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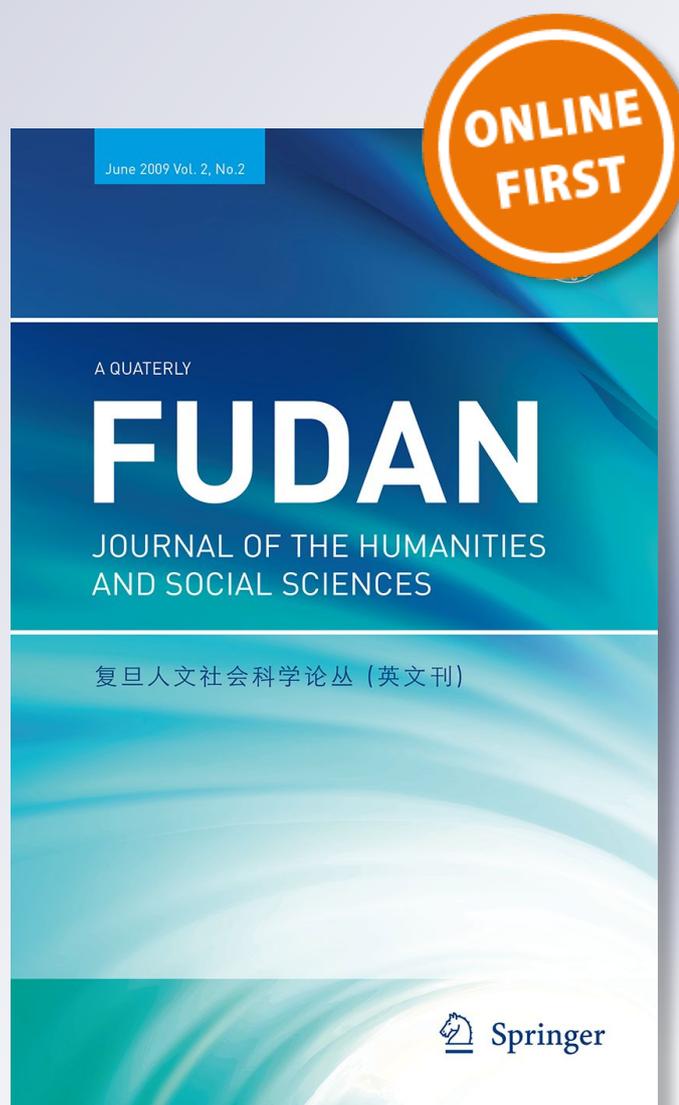
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Is There Such Thing as ‘Populist Constitutionalism’? The Case of Hungary

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Abstract The paper deals with recent deviations from the shared values of constitutionalism towards a kind of ‘populist, illiberal constitutionalism’ introduced by Hungary’s new constitution in 2011. The populism of FIDESZ was directed against all elites, including the ones that designed the 1989 constitutional system (in which FIDESZ also participated), claiming that it was time for a new revolution. This is why PM Viktor Orbán characterized the results of the 2010 elections as a ‘revolution of the ballot boxes’. His intention with this revolution was to eliminate all checks and balances, and even the parliamentary rotation of governing parties. His vision for a new constitutional order—one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over values—has now been entrenched in the new constitution. The paper argues that this current Hungarian constitutional system was made possible by FIDESZ’ anti-pluralist nationalist populism, but is not necessarily based on a true commitment to expressing the will of the people via ‘illiberal constitutionalism’. The populist government rather misuses the country’s lack of constitutional culture. Adherence to constitutional patriotism would mean that FIDESZ would have to endorse what John Rawls once called ‘constitutional essentials’. The core of this kind of constitutional patriotism is a constitutional culture centred on universalist liberal democratic norms and values. Instead, the current Hungarian constitutional system is confronted with unconstitutional patriotism, a kind of nationalism that violates constitutional essentials in the name of ‘national constitutional identity’.

