

CHAPTER 15

A Coup Against Constitutional Democracy

The Case of Hungary

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Abstract

The paper deals with the Hungarian ‘constitutional counter-revolution’, which was directed against liberal constitutionalism introduced by 1989 transitional constitution. The 2010 elections was called by Viktor Orbán, the leader of the winner Fidesz party as a ‘revolution of the ballot boxes’. His intention with this revolution was to eliminate all checks and balances, and even the parliamentary rotation of governing parties. Since 2012 his 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 been entrenched in a new constitution.

The paper argues that this current Hungarian constitutional system was made possible by FIDESZ’ anti-pluralist nationalist populism, and commitment to an ‘illiberal state’. To achieve this aim the populist government misuses the country’s lack of constitutional culture, and violates the values of constitutional democracy in the name of its own understanding of ‘national constitutional identity’.

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Hungary was one of the first and most thorough political transitions after 1989, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably the model case, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements. The current Hungarian constitutional system was made possible by FIDESZ' anti-pluralist nationalist populism. To achieve this aim the populist government misuses the country's lack of constitutional culture, and violates the values of constitutional democracy in the name of its own understanding of 'national constitutional identity'.

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.¹ 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 rubber stamped the comprehensive amendment to the Constitution, which went into effect in October 1990, and which was the basic document of the 'constitutional revolution.' Similar 'post-sovereign'²

¹ The terms 'single' and 'dual' transitions are used by Przeworski. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: 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 Claus Offe, *Varieties of Transition: The East European and East German Experience* (New York: MIT Press, 1997).

² Andrew Arato, "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?," *South African Journal of Human Rights* 26 (2010): 19–44.

or ‘pacted constitution-making’³ process happened in Spain in the end of the 70s and in South Africa from the beginning through the middle of the 90s.

Both the state-party and the opposition were motivated in not leaving the establishment of the transition’s constitutional framework to a new constitution by the fear that they could lose the democratic elections. Thus the 1989 constitutional amendment inserted new content into the 1949 framework, which can be considered as a rule of law document, even if the Rákosist-Kádárist skeleton lolls out sometimes, especially concerning the unchanged structure of the chapters, starting with the state organization, following by the fundamental rights parts. Apparently, the negotiations-based drafting explains that the old-new constitution principally follows the model of a consensual democracy widely accepted in the continental European systems. The system of government, which assumes the presence of more than two parties in the Parliament and a coalition-governance, at the same time meant that the parties knowingly rejected both the semi- or full presidential regime that was preferred by the Communists and was applied in many post-communist countries, and also the English Westminster-type of two-party parliamentarism. If compared to the Western European solutions, the decision-making process set up in 1989-90 has another distinctive characteristic that obviously could be explained by the legacy of the forty-year long totalitarian regime: it is not only based on the consensus among the coalition parties, but in some cases it requires the involvement of the opposition, and it significantly strengthens the checks on the governmental powers. As regards the acts requiring two-third of majority, hence the support of the opposition, in their original forms as “acts with the force of the Constitution” practically called for a two-third quorum in all questions concerning the structure of the government and fundamental rights.

The other decisive element of the new constitutional system was a very strong judicial review power. The first Constitutional Court led by László Sólyom expressly followed an activist approach in the interpretation of the Constitution, which was laid down in the concept of the ‘invisible constitution’ elaborated in his concurring opinion to the decision on the death penalty: “The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its

³ The term is used by Michel Rosenfeld, *The Identity of the Constitutional Subject* (New York: Routledge, 2010).

decisions, which as an ‘invisible Constitution’ provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore, this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions”.⁴ Therefore, Sólyom, and many academics argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court make a new constitution unnecessary.

