

# The Making of ‘Illiberal Constitutionalism’ with or without a New Constitution

## *The Case of Hungary and Poland*

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### **Introduction: Is There Such a Thing As ‘Illiberal Constitutionalism’?**

This chapter deals with recent deviations from the shared values of constitutionalism towards a kind of ‘illiberal constitutionalism’ introduced either through a brand-new constitution, as is the case in Hungary since 2010, or through legislative changes that ignore the valid liberal constitution, as is the case in Poland since 2015. Ironically, both countries are still members of the European Union, a value community based on liberal democratic constitutionalism. Throughout the chapter I consider the term ‘illiberal constitutionalism’ as an oxymoron, just like ‘illiberal democracy’, which presupposes that constitutionalism or democracy for that matter can be either liberal or illiberal, the latter having a number of institutional deficits that hinder respect for the rule of law and exhibit weaknesses in terms of independent institutions that seek to protect fundamental rights.<sup>1</sup> In fact, Carl Schmitt went so far as to claim the incompatibility of liberalism and democracy, and argued that plebiscitary democracy based on the homogeneity of the nation was the only true form of democracy.

By contrast, in my view, liberalism is not merely a limit on the public power of the majority, but also a constitutive precondition for democracy, which provides for the

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<sup>1</sup> C. Mudde and C. R. Kaltwasser, *Populism: A Very Short Introduction*, Oxford University Press, 2017. 88. Similarly, Bojan Bugarcic claims that anti-liberal constitutionalism is not necessarily anti-democratic. See B. Bugarcic, ‘The Populist at the Gates: Constitutional Democracy Under Siege? Paper for the *Conference on Public Law and the New Populism*. New York University School of Law, Jean Monnet Center for International and Regional Economic Law and Justice, New York, September 2017.

rule of law, checks and balances, and guaranteed fundamental rights. In this respect, there is no such a thing as an ‘illiberal democracy’<sup>2</sup> or for that matter anti-liberal or non-liberal democracy. In my view, the populist understanding of the constitution opposes the main components of constitutionalism: limits on the unity of power, adherence to the rule of law, and the protection of fundamental rights. The same applies to ‘authoritarian’ or ‘illiberal’ constitutionalism. If the main characteristic of constitutionalism is the legally limited power of the government, neither authoritarian nor illiberal polities can fulfil the requirements of constitutionalism.<sup>3</sup> As Matthias Kumm argues, Carl Schmitt’s interpretation of democracy, inspired by Rousseau, and used by authoritarian populist nationalists as ‘illiberal democracy’, becomes an anti-constitutional topos.<sup>4</sup> Consequently, I equate constitutionalism with liberal democratic constitutionalism.<sup>5</sup> This does not mean, however, that constitutions cannot be illiberal or authoritarian. Therefore it is legitimate to talk about constitutions in authoritarian regimes, as Tom Ginsburg and Alberto Simpser do in their book,<sup>6</sup> but I do not agree with the use of the term ‘authoritarian constitutionalism’<sup>7</sup> or ‘constitutional authoritarianism.’<sup>8</sup> Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal.<sup>9</sup> Theocratic

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<sup>2</sup> J-W. Müller, ‘The Problem With “Illiberal Democracy”’, *Project Syndicate*, January 21, 2016.

<sup>3</sup> See e.g. the following definition of constitutionalism in the Stanford Encyclopaedia of Philosophy: ‘Constitutionalism is the idea ... that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.’ (<https://plato.stanford.edu/entries/constitutionalism/>). In the legal scholarship, Stephen Holmes asserts that the minimalist vision of constitutionalism is achieved if the following requirements are met: the constitution emanates from a political decision and is a set of legal norms; the purpose is ‘to regulate the establishment and the exercise of public power’; comprehensive regulation; constitution is higher law; constitutional law finds its origin in the people. See S. Holmes, ‘Constitutions and Constitutionalism’, in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press. 2012. 189-216.

<sup>4</sup> M. Kumm, ‘Demokratie als verfassungsfeindlicher Topos’, *Verfassungsblog On Matters Constitutional*. 6 September 2017.

<sup>5</sup> In contrast, others also regard other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See for instance M. Tushnet, ‘Varieties of Constitutionalism’, 14 *ICON*, 2016. 1-5. Similarly, Gila Stopler defines the state of the current Israeli constitutional system as ‘semi-liberal constitutionalism’. Cf. G. Stopler, ‘Constitutional Capture in Israel’, *ICONnect*, 21 August 2017. (Stopler 2017).

<sup>6</sup> T. Ginsburg and A. Simpser, *Constitutions in Authoritarian Regimes*, Cambridge University Press, 2014.

<sup>7</sup> M. Tushnet, *Authoritarian Constitutionalism*, Harvard Public Law Working Paper no. 13-47. 2013.

<sup>8</sup> S. Levitsky and L. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, 2010. 51-52.

<sup>9</sup> L-A. Thio, ‘Constitutionalism in Illiberal Polities’, in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012. Contrary to my understanding, Thio also talks about ‘constititionalism’ in illiberal polities.

constitutions, in contrast to modern constitutionalism, do reject secular authority.<sup>10</sup> In communitarian constitutions, like the ones in South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receive utilitarian priority over the individual freedom principle of liberalism. But in these illiberal polities, just like in the Hungarian and the Polish ones, to be discussed below, there is no constitutionalism.

