld, *The Identity of the Constitutional Subject* (Routledge, 2009).
 - 11 A. Arato, ‘Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?’, *South African Journal of Human Rights*, Vol. 26, 2010, p. 19.
 - 12 Cf. G. Halmai, ‘Én az alkotmányosság dimenziójában beszélek „ellenforradalomról.”’ ‘Beszélgetés Arató András szociológus-politológussal’ [I speak of ‘counterrevolution’ in the context of constitutionalism. Conversation with the sociologist/political scientist Andras Arato], *Fundamentum*, No. 1, 2011.
 - 13 See the discussion in the Hungarian weekly, *Élet és Irodalom*, initiated and concluded by my articles: G. Halmai, *Búcsú a jogállamtól (Farwell to the Rule of Law)*, 23 July 2010, and *Jogállami ellenforradalom – illiberális demokrácia (Rule of Law Counter-Revolution and Illiberal Democracy)*, 24 September 2010.
 - 14 Bruce Ackerman distinguishes between three models of democracy: monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and there impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See Bruce Ackerman, *We the People: Foundations*, Cambridge, Mass.: Harvard University Press, 1991, 6–16.
 - 15 A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven, 1999.
 - 16 G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, 2nd edn, New York University Press: New York, 1997.
 - 17 B. Ackerman, ‘The New Separation of Powers’, *Harvard Law Review*, Vol. 113, 2000, pp. 633–727.
 - 18 Cf. P. Norton, ‘Governing Alone’, *Parliamentary Affairs*, 2003, p. 544.
 - 19 See D. Judge, ‘Whatever Happened to Parliamentary Democracy in the United Kingdom’, *Parliamentary Affairs*, 2004, p. 691.
 - 20 Cf. K.D. Ewing, ‘The Human Rights Act and Parliamentary Democracy’, *Modern Law Review*, 1999, p. 92.
 - 21 See M. Flinders, ‘Shifting the Balance? Parliament, the Executive and the British Constitution’, *Political Studies*, 2002, p. 62.
 - 22 See S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, Cambridge, 2013, about the new model. This model has also come to be known by several other names: (a) ‘weak-form of judicial review’ (M. Tushnet, ‘Alternative Forms of Judicial Review’, *Michigan Law Review*, Vol. 101, 2003, p. 2781) or just ‘weak judicial review’ (J. Waldron, ‘The Core of the Case Against Judicial Review’, *Yale Law Journal*, Vol. 115, 2006, p. 1354); (b) ‘the parliamentary bill of rights model’ (J. Hiebert, ‘Parliamentary Bill of Rights. An Alternative Model?’, *Modern Law Review*, Vol. 69, No.7, 2006, p. 3.), ‘the dialogue model’, ‘the model of democratic dialogue’ (A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), Hart Publishing, Oxford, chapter 5.), or ‘dialogic judicial review’

- (K. Roach, 'Dialogic Judicial Review and its Critics', *Supreme Court Law Review*, Vol. 23, second series, 2004, p. 49).
- 23 See C. Fusaro & D. Oliver, 'Towards a Theory of Constitutional Change', in D. Oliver & C. Fusaro (eds.), *How Constitutions Change – A Comparative Study* (Hart Publishing, New York, 2011), pp. 417–18.
- 24 See the results of the research project 'Negotiating Modernity: History of Modern Political Thought in East-Central Europe', led by Balázs Trencsényi, and supported by the European Research Council, <https://erc.europa.eu/“negotiating-modernity”-history-modern-political-thought-east-central-europe>.
- 25 See I. Bibó, *Kelet-európai kis-népek nyomorúsága* [*The Misery of the Small States of Eastern Europe*], 1946.
- 26 The text of the anthem was written by József Kölcsey in 1823, two years before the Reform Era (1825–1848) started in Hungary. Paradoxically, this was probably the last time in the Hungarian history, when the society was tolerant, open to cultural, religious, and national diversity.
- 27 'Az írás ott volt a falon, de senki sem volt hajlandó elolvasni és megérteni' [The Scriptum was already on the Wall, but Nobody Dared to Read and Understand It], Interview with Professor György Csepeli, 25vSept. 2015. <http://www.boon.hu/az-iras-ott-volt-a-falon-de-senki-sem-volt-hajlando-elolvasni-es-megerteni/2922802>.
- 28 A sign at an exhibit in the National Museum offers an explanation for opting for the Axis in WWII: 'Aside from the expansive Italian Fascist movement and the foreign policy of the German National Socialist state, there were no other powers from whom a revision of the Trianon Treaty could be expected'. A bronze statue commissioned and installed by the current Hungarian government in the summer of 2014 in Szabadság Square in Budapest features an angel, a male figure with his tunic open to his breast, menaced by an eagle whose talons clutched a bar just overhead. The angel is Hungary, and the eagle is the Nazis, who had entered Budapest on 19 March 1944. See James Traub, 'Hungary's 500-Year-Old Victim Complex', *Foreign Policy*, October 28, 2015. https://foreignpolicy.com/2015/10/28/hungarys-500-year-old-victim-complex-nazis-habsburgs/?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2AEditors%20Picks.
- 29 This is a long argument of two psychologists, on the reason of why Orbán was to keep his power in 2014, despite the population's disappointments with his governance in the previous parliamentary term. See T. Halmi – E. Sebestyén, 'Megvédünk az önállóságtól' [We protect you from self-determination], *Élet és Irodalom*, 25 Sept. 2015.
- 30 See Jason Stanley, 'Democracy and Demagogue', *The New York Times*, October 12, 2015. Stanley argues that Plato's prediction is most dramatically exhibited by Weimar Germany, and recently in the cases of Hungary and Russia.
- 31 Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, p. 15.
- 32 See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', in A. Czarnota, M. Krygier, & W. Sadurski (eds.), *Rethinking the Rule of Law After Communism*, CEU Press, Budapest, 2005, pp. 9–24.
- 33 See R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, p. 4.
- 34 Cf. Sadurski, 2005, p. 23.
- 35 See the reviews on Blokker's book by Jiri Priban and Bogusia Puchalska in ICONnect. <www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>.

