‘Populist Constitutionalism’ and Judicial Review

The Case of Hungary

A. Introduction

The paper deals with recent deviations from the shared principles of constitutionalism, such as the limited government, the adherence to rule of law, and guaranteed fundamental rights, especially through substantially limiting the review powers of constitutional courts and packing them. This backsliding towards a kind of ‘populist, illiberal constitutionalism’ was introduced by a new constitution in Hungary, and followed in Poland by the constant violation the country’s 1997 liberal democratic constitution. After discussing the more theoretical relationship between populism and constitutionalism, the paper describes the fate of judicial review in Hungary (and in Poland for that matter) after the democratic backsliding, followed by a delimitation of the populist treatment of judicial review from the concept of political constitutionalism, and approaches of weak judicial review.

B. Populism and Constitutionalism in East-Central Europe

The theoretical question that these changes raise is whether populism and illiberalism are reconcilable with constitutionalism at all. Due to my focus on the Hungarian case (and also mentioning Poland), I shall concentrate on a particular version of populism, which is nationalist and illiberal, and mainly present in the countries of East-Central Europe. Most of these countries are also members of the European Union, a value community based on liberal democratic constitutionalism. The arguments set forth below about East-Central European populist constitutionalism in this paper do not necessarily apply to other parts of Europe.

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1 See a similar description of the new East-Central European populism in a recent paper by Bojan Bugaric. (Bugaric 2017). Bugaric claims that this anti-liberal populism is not necessarily anti-democratic. In this article I argue that it is.
(Greece and Spain), Latin-America (Bolivia), or the US, where populism has a different character and its relationship to constitutionalism is distinct from the Hungarian and the Polish cases.

The relationship between populism and constitutionalism has proven difficult to define. Before highlighting different views on ‘populist constitutionalism’ let me anticipate my own view on this. I thing that the special East-Central European variation of populism is rather authoritarian, anti-pluralist, and therefore has nothing to do with liberal constitutionalism, and only uses constitutionalism or constitutional theory for that matter as a tool to legitimate itself and hide its real authoritarian nature. From the large range of definitions of populism, I use the one provided by Mudde and Kaltwasser, who define populism as a ‘thin-centered ideology that considers society to be 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.”² Some scholars argue that populism rejects the basic principles of constitutional democracy,³ understood as limited government, governed by the rule of law, and protecting fundamental rights⁴. Luigi Corrias argues that populism’s mostly implicit constitutional theory contains three main claims: one concerns the nature of constituent power, the second involves the scope of popular sovereignty, and the third relates to its approach to constitutional identity.⁵

Regarding constituent power, populists claim not only that it belongs to the people, but also that it is almost absolute, and is potentially being exercised directly in the polity. The absolute primacy of the constituent power of the people applies also vis-à-vis the constitution, which is in contradiction with the concept of the constitution being a ‘higher law’. Unlike liberal

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constitutionalism, populists claim not only that the power to create a constitution belongs to the people alone, that is, that the people have a monopoly over the original or primary *pouvoir constituant*; but also the derivative or secondary constitutional amending power, which, for them, means that the power of the people to amend it is unlimited. This also means an absolute primacy of politics over the rule of law. By not accepting the authority of the law, populists reject the dualism of law and politics, the common characteristic of both the American and French revolutions, and the German and British evolutionary approaches to constituent power. 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. Representation merely serves as a tool to give voice to the unity. But as Pinelli rightly points out, contemporary populists do not necessarily reject representation, nor do they necessarily favour the use of referenda. For instance, Viktor 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 motherland (haza) 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 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. But the reference to the people’s will is often only rhetoric of populists. The Orbán government, which in 2010 came to power by overthrowing its predecessor as a result of a popular referendum, after coming to power 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 invalid. The ambivalence of

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6 Corrias, *ibid*, 16.
7 Corrias, *ibid*, 18-19.
8 Pinelli, *ibid*, 11.
9 https://mno.hu/migr_1834/a-haza-nem-lehet-ellenzekben-781904
10 Law No. of 2013 on CCXXXVIII of 2013 on referendum It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated 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
populists towards representation and referenda in government and in opposition applies to their attitude regarding established institutions. While they readily attack the ‘establishment’, while in opposition, they very much protect their own governmental institutions. The situation is different with transnational institutions, like the EU, which are also attacked by populist governments as threats to their countries’ sovereignty. A good example is again 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 on its own axis.”