This constitutional system without the second step of a post-sovereign constitution-making process, namely a final liberal democratic constitution seemed to work for more than 20 years, until FIDESZ’s overwhelming electoral victory in 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 country⁵. The centre-right FIDESZ strengthened these feelings by claiming that there had been no real transition in 1989-90; the previous nomenclatura 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 election 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 Viktor 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

⁴ Decision 23/1990. (XII. 31.) AB

⁵ 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.). European Commission, *Eurobarometer: Public Opinion in the European Union*, 2009.

of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, 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 center 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. The new constitutional order was built with the votes of his 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.⁶

⁶ 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 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, *Kossuth Rádió*, July 5, 2013, <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.

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 affect the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, 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 independence of the judiciary was dealt with the constitutional amendment, in which have changed the appointment and reassignment process for judges. The Transitory Provisions to the Fundamental Law reduced the retirement age for judges on ordinary courts from 70 to 62, starting on the day the new constitution went into effect. This change forced somewhere between 274 judges into early retirement. Those judges include six of the 20 court presidents at the county level, four of the five appeals court presidents and 20 of the 80 Supreme Court judges. According to the cardinal law on the status of the churches the power to designate legally recognized churches is vested in the Parliament itself. The law has listed fourteen legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). As a result, the vast majority of previously registered churches have been deprived of their status as legal-entities.

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, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. 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 were 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 harmonized domestic rights protection to comply with European human rights law. This made it possible for PM Orbán to raise the possibility of the reintroduction of the death penalty, declared unconstitutional by the Constitutional Court in 1990, or threaten with retroactive political justice despite a 1992 ban by the Court. 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 and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

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 the amendment to the electoral system, secured again two-thirds majority⁷. In early 2015, FIDESZ lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the openly anti-Semitic, anti-Roma far-right Jobbik party, which in 2007 established the paramilitary organization Magyar Gárda, 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

⁷ In December 2011 the Parliament enacted a controversial election law with its gerrymandered electoral districts, making the electoral system even more disproportional, which favoured the governing party in the elections to come. The main changes in the system were as follows: shift to the majoritarian principle, by increasing the proportion of single-member constituency mandates, eliminating the second round, introducing relative majority system instead of the absolute majority, and introducing "winner-compensation".

‘illiberal democracy’ became a genuinely popular idea in Hungary⁸.

What we do know is that since the 1989 democratic transition, the Hungarian people have not yet subscribed to ‘constitutional patriotism,’⁹ 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 based on their on historical experiences. 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’¹⁰.

The Hungarian system of governance became populist, illiberal and undemocratic¹¹;

⁸ J-W. Müller, “Taking ‘Illiberal Democracy’ Seriously,” *Public Seminar*, July 21, 2017, <http://www.publicseminar.org/2017/07/taking-illiberal-democracy-seriously/>.

⁹ 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 Jan-Werner Müller, *Constitutional Patriotism* (Princeton: Princeton University Press, 2007).

¹⁰ In 2016 the Orbán government argued with Hungary’s ‘national constitutional identity’ to defy the resolution of European Council to relocate asylum seekers within the Member States of the EU. See Gábor Halmai, “From a Pariah to a Model? Hungary’s Rise to an Illiberal Member State of the EU,” *European Yearbook of Human Rights*, ed. Wolfgang Benedek et al. (Vienna: NWV, 2017).

¹¹ 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 Jan-Werner Müller, “The Problem With ‘Illiberal Democracy’,” *Project Syndicate*, January 21, 2016, <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accessreg>.

this was PM Orbán's openly stated intention¹². The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacements, because both the internal and the external democratic defense mechanisms against the abuse of constitutional tools failed.¹³ The internal ones (constitutional courts, judiciary) failed because

¹² In a speech delivered on July 26, 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 Viktor Orbán, "Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014," *Budapest Beacon*, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

¹³ The category of 'abusive constitutionalism' was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (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

the new regime 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.

CAUSES OF DEMOCRATIC BACKSLASH

The main reasons for the turn away from constitutionalism in Hungary are 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-legitimize 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'.¹⁴ Otherwise, in the national histories of the Central and Eastern European countries, authoritarianism, such as the pre-1939 authoritarian Hungarian state, has played a much more important role¹⁵.