I also do not consider political constitutionalism or all of the concepts rejecting strong judicial review, or judicial review altogether, as illiberal<sup>11</sup>. Political constitutionalists like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from each other significantly, emphasise the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them rejects the main principles of constitutional democracy, as illiberals do. Similarly, those who describe a new model of constitutionalism, based on deliberation between courts and the legislator, with the latter retaining the final word, have nothing to do with populist constitutionalism.<sup>12</sup> Those scholars realise that parliamentary sovereignty tends to be increasingly restrained, either legally or politically, and the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant*, conceived as the unrestrained ‘will of the people’, even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.<sup>13</sup> In contrast to these new trends, in the Hungarian and Polish constitutional systems, the parliamentary majorities not only decide every single issue

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<sup>10</sup> There are two subcategories distinguished here: the Iranian, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi Arabian, where Islam is present, without the formal authority of modern constitutionalism.

<sup>11</sup> See the opposite view by Lucia Corso. L. Corso, ‘What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions.’ *Rivista di filosofia del Diritto*, 2014. 443-469.

<sup>12</sup> See S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, 2013 about the new model. This model has also come to be known by several other names: 1) ‘weak-form of judicial review’ (M. Tushnet, ‘Alternative Forms of Judicial Review’, 101 *Michigan Law Review*, 2003, p. 2781.) or just ‘weak judicial review’ (J. Waldron, ‘The Core of the Case Against Judicial Review’, 115 *Yale Law Journal*, 2006, p. 1354.), 2) ‘the parliamentary bill of rights model’ (J. Hiebert, ‘Parliamentary Bill of Rights. An Alternative Model?’, 69 *Modern Law Review* 7, 2006, p. 3.) ‘the dialogue model’, ‘the model of democratic dialogue’ (A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), Oxford: Hart Publishing, ch. 5.), ‘dialogic judicial review’ (K. Roach, ‘Dialogic Judicial Review and its Critics’, 23 *Supreme Court Law Review*, second series, 2004, p. 49.), or ‘collaborative constitution’ (A. Kavanaugh, ‘The Lure and the Limits of Dialogue’, 66 *University of Toronto Law Journal*, 2016).

<sup>13</sup> 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, 2011. 417-418.

without any dialogue, but there are practically no partners for such a dialogue, as the independence of both the ordinary judiciary and the constitutional courts have been silenced.

### **Hungary: The 'Constitutional Counter-Revolution' after 2010**

Before the 2010 elections the majority of voters was already dissatisfied not only with the government, but also with the transition itself - more than in any other East Central European country.<sup>14</sup> The centre-right FIDESZ strengthened these feelings by claiming that there had been no real transition in 1989-90; the previous nomenclature had merely converted its lost political power into an economic one, exemplified by the two last prime ministers of the Socialist Party, who both became rich after the transition due to the privatization process. FIDESZ, with its tiny Christian democratic coalition partner received more than 50 % of the actual votes, and due to the disproportional electoral system, received two-thirds of the seats in the 2010 parliamentary elections. With this overwhelming majority they were able to enact a new constitution without the votes of the weak opposition parties.

The populism of FIDESZ was directed against all elites, including those who designed the 1989 constitutional system (in which FIDESZ also took part), claiming that it was time for a new revolution. That is why Orbán characterized the results of the 2010 elections as a 'revolution of the ballot boxes'. His intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, Viktor Orbán predicted that there was 'a real chance that politics in Hungary will no longer be defined by a dualist power space. . . . Instead, a large governing party will emerge in the centre of the political stage [that] will be able [to] formulate national policy, not through constant debates but through a natural representation of interests.' Orbán's vision for a new constitutional order - one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over values - has now been entrenched in a new constitution, enacted in April 2011.

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<sup>14</sup> In 2009, 51% of Hungarians disagreed with the statement that they were better off since the transition, and only 30% claimed improvements. (In Poland 14% and in the Czech Republic 23% detected worsening, and 70% and 75% respectively perceived improvement.). Eurobarometer, 2009.

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws affected the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, the functioning of the Constitutional Court and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of law-making and for the future of human rights in Hungary.

The new constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on 18 April 2011.<sup>15</sup> The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate — effectively— took place with the sole and exclusive participation of representatives of the governing political parties.<sup>16</sup>

Here I address some of those flaws in its content in relation to which the suspicion arises that they may permit exceptions to the European requirements of democracy, constitutionalism and the protection of fundamental rights, and, thus, that in the

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<sup>15</sup> For the ‘official’ English translation of the Fundamental Law, see: <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

<sup>16</sup> In its opinion approved at its plenary session of 17-18 June 2011, the Council of Europe’s Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations. See: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf). Fidesz’s counter-argument was that the other Parliamentary parties excluded themselves from the decision-making process with their boycott, with the exception of Jobbik, which voted against the document.

course of their application they could conflict with Hungary's international obligations.

1. Government without checks<sup>17</sup>. The new constitution *appears* to still contain the key features of constitutional constraint imposed by checked and balanced powers. But those constraints are largely illusory, because key veto points have been abolished or seriously weakened. Appointments to key offices, like Constitutional Court judgeships, ombudsmen, the head of the State Audit Office and the public prosecutor, no longer require minority party input. Independent boards regulating crucial institutions necessary for democracy, like the election commission and the media board, no longer ensure multiparty representation. The Constitutional Court itself has been packed and weakened because its jurisdiction has been limited. The constitutional reforms have seriously undermined the independence of the ordinary judiciary through changing the appointment process of judges.

2. Identity of the political community. An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts.

a) Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: "*We, the members of the Hungarian Nation ... hereby proclaim the following*". A few paragraphs down, the Hungarian nation returns as "our nation torn apart in the storms of the last century". The Fundamental Law defines it as a community, the binding fabric of which is "intellectual and spiritual": not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond our borders.

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<sup>17</sup> See a more detailed analysis on the lack of checks and balances in M. Bánkúti & G. Halmai & K. L. Scheppele, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions', in G. A. Tóth (Ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, CEU Press, 2012.