Orbán repeated the same populist, nationalistic mantra at the plenary debate of the European Parliament on 11 September 2018, when defying the Sargentini report, on the basis of which the Parliament launched Article 7 TEU proceedings against Hungary: “…you are not about to denounce a government, but a country and a people. You will denounce the Hungary, which has been a member of the family of Europe's Christian peoples for a thousand years; the Hungary which has contributed to the history of our great continent of Europe with its work and, when needed, with its blood. You will denounce the Hungary which rose and took up arms against the world's largest army, against the Soviets, which made the highest sacrifice for freedom and democracy, and, when it was needed, opened its borders to its East German brothers and sisters in distress. Hungary has fought for its freedom and democracy. I stand 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.

11 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, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.
here now and I see that Hungary is being arraigned by people who inherited democracy, not needing to assume any personal risk for the pursuit of freedom. [...] the report before you is an affront to the honor of Hungary and the Hungarian people. Hungary's decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves.”

The third 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 minorities (Corrias, 2016, 13). This is the reason why 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 (hereinafter: Commissioner), 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”.


13 For a detailed analysis of the decision see (Halmai, The Abuse of Constitutional Identity The Hungarian Constitutional Court on the Interpretation of Article E) (2) of the Fundamental Law, Forthcoming)
Paul Blokker understands popular constitutionalism as a form of constitutional critique and ‘counter-constitutionalism’ rather than an outright denial of liberal constitutionalism and the rule of law. Similar to Ernesto Laclau’s argument that the rise of populism is a consequence of the denigration of the masses,14 Blokker claims that the populist critique of liberal constitutionalism does invoke relevant critical dimensions of the current democratic malaise, and populists claim to represent and give voice to the ‘pure’ people15. According to Blokker, this critical stance towards liberal constitutionalism is related to a Schmittian understanding of the constitution, and to Carl Schmitt’s critique of liberal constitutionalism and its conception of the rule of law. As is well-known, the constitution in Schmitt’s view is an expression of ‘the substantial homogeneity of the identity and the will of the people’, and guarantee of the state’s existence, and ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. In other words, in Schmitt’s view the basis of the constitution is ‘a political decision concerning the type and form of its own being’, made by the people as a ‘political unity’, based on their own free will. This political will ‘remains alongside and above the constitution’.16 Schmitt also portrays the people as an existential reality as opposed to mere liberal representation of voters in parliament, holding therefore that Mussolini was a genuine incarnation of democracy.

According to Mudde and Kaltwasser, populists critique elitist, judicial constitutionalism and endorse the participation of ordinary citizens in constitutional politics.17 In a more recent work they argue that populism, by holding that nothing should constrain ‘the will of the (pure)

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14 E. Laclau, On Populist Reason. Verso, 2005


16 C. Schmitt, Constitutional Theory, Duke University Press, 2008, 125-126. This idea is also shared by a part of the, otherwise not populist, French constitutional doctrine, influenced by Rousseau’s general will. This is the reason that the representatives of this doctrine hold that during a constitutional transition a referendum is sufficient to legitimate a new constitution. See the French Constitutional Council’s approval of De Gaulle’s 1962 amendment to the 1958 Constitution, ignoring the Constitution’s amendment provisions. Thanks to Théo Fournier, who called my attention to this.

people’, is democratic\(^{18}\), but at odds with liberal democracy, which rejects the notion of pluralism.\(^{19}\) Although they admit that populism can develop into illiberal democracy, they also claim that it is not populism but rather nativism that is the basis for excluding those who they contend are not the ‘real people.’\(^{20}\) This understanding of populism presupposes that democracy can be liberal or illiberal (electoral), the latter having a number of institutional deficits that hinder respect for the rule of law and exhibit weaknesses in terms of independent institutions seeking the protection of fundamental rights.\(^{21}\) 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 rule of law, checks and balances, and guaranteed fundamental rights. In this respect, there is no such a thing as an ‘illiberal democracy,’\(^{22}\) or for that matter anti-liberal or non-liberal democracy. Those who perceive democracy as liberal by definition also claim that populism is inherently hostile to values associated with constitutionalism: checks and balances, constraints on the will of the majority, fundamental rights, and protections for minorities. Those sceptical about populist constitutionalism have a different understanding of populism, as a distinctly moral way to understand the political world, which necessarily involves a claim to exclusive moral representation. This means, as Jan-Werner Müller argues, that this moralistic vision of politics is not just anti-elitist, but it also and foremost anti-pluralist.\(^{23}\) But, as Müller also claims, since


