3

Illiberal Constitutionalism in East-Central Europe

GÁBOR HALMAI

In section I of this chapter I try to answer the question whether there is a genuine constitutional theory of 'illiberal constitutionalism', recently advocated in some East-Central European Member States of the European Union (EU), especially in Hungary and Poland. Section II focuses on some attempts in legal and political scholarship to legitimise 'illiberal constitutionalism' in general, and unchecked governance, the dismantling of constitutional review and the non-compliance with European values in particular.

I. IS THERE SUCH A THING AS 'ILLIBERAL OR NON-LIBERAL CONSTITUTIONALISM'?

A. Populist Autocrats against Liberal Democracy and Constitutionalism

In a speech delivered on 26 July 2014, before an ethnic Hungarian audience in the neighbouring Romania, Prime Minister Viktor Orbán proclaimed his intention to turn Hungary into a state that 'will undertake the odium of expressing that in character it is not of liberal nature'. Citing as models he added:

> We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world … Today, the stars of international analyses are Singapore, China, India, Turkey, Russia … and if we think back on what we did in the last four years, and what we are going to do in the following four years, then it really can be interpreted from this angle. We are … parting ways with Western European dogmas, making ourselves independent from them … If we look at civil organizations in Hungary … we have to deal with paid political activists here … [T]hey would like to exercise influence … on Hungarian public life. It is vital, therefore, that if we would like to reorganise our nation state instead of it being a 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 the Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests.[1]

Four years later at the same venue Orbán again expressed his support for illiberal democracy, adding that he considers Christian democracy as illiberal as well:

> There is an alternative to liberal democracy: it is called Christian democracy … Let us confidently declare that Christian democracy is not liberal. Liberal democracy is liberal, while Christian democracy is, by definition, not liberal: it is, if you like, illiberal.[2]

In June 2019, after Fidesz was suspended from the centre-right party family, the European People's Party set up a special committee to examine the Fidesz party's adherence to democratic standards. One of the questions the members of the committee, comprising former Austrian Chancellor Wolfgang Schüssel, former European Council President Herman Van Rompuy and former European Parliament President Hans-Gert Pöttering, addressed to Viktor Orbán was 'Please explain what you mean by the expression "illiberal state".' Here is the response of the Fidesz chairman and Hungarian Prime Minister:

> We are Christian democrats and we are differing nowadays at least in three aspects from the liberals: The first one is the conviction that family is fundamental, and family is based on one man and one woman. We believe that this needs to be protected, which the liberals deny. Secondly, while the cultural life of every country is diverse, a Leitculture, a cultural tradition is present everywhere. In Hungary this is Christian culture. We respect other cultures, but our own has a prominent role for us, and it is our responsibility to preserve it. Liberals refuse this concept. The third aspect is that liberal democrats are everywhere pro-immigration while we are against immigration. So, whether one admits it or not: Christian democrats are illiberal by definition.[3]

In a conversation with the French philosopher Bernard-Henry Lévy, Orbán identified liberalism with totalitarianism, and illiberalism with true democracy:

> Liberalism gave rise to political correctness – that is, to a form of totalitarianism, which is the opposite of democracy. That's why I believe that illiberalism restores true freedom, true democracy.[4]

[1] See Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, *Budapest Beacon* (29 July 2014) available at http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

[2] See Prime Minister Viktor Orbán's Speech at the 28th Bálványos Summer Open University and Student Camp, *Tusnádfürdő (Băile Tuşnad)*, 28 July 2018, available at www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/.

[3] The leaked letter has been published by Politico at www.politico.eu/article/viktor-orban-rejects-epp-concerns-rule-of-law/.

[4] B-H Lévy, 'How an Anti-totalitarian Militant Discovered Ultranationalism. After 30 years, I spoke with Viktor Orbán again' *The Atlantic* (13 May 2019).

In July 2019, in the yearly Băile Tuşnad/Tusnádfürdő Free University, Orbán admitted that 'illiberalism' carries a negative connotation, and therefore he changed the terminology, calling illiberalism 'Christian liberty', which according to him is 'a genuine model of a theory of state, a unique Christian democratic state'. He made it clear, however, that 'Christian liberty does not mean individual liberty, because individual freedoms can never encroach on the interests of the community. There is indeed a majority that must be respected, that is the foundation of democracy.'[5]

In a speech delivered in mid-September 2019 at the 12th Congress of the Association of Christian Intelligentsia, Orbán said that 'Christian liberty' is superior to the individual liberty – defined by John Stuart Mill in his 'On Liberty' – which can only be infringed upon if the exercise of one's liberty harms others. Christian liberty, by contrast, holds that we ought to treat others as we want to be treated.[6] The teachings of 'Christian liberty' – he added – maintain that the world is divided into nations. As opposed to liberal liberty, which is based on individual accomplishments, the followers of 'Christian liberty' acknowledge only those accomplishments that also serve the common good. While liberals are convinced that liberal democracies will eventually join together to form a world government à la Immanuel Kant in the name of liberal internationalism, Christian liberty by contrast considers 'nations to be as free and sovereign as individuals are, and therefore they cannot be forced under the laws of global governance'.[7]

In the system 'Christian liberty', Hungary has a special place:

> We shouldn't be afraid to declare that Hungary is a city built on a hill, which, as is well known, cannot be hidden. Let's embrace this mission, let's create for ourselves and show to the world what a true, deep, and superior life can be built on the ideal of Christian liberty. Perhaps this lifeline will be the one toward which the confused, lost, and misguided Europe will stretch its hand. Perhaps they will also see the beauty of man's work serving his own good, the good of his country, and the glory of God.[8]

[5] See at www.miniszterelnok.hu/yes-to-democracy-no-to-liberalism/. As Yale law and history professor Samuel Moyn pointed out, President Trump has also begun to nudge the political culture to the same direction. He quoted Sohrab Ahmari, a conservative journalist, who approvingly explained Trump's policy as re-ordering the common good and ultimately the 'Highest Good', that is, the Christian God – Moyn argues. See S Moyn, 'We Are in an Anti-Liberal Moment. Liberals Need Better Answers' *The Washington Post* (21 June 2019).

[6] See at www.miniszterelnok.hu/orban-viktor-beszede-a-kereszteny-ertelmisegiek-szovetsegenek-kesz-xii-kongresszusan/. This time the webpage of the Prime Minister, besides the original Hungarian text of the speech, contains no English but only a German-language translation, available at www.miniszterelnok.hu/viktor-orbans-rede-auf-dem-kongress-des-verbandes-der-christlichen-intellektuellen-kereszteny-ertelmisegiek-szovetsege-kesz/.

[7] ibid.

[8] ibid. As Éva S Balogh points out, this passage is taken from the Gospel of Matthew (5:13–15), without identifying it. See ÉS Balogh, 'Orbán, the New Jesus Delivers His Sermon on the Mount' *Hungarian Spectrum* (15 September 2019) available at https://hungarianspectrum.org/2019/09/15/orban-the-new-jesus-delivers-his-sermon-on-the-mount/.