The elevation of the “single Hungarian nation” to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-Trianon Hungary, and certainly to those places where Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the “united Hungarian nation” who live outside the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary.

b) It characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. “We recognise the role of Christianity in preserving nationhood”, it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: “God bless the Hungarians”.

c) The preamble of the Fundamental Law also claims that the “continuity” of Hungarian statehood lasted from the country’s beginnings until the German occupation of the country on 19 March 1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus, it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the fallen regime. It rejects the national assembly election of December 1945.

3. Intervention into the right to privacy. The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other. Instead of this, the text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations towards the community. These values, which

are not doctrinally neutral, feature as high up as the Fundamental Law's preamble entitled National Avowal:

"We recognise the role of Christianity in preserving nationhood."

"We hold that individual freedom can only be complete in cooperation with others."

"We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love".

"Our Fundamental Law ... expresses the nation's will and the form in which we want to live."

4. Weakening of the protection of fundamental rights. The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

5. Constitutional entrenchment of political preferences. The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the current government enjoying a two-thirds majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy. This can make efficient crisis management impossible. These risks are present irrespective of the fact whether in writing two-third statutes the governing majority will exercise self-



restraint (contrary to past experience). The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court was the decision to annul all Court decisions prior to when the Fundamental Law entered into force. At one level, this would have made sense, but the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonised domestic rights protections to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary.

The new constitutional order was built with the votes of Orbán's political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfil this plan: they do not recognise the separation of powers, and do not guarantee fundamental rights. Therefore, the new Hungary (not even a Republic in its name anymore) cannot be considered a liberal constitutional democracy, but rather an illiberal state.<sup>18</sup>

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<sup>18</sup> In an interview on Hungarian public radio on July 5, 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said: 'In Europe the trend is for every constitution to be

In April 2014, FIDESZ, with 44,5 % of the party-list votes, won the elections again, and due to ‘undue advantages’ for the governing party provided by an amendment to the electoral system, secured again a two-thirds majority. In early 2015, FIDESZ lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party received another 20,5 % of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism. But, as Jan-Werner Müller argues, with reduced media pluralism and an intimidated civil society, the real ‘popularity’ of the populist illiberal state has limited meaning. Therefore, we cannot really conclude that ‘illiberal democracy’ became a genuinely popular idea in Hungary, not to speak about other parts of Europe or the world for that matter.<sup>19</sup> What we do know is that since the 1989 democratic transition, the Hungarian people have not yet subscribed to ‘constitutional patriotism’,<sup>20</sup> which would have meant that the citizens had endorsed what John Rawls once called ‘constitutional essentials’, and that they were attached to the idea of a constitution. The core of this kind of constitutional patriotism is a constitutional culture centred on universalist liberal-democratic norms and values, refracted and interpreted through particular historical experiences. Instead of this, the Hungarian people found themselves confronted with the populist government’s unconstitutional patriotism, a kind of nationalism that violates constitutional essentials in the name of ‘national constitutional identity’.

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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% 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’. See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, July 5, 2013. Kossuth Rádió. <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszdek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>

<sup>19</sup> J-W. Müller, ‘Taking “Illiberal Democracy” Seriously’, *Public Seminar*, 21 July, 2017.

<sup>20</sup> After Dolf Sternberger’s and Jürgen Habermas’ conceptions of constitutional patriotism at the end of 1970s and ’80s respectively, both of which have been answers to particular German challenges, Jan-Werner Müller developed a new theory of the term, concentrating on universal norms and constitutional culture. See J.-W. Müller 2007.

From the very beginning, the government of Viktor Orbán has justified non-compliance with the principles of liberal democratic constitutionalism enshrined also in Article 2 of the Treaty of the European Union (TEU) by referring to national sovereignty.<sup>21</sup> Lately, as an immediate reaction to the EU's efforts to solve the refugee crisis, the government has advanced the argument that the country's constitutional identity is guaranteed in Article 4 (2) TEU. After a failed referendum and a constitutional amendment, the packed Constitutional Court rubberstamped the government's constitutional identity defence.<sup>22</sup>

After some draconian legislative measures were adopted, the government started a campaign against the EU's plan to relocate refugees. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: 'Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?'. Although 92 % of those who casted votes and 98 % of all the valid votes agreed with the government, answering 'no' (6 % were spoiled

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<sup>21</sup> The first reaction of the Hungarian government to the 'Tavares report' of 3 July 2013 of the European Parliament on the Hungarian constitutional situation (<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>) was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on 'the equal treatment due to Hungary'. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: 'We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.' The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament called on the Hungarian government 'not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families'. These words very much reflect the Orbán government's view of 'national freedom', which emphasizes the liberty of the state (or the nation) to determine its own laws: 'This is why we are writing our own constitution... And we don't want any unsolicited help from strangers who are keen to guide us... Hungary must turn on its own axis'. (For the original, Hungarian-language text of Orbán's speech, entitled *Nem leszünk gyarmat!* [We won't be a colony anymore!] see e.g. [http://www.miniszterelnok.hu/beszzed/nem\\_leszunk\\_gyarmat](http://www.miniszterelnok.hu/beszzed/nem_leszunk_gyarmat)\_The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>).

<sup>22</sup> See G. Halmai, 'From a Pariah to a Model? Hungary's Rise to an Illiberal Member State of the EU', *European Yearbook of Human Rights*, 2017.

ballots), the referendum was invalid because the turnout was only around 40 %, instead of the required 50 %.

As a next attempt, Prime Minister Orbán introduced the Seventh Amendment, which would have made it ‘the responsibility of every state institution to defend Hungary’s constitutional identity’. The most important provision of the draft amendment reads: ‘No foreign population can settle in Hungary’. Since the governing coalition lost its two-thirds majority, even though all of its MPs voted in favour of the proposed amendment, it fell two votes short of the required majority. After this second failure, the Constitutional Court, loyal to the government, came to the rescue of Orbán’s constitutional identity defence of its policies on migration. The Court revived a petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015.