\(^{20}\) Similarly, Tjitske Akkerman argues that not populism, but authoritarian nationalism, is the real threat to democracy. See T. Akkerman, ‘Authoritarian Nationalism, Not Populism Is Real Threat to Democracy’ Social Europe. 9 August, 2017.


democracy, which must be pluralist, is an institutionalized uncertainty, populists destroy
democracy itself by promising certainty through the use of their own constitutions to make
their image of the people and what they regard as the morally right policies as certain as
possible.24 Another consequence of the exclusionary moral and ideological position of
populism is that it rests on an essentialist concept of citizenship, which classifies people as
citizens who are members of the political community on the basis of their political and social
views or their ideological commitments, as opposed to the traditional pluralist liberal concept
of citizenship that rests on the place of birth, residence, or the citizenship of parents.25

Interestingly enough, in another of Paul Blokker’s works, he argues that, ‘while populism can
be situated within a modern democratic tradition of constitutionalism, it produces a distorted
version, which leads to an undoing of its democratic potential and pushes the populist project
towards democratic dictatorship.’26 According to Blokker, the ‘really existing’ populist
constitutionalism, such as those of Poland and Hungary, is not at all universalistic and
inclusionary, and stands in stark contrast to democratic constitutionalism. In other words,
Blokker acknowledges that the distorted Hungarian and Polish populism can lead to
‘democratic dictatorship’, but it is still considered as a form of constitutionalism, because its
key instrument is the constitution.27

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24 J.-W. Müller, The People Must be Extracted from Within the People: Reflections on Populism 2014. Müller
distinguishes the deeply problematic populist constitutionalism from a legitimate form of popular
constitutionalism. Regarding the distinction he refers to C. Brettschneider, ‘Popular Constitutionalism contra

25 Alon Harel argues that in Israel, populism rests on the essentialist characterization of citizenship. See A.

26 P. Blokker, ‘Populism as a Constitutional Project.” ‘Public law and New Populism’, Workshop. NYU School
of Law, 2017.

27 Blokker, ibid. Besides the proposition that a dictatorship can be democratic, also the claim that the use of the
constitution as an instrument is a sufficient condition of constitutionalism is highly contested. While most of the
’really existed’ communist regimes used constitutions to legitimise their systems, the current Polish populist
regime, which does not have a two-thirds majority in parliament, uses extra-constitutional tools to dismantle
constitutional democracy.
In my view, the special East-Central European authoritarian populist understanding of the constitution opposes limits on the unity of power, adherence to the rule of law, and the protection of fundamental rights, as the main components of constitutionalism. The term ‘populist constitutionalism’ seems to me to be an oxymoron altogether. 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. As Mattias 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. Consequently, I equate constitutionalism with liberal democratic constitutionalism. 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, but I do not agree with the use of the term ‘authoritarian constitutionalism’ or ‘constitutional authoritarianism.’ Besides the constitutions in the Communist countries, both current

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28 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/](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. S. Holmes, ‘Constitutions and Constitutionalism,’ in M. Rosenfeld and A. Sajó (eds.) *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press.2012, 189-216.


30 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.


theocratic and communitarian constitutions are considered as illiberal. 34 Theocratic constitutions, in contrast to modern constitutionalism, do not reject secular authority. 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 rather than the individual freedom principle of liberalism. But in these illiberal polities, just like in the Hungarian and the Polish one, to be discussed below, there is no constitutionalism. To sum up my own opinion about the discussed different views on ‘populist constitutionalism,’ I thing in the countries of East Central Europe, I discuss in this paper, there is no such thing. The populist leaders, such as Orbán and Kaczynski may use constitutionalism as rhetoric, but they deny to concept of constitutionalism, as their aim is to build up and maintain an authoritarian regime.