Another new element of the speech is that Orbán puts 'Christian liberty' at the centre of the 'Christian democratic state', 'a new and authentic model of state and political theory', which has been reached in the last 30 years by the taking of two big steps. The first has been the liberal democratic transition in 1989, while the second, more important one is the national or Christian regime change in 2010.

Regarding the new constitutional order, introduced by the 2011 Fundamental Law of Hungary, Orbán admitted 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.[9]

Orbán also refused the separation of powers, checks and balances as concepts alien to his illiberal constitutional system, saying 'Checks and balances is a US invention that for some reason of intellectual mediocrity Europe decided to adopt and use in European politics.'[10] The ideological foundation of Orbán's illiberalism can be found in the works of his two court ideologues, the sociologist and former liberal MP Gyula Tellér, and András Lánczi, a political scientist. It is easy to prove that Orbán, in his 2014 speech on 'illiberal democracy', recited a study by Tellér published earlier on that year, which Orbán assigned as compulsory reading for all his ministers.[11] Tellér claims that the 'system of regime-change' has failed because the liberal constitution did not commit the Government to protecting national interests, therefore the new 'national system' has to strengthen national sovereignty, and with it the freedom of degree of government activity. This, Tellér argues, is necessary to counter the moral

[9] 'A Tavares jelentés egy baloldali akció' ('The Tavares report is a leftist action'), Interview with PM Viktor Orbán on Hungarian Public Radio, Kossuth Rádió, 5 July 2013.

[10] Interview with *Bloomberg News*, 14 December 2014. Similarly, Tünde Handó, head of the National Judicial Office, a close ally of Orbán, said '[t]he rule of law over the State, like, for example, in the United States, is not the right way'. See at https://nepszava.hu/3029940_hando-nem-kell-a-birosagoknak-szembehelyezkedniuk-az-allammal.

[11] See G Tellér,' Született-e Orbán-rendszer 2010 és 2014 között?' [Was an Orbán System Born between 2010 and 2014?], NAGYVILÁG, March 2014.

command of the liberal rule of law regime, according to which 'everything is allowed that does not harm others' liberty'.

Lánczi's anti-liberal concept can be found in his book *Political Realism and Wisdom*, which was published in English in 2015, as well as in an article published in 2018, after Fidesz' third consecutive electoral victory.[12] Lánczi's critique is an outright rejection of liberalism as a utopian ideology, which is – similar to communism – incompatible with democracy.

Like Orbán, the then Prime Minister Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post) described the actions of the PiS Government in dismantling the independence of the Constitutional Tribunal and the ordinary courts as a blitz to install an illiberal state. In mid-September 2016, at a conference in the Polish town of Krynica, Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the EU into an illiberal project. A week later at the Bratislava EU summit, the prime ministers of the Visegrád Four countries demanded a structural change of the EU in favour of the nation states.[13] Witold Waszczykowski, Poland's Minister of Foreign Affairs, expressing his own and his governing PiS Party's anti-liberalism, went as far as to mock liberalism as 'a world made up of cyclists and vegetarians, who only use renewable energy and fight all forms of religion'.[14]

Ryszard Legutko, the main ideologue and MEP of PiS, similarly to his Hungarian counterpart, Lánczi, also likens liberal democracy with communism, both being fuelled by ideas of modernisation and progress, arguing that liberalism – in its 'sterility' – has little if anything to say about substantive, human moral questions; indeed liberalism is 'comparably simplistic and equally impoverishing as communist thought was'.[15] Another critique of liberalism expressed by Legutko is its inauthenticity, 'being more and more remote from reality'.[16] As Paul Blokker observes, Lánczi makes a similar point in his *Political Realism and Wisdom*, that liberalism fails to engage with reality.[17] According to Legutko, a further problem with liberalism is that it drives egalitarianism, which renders 'all social hierarchies as immediately problematic because they were obviously, not natural'.[18] In his communitarian reading, human rights become 'arbitrary claims, ideologically motivated, made by various political groups in

[12] See A Lánczi, 'The Renewed Social Contract – Hungary's Elections' (2018) 9 *Hungarian Review* at www.hungarianreview.com/article/20180525_the_renewed_social_contract_hungary_s_elections_2018. For a detailed analysis of Lánczi's arguments, see KL Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism' (2019) 3 *German Law Journal* 314.

[13] S Sierakowski even speaks about an 'illiberal international'. See S Sierakowski, 'The Polish Threat to Europe' *Project Syndicate* (19 January 2016).

[14] See at www.bild.de/politik/ausland/polen/hat-die-regierung-einen-vogel-44003034.bild.html.

[15] See R Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (New York, Encounter Books, 2016) 118.

[16] ibid 13.

[17] P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) 15 *European Constitutional Law Review* 519, fn 18.

[18] See Legutko (n 15) 132.

blatant disregard of the common good, generously distributed by the legislatures and the courts, often contrary to common sense and usually detrimental to public and personal morality'.[19]

In Poland, besides Legutko, Marek Cichocki, Marcin Król, Dariusz Gawin, Zdzislaw Krasnodebski and Lech Morawski are recognised as prominent illiberal intellectuals.[20] The late Lech Morawski, who was one of PiS's illegally appointed judges of the Constitutional Tribunal, harshly criticised the 'liberal state, in which the political system is based on the individualistic concept of rights as trump card against community (R Dworkin)'.[21]

Both Lánczi and Legutko assert, together with other anti-liberals, with one voice, that liberalism and communism, or for that matter its ideology, Marxism, are secretly allied and share a common ancestry in that they are two offshoots of an Enlightenment tradition. Legutko also accuses liberalism of a tendency to root out all forms of inequality, and asserts that human rights – as legal norms that promote equality – become 'arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good'.[22]

This anti-liberal political theory is present outside East-Central Europe as well. For instance, Patrick Deneen's book[23] is directed at the left in the US, targeting both contemporary progressivism and the 'classical liberalism' of conservatives. The Israeli political theorist Yoram Hazony in his book[24] also criticises those conservatives who defend liberal democracy. The common goal of all these thinkers is to conflate liberal democracy with contemporary progressivism, and thus to suggest that conservatives should have no interest in supporting or defending liberal democracy.[25]

This critique of liberalism goes back to the concept of *Volksgemeinschaft* (national community), or *völkisches Recht*, one of the core principles of National Socialist law, which can be characterised negatively by rejection of the individualistic, normative concept of the people (*Volk*) as the sum of nationals of the state, as presented in the 1918 Weimar Constitution.[26] *Volksgemeinschaft* together with the *Führerprinzip*, the other main principle

[19] ibid 140.

[20] See B Trencsényi, M Kopecek, LL Gabrielcic, M Falina and M Baár, *A History of Modern Political Thought in East Central Europe*, vol II: *Negotiating Modernity in the 'Short Twentieth Century and Beyond* (Oxford, Oxford University Press, 2018).

[21] L Morawski, Contribution to Symposium 'The Polish Constitutional Crisis and Institutional Self-defense', Trinity College, University of Oxford (9 May 2017).