- 36 W.J. Dobson, *The Dictator's Learning Curve. Inside the Global Battle for Democracy*, Doubleday, 2012, p. 4.
- 37 In a speech delivered 26 July 2014 before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that 'will undertake the odium of expressing that in character it is not of liberal nature'. Citing as models he added: 'We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world. . . . Today, the stars of international analyses are Singapore, China, India, Turkey, Russia . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, then it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them. . . . If we look at civil organizations in Hungary . . . we have to deal with paid political activists here. . . . [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests. . . . This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests'. See the full text of Viktor Orbán's speech here: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.
- 38 See S. Levitsky and L.A. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, 2010, p. 5.
- 39 See J. Rupnik, 'Europe and the Democratization of Its Neighbourhood', in *Democracy in Precipice*, Council of Europe Democracy Debates 2011–2012 (Council of Europe Publishing, 2012), pp. 85–96.
- 40 Gilles Kepel, Jaques Rupnik, 'Explosive Nachbarn. Demokratie, Revolution und Geopolitik östlich und südlich von Europa', *Lettre Internationale*, 109, Sommer 2015.
- 41 See B. Szabó, 'Félázsiai származékoknál, mint mi, csak így megy' [*With a half-Asian lot such as ours, there is no other way*], *Népszabadság*, 27 July 2012.
- 42 'La Hongrie est une fatalité', *Le Monde*, 10 February 2012.
- 43 Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute's research, Budapest, 2012.
- 44 See Zoltán Ádám and András Bozóki, 'The God of Hungarians': Religion and Right-Wing Populism in Hungary', Manuscript, 2015. On file with the author.
- 45 'Minden magyar a turulba születik' [All Hungarian Are Born Into the Turul Bird], *Népszabadság*, 29 Sept. 2012.
- 46 <http://uk.businessinsider.com/eurostat-map-of-married-couples-in-europe-2015-10?r=US&IR=T>. I am thankful to Kim Lane Scheppelle for calling this aspect to my attention.
- 47 A new law adopted in 10 June 2014 ended the separate city and district council elections in Budapest, and delegated elected district mayors to the city council. According to the original structure, besides the 23 district mayors, 9 additional seats would have been distributed according to a compensation list. The new law abolished the previous system whereby Budapest city council members were directly elected from party lists. Based on the new law, which secured the majority for Fidesz, the 'election' or rather the delegation of the Budapest City Council cannot be considered as free anymore.
- 48 Sylvana Habdank-Kołaczowska, 'Authoritarian Aggression and the Pressures of Austerity', *Nations in Transit* 2013 (Freedom House, 2013).
- 49 <https://freedomhouse.org/report/nations-transit/2015/hungary>.
- 50 J. Birdwell, S. Feve, C. Tryborn, and N. Vibla, *Measuring Democracy in the EU* (Demos, 2013), pp. 20–21.

- 51 See the study of the Republikon Institute saying that in 2013 around 12% of the adult population considered themselves as liberal; there were about 1.5 million people in Hungary who supported liberal values in human rights related questions. In certain issues this support is even bigger: the liberty of abortion and euthanasia as well as the separation of state and church enjoy around 2/3 support, and also about 25–28% of the respondents accept gay marriage. See ‘Párhuzamos liberalizmusok: Kik a liberális szavazók? Republikon Intézet, 2013. <http://republikon.hu/media/12016/20130522.pdf>. Based on these results, János Kis claims that even if there is no liberal party in the current Parliament, around 8% of the entire adult population would be reachable for liberal politics. See J. Kis, *Liberalizmus a 3. Köztársaságban* [Liberalism in the Third Republic], *szuveren.hu* and *beszelo.hu*, 2 October 2014.
- 52 Asking the question, whether liberal democracy is at risk, Ivan Krastev responds that the big difference from the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus; rather, they have a problem with the liberal part of it. See I. Krastev, ‘Europe in Crisis: Is Liberal Democracy at Risk?’, in *Democracy in Precipice*, Council of Europe Democracy Debates 2011–2012 (Council of Europe Publishing, 2012), 67–73.
- 53 Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law.

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