C. Silencing Constitutional Review

The weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the centre-right FIDESZ party in the 2010 parliamentary elections. After the 2015 parliamentary election in Poland, the Law and Justice Party (PiS) also followed the playbook of Viktor Orbán, and started to capture first the Constitutional Tribunal. What happened in Hungary resonates with some less successful, similar attempts to weaken constitutional review in other East-Central European countries that took place roughly around the same time. In the Summer of 2012 there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there. 36 Since 2014 there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has


35 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.

been working two—and since February 2016 three—judges short, because the President of the Republic refuses to fill the vacancies.37

But there is a more successful follower of the Hungarian playbook, how to dismantle constitutional review: Jaroslav Kaczynski’s governing party (PiS) and its government in Poland. The first victim of PiS’ capture of the constitutional system 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.38

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 term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them has 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 term were not yet over by 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 of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment to the organization of the Tribunal, increasing the number of judges that have to be present in a ruling from 9 to 13 out of 15. As


opposed to the previous simple majority, decisions of the Tribunal will be taken by a 2/3 majority. 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 2/3 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 the government disputing the content of certain judgment. 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.39

In 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 replacing 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 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. This is what Wojciech Sadurski calls a constitutional coup d’etat.\footnote{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/} The next step of the coup was to dismantle judicial independence altogether, and its main targets have been the Supreme Court, the ordinary courts and the National Council for the Judiciary.\footnote{The reasoned proposal of the European Commission in accordance with Article 7(1) TEU regarding the rule of Law in Poland dated on 20 December 2017 proposes to the Council to recommend to Poland to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution, as well as to guarantee judicial independence. European Commission, Brussels, 20.12.2017 COM(2017) 835, 2017/0360 (APP)}

\section{Shrinking Jurisdiction and Standing}

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.\footnote{See a detailed discussion of the laws M. Bánkuti, G. Halmai and K.L. Scheppele, ‘From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitutions (together with Miklós Bánkuti and Kim Lane Schepple), In: Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law, CEU Press, 2012.} These laws affect the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, elections to Parliament, and most importantly the functioning of the Constitutional Court.

The Fundamental Law of 2011 has changed 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.

The considerable restriction on ex-post control has caused great controversy in Hungary and abroad. The withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that financial laws typically cannot breach. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled. This also clearly represents a breach of the guarantees, set out in Article 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respect of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court’s powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the actio popularis, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two decades or more this unique instrument has provided, not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that they regard as unconstitutional. It could of course be argued that this toolkit has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that has been achieved and which now diminishing.
Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament. This makes any such petitions much more difficult, since the government is hardly about to make use of this opportunity against their own bills, while a quarter of MPs’ votes would assume a coalition between the two democratic opposition parties and the extremist right-wing party, which supports the government.\(^{43}\)

The cardinal Act on the Constitutional Court, passed in October 2011 decided on the fate of the several hundred petitions that are already lying in the court’s in-tray, submitted in the form of an *actio popularis* by private individuals entitled to do so prior to the entry into force of the Fundamental Law, but who will be subsequently divested of this right. It applies the *in malam partem* retroactive effect, so willingly applied by the present government in other cases, also came into play here with the result that the Constitutional Court does not pass judgement on previously submitted petitions.

Private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions.

**II) The Constitutional Court’s Packing**

\(^{43}\) Indeed, in 2012 it was only the ombudsman, who filed such petitions in 35 cases (12 petition files were still pending earlier, and there were 23 new ones). The Constitutional Court decided on 11 of these cases, 6 cases in favour of the petitions, and 5 rejections. There are still 24 petitions pending. See: Ombudsmani indítványok az Alkotmánybíróság előtt. (Petitions of the ombudsman before the Constitutional Court) http://www.jogiforum.hu/hirek/28922
There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating constitutional court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from eleven to fifteen, which makes it possible to select five more new judges, after the two judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous nine; in other words, for three parliamentary cycles. In future the president of the constitutional court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes could not wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the new members were selected at the end of July based on an amendment to the existing constitution, passed in 6 July 2011, and also the Parliament re-elected the same President, who was previously elected by his peers.  

III) Levelling Down the Constitutional Court’s Case Law

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

44 See: http://www.parlament.hu/rom39/03199/03199.pdf
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. 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

D) Political versus Populist Constitutionalism

Although these populist, illiberal tendencies are escorted by the limitation of the powers of
constitutional courts, I do not consider them as manifestations of political constitutionalism,
based on republican philosophy, or of those concepts that reject strong judicial review. The
attempts by some scholars and constitutional court justices both in Hungary and Poland to
interpret the new constitutional system with the change of concept from legal to political
constitutionalism. In my view, these interpretations are rather efforts to legitimize the
silencing of judicial review. One of the ‘fake judges’ of the Polish Constitutional Tribunal, the
late Lech Morawski, emphasized the republican traditions, present both in Hungary and
Poland, mentioning the names of Michael Sandel, Philip Pettit and Quentin Skinner.\textsuperscript{45} Also,
constitutional law professor, Adam Czarnota explains the necessity of the changes, with the
argument that “legal constitutionalism alienated the constitution from citizens”\textsuperscript{46}. In Hungary,
István Stumpf, constitutional judge, nominated without any consultation with opposition
parties by the new FIDESZ right after the new government took over in 2010, and elected
exclusively with the votes of the governing parties’ votes, in his book arguing for a strong