The Constitutional Court in its decision held that ‘the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty’.<sup>23</sup> Therefore, the Court argued, ‘the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State’.<sup>24</sup> This abuse of constitutional identity aimed at not taking part in the joint European solution to the refugee crisis is an exercise of national constitutional parochialism,<sup>25</sup> which attempts to abandon the common European liberal democratic constitutional whole.

## **Poland: ‘Remodeling’ Democracy after 2015 without Changing the Constitution**

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<sup>23</sup> Decision 22/2016 AB of the Constitutional Court of Hungary [67]

<sup>24</sup> *Ibid.*

<sup>25</sup> See the term used by M. Kumm, ‘Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism’, in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Hart, 2012. 51.

Poland's 1989 negotiated democratic transition preceded Hungary's, but it followed Hungary's constitutional backsliding after the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, won parliamentary elections in October 2015. The party had already taken over the presidency in May that year. After Solidarity, led by the proletarian leader Lech Wałęsa, won massive electoral support in partially free elections held in June 1989, Poland's last communist president, General Jaruzelski - based on an arrangement known as 'your president, our prime minister' - was forced to appoint Tadeusz Mazowiecki, Wałęsa's former leading adviser, a liberal intellectual nominated by Solidarity as prime minister. At the end of 1990, Jarosław Kaczyński ran Wałęsa's winning campaign for the presidency and was rewarded with a position as the head of the presidential chancellery, but later accused him of betraying the revolution, and becoming 'the president of the reds'. Kaczyński's conspiracy theory that liberal intellectuals had become allies to former communists led to a final split known as Solidarity's 'war at the top'.<sup>26</sup> The alleged conspiracy between other dissidents and the governing Polish United Workers party also determined how Kaczyński viewed the 'roundtable' agreement in 1989, which led eventually to the end of the communist regime.<sup>27</sup> The new government parties both in Hungary and Poland rejected '1989' for the same reasons: namely, absence of radicalism of the democratic transition, and for the alleged liberation of the Communist elites.<sup>28</sup>

As in Hungary in 1994, the fight among erstwhile Solidarity allies brought Poland's former communists back into power: the Democratic Left Alliance, the successor to the Polish United Worker's Party, won parliamentary elections and the presidency in 1993 and 1995 respectively. In contrast to their failed attempt in Hungary in 1995-1996, the Polish post-communists and the liberals successfully negotiated a new liberal democratic constitution, enacted in 1997. Because the new document enshrined the Catholic church's role in public life, conspiracy theorists charged that it provided additional evidence of a secret liberal-communist alliance. According to the

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<sup>26</sup> Ch. Davis, 'The conspiracy theorists who have taken over Poland', *The Guardian*, February 16, 2016.

<sup>27</sup> See J. Gross, 'Jaroslaw Kaczynski's party is rewriting the history of Poland', *Financial Times*, March 13, 2016

<sup>28</sup> See I. Krastev, 'Walesa, Gorbachev and Freedom's End', *The New York Times*, March 14, 2016.

conspiracists, there is no difference between liberal secularism and communist atheism or between liberal democracy and communist authoritarianism. This led in 2001 to the final division of Solidarity into two rival parties: Civic Platform (led by Donald Tusk), and Law and Justice (led by the Kaczyńskis, Jarosław and his twin brother, Lech), the former acknowledging, and the latter denying, the legitimacy of the new constitutional order.

In 2005, Law and Justice defeated Civil Platform, and Tusk won both the parliamentary and the presidential elections. Lech Kaczyński became President of the Republic, while Jarosław became head of the coalition government, which consisted of Law and Justice, the agrarian-populist Self Defense Party and the nationalist-religious League of Polish Families. The new government proposed a decommunisation law, which was partly annulled as unconstitutional by the still independent Constitutional Tribunal. The coalition fell apart in 2007, and Civic Platform won the subsequent elections. Donald Tusk replaced Jarosław Kaczyński as Prime Minister, while Lech remained President until he died after his plane crashed in the the Katyn forest near Smolensk in Western Russia crash in April 2010. Although his support has collapsed by the beginning of 2010, and his chances of re-election at the end of the year were widely assumed to be very low, his death fed the theory of a conspiracy between then Poland's Prime Minister Tusk and Russian President Putin willing to kill the Polish President.<sup>29</sup>

Jarosław Kaczyński's Law and Justice Party returned to power with a vengeance, committed to reshaping the entire constitutional system in order to create a 'new and virtuous Fourth Republic'. This meant a systemic and relentless annihilation of all independent powers that could check the will of the ultimate leader. In that respect,

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<sup>29</sup> I. Krastev, 'The Plane Crash Conspiracy Theory That Explains Poland', *Foreign Policy*, December 21, 2015. On April 10, 2016 at an event to commemorate the sixth anniversary of the crash, Jarosław Kaczyński said that "One wanted to kill our memory, as one was afraid of it. Because someone was responsible for the tragedy, at least in moral terms, irrespectively of what were its reasons...Donald Tusk's government was responsible for that." He added: "Forgiveness is necessary, but forgiveness after admitting guilt and administering proper punishment. This is what we need". 'Poland's Kaczyński blames Tusk's government for President's Jet Crash', *Business Insider*, April 11, 2016. In early October Kaczyński expressed his doubts that the Polish government will support Tusk for his second term in the European Council with the same explanation. See <https://www.ft.com/content/d6a93538-8a36-11e6-8cb7-e7ada1d123b1?ftcamp=crm/email/nbe/BrusselsBrief/product>

his role model is Viktor Orbán.<sup>30</sup> In 2011, PiS published a long document, authored largely by Kaczyński himself, on the party's and its leader's vision of the state. The main proposition of this paper is very similar to the one that Orbán described in his Kötöcsé speech in 2009: a well-ordered Poland should have a 'centre of political direction', which would enforce the true national interest. This illiberal counter-revolution of both Orbán and Kaczyński is based on a Communist rejection of checks and balances, as well as constitutionally entrenched rights.<sup>31</sup>