As surveys on the links between modernization and democracy show, a society's historic and religious heritage leaves a lasting imprint¹⁶. According to these surveys, the

impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath, see Bruce Ackerman, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge, MA: Harvard University Press, 2007).

¹⁴ 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.

¹⁵ Shlomo Avineri, "Two Decades After the Fall: Between Utopian Hopes and the Burdens of History," *Dissent*, September 30, 2009, https://www.dissentmagazine.org/online_articles/two-decades-after-the-fall-between-utopian-hopes-and-the-burdens-of-history.

¹⁶ Ronald Inglehart and Christian Welzel, "Changing Mass Priorities: The Link between Modernization and Democracy," *Perspectives on Politics* 8 (2010): 551–567.

publics of formerly agrarian societies, including Hungary, emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality.¹⁷ Even modernization'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.¹⁸ The study social cohesion examined in 34 countries in the EU and the OECD. Social cohesion is defined as the special quality with which members of a community live and work together. Hungary was ranked 27th, between Poland and Slovakia.

(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, but especially to 'market freedom', which meant that people expected the new state to produce speedy economic growth, with which the country could attain the living standards of the West overnight, without painful reforms¹⁹. In other words, one can argue that the average Hungarian person

¹⁷ Inglehart and Welzel, 553. Christian Welzel in his recent book argues that fading existential pressures open people's minds, making them prioritize 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 emphasize the opposite priorities. This is the utility ladder of freedom. Cf. Christian Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation* (New York: Cambridge University Press, 2013).

¹⁸ David Schiefer, Jolanda van der Noll, Jan Delhey and Klaus Boehnke, *Cohesion Radar: Measuring Cohesiveness* (Bertelsmann Foundation 2013), https://www.bertelsmann-stiftung.de/fileadmin/files/Projekte/Gesellschaftlicher_Zusammenhalt/englische_site/further-downloads/social-cohesion/Social_Cohesion_2012.pdf.

¹⁹ 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

looked to the West as a model in 1989, not so much in terms of its economic and political systems, but rather in terms of living standards. As Hannah Arendt argued, it is impossible to establish a republic based on freedom without the liberation from poverty and misery²⁰. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, warning that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.²¹ This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclatura, 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 confiscated properties, were reasons for disappointment.

Trying to explain the attitudes of voters who support authoritarian populist leaders such as Orbán, Ronald Inglehart and Pippa Norris suggests 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 emphasize nationalistic and xenophobia agendas, reject outsiders, and uphold old-fashioned gender roles²².

Ulrich Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress* (Atlantic Highlands, NJ: Humanities Press, 1993), 3.

²⁰ Arendt quotes Sain-Just: “if you wish to found a republic, you first must pull the people out of a condition of misery, which corrupts them.” Hannah Arendt, “What Freedom and Revolution Really Means, Thoughts on Poverty, Misery, and the Great Revolutions of History,” *The New England Review*, 2017.

²¹ Cf. Claus Offe, “Designing Institutions for East European Transitions,” *Institut für Höhere Studies* (1994), 15, https://www.ihs.ac.at/publications/pol/pw_19.pdf.

²² Ronald F. Inglehart and Pippa Norris, “Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash,” *Harvard Faculty Research Working Paper Series*, August 2016, <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>.

(c) According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 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.²³ Adherents to this viewpoint argue that the legalistic form of 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.²⁴ In other words, legalistic 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-government²⁵.

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 a robust institutional linkage between civic associations and citizens and 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. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and

²³ See this argument in Paul Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (London: Routledge, Taylor & Francis Group, 2014). 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 Wojciech Sadurski, “Transitional Constitutionalism: Simplistic and Fancy Theories,” in *Rethinking the Rule of Law After Communism*, ed. Adam W. Czarnota, Martin Krygier and Wojciech Sadurski (Budapest: CEU Press 2005), 9–24.

²⁴ See Richard Albert, “Counterconstitutionalism,” *Dalhousie Law Journal* 31 (2008): 1, 4.