\textsuperscript{46} A. Czarnota, ’The Constitutional Tribunal, Verfassungsblog On Matters Constitutional, 3 June 2017.
state claimed the expansion of political constitutionalism regarding the changes. From the scholarly literature, Attila Vincze argues that the decision of the Constitutional Court accepting the Fourth Amendment to the Fundamental Law, which among other things also invalidated the entire case-law of the Court prior to the new constitution is a sign of political constitutionalism prevailing over the legal one.

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 populist do. Even Richard D. Parker, who announced a “constitutional populist manifesto” wanted only to challenge the basic idea, central to constitutional law, ‘that constitutional constrains on public power in a democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize, and release it’.

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. Those scholars realize that parliamentary sovereignty tends to be increasingly restrained, either legally or


49 Analysing Thomas Mann’s novel Mario and the Magician, written in 1929, Parker draws the conclusion for today that ‘the point is to get out and take part in politics ourselves, not looking down from a ‘higher’ pedestal, but on the same level with all of the other ordinary people.’ (Parker, 1993, 583.) A similar message can be detected in the interview with Mark Lilla, a conservative liberal professor of the humanities at Columbia, who on the day after Donald Trumps presidential victory declared: ‘One of the many lessons of the recent presidential election and its repugnant outcome is that the age of identity liberalism must be brought to an end’. (Lilla, 2016). Later, in an interview on the topic of the most effective tools against the President’s populism, he emphasized the importance that opponents find a way to unify: ‘we have to abandon the rhetoric of difference, in order to appeal to what we share’. (Remnick, 2017)

50 See (Gardbaum, 2013) about the new model. This model has also come to be known by several other names: 1) ‘weak-form of judicial review’ (Tushnet, Alternative Forms of Judicial Review, 2003), or just ‘weak judicial review’ (Waldron, 2006), ‘the parliamentary bill of rights model’ (Hiebert, 2006), ‘the model of democratic dialogue’ (Young, 2009), ‘dialogic judicial review’ (Roach, 2004), or ‘collaborative constitution’ (Kavanaugh, 2016).
politically, and that the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituent*, conceived as the unrestrained “will of the people,” even in cases of regime change or the establishment of substantially and formally new constitutional arrangements (Fusaro és Oliver 2011). In contrast to these new trends, 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.

Following Tamás Györfi’s theory there are three different forms of weak judicial review, each of them is lacking one of the defining features of strong constitutional review, but all of them want to strike a balance between democracy and the protection of human rights that differs from the balance struck by the ‘new constitutionalism’ of strong judicial review.\(^5^1\) Firstly, judicial review is limited if the constitution lacks a bill of rights, as is the case in Australia. Second, judicial review is deferential if courts usually defer to the views of the elected branches, as in the Scandinavian constitutional systems, or are even constitutionally obliged to do so, as in Sweden and Finland. Finally, and probably most importantly, the Commonwealth model of judicial review, where courts are authorized to review legislation, but the legislature has the possibility to override or disregard judicial decisions.\(^5^2\)

In my view neither the Polish nor the Hungarian model fits to any of these approaches to weak judicial review, as their aim is not to balance democracy and the protection of fundamental rights. As I tried the prove these systems do not comply with the requirements of constitutional democracy, consequently they do not want to limit the power of the government, do not adhere to the rule of law, and do not guarantee fundamental right. Their constitutional system cannot be considered as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.\(^5^3\) This means that the new Hungarian


\(^{53}\) Bruce Ackerman distinguishes between three models of democracy: monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and there impose limits, and dualist, which
constitution and the Polish constitutional practice do not comply with either of the above discussed models of government, which are based on different concept of separation of powers. The more traditional model creations of government forms are based on the relationship between the legislature and the executive. For instance Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while of the second the continental European parliamentary, as well as the U.S. presidential system. Giovanni Sartori speaks about presidentialism and semi-presidentialism, as well as about two forms of parliamentarism, namely the premiership system in the UK, and Kanzlerdemokratie in Germany, and the assembly government model in Italy. Bruce Ackerman besides the Westminster and the US separation of powers systems, uses the constrained parliamentarism model as a new form of separation of power, which has emerged against the export of the American system in favour of the model of Germany, Italy, Japan, India, Canada, South Africa and other nations, where both popular referendum and constitutional courts constrains the power of the parliament.