Unlike FIDESZ in 2011, PiS lacks the constitution-making or amending two-thirds majority in the parliament. Therefore, it started to act by simply disregarding the liberal democratic Constitution of 1997. The first victim was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS' legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly.<sup>32</sup>

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil Platform government, even though the nine-year terms of two of the judges would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in the five new judges elected by the old Sejm, despite the fact that the terms of office for three of them had already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose terms had not expired before the dissolution of the previous Sejm in October 2015 was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge

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<sup>30</sup> As early as 2011 Kaczyński announced he wanted to create 'Budapest in Warsaw.' Cf. J-W. Müller, 'The Problem with Poland', *The New York Review of Books*, February 11, 2016.

<sup>31</sup> Wojciech Sadurski, professor of constitutional law, who was the Kaczyński brothers' fellow student at the University of Warsaw in the 1970s says that this vision bears a striking resemblance to the writings of Stanislaw Ehrlich, their joint ex-Marxist professor. See W. Sadurski, 'What Make Kaczyński Tick?', *I•CONnect*, January 14, 2016.

<sup>32</sup> About the battle for the Constitutional Tribunal see T.T. Konciewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense', *I•CONnect*, December 6, 2015.

of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment regarding the organisation of the Tribunal, increasing the number of judges required to be in attendance from 9 out of 15 to 13 out of 15. It also required decisions of the Tribunal to be taken by a two-thirds majority, rather than a simple majority, which was the existing rule prior to the amendment. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary two-thirds majority to quash the new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which gives power to officials loyal to PiS to institute the dismissal of judges. In early March 2016, the Constitutional Tribunal invalidated all of the pieces of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect. As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of a deadlock with the government. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.<sup>33</sup>

At the end of 2016, the Polish parliament adopted three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President to

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<sup>33</sup> <http://www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangle>



replace the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in the Sejm, to assume their judicial duties suspended by the previous Tribunal President and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal. With this the Constitutional Tribunal has been captured.

In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the media. At the end of 2015, the PiS government introduced a new law, the so-called 'small media law', amending the former Law on Radio and Television Broadcasting. This amendment enabled the government to appoint and dismiss the heads of the public television and radio. According to the new rules, the presidents and members of the board of both institutions will be appointed and dismissed by the Minister of Treasury instead of the National Broadcasting Council from among multiple candidates. The new law also terminated the current managers' and board members' contracts with immediate effect, allowing the government to replace them. Since the 'small media law' was about to expire on 30 June 2016, the government in April submitted the 'large media law' to the Sejm. The draft bill planned to turn public broadcasters into 'national media', which would be obliged to spread the views of the Polish parliament, government and president, and have to 'respect Christian values and universal ethical principles'. The national media entities would be supervised by the newly established National Media Council. The Council of Europe published an expert opinion of the draft law on 6 June, calling for a number of changes. The report said that new law should ensure that members of the National Media Council were appointed in a transparent way, for instance after a public hearing of the candidates, and that the Council should act independently of political influence. The draft suggested that the Council would consist of six members appointed by the parliament and the president, only one of which upon the recommendation of the largest opposition group in the Sejm. On June 9, the government postponed a draft law that was to enter into force on 1 July in order to notify the EU about the far-reaching changes. In the meantime, a 'bridge law' was created to empower the New Media Council to supervise public media, with two of

five members recommended by the opposition.<sup>34</sup>

The third danger to PiS' 'centre of political direction' has been an apolitical civil service. Here Kaczyński, just like Orbán, started the complete politicization of the civil service by removing a previously existing rule that the new head of the civil service must be a person who has not been a member of a political party for the last five years. The same law also allows the new head to be appointed from outside the civil service. Another element of Orbán's agenda was to build up a surveillance state. In early February 2016, the new Polish Parliament also passed a controversial surveillance law that grants the government greater access to digital data and broader use of surveillance for law enforcement. On 13 June, the Venice Commission issued an opinion on this, criticising the government for exercising nearly unlimited capacities without adequate independent checks or reasonable limits to the law.<sup>35</sup>

The next target was the ordinary judiciary. In the summer of 2017, the government rushed three new legislative acts through the Polish Parliament: (a) The law on the Supreme Court; (b) the Law on the National Council for the Judiciary; and (c) the Law on the Ordinary Courts' Organisation. The first two laws were vetoed but the third adopted<sup>36</sup>. The latter alone is enough to undermine the independence of Polish courts by permitting the government to replace the leadership of the lower courts.

In early May 2016, Jarosław Kaczyński announced his party's aim to change the 1997 Constitution: 'the constitution must be verified every twenty years', hinting 'next year will be the 20<sup>th</sup> anniversary of Poland's contemporary basic law'. He admitted however that 'we might not find enough support to change the constitution this term, but it's time to start to work. We can ask Poles if they prefer Poland that we've all seen or the one that's ahead of us'.<sup>37</sup> A day later Polish President Andrzej Duda said the country's current constitution was a 'constitution of a time of transition', adding that 'it should be examined, a thorough evaluation carried out and a new solution

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<sup>34</sup> <https://euobserver.com/political/133761>

<sup>35</sup> [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e)

<sup>36</sup> As Wojciech Sadurski argued President Duda's bills tabled to replace the laws vetoed by him are as unconstitutional as the original ones. See W. Sadurski, 'Judicial „Reform” in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed', *Verfassungsblog*, 28 November 2017.