²⁵ See Sadurski, “Transitional Constitutionalism,” 23.

globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.²⁶

(d) 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.²⁷ 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.²⁸ 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 was the main political goal. But as soon as the main political goals were achieved, the liberal consensus died²⁹, and full democratic consolidation was never achieved³⁰.

A POPULIST ILLIBERAL SYSTEM

If from the large range of definitions of populism, we use the one provided by Mudde and Kaltwasser, who define populism as a 'thin-centered ideology that considers society to be

²⁶ See the reviews on Blokker, *New Democracies in Crises?* by Jiri Priban and Bogusia Puchalska, *ICONnect*, September 2013, www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism.

²⁷ Dorothee Bohle and Béla Greskovits state that East Central European democracies had a 'hollow core' at their inception. See Dorothee Bohle and Béla Greskovits, *Capitalist Diversity on Europe's Periphery* (Ithaca: Cornell University Press, 2012).

²⁸ See Preuss, *Constitutional Revolution*, 3.

²⁹ Ivan Krastev, "Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus," *Journal of Democracy* 18 (2007): 56–63.

³⁰ James Dawson and Seán Hanley, "What's Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus," *Journal of Democracy* 7 (2016): 20–34.

ultimately separated in two homogeneous and antagonistic camps, ‘the pure people’ and the ‘corrupt elite,’ and which argues that politics should be an expression of the ‘volonté générale’ (general will) of the people’³¹, the Hungarian constitutional system became a populist one. This populism rejects the basic principles of constitutional democracy³², understood as limited government, governed by the rule of law, and protecting fundamental rights³³. In Hungary we can also detect the main characteristics of populism, described Luigi Corrias on popular sovereignty, as well as its approach to constitutional identity³⁴.

For popular sovereignty, as Corrias argues, populism holds the belief that ‘the people’ is a unit, and that, as such, it is present in the polity often only through the means of direct democracy, such as referenda. Particularly while in opposition, for populist, such as Orbán, representation merely serves as a tool to give voice to the unity³⁵. But as Pinelli rightly points out, contemporary populists, especially being on government, do not necessarily reject representation, nor do they necessarily favour the use of referenda.³⁶ For instance, Orbán’s FIDESZ party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections. He refused to concede defeat, declaring that ‘the nation cannot be in opposition, only the government can be in opposition against its own people’. After the 2010 electoral victory, he claimed that through the ‘revolution at the voting booths’, the majority

³¹ Cas Mudde and Rovira C. Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 6.

³² See Cesare Pinelli, “The Populist Challenge to Constitutional Democracy,” *European Constitutional Law Review* 7 (2016): 5–16, 6.

³³ See these ‘essential characteristics’ of constitutional democracy in Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy,” *Southern California Law Review* 74 (2001): 1307–1352, 1307.

³⁴ Luigi Corrias, “Populism in a Constitutional Key: Constituent Power, Popular Power, Popular Sovereignty and Constitutional Identity,” *European Constitutional Law Review* 12 (2016): 6–26, 12.

³⁵ *Ibid.*, 18–19.

³⁶ See Pinelli, “Populist Challenge,” 11.

has delegated its power to the government representing it. This means that the populist government tried to interpret the result of the elections as the will of the people, viewed as a homogenous unit. Also, the Orbán government, which after overthrowing its predecessor in 2010 as a result of a popular referendum, made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 percent of the voters to cast a vote, the new law requires at least 50 percent of those eligible to vote to take part, otherwise the referendum is invalid³⁷. The ambivalence of Orbán towards representation and referenda in government and in opposition applies to his attitude regarding established institutions. While he readily attacked the ‘establishment’, while in opposition, he very much protects his own governmental institutions. The situation is different with transnational institutions, like the EU, which are also attacked by the Hungarian populist governments as threats to their countries’ sovereignty. A good example is the Hungarian Parliament’s reaction to the European Parliament’s critical report from July 2013 on the constitutional situation in Hungary. The Hungarian parliamentary resolution on equal treatment reads: “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.” These words very much reflect the Orbán government’s view of ‘national freedom’, 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 unconsolidated help from strangers who are keen to guide us...Hungary must turn