Hungary and Poland from 1990 till 2010 and 2015 respectively belonged to the consensual and constrained parliamentary systems, close to the German Kanzlerdemokratie, in Poland with a more substantive role of the President of the Republic. But in Hungary the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints of the parliamentary power. In Poland, due to the legislative efforts of the PiS government the 1997 Constitution became a sham document. In both countries, the system has moved towards an absolute parliamentary sovereignty model without the cultural constrains of the Westminster form of government. Not to mention the fact that in the last decades the traditional British model of constitutionalism has also been changed drastically with the introduction of bill of rights by left-of-centre governments (and opposed by right-of-centre opposition parties in Canada (1982), New Zealand (1990), the United Kingdom (1998), the

finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See B. Ackerman, 1992a, pp. 6-16.


Australian Capital Territory (2004) and the State of Victoria (2006). Contrary to the traditional Commonwealth model of constitutionalism in the new Commonwealth model the codified bill of rights became limits on the legislation, but the final words remained in the hands of the politically accountable branch of government. In this respect this new Commonwealth model is different from the judicial supremacy approach of the US separation of powers model, as well from the European constrained parliamentary model. The biggest change occurred in the UK, and some even talk about the “demise of the Westminster model”. The greatest deviation from the system of unlimited Parliamentary sovereignty was the introduction of judicial review. In just over two decades, the number of applications for judicial review nearly quadrupled to over 3,400 in 2000, when the Human Rights Act 1998 came into effect in England and Wales. The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention of Human Rights. This does not allow UK courts to strike down, or ‘disapply’, legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility (under section 4.2). Then it is up to the government and Parliament to decide how to proceed. In this sense the legislative sovereignty of the UK Parliament is preserved. Some academics argue that, although as a matter of constitutional legality, Parliament may well be sovereign, as a matter of constitutional practice it has transferred significant power to the judiciary.

Others go even further and argue that although the Human Rights Act 1998 is purported to reconcile the protection of human rights with the sovereignty of Parliament, it represents an unprecedented transfer of political power from the executive and legislature to the judiciary.

Besides the mentioned Commonwealth countries a similar new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994 contains a “notwithstanding” provision, similar to the Canadian one. The new model of Commonwealth constitutionalism is

based on a dialogue between the judiciary and the parliament.\textsuperscript{61} But also comparative constitutional studies conclude that parliamentary sovereignty tends to be restrained either legally or politically more and more, and the last decades have witnessed less and less scope for the exercise of traditional \textit{pouvoir constituant} conceived as unrestrained ‘will of the people’, even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.\textsuperscript{62} In contrast to these new trends, in the Hungarian and Polish constitutional system the parliamentary majority not only decides every single issue without any dialogue, but practically there is no partner for such a dialogue, as the independence of both the ordinary judiciary and the constitutional courts have been silenced. To sum it up, the remainders of the Hungarian (and Polish) constitutional review has nothing to do with any types of political constitutionalism or weak judicial review approach, which all represent a different model of separation of powers. In the authoritarian Hungarian (and in Polish) sham system of constitutionalism there is no place for any kind of separation of power.

\textbf{Conclusion}

Both in Hungary and Poland, the system of governance became populist, illiberal and undemocratic\textsuperscript{63}; which was openly stated intention of PM Orbán,\textsuperscript{64} and also former PM Beata Szydlo (with Kaczyński,

\begin{footnotesize}
\begin{enumerate}


\item 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.

\item 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.
\end{enumerate}
\end{footnotesize}
ruling from behind the scenes as he holds no official post), have described their actions as a blitz to install an illiberal state.\textsuperscript{65} 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.\textsuperscript{66} The internal ones, among them first and foremost the constitutional courts failed because the new regimes managed to abolish their powers to checks on them, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

In this populist, illiberal system the institutions of a constitutional state, such as the constitutional courts 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 constitutional court. And this has nothing to do with political constitutionalism or the concept of weak judicial review, only with the authoritarian ambitions of political leadership of these countries to keep their power as long as possible.

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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/


\textsuperscript{66} 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.