<sup>37</sup> <http://uatoday.tv/news/poland-may-soon-change-its-constitution-j-kaczy-ski-642126.html>

drawn up'.<sup>38</sup> On 3 May 2017, on the anniversary of the 1791 Polish constitution, President Duda announced that he wanted to hold a referendum in 2018 on the current constitution. His stated reason was that the present Polish people should decide what kind of constitution they wanted, how strong the president and parliament should be, and which rights and freedoms should be emphasized.<sup>39</sup> These references to a new basic law leave open how the party intends to circumvent the lack of the necessary two-thirds majority in the Sejm for constitution-making. But as critics argue, PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change to the constitution through sub-constitutional laws. Wojciech Sadurski calls this a constitutional coup d'état.<sup>40</sup>

### **Possible Explanations for Backsliding**

The main reasons for the turn away from constitutionalism in these two countries can be summarized as follows:

(a) Historically, in the East-Central European countries, there were only some unexpected moments - quick flourishes of liberal democracy - followed by equally quick acts to de-legitimise them. Examples include the short period after 1945, until the communist parties' took over, and after 1989, when liberal democracy again seemed to be the 'end of history'.<sup>41</sup> Otherwise, in the national histories of the Central and Eastern European countries, authoritarianism, such as the pre-1939 authoritarian Polish and Hungarian state, has played a much more important role.<sup>42</sup>

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<sup>38</sup> <http://www.thenews.pl/1/9/Artykul/251184,Polish-president-calls-for-constitution-to-be-reexamined>

<sup>39</sup> <http://foreignpolicy.com/2017/05/03/on-anniversary-of-first-constitution-polish-president-calls-for-referendum/>

<sup>40</sup> M. Steinbeis, 'What is Going on in Poland is an Attack against Democracy', Interview with Wojciech Sadurski, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

<sup>41</sup> 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

<sup>42</sup> See Slomo Avineri, Two Decades After the Fall: Between Utopian Hopes and the Burdens of History, *Dissent*, 30 September 2009.

As surveys on the links between modernisation and democracy show, a society's historic and religious heritage leaves a lasting imprint.<sup>43</sup> According to these surveys, the publics of formerly agrarian societies including Hungary and Poland emphasise religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasise secularism, cosmopolitanism, autonomy, and rationality.<sup>44</sup> Even modernisation's changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers at Jacobs University in Bremen and published by the German Bertelsmann Foundation.<sup>45</sup> According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the postcommunist transformation. Social cohesion is defined as the special quality with which members of a community live and work together. Hungary was ranked 27<sup>th</sup>, between Poland and Slovakia.

(b) Even though the transitions to democracy in both Hungary and Poland were driven by the fact that a large share of the population gave high priority to freedom itself, people expected the new states to produce speedy economic growth, through which Western living standards could be reached without painful reforms.<sup>46</sup> In other words, one can argue that the average Hungarian and Polish person looked to the West as a model in 1989, not so much in terms of its economic and political system, but rather in terms of living standards. Claus Offe, who predicted the possible backsliding effect of the economic changes and decline in living standards, warned that this could

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<sup>43</sup> See R. Inglehart & C. Welzel, 'Changing Mass Priorities: The Link between Modernization and Democracy', *Perspectives on Politics*, 2010, Vol. 8, No. 2, pp. 551-567.

<sup>44</sup> *Id.*, p. 553. Christian Welzel in his recent book argues that fading existential pressures open people's minds, making them prioritise freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand, persistent existential pressures keep people's mind closed, in which case they emphasise the opposite priorities. This is the utility ladder of freedom. Ch. Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation*, Cambridge University Press, 2013.

<sup>45</sup> D. Schiefer, J. van der Noll, J. Delhey, & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, <[www.bertelsmann-stiftung.de/bst/en/media/xcms\\_bst\\_dms\\_36378\\_\\_2.pdf](http://www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf)>

<sup>46</sup> As Ulrich Preuss argues, the satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that constitutions did not really make a difference. See U. K. Preuss, *Constitutional Revolution. The Link Between Constitutionalism and Progress*. Humanities Press. 1993, 3.

undermine the legitimacy of democratic institutions and turn back the process of democratization.<sup>47</sup> 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.

Trying to explain the attitudes of voters who support the authoritarian agendas of populist leaders such as Orbán and Kaczyński, Ronald Inglehart and Pippa Norris suggest that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasise nationalistic and xenophobic policies, reject outsiders, and uphold old-fashioned gender roles.<sup>48</sup>

(c) There was also a lack of consensus about liberal democratic values at the time of the transition. In the beginning of the democratic transitions in these new democracies, preference was given to general economic effectiveness over mass civic and political engagement.<sup>49</sup> The satisfaction of basic economic needs was so important for both ordinary people and the new political elites that constitutions did not really make a difference.<sup>50</sup> Between 1989 and 2004, all political forces accepted a certain minimalistic version of a ‘liberal consensus’, understood as a set of rules and laws rather than values, according to which NATO and EU accession were the main political goals. But as soon as the main political goals were achieved, the liberal consensus died,<sup>51</sup> and full democratic consolidation was never achieved.<sup>52</sup>

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<sup>47</sup> Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, 15.

<sup>48</sup> R. Inglehart and P. Norris, ‘Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash’, Faculty Research Working Paper Series, August 2016 RWP16-026

<sup>49</sup> Dorothee Bohle and Béla Greskovits state that East Central European democracies had a ‘hollow core’ at their inception. See Bohle and Greskovits 2012.

<sup>50</sup> See Preuss 1995, 3.

<sup>51</sup> See I. Krastev, ‘Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus’, 18. *Journal of Democracy*, (October 2007), 56-63.

<sup>52</sup> J. Dawson and S. Hanley, ‘What’s Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus’, 7 *Journal of Democracy*, (January 2016), 20-34.