³⁷ It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated – one against the EU’s migration policy - failed. 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 ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

on its own axis”.³⁸

The other element of populist constitutional theory, according to Corrias, is constitutional identity as collective selfhood. Here populists have the tendency to reject what they perceive as threats to the constitutional identity of the people by immigrants, refugees and minorities³⁹. This is the reason that as early as May 2015, a few days after many hundreds of refugees had drowned in the Mediterranean Sea, Orbán announced that ‘We need no refugees’, arguing that Europe does not need immigrants at all, that the European Union should be sealed off and defended against intruders by the army, and that it should not overreach its immigration and refugee policies. Rather, the Member States should formulate their own policies and deal with their unwanted immigrants as they saw fit. In the summer of 2015, the Hungarian government left thousands of refugees to languish in fields and on the streets, forcibly herded others into squalid detention camps, and fired water cannons and teargas at refugees gathered against the razor fence it had erected, first on its border with Serbia, and later with Croatia, another EU Member State. Orbán, styling himself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion, managed to encourage other eastern European governments to follow his example.

To legitimate this policy against Hungary’s unwanted immigrants, the government announced it would hold a ‘national consultation’. The government sent out eight million questionnaires to the voting-age population, with questions like these: “Do you agree that mistaken immigration policies contribute to the spread of terrorism? In your opinion did Brussels’ policies on immigration and terrorism fail? Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps?”

³⁸ 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/beszed/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*, March 16, 2012, <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.

³⁹ See Corrias, “Populism in a Constitutional Key,” 13.

The Hungarian government, after the above-mentioned failed referendum, introduced the Seventh Amendment to defend Hungary's constitutional identity and politically legitimise non-compliance with EU law in this area. Since the proposed amendment fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law, 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 an abandoned petition of the also loyal Commissioner for Fundamental Rights filed a year earlier, before the referendum was initiated, and ruled 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". 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". Because sovereignty and constitutional identity are in contact with each other in many points, "their control should be performed with due regard to each other in specific cases"⁴⁰.

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. But the curtailment of the Court's jurisdiction clearly serves to eliminate its control function altogether, and has nothing to do with political constitutionalism, or all of the concepts rejecting strong judicial review, or judicial review

⁴⁰ For a detailed analysis of the decision see Gábor Halmai, "Nationa(ist) Constitutional Identity?: Hungary's Road to Abuse Constitutional Pluralism," EUI Working Papers, 2017/08, <http://cadmus.eui.eu/handle/1814/46226>.

altogether.⁴¹ Political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from each other significantly, emphasize the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them reject the main principles of constitutional democracy, as populists in the Hungarian government do. Similarly, in contrast to those who describe a new model of constitutionalism, based on deliberation between courts and the legislator, with the latter retaining the final word, in the Hungarian constitutional system the parliamentary majority not only decides every single issue without any dialogue, but there is practically no partner for such a dialogue, as the independence of both the ordinary judiciary and the Constitutional Court has been silenced.

CONCLUSION

Although Hungary became a liberal democracy on an institutional level 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 as also a concept that encompasses the constitutive precondition of democracy - the rule of law, checks and balances, and guaranteed fundamental rights - then Hungary is not a liberal democracy anymore. Since the 2010 victory of the current governing FIDESZ party, all of the public power is in the hands of the representatives of one party. Freedom of the media and religious rights, among others, are seriously curtailed. And before the 2014 parliamentary elections, the electoral system became unfair, ensuring again a two-thirds majority for FIDESZ in the Hungarian parliament.

The problem with the Hungarian populist and illiberal constitutional system is that the country is currently a member 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, 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

⁴¹ See the opposite view Lucia Corso, "What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions," *Rivista di filosofia del Diritto* (2014): 443–469.

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 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.