[22] Legutko (n 15) 135. In a recent article, Paul Blokker characterises both Legutko and Lánczi as conservative intellectuals who have provided ideas for the conservative populist project, and an important contribution to rethinking/re-imagining constitutional democracy in the contemporary European context. See Blokker (n 17) fn 18.

[23] P Deneen, *Why Liberalism Failed* (New Haven, CT, Yale University Press, 2018).

[24] Y Hazony, *The Virtue of Nationalism* (New York, Basic Books, 2018).

[25] See M Plattner, 'Illiberal Democary and the Struggle on the Right' (2019) 30 *Journal of Democracy* 5, 16–17.

[26] About the role of Volksgemeinschaft in National Socialist law, see O Lepsius 'The Problem of Perceptions of National Socialist Law or: Was There A Constitutional Theory of National Socialism?' in C Joerges and N Singh Ghaleigh (eds), *Darker Legacies of Law in Europe*.

of National Socialist *Weltanschauung*, aim to overcome individualism, hence meaning strong anti-liberalism. Given Carl Schmitt's well-known flirtation with National Socialism, it is not surprising that the critical stance of the new illiberals towards liberal constitutionalism is also related to a Schmittian understanding of the constitution, and to his critique of liberal constitutionalism and its conception of the rule of law.[27] The constitution in Schmitt's view is an expression of 'the substantial homogeneity of the identity and the will of the people', and a guarantee of the state's existence, and ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. The absolute authority of the political will of the people overrides all constitutional requirements, which according to Schmitt are signs of depoliticisation tendencies caused by liberal democracies. This is the reason that he elaborated 'The concept of the Political'[28] (*das Politisches*), based on the distinction between friend and enemy, which is precisely the opposite of liberal neutrality.[29]

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'.[30] Schmitt also portrays the people as an existential reality as opposed to the mere liberal representation of voters in parliament, holding, therefore, that Mussolini was a genuine incarnation of democracy. Schmitt goes so far as to claim the incompatibility of liberalism and democracy, and argues that plebiscitary democracy based on the homogeneity of the nation is the only true form of democracy. But Schmitt is talking about these intermittent plebiscites as a tool to tap the resource of consent by the governed within a 'qualitative' and strong totalitarian state, the authority of which rests on the military and the bureaucracy, and which cannot accept the existence of political opposition.[31] In other words, the strong state cannot be liberal.[32]

The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Oxford, Hart Publishing, 2003) 19–41.

[27] As Heiner Bielefeld demostrates, Carl Schmitt systematically undermines the liberal principle of the rule of law. See H Bielefeld, 'Deconstruction of the Rule of Law. Carl Schmitt's Philosophy of the Policial' (1996) 82 *Archiv für Rechts- und Sozialphilosophy* 379, 396.

[28] C Schmitt, *The Concept of the Political* (Chicago, IL, University of Chicago Press, 2007).

[29] See H Bielefeld, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism' (1997) X *Canadian Journal of Law and Jurisprudence* 67.

[30] See C Schmitt, *Constitutional Theory* (Durham, NC, Duke University Press, 2008). This idea is also shared by a part of the French constitutional doctrine, influenced by Rousseau's general will. This is the reason why 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.

[31] See C Schmitt, '*Legalität and Legitimität*' in *Verfassungsrechtliche Aufsätze* (Berlin, Duncker & Humblot, 1958) 93–94. Quoted by A Somek, 'Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933–1938 and Its Legacy' in Joerges and Singh Ghaleigh (eds) (n 26) 375.

[32] Regarding the revival of Carl Schmitt in the Hungarian political and constitutional theory, see A Antal, 'The Rebirth of the Political – A Schmittian Moment in Hungary', transcript of the lecture given at the Constitutional Systems in Middle Europe, the cycle of meetings about political ideas of

As Mattias Kumm argues, Carl Schmitt's interpretation of democracy, inspired by Rousseau and used by authoritarian populist nationalists like Viktor Orbán as 'illiberal democracy', becomes an anti-constitutional topos.[33] The Hungarian political scientist, András Körösényi, implementing the Weberian concept, calls the Orbán regime a 'plebiscitary leader democracy', where the activity of the leader (or Führer? – GH) is posteriorly approved by the people; but since this approval can be withdrawn, this is still a democratic system.[34] In contrast, Wojciech Sadurski, using Guillermon O'Donnell's 'delegative democracy' concept, characterises the Polish system after 2015 as 'plebiscitary autocracy', in which the electorate approves of governmental disregard of the constitution.[35] In Hungary, even the electoral approval is manipulated, hence the formal democratic character of the regime can also be questioned. This leads Larry Diamond to call the Hungarian system 'pseudo-democracy'.[36]

Tadeusz Mazowiecki organised by Polska Fundacja im. Roberta Schumanaon, 6 November 2017, Warsaw, available at www.academia.edu/35061692/The_Rebirth_of_the_Political__A_Schmittian_Moment_in_Hungary_Transcript_of_Lecture?email_work_card=thumbnail. Also Z Balázs, 'Political Theory in Hungary After the Regime Change' (2014) 7 *International Political Anthropology* 5. On Schmitt's influence on the Polish constitutional discourse, see D Bunikowski, 'The Crisis in Poland, Schmittian Questions, and Kaczyński's Political and Legal Philosophy', available at www.academia.edu/31450497/The_crisis_in_Poland_and_Schmittian_questions_in_the_rule_of_law_debate.

[33] M Kumm, 'Demokratie als verfassungsfeindlicher Topos' *Verfassungsblog*, 6 September 2017, at https://verfassungsblog.de/demokratie-als-verfassungsfeindlicher-topos/.

[34] See A Körösényi, 'Weber és az Orbán-rezsim: plebiszciter vezéremokrácia Magyarországon' [Weber and the Orbán-regime: Plebisciter Leader Democracy in Hungary], *Politikatudományi Szemle*, 2017/4, 7–28. In a more recent interview, however, Körösényi admitted that for the withdrawal of approval, currently a miracle is needed. See *Csak a csoda segít* [Only a Miracle Helps], hvg, 20 June 2019.

[35] See W Sadurski, *Poland's Constitutional Breakdown* (Oxford, Oxford University Press, 2019) 242–43. Similarly, Juan José Linz, to avoid confusion, proposes the addition of adjectives to 'authoritarianism' rather than to 'democracy' for such regimes, eg 'electoral authoritarianism'. See JJ Linz, *Totalitarian and Authoritarian Regimes* (Boulder, CO, Lynne Rienner, 2000) 34. Also, Larry Diamond refers to 'electoral authoritarianism' in hybrid regimes. See L Diamond, 'Thinking About Hybrid Regimes' (2002) 13 *Journal of Democracy* 21, 24.

[36] 'The test of a democracy is not whether the economy is growing, employment is rising, or more couples are marrying, but whether people can choose and replace their leaders in free and fair elections. This is the test that Hungary's political system now fails. When Viktor Orbán and his Fidesz party returned to power in 2010 with a parliamentary supermajority, they set about destroying the constitutional pillars of liberal democracy … By the 2014 elections, Orbán had rigged the system. Yes, multiparty elections continued, but his systematic degradation of constitutional checks and balances so tilted the playing field that he was able to renew his two-thirds majority in parliament with less than a majority of the popular vote (and did so again in 2018) … Orbán has transformed Hungary into not an illiberal democracy but a pseudo-democracy.' See L Diamond, 'How Democratic Is Hungary?', *Foreign Affairs*, September/October 2019. Similarly, Steven Levitsky and Lucan Way recently argued, 'Clearly, Hungary is not a democracy. But understanding why requires a nuanced understanding of the line between democracy and autocracy … Orbán's Hungary is a prime example of a competitive autocracy with an uneven playing field': S Levitsky and L Way, 'How autocrats can rig the game and damage democracy' *The Washington Post* (4 January 2019). See also A Bozóki and D Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union' (2018) 25 *Democratization* 1173.

B. Authoritarian Populism as a Rhetoric

The illiberal regimes in Central and Eastern Europe manifest themselves as populist, using anti-representation and pro-direct democracy arguments. But in reality this is only rhetoric, which does not necessarily correspond with these populists' practice. For instance, Viktor Orbán's Fidesz party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections.[37] 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 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 homogeneous unit. Also, the Orbán Government, after overthrowing its predecessor as a result of a popular referendum in 2010, made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 per cent of the voters to cast a vote, the new law required at least 50 per cent of those eligible to vote to take part, otherwise the referendum would be invalid.[38] The ambivalence of authoritarian 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 once in power.

The situation is different with transnational institutions, like the EU, which are also attacked by these autocratic populist governments as threats to their countries' sovereignty.[39] 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.

[37] Regarding the use of populist rhetoric by Viktor Orbán and his Government, see a more detailed description in my article G Halmai, 'Populism, Authoritarianism and Constitutionalism' (2019) 20 *German Law Journal* 296, 313.

[38] 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 exactly because of the new validity requirement.

[39] Andrea Pin, in the parallel special issue, argues that supranational courts are partially also responsible for the rise of populism by judicialisation of political choices and replacing national debates and rules. In my view this critique does not apply in the case of Member States of the EU, such as Hungary and Poland, where the democratic process is not operating satisfactorily and the political institutions of the EU seem to be unable or unwilling to act. Here the CJEU, or the ECtHR for that matter, despite its otherwise problematic de-politicised language, can be the last resort to enforce compliance with European values. See A Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of the Courts' (2019) 20 *German Law Journal* 225, 244.

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.'[40]

Orbán repeated the same populist, nationalist 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:

> [Y]ou 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 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. … [T]he report before you is an affront to the honour 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.[41]

Hence, I claim that autocrats' populism is 'false',[42] and they may use populist rhetoric but their decisive characteristic is authoritarianism. What makes them distinct from non-populist autocrats are the democratic elections through which they come to power, even though being in government they often change the electoral law to keep their power.

The Hungarian Government of Viktor Orbán proved this spectacularly by introducing their Enabling Act[43] on 30 March 2020, similar to Hitler's

[40] The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see eg *Financial Times*: Brussels Blog, 16 March 2012.

[41] See at www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report.

[42] The term 'false' populism was used by Isaiah Berlin, defining 'the employment of populist ideas for undemocratic ends'. See *To Define Populism*, The Isaiah Berlin Virtual Library, Isaiah Berlin 1968, The Isaiah Berlin Literary Trust 2013, posted 14 October 2013, available at http://berlin.wolf.ox.ac.uk/lists/bibliography/bib111bLSE.pdf.

[43] See the translation of the draft law, which was enacted by the Hungarian Parliament in its last session before the emergency power entered into force without any change. The Government rejected all the proposed amendments submitted by opposition parties, including one that aimed at imposing a 90-day time limit on governmental actions, and the President of the Republic, a founder of Orbán's Fidesz party, signed the bill within two hours. See at https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/.

Ermächtigungsgesetz of 1933. The Act grants dictatorial powers under cover of declaring a state of emergency to fight COVID-19. The Act was needed, because on 11 March the Government by its decree declared a 'state of danger', a special state of emergency regulated by the Fundamental Law in order to get exceptional competences to combat the Coronavirus. According to the Fundamental Law, the Parliament is required to authorise the extension beyond 15 days. But the Act violates Fidesz' own constitution, the Fundamental Law of Hungary enacted in 2011 with the exclusive support of the governing party, and not just because the 15-day deadline had already expired when the law was enacted. Article 53 of the Fundamental Law mentions only natural disasters and industrial accidents, not pandemics. This last cause of a state of danger is only covered by Act 128 of 2011 concerning the management of natural disasters. In other words, there was no constitutional authorisation either for the decree, or for the Enabling Act.

The Act, enacted exclusively with the votes of the governing majority, enables the Government to take any measure by executive decree for an indefinite period of time. These measures, which are not tailored to fight the Coronavirus, can include suspending or overriding any laws, or simply departing from them, and suspending by-elections and referenda as well as the functioning of ordinary courts. The Constitutional Court, which could be the only body to check the Government, is allowed to continue to exercise its review power, but it has been packed by judges loyal to the Government since 2013. The Enabling Act has inserted two new crimes into the Criminal Code, which will not go away when the emergency is over. Anyone who 'claim[s] or spread[s] a distorted truth in relation to the emergency in a way that is suitable for alarming or agitating a large group of people' can be punished for a term of up to five years in prison. Also, anyone who interferes with the operation of measures that the Government takes to fight the pandemic could also face a jail sentence of up to five years. These clearly unconstitutionally disproportionate threats to freedom of expression can silence the remaining free media and independent civil society organisations. Besides the law, governmental decrees enacted after 11 March also contain unconstitutional provisions, the validity of which has now been extended by the Enabling Act. One of those allowed for the army to commandeer around 140 state-owned and private strategic factories. In this case neither the Fundamental Law, nor even the law on the management of natural disasters, mentioned above, gives power to the Government to make extraordinary rules concerning the army.

The blanket authorisation of uncontrolled executive power will last as long as the 'state of danger' persists, which will be determined by the Government itself. There are legitimate worries about the end of the current emergency power, because the special 'state of emergency caused by mass migration' introduced in 2015 is still in force without there being any refugees in the country.

C. Is there Such a Thing as Authoritarian Constitutionalism?

Constitutionalism is often defined as 'limited government'. For instance, Giovanni Sartori defines constitutionalism as 'a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure "limited government"'.[44] András Sajó and Renáta Uitz also describe constitutionalism as a liberal political philosophy that is concerned with limiting government.[45] The main aim of limiting government is to guarantee individual rights. In other words, modern constitutionalism is by definition liberal.[46] 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 Simpler do in their book,[47] but I do not agree with the use of the terms 'authoritarian constitutionalism'[48] or 'constitutional authoritarianism'.[49]

Mark Tushnet, for instance tries, generally to pluralise the normative understanding of non-liberal constitutionalism, differentiating between an absolutist, a mere rule of law and an authoritarian form of constitutionalism, Singapore being the main example of the last of these.[50] Tushnet defines authoritarian constitutionalism as an intermediate normative model between liberal

[44] See G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 855.

[45] A Sajó and R Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford, Oxford University Press, 2017) 13.

[46] In contrast, others also pay regard to other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See, eg, M Tushnet, 'Varieties of Constitutionalism' (2016) 14 *International Journal of Constitutional Law* issue 1, editorial 1. On 11 October 2019, Tushnet posted the following message on his Facebook page: 'My lecture today was on "Varieties of Constitutionalism," and argued that a thin version of constitutionalism requires only (1) that there be some entrenched provisions, (2) that there be some mechanism for resolving disputes about what the law is that is oriented solely to making decision according to law, and (3) that the regime receive popular consent to the regime as a whole measured over some reasonable period of time. (Lots of complexities elided here.) The first subtext, which almost surfaced in the discussion afterwards, is that the Chinese leadership doesn't really have to fear constitutionalism as such (as it seems to do), if the very thin version I outlined counts as constitutionalism (which I think it does). The second subtext is that, if the idea of thin constitutionalism were accepted the way would be open for discussions about whether thin constitutionalism should be thickened (discussions that are harder to have if the idea of constitutionalism is ruled off the table from the outset.)' 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.

[47] T Ginsburg and A Simpser, *Constitutions in Authoritarian Regimes* (Cambridge, Cambridge University Press, 2014).

[48] See, eg, Somek (n 31); T Isiksel, 'Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism' (2013) 11 *International Journal of Constitutional Law* 702.

[49] S Levitsky and LA Way, 'The Rise of Competitive Authoritarianism' (2002) 13 *Journal of Democracy* 51.

[50] M Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391.

constitutionalism and authoritarianism[51] that has moderately strong normative commitments to constitutionalism in nations with specific social and political problems, such as a high degree of persistent ethnic conflict.[52] In other words, he refers to a distinct type of regime, wherein there are faulty practices and a constitution with an authoritarian content.

In contrast to Tushnet's understanding of authoritarian constitutionalism, which can also be considered as an empirical work about hybrid regimes, Roberto Niembro Ortega provides a more conceptual approach that refers to a very sophisticated way in which ruling elites with an authoritarian mentality exercise power in not fully democratic states.[53] Here the regimes do have a liberal democratic constitution, but instead of limiting the power of the state, the constitution is used for practical and authoritarian ideological functions to mask the idea of constitutionalism. But, as pointed out earlier, if the constitution does not limit the government's power, it cannot fulfil the requirements of constitutionalism, and can only be considered as a sham constitution[54] and as a rhetorical tool, just as populism is in the hands of autocrats.

Most of the chapters in a recently published book[55] – as the editors' preface states – 'challenge the notion of a single "proper sense" of constitutionalism that is coextensive with and exhausted by the discrete elements of the liberal paradigm'. In the introductory chapter, Günter Frankenberg argues that 'liberal orthodoxy treats authoritarian constitutionalism not just as a contested concept, but as a mere travesty or deceitful rendition of the rules and principles, values and institutions of what is innocently referred to as "Western constitutionalism"'.[56]

Referring to Roberto Gargarella's book on Latin American constitutionalism,[57] Frankenberg claims that the orthodoxy pays 'obsessive attention to issues of rights', especially enforceable civil and political rights, at the expense of

[51] Tushnet provides the following rough definition of authoritarianism (ibid 448): all decisions can potentially be made by a single decision maker (which might be a collective body), whose decisions are both formally and practically unregulated by law.

[52] In the case of Singapore, Tushnet argues that the Government needs to preserve ethnic and religious harmony, without indicating why this goal can only be achieved with authoritarian tools. He mentions Malaysia, Mexico before 2000, Egypt under Mubarak, and Taiwan between 1955 and the late 1980s, and South Korea between 1948 and 1987, as candidates for authoritarian constitutionalism. See ibid 393.

[53] See R Niembro Ortega, 'Conceptualizing Authoritarian Constitutionalism' (2016) 49 *Verfassung und Recht in Übersee* 339.

[54] Regarding the concept of sham constitution, see DS Law and M Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

[55] H Alviar Garcia and G Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Cambridge, Cambridge University Press, 2019).

[56] See G Frankenberg, 'Authoritarian Constitutionalism: Coming to Terms with Modernity's Nightmares' in Alviar Garcia and Frankenberg (eds) (n 55) 1.

[57] CFR Gargarella, *Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution* (Oxford, Oxford University Press, 2013).

redistributive policies or social entitlements, free and fair elections, separation of powers and judicial review. He introduces authoritarian constitutionalism as 'one of modernity's narratives alloying rule and law' by using Machiavellian constitutional opportunistic technology, like Chinese head of state Xi Jinping's observing an established constitutional amendment procedure while stripping himself of the existing term limit, or more Hobbesian claims to defend the public good and people's interest, like that of Hungarian Prime Minister Viktor Orbán, referring to European Christian values while denouncing the human rights of refugees.[58]

As Helena Alviar Garcia and Michael Wilkinson demonstrate in their contributions to the same book, political authoritarianism entertains an affinity with economic neoliberalism.[59] This can be proved to perfection by the neoliberal economic policy of the current authoritarian regime in Viktor Orbán's Hungary. One of the most tragic historical examples of this relationship is the politics of the van Papen Government in the last period of the Weimar Republic, as clearly seen already by Hermann Heller in 1933.[60] Heller claims that Papen wanted the state and the economy to be 'strictly' separated, one from the other. Legitimising this policy, Carl Schmitt in November 1932 lectured on 'the state and economy', arguing that the total state makes an attempt to order the economy in an authoritarian way, drawing a sharp line of separation vis-à-vis the economy, although ruling on the other hand with the strongest military means and means of mass manipulation (radio broadcasting, cinema).[61] Besides retreating from economic and social policy, this authoritarian state is also supposed to retreat from socio-cultural policy. Heller concludes that this 'authoritarian liberalism', which is characterised by the retreat of the authoritarian state from social policy, liberalisation of the economy and dictatorial control by the state of politico-intellectual functions, cannot be ruled in democratic forms, proving the claim made earlier here that not only does democracy presupposes liberalism, but there is also no liberalism without democracy. Together with Juan José Linz we can also be sceptical regarding the efforts to distinguish between an ostensibly benevolent 'authoritarian, antidemocratic political solution' and totalitarianism in the 1930s.[62] Based on the experiences of the current authoritarian regimes, for instance in Russia,[63] I would add the same doubts about the benevolence of 'authoritarian constitutionalism' altogether.

[58] See Frankenberg (n 56).

[59] See H Alviar Garcia, 'Neoliberalism As a Form of Auhoritarian Constitutionalism' in Alviar Garcia and Frankenberg (eds) (n 55) 37; and MA Wilkinson, 'Authoritarian Liberalism As Authoritarian Constitutionalism' in Alviar Garcia and Frankenberg (eds) (n 55) 317.

[60] Cf Heller's paper on 'Authoritarian Liberalism?', which originally appeared in (1933) 44 *Die Neue Rundschau* 289–98. See the English translated version in (2015) 21 *European Law Journal* 295.

[61] ibid 299.

[62] See Linz (n 35) 51.

[63] Among the Machiavellian technologies, Frankenberg mentions the Putin-Medvedev tandemocracy: Frankenberg (n 56).

Besides the constitutions in the communist countries, both current theocratic and communitarian constitutions are considered illiberal.[64] Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.[65] In communitarian constitutions, like the ones in South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receives utilitarian priority rather than individual freedom, which is the principle of liberalism. But in these illiberal polities, there is no constitutionalism; their constitutions – using Pablo Castillo-Ortiz's term – are 'de-normativised'.[66] In other words, in my view, 'illiberal constitutionalism' is an oxymoron.

D. Can 'Non-liberal Constitutionalism' Really be Constitutionalist?

Besides illiberal constitutionalism, there are also attempts to legitimate 'non-liberal constitutionalism' as a subtype of constitutionalism. Graham Walker uses the term for constitutionalist structures, 'wherever people value some aspects of communal identity more than autonomy of individual choice'.[67] Walker's main example for the non-liberal, rather local than universal values is the multicultural grant of group rights to native peoples and the distinct society of Québec, but he also mentions the state of Israel, which fails its non-citizen residents in many regrettable ways, as well as the tribal life of the Native American nations in the US. The common characteristic of all these approaches is 'to indict the notion of individual autonomy rights as a form of naïve and homogenizing universalism, and to unmask the ethnic and moral "neutrality" of the liberal state as a covert form of coercion'.[68] Walker builds up his concept using Charles Howard McIlwain's understanding of constitutionalism in his 1940 book.[69] According to McIlwain, the limitation of government by law is not necessarily liberal, because the rights of individuals are not centralised, and there is no need for a public authority to be a neutral arbiter among competing value systems. Among the more contemporary thinkers, Walker relies on Stanley Fish's scepticism about individual rights of all kinds. In his notorious articles from 1987[70] and 1992[71]

[64] L-A Thio, 'Constitutionalism in Illiberal Polities' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012). Contrary to my understanding, Thio also talks about 'constitutionalism' in illiberal polities.

[65] There are two subcategories distinguished here: the Iranian subcategory, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi Arabian subcategory, where Islam is present, without the formal authority of modern constitutionalism.

[66] See P Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 *European Constitutional Law Review* 48, 67.

[67] G Walker, 'The Idea of Nonliberal Constitutionalism' (1997) 39 *Nomos* 154, 155.

[68] ibid 157.

[69] CH McIlwain, *Constitutionalism, Ancient and Modern* (Ithaca, NY, Cornell University Press, 1940).

[70] S Fish, 'Liberalism Doesn't Exist' (1987) 6 *Duke Law Journal* 997.

[71] S Fish, 'There's No Such Thing as Free Speech and It's a Good Thing, Too' (1992) 17 *Boston Review* 3.

respectively, Fish argues that because liberalism conceives its rational principles precisely as supranational and non-partisan, 'one can only conclude, and conclude nonparadoxically, that liberalism doesn't exist'. According to Walker, non-liberal constitutionalism historically was anticipated in some features of Republican Rome or of medieval Europe, or in the millet system of the Ottoman Empire, and in more recent history in Canada before the 1982 Charter of Rights and Freedoms. He also considers the evolving multiculturalist/tolerationist American university campus practices as an embryonic version of non-liberal constitutionalism, and 'politically correct' thinkers who promote such policies as hostile to the notion of 'individual rights'.

The problem with Walker's concept is that he conflates constitutionalism with the constitution. While the latter indeed pre-dates the Enlightenment, the former, together with liberalism, does not.[72] The 'constitution', as the configuration of public order defined by Aristotle or Cicero, did not require the notion of individual rights, while modern constitutionalism does.[73] For instance, Montesquieu in *The Spirit of Laws* argues that the constitutional system based on the separation of powers is necessary for securing political liberty and preventing the emergence of 'tyrannical laws' and 'execution of laws in a tyrannical manner'.[74] This means that 'fettered power', which, according to Walker, is the essence of constitutionalism, presupposes guaranteed individual rights. In other words, not only the anti- or illiberal version of constitutionalism discussed earlier, but also the non-liberal one is oxymoronic.

II. ATTEMPTS TO LEGITIMISE 'ILLIBERAL CONSTITUTIONALISM'

A. Majoritarian (Westminster) System

Proponents of the Fidesz illiberal constitution, such as Béla Pokol, professor of law and member of the packed Hungarian Constitutional Court, argue that

[72] 'Classic liberalism' in its 19th-century European sense means individual liberty and a free market. See A Sajó and R Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford, Oxford University Press, 2017) 13.

[73] Carl J Friedrich, one of the authors to whom Walker refers, in the later editions of his famous text on *Constitutional Government and Democracy* emphasises that the single function of constitutionalism is safeguarding each person in the exercise of 'individual rights'. See CJ Friedrich, *Constitutional Governance and Democracy: Theory and Practice in Europe and America*, 4th edn (Waltham, Blaisdell Publishing, 1968) 24, 7. Walter Murphy, another author quoted by Walker after the democratic transition in Eastern Europe, has also talked about 'protecting individual liberty' as the ultimate civic purpose of constitutionalism. Cf WF Murphy, 'Constitutions, Constitutionalism and Democracy' in D Greenberg, SN Katz, MB Oliviero and SD Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford, Oxford University Press, 1993).

[74] Montesquieu, *The Spirit of the Laws*, eds AM Cohler, BC Miller and HS Stone (Cambridge, Cambridge University Press, 1999) bk XI, ch 6, 157 (quoted by GA Tóth, 'Constitutional Markers of Authoritarianism' (2018) *Hague Journal on the Rule of Law* 1).

the post-2012 constitutional system envisages the Westminster-type of parliamentary system, in which the 'winner takes all' and where the principle of the unity of power prevails.[75] But the Hungarian, or for that matter Polish, constitutional system cannot be considered as a monistic democracy, which simply gives priority to democratic decision making over fundamental rights.[76] In fact, the new Hungarian constitution and the Polish constitutional practice do not comply with any model of government based on the concept of the separation of powers. The more traditional models of government forms are based on the relationship between the legislature and the executive. For instance, Arendt Lijphart differentiates between the majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British model, the second being the Continental European parliamentary model, as well as the US presidential system.[77] Giovanni Sartori speaks about presidentialism and semi-presidentialism, as well as about two forms of parliamentarism, namely, the premiership system in the UK, or *Kanzlerdemokratie* in Germany, and the assembly government model in Italy.[78] Bruce Ackerman uses, besides the Westminster and the US separation of powers systems, the constrained parliamentarism model as a new form of separation of powers, which has emerged against the export of the American system in favour of the models in Germany, Italy, Japan, India, Canada, South Africa and other nations, where both popular referendums and constitutional courts constrain parliamentary power.[79]

Hungary and Poland, from 1990 until 2010, and 2015 respectively, belonged to the consensual and constrained parliamentary systems, close to the German *Kanzlerdemokratie*, in Poland with a more substantive role for the President of the Republic. But in Hungary, the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints on governmental power. In Poland, in spite of the fact that the governmental majority is not able to change the Constitution, due to the legislative efforts of the PiS Government, the 1997 Constitution has become a sham document. In both countries, the system has moved towards an absolute parliamentary sovereignty model, without the cultural constraints of the Westminster form of government. Not to mention the fact that in the last decades, the traditional British model of constitutionalism has also been changed drastically with the introduction of

[75] B Pokol, 'Elismerés és kritika' ['Recognition and Criticism'] *Magyar Nemzet* (24 March 2011).

[76] Bruce Ackerman distinguishes between three models of democracy: monistic; rights fundamentalism, in which fundamental rights are morally prior to democratic decision making and impose limits; and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision making to constitutional guarantees. See B Ackerman, *We the People* (Cambridge, MA, Harvard University Press, 1992) vol 1, 6–16.

[77] A Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven, CT, Yale University Press, 1999).

[78] G Sartori, *Comparative Constitutional Engineering*, 2nd edn (New York, New York University Press, 1997).

[79] B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.

bills 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 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 bills of rights became limits on the legislation, but the final word 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 as from the European constrained parliamentary model. The biggest change occurred in the UK, and some even talk about the 'demise of the Westminster model'.[80] 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.[81] The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention on Human Rights. This does not allow 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) of the Act. The Government and Parliament then 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.[82]

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.[83]

Besides the aforementioned Commonwealth countries, a similarly 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. In contrast to these new trends, in the Hungarian and Polish constitutional systems the parliamentary majority not only decides every single issue without any dialogue, but in practice there is no partner for such a dialogue, due to the fact that the independence of both the ordinary judiciary and the constitutional courts has been eliminated.

[80] Cf P Norton, 'Governing Alone' (2003) 56(4) *Parliamentary Affairs* 543, 544.

[81] See D Judge, 'Whatever Happened to Parliamentary Democracy in the United Kingdom' (2004) 57(3) *Parliamentary Affairs* 682, 691.

[82] Cf KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79.

[83] See M Flinders, 'Shifting the Balance? Parliament, the Executive and the British Constitution' (2002) 50(1) *Political Studies* 23.

B. Political Constitutionalism

It is striking, and of significance, how the illiberal authoritarians in Central and Eastern Europe attempt to legitimise their actions by referring to political constitutionalism as their approach to constitutional change. The main argument of Central and Eastern European illiberals to defend their constitutional projects is grounded in a claim to political constitutionalism, which favours parliamentary rule and weak judicial review. To be clear, despite some academics' efforts to apply the concept of political constitutionalism in defence of illiberalism, I do not consider political constitutionalism, based on republican philosophy, or all of the concepts rejecting strong judicial review, or judicial review altogether, as populist.[84] Some scholars and constitutional court justices, both in Hungary and Poland, have attempted to interpret the new constitutional system as a change from legal to political constitutionalism. In my view, these interpretations are simply efforts to legitimise the silencing of judicial review.

One of the 'fake judges' of the Polish Constitutional Tribunal, the late Lech Morawski, emphasised the republican traditions, present in both Hungary and Poland, mentioning the names of Michael Sandel, Philip Pettit and Quentin Skinner.[85] Also, constitutional law professor Adam Czarnota explained the necessity for the changes, with the argument that 'legal constitutionalism alienated the constitution from citizens … The place of excluded citizens was taken by lawyers.'[86] He proudly acknowledges that the governing party, PiS, has appointed judges that represent its worldview, which according to Czarnota is based 'on the principle of supremacy of the Parliament in relation to constitutional review and acceptance of a role of judicial restraint not judicial activism which was earlier the norm'.[87] Czarnota interprets the present constitutional crisis in Poland and in some other countries in Central-Eastern Europe as 'an attempt to take the constitution seriously and return it to the citizens'[88] – what he considers the fulfilment of political constitutionalism.

In Hungary, István Stumpf, constitutional judge, nominated without any consultation with opposition parties by Fidesz right after the new Government took over in 2010, and elected exclusively with the votes of the governing parties, argued in his book for a strong state and claimed the expansion of political constitutionalism regarding the changes.[89] It is remarkable that two other members of the current packed Constitutional Court also argue against legal

[84] See for the opposite view L Corso, 'What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions' (2014) III(2) *Rivista di Filosofia del Diritto* 443.

[85] L Morawski, 'A Critical Response', *Verfassungsblog*, 3 June 2017.

[86] A Czarnota, 'The Constitutional Tribunal', Verfassungsblog, 3 June 2017.

[87] ibid.

[88] ibid.

[89] See I Stumpf, *Erös állam – alkotmányos korlátok* [*Strong State – Constitutional Limits*] (Budapest, Századvég, 2014) 244–49.

constitutionalism, decrying it as 'judicial dictatorship'[90] or 'juristocratic'.[91] In the scholarly literature, Attila Vincze argued 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 – was a sign of political constitutionalism's prevailing over legal constitutionalism.[92] Even those, like Kálmán Pócza, Gábor Dobos and Attila Gyulai, who acknowledge that the Court has not been confrontational as regards the current legislature and the Government, characterise this behaviour as a special approach within the system of the separation of powers, best described as a partnership in a constitutional dialogue.[93]

Political constitutionalists like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson and Mark Tushnet, who themselves differ from one another significantly, emphasise the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them rejects the main principles of constitutional democracy, as 'illiberal' populist constitutionalists do. Even Richard D Parker, who announced a 'constitutional populist manifesto', wanted only to challenge the basic idea, central to constitutional law, 'that constitutional constraints on public power in a democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanise, and release it'.[94] 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 illiberal constitutionalism.[95] Those scholars realise that parliamentary sovereignty tends to be increasingly restrained,

[90] See AZ Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Budapest, Dialóg Campus, 2019) 16.

[91] B Pokol, *The Juristocratic State: Its Victory and the Possibility of Taming* (Budapest, Dialóg Campus, 2017).

[92] A Vincze, 'Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról: az alkotmánymódosítás alkotmánybírósági kontrollja' ['The Decision of the Constitutional Court on the Fourth Amendment to the Fundamental Law: The Constitutional Review of Constitutional Amendments)'] (2013) 3 *Jogesetek Magyarázata* 12.

[93] See K Pócza, G Dobos and A Gyulai, 'The Hungarian Constitutional Court: A constructive partner in constitutional dialogue' in K Pócza (ed), *Constitutional Politics and the Judiciary. Decision-Making in Central and Eastern Europe* (Abingdon, Routledge, 2018) ch 5.

[94] Analysing T 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': RD Parker, 'Here, the People Rule: A Constitutional Populist Manifesto' (1993) 27 *Valparaiso University Law Review* 531–84, 583.

[95] Regarding the new model, see S Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge, Cambridge University Press, 2013). This model has also come to be known by several other names: 'weak-form of judicial review' (M Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781); 'weak judicial review' (J Waldron, The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1348); 'the parliamentary bill of rights model' (J Hiebert, 'Parliamentary Bill of Rights. An Alternative Model?' (2006) 69 *MLR* 7); 'the model of democratic dialogue' (AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2006)); 'dialogic judicial review' (K Roach, 'Dialogic Judicial Review and its Critics' (2004) 23 *Supreme Court Law Review* 49);

either legally or politically, and that the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant*, conceived as the unrestrained 'will of the people', even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.[96] The remnants of both Hungarian and Polish constitutional review have nothing to do with any types of political constitutionalism or a weak judicial review approach, which all represent a different model of the separation of powers. In the authoritarian Hungarian and in the Polish sham systems of constitutionalism, there is no place for any kind of separation of powers.

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.[97] First, 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, there is the Commonwealth model of judicial review, where courts are authorised to review legislation, but the legislature has the possibility to override or disregard judicial decisions.[98]

In my view, neither the Polish nor the Hungarian model fits any of these approaches to weak judicial review, as their aim is neither to balance democracy nor the protection of fundamental rights. The weakening of the power of constitutional courts started in Hungary right after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections. What happened in Hungary resonated 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 in Romania too, 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.[99] From 2014, there has also been a constitutional

'collaborative constitution' (A Kavanaugh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451); or 'democratic constitutionalism' (R Post and R Siegel, 'Democratic Constitutionalism', White Paper, available at https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism).

[96] C Fusaro and D Oliver, 'Towards a Theory of Constitutional Change' in D Oliver and C Fusaro (eds), *How Constitutions Change – A Comparative Study* (Oxford, Hart Publishing, 2011).

[97] See T Györfi, *Against the New Constitutionalism* (Cheltenham, Edward Elgar Publishing, 2016).

[98] See Gardbaum (n 95).

[99] Regarding the Romanian crisis, see V Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis' (2015) 13 *International Journal of Constitutional Law* 246–78; B Iancu, 'Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Oxford, Hart Publishing, 2015) 153.

crisis in progress in Slovakia, where the Constitutional Court has also worked short of two – and from February 2016 three – judges, because the President of the Republic refused to fill the vacancies.[100] But the most successful follower of the Hungarian playbook on how to dismantle constitutional review has been Jaroslaw Kaczynski's governing party (PiS) and its Government in Poland. After the 2015 parliamentary election in Poland, the Law and Justice Party (PiS) also followed the playbook of Viktor Orbán, and started by first capturing the Constitutional Tribunal.[101] But these efforts have nothing to do with political constitutionalism, partly because they do not question the capacity of constitutional courts to invalidate legislation passed by parliaments, partly because they are not based on the mechanism of political accountability and checks on power.[102] Also, political constitutionalism emphasises the importance of legislatures over courts, and not the direct role of citizens, as Czarnota argues. This dismantlement of constitutional review cannot be considered as a par-excellence majoritarian project either.[103]

C. Constitutional Identity

From the very beginning, the Government of Viktor Orbán has justified non-compliance with the principles of liberal democratic constitutionalism also enshrined in Article 2 of the Treaty of the European Union (TEU) by referring to national sovereignty. Lately, as an immediate reaction to the EU's efforts to resolve the refugee crisis, the Government has advanced the argument that the country's constitutional identity, being Christian, and thus conflicting with the acceptance of Muslim refugees, is guaranteed in Article 4(2) TEU.

After some draconian legislative measures were adopted, the Government started a campaign against the EU's plan to relocate refugees. The first step was a referendum initiated by the Government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: 'Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?' Although 92 per cent of those who cast votes and 98 per cent of all the valid votes agreed with the Government, answering 'No' (6 per cent were spoiled ballots), the referendum was invalid because the turnout was only around 40 per cent, instead of the required 50 per cent.

[100] T Lálik, 'Constitutional Crisis in Slovakia: Still Far from Resolution', ICONNECT, 5 August 2016, available at www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/.

[101] The same playbook was also used outside the region, in Turkey by Erdoğan and in Venezuela by Chavez.

[102] See these requirements of political constitutionalism in Castillo-Ortiz (n 65) 64.

[103] As Wojciech Sadurski rightly points out, the Polish governing party, PiS, obtained 18% of the votes of all eligible voters. See Sadurski (n 34) 1.

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

The Constitutional Court in its decision held that 'the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty'.[104] 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'.[105] This abuse of constitutional identity aimed at not taking part in the joint European solution to the refugee crisis is an exercise of national constitutional parochialism,[106] which attempts to abandon the common European liberal democratic constitutional whole.

The Constitutional Court in its Decision 3/2019. (III. 7.) AB also ruled on the constitutionality of certain elements of the 'Stop Soros' legislative package, and found that the criminalisation of 'facilitating illegal immigration' does not violate the Fundamental Law. The Court again referred to the constitutional requirement to protect Hungary's sovereignty and constitutional identity, to justify this clear violation of the freedom of association and freedom of expression, hiding behind the alleged obligation to protect the Schengen borders against 'masses entering [the EU] uncontrollably and illegitimately'.[107] Besides infringing the rights of the non-governmental organisations, the Decision deprives all asylum seekers of the protection of all fundamental rights by stating that

> the fundamental rights protection … clearly does not cover the persons arrived in the territory of Hungary through any country where he or she had not been persecuted

[104] Decision 22/2016 AB of the Constitutional Court of Hungary [67]. See, for a detailed analysis of the Decision, G Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23.

[105] Decision 22/2016 AB of the Constitutional Court of Hungary [67].

[106] See the term used by M Kumm, 'Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism' in M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012) 51.

[107] 3/2019. (III. 7.) AB [43].

> or directly threatened with persecution. Therefore, the requirements set forth by Article I Paragraph (3) of the Fundamental Law regarding the restriction of fundamental rights shall not be applied to the regulation of the above listed cases.[108]

With this the Court denies the core of human dignity: the right to have rights.

III. CONCLUSION

In the chapter I have tried to demonstrate that court ideologists of populist autocrats use Carl Schmitt's concept of political sovereignty and the collective identity of the people, or misuse Max Weber's leader democracy or Richard Bellamy's or others' political constitutionalism ideas, to legitimise 'illiberal constitutionalism' in general, and unchecked governance, the dismantling of constitutional review and the non-compliance with European values in particular. The dismantlement of checks on the government is based on references to the majoritarian (Westminster) system of governance. The silencing of the once very powerful and activist Hungarian and Polish Constitutional Courts, which happened through the shrinking of their jurisdiction and packing them with judges loyal to the Government, has been explained by misuse of the concept of political constitutionalism. The abuse of national constitutional identity by the Governments, the packed Constitutional Courts and academics serves to legitimise the non-compliance of Hungary and Poland as Member States with the EU's constitutional identity.

I have argued that the constitutional concept, which rejects liberalism as a constitutive precondition of democracy, cannot be in compliance with the traditional idea of liberal democratic constitutionalism. All these attempts to legitimate 'illiberal constitutionalism', I have argued, are rather pretexts to hide the authoritarian pursuits of these rogue governments with the help of their court ideologists.

[108] ibid [49].