(d) In addition, an initial failure of the 1989 constitutional changes also contributed both to Fidesz's and PiS' electoral victories, namely the disproportional election systems. In the case of Fidesz 53 percent vote share into 68 percent in 2010 and 45.5 percent into 67 percent of the seats in Parliament in 2014. This made Fidesz able to change the entire constitutional system after its electoral success in 2010. PiS in 2015 got 51 percent of the seats in the Sejm for 37.6 percent of the votes. With their absolute majority they were able to enact laws- after packing the Constitutional Tribunal even unconstitutional ones - without any need to consult with their parliamentary opposition.

(e) According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–90 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.<sup>53</sup> Adherents to this viewpoint argue 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, jeopardised the development of participatory democracy.<sup>54</sup> In other words, legal constitutionalism fell 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.<sup>55</sup>

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<sup>53</sup> 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.

<sup>54</sup> See R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, p. 4.

<sup>55</sup> Cf. Sadurski, 2005, p. 23.

The concept of civic or participatory constitutionalism is based on ‘democratic constitutionalism’ (James Tully), emphasising 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 a robust institutional linkage between civic associations and citizens and formal politics.

One can raise the hypothetical question whether earlier and more inclusive or participatory constitution-making processes could have ensured the durability of democratic institutions. Indeed, there was no early constitution making, and the amendment processes that happened instead were not participatory. Neither Poland nor Hungary enacted a new constitution right after the democratic transitions of 1989. Instead, in both countries as a result of the Round Table negotiations, between the representatives of the authoritarian Communist regime and their democratic opposition, the illegitimate legislature was put in the position of enacting modifications to the old Stalinist constitutions. This was done based on the elite agreement without any consultation with the people. In the case of Poland, the 1952 Constitution was slightly modified in April 1989, while in Hungary the 1949 Constitution was comprehensively amended in October 1989. This was called by Andrew Arato ‘post-sovereign’ constitution-making.<sup>56</sup> It is true that in Poland, the democratically elected Parliament enacted the so called Small Constitution in 1992, but it only changed some elements of the state organization, without the ambition of becoming the final closing act of the democratic transition. The new constitution was only enacted in 1997, again without participatory process, like a referendum. In Hungary, a similar new constitution-making effort failed in 1996, and even though the content of the 1989 comprehensive amendment fulfilled the requirements of a liberal democratic constitution, but its heading had 1949 in it. With that Fidesz after its electoral victory in 2010 could claim the need to enact a new constitution of the democratic transition and it had all the votes to enact what it was wishing to. But this wasn’t a liberal democratic constitution anymore.

One can only speculate, whether an earlier and more participatory constitution-making would have been a guarantee against backsliding. There is nothing to suggest

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<sup>56</sup> A. Arato, ‘Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?’, *South African Journal of Human Rights*, Vol. 26, 2010.

that an earlier and more participatory constitution-making process would have prevented the populist turn. As the Polish example proves even the existence of a liberal democratic constitution does not constitute an obstacle against backlash. In my view, those proponents of participatory constitutionalism who argue that with participation backsliding would not necessarily have happened, do not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, due to poor constitutional culture.<sup>57</sup>

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Despite the many similarities there also some differences between the illiberal constitutional systems and their circumstances in Hungary and Poland.<sup>58</sup> Besides the previously mentioned lack of constitution-making and amending power of PiS,<sup>59</sup> and consequently the presence of a liberal constitution in Poland, the chances of stopping the backsliding of liberal constitutionalism are better in Poland than in Hungary, which already has an illiberal constitution.

As regards internal differences, the parliamentary opposition to PiS, which was not as compromised as its Hungarian counterpart, is much stronger. FIDESZ's strongest challenger is the far-right Jobbik party, against which it is always easier to win elections, especially since FIDESZ fulfils the agenda of Jobbik. Civil society is also playing a crucial role in Poland, thanks to the more active opposition movement against the Communist regime. In fact, since the end of 2015, there have been constant civic demonstrations in Poland, which, with the exception of when the Orbán government was about to introduce an Internet tax, has not happened in Hungary. On the other hand, the exceptionally powerful Catholic Church in Poland seems to support the PiS government. FIDESZ can count on not only the public, but also the private media, which is mostly in the hands of their own oligarchs. Orbán's main

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<sup>57</sup> See similarly the critical reviews on Blokkers book (Fn. 53) by Jiri Priban and Bogusia Puchalska in ICONnect. *Book Review/Response: Paul Blokker, Jiri Priban and Bogusia Puchalska on Civic Constitutionalism*, Int'l J. Const. L. Blog (10 September 2013).

<sup>58</sup> About the more political differences see S. Sierowski, 'Pathetische Gesten', *Die Zeit*, 21. Januar 2016.

<sup>59</sup> Although in early 2015 FIDESZ lost its two-thirds majority by two votes, since then, with the exception of the mentioned failed amendment on constitutional identity, it was able to get these votes if it was necessary from the far right Jobbik party.



interest seems to be to build up a new financial oligarchy around himself, while Kaczyński is more ideological, including in his opposition to the EU. As Wojciech Sadursi put it, he and his people are not oligarchs, they pursue and really believe in the ideology of Poland as a proud sovereign state based on Catholic national identity. In other words, while the Polish system is ideology-driven, the Hungarian one only uses ideology.<sup>60</sup>

The main external difference is that while FIDESZ belongs to the European People's Party, the centre-right party faction in the European Parliament, and the EPP needs the votes of FIDESZ' MEPs to maintain its majority, PiS is a member of the much less important group of Conservatives, which makes the EU more committed to stand up to violations of EU values by the Polish government. One can argue that this hypothesis is difficult to reconcile with the Resolutions of the European Parliament of 10 June 2015 and 16 December 2015, especially paragraph 11 of the June resolution, which states that the EP: 'Urges the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary'. The fact that this was adopted by a majority in the European Parliament can suggest that a majority of MEPs are no less committed to standing up to Hungary than they are to Poland. Even though this is a mere speculation, I do not think that the two above-mentioned parliamentary resolutions urging the Commission to start the Article 7 procedure contradict the assumption that it did not happen because of FIDESZ' EPP membership. In deciding whether or not to take action, has taken into account the said faction membership. Not only the President of the Commission, who himself is a member of the EPP faction, but informally also influential national leaders belonging to the same party group could play an important role in influencing the Commission's (non-)action, even despite a resolution of the Parliament.