Keywords Populism · Constitutionalism · Illiberal democracy · Hungary · East-Central Europe

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1 Introduction: Populism and Constitutionalism in East-Central Europe

The paper deals with recent deviations from the shared values of constitutionalism towards a kind of 'populist, illiberal constitutionalism' introduced by a new constitution in Hungary. The theoretical question that Hungarian backsliding raises is whether populism and illiberalism are reconcilable with constitutionalism at all. Due to my focus on the Hungarian case, 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 are also members of the European Union, a value community based on liberal democratic constitutionalism.¹ The arguments set forth below about East-Central European populist constitutionalism in this paper do not necessarily apply to other parts of Europe (Greece and Spain), Latin America (Bolivia) or the USA, where populism has a different character and its relationship to constitutionalism is distinct from the Hungarian variant, or from the Polish case for that matter.

I tend to agree with Pierre Rosenvallon, who favours social and economic inequalities as the main roots of populism² and differentiates between rightist and leftist populism. The former is a simplification of social reality, based on the belief that the glue that holds the majority together is its shared identity, while the latter adheres to a simplification of economic reality.³ Consequently, rightist populists are nationalists. They attack non-nationals, such as migrants, and violate principles of constitutionalism. Leftists, like Syriza in Greece or Podemos in Spain, or Bernie Sander's 'left-wing egalitarianism' in the USA for that matter, care more about poverty. Their enemies are the wealthy, the banks, the bourgeoisie, and, at least in Europe, they pose no threat to constitutionalism.⁴

I also do not consider political constitutionalism, or all of the concepts rejecting strong judicial review, or judicial review altogether, as populist.⁵ 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

¹ See a similar description of the new East-Central European populism in a recent paper by Bojan Bugarcic (Bugarcic 2017). Bugarcic claims that this anti-liberal populism is not necessarily anti-democratic. In this article, I argue that it is.

² See Pierre Rosenvallon, *Penser Le Populisme*, Leçon Inaugurale A Collège de France, 18. 2011. Thanks to Théo Fournier, my PhD researcher at EUI, for drawing my attention to this.

³ Rosenvallon talked about this in a program that aired on Radio France on 2 November 2016. 'Le Populisme, Ou Le Retour Des Passions Politiques?', France Culture <https://www.franceculture.fr/emissions/linvite-des-matins/le-populisme-ou-le-retour-des-passions-politiques> [accessed 8 September 2017]. I thank Théo Fournier for bringing this to my attention.

⁴ This does not necessarily apply to all forms of leftist populism, such as the one in Venezuela both under President Chávez and Maduro. On the other hand, Evo Morales' populism involves inclusionary identity politics, which was also one of the aims for drafting a new constitution for Bolivia. See (D'Eramo 2017, 132).

⁵ See the opposite view Corso (2014).

'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, galvanize, and release it'.⁶ 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.⁷ Those scholars realize that parliamentary sovereignty tends to be increasingly restrained, 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 (Fusaro and 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.

As Bojan Bugarcic argues, populist constitutionalism must also be distinguished from popular constitutionalism, 'which seeks to preserve the primary role of the people in interpretation and administration of constitutional law and is compatible with liberal democracy'.⁸

The relationship between populism and constitutionalism has proven difficult to define. From the large range of definitions of populism, I use the one provided by Mudde and Kaltwasser, who define populism as a 'thin-centred 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' (Mudde and Kaltwasser 2017, 6). Some scholars argue that populism rejects the basic principles of constitutional democracy (Pinelli 2016, 6.), understood as limited

⁶ 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 Trump's 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).

⁷ 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 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' (Kavanagh 2016).

⁸ See (Bugarcic 2017). Unfortunately, Bugarcic does not define popular constitutionalism. Jan-Werner Müller, who also differentiates between populist and popular constitutionalism, admits that we do not know exactly what popular constitutionalism is. See