## **Conclusion: Present and Future of Constitutionalism in Poland and Hungary**

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<sup>60</sup> This is the main conclusion of a Polish-Hungarian comparative study as well. See B. Magyar – M. Mitrovits, 'Lengyel-magyar párhuzamos rendszerrajzok.' [Polish-Hungarian parallel system drawings], *Élet és Irodalom*, August 12 and 19, 2016.

Both in Hungary and Poland, the system of governance became populist, illiberal and undemocratic;<sup>61</sup> which was the openly stated intention of PM Orbán.<sup>62</sup> Also that time PM Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), have described their actions as a blitz to install an illiberal state.<sup>63</sup> The backsliding has happened through the use of ‘abusive constitutional’ tools: constitutional amendments and even replacements, because both the internal and the external democratic defence mechanisms against the abuse of constitutional tools failed.<sup>64</sup> The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

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<sup>61</sup> As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them ‘illiberal democracies’ we should describe them as illiberal and ‘undemocratic’ regimes. See J.-W. Müller, *The Problem With “Illiberal Democracy”* 2016.

<sup>62</sup> In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighbouring 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 abandon 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, than 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/>

<sup>63</sup> Sławomir Sierakowski, ‘The Polish Threat to Europe’, *Project Syndicate*, January 19, 2016.

<sup>64</sup> The category of ‘abusive constitutionalism’ was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, *Abusive Constitutionalism*.” 47 *UC Davis Law Review*, 2013. 189-260. Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal is reminiscent of the events in the years after the election of Jefferson, as the first anti-federalist President of the US. On 2 March 1801, the second-to-last day of his presidency, President Adams appointed judges, most of whom were federalists. The federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath, see B. Ackerman *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, Harvard University Press. 2007.

In this populist, illiberal system, the institutions of a constitutional state (the constitutional court, ombudsman, judicial or media councils) still exist, but their power is very limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary and constitutional court. To be clear, if the competences of the constitutional courts were very strong in the beginning of the transition, they can be weakened provided that they still are able to fulfil their function as a check on governmental power, or if other control mechanisms exist.

Although Hungary and Poland became liberal democracies on an institutional level, in Hungary after 1989, on a behavioural level, the consolidation of the system has always been very fragile. If one considers liberalism as not merely a limit on the public power of the majority, but also as a concept that encompasses the constitutive precondition of democracy - the rule of law, checks and balances, and guaranteed fundamental rights - then Hungary and Poland are not liberal democracies anymore. Since the victory of the current governing parties, almost all public power in both countries is in the hands of the representatives of one party. Freedom of the media and religious rights, among others, are seriously curtailed.

The problem with the Hungarian and Polish populist and illiberal constitutional systems is that the countries are currently members of the European Union, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course, the citizens of Hungary and Poland, as any other citizens of a democratic nation-state, have the right to oppose joint European measures, for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There are still a significant number of people who either consider themselves to be supporters of liberal democracy, or at least represent views which are in line with liberal democracy. But if Hungarians and Poles ultimately opt for a non-liberal system, they must accept certain consequences, including parting from the European Union and the wider community of liberal democracies.

The behaviour of the Hungarian government, supported by the other three Visegrád countries, among them Poland during the refugee crisis, has taught us that the

strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of liberal democratic constitutionalism. We have also learned that membership in the European Union is not a guarantee for maintaining the liberal democratic regimes in all Member States. Unfortunately, an outsized fear of threats, physical and social, lately, for instance, the refugee crisis, strengthened populist illiberal systems, such as Turkey and authoritarian regimes, such as Russia all over Europe. The same tendency can be observed in the cases of Hungary and Poland even inside the EU,<sup>65</sup> not to mention the consequences of the Trump presidency in the US.<sup>66</sup> The division between the old and the new Member States has been strengthened, but the support of the far-right parties has been increased even in the old Member States.<sup>67</sup> Since the EU institutions have proven incapable of enforcing compliance with core European values at least two populist/illiberal Member State have emerged in the EU, which cannot be considered constitutional democracies anymore. The current Hungarian and Polish constitutional systems were made possible by the governing parties' anti-pluralist nationalist populism, but one can hope that it is not necessarily based on a true commitment of the people to anti-constitutionalist ideas, and that the populist governments were only able to misuse the countries' lack of constitutional culture.

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<sup>65</sup> At a conference in the Polish town of Krynica in mid-September 2016, Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit, the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favour of the nation states. Sławomir Sierakowski even speaks about an 'illiberal international'. See Sierakowski 2016.

<sup>66</sup> The success of Donald Trump, an authoritarian presidential candidate in the US can be explained with the same reasons. See A. Taub, 'The Rise of American Authoritarianism', *Vox*, 1 March 2016. About the socio-psychological causes of authoritarianism, see Bob Altemeyer's work, which is based on Adorno's 'fascist personality concept explains the "authoritarian personality"' with authoritarian submission, authoritarian aggression, and conventionalism. Cf. B. Altemeyer, 'The other "authoritarian personality"' *Advances in Experimental Social Psychology* 30: 47-92 1998.

<sup>67</sup> Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of 'authoritarian liberalism'. See M. Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union.* 14 *German Law Review* 14. 2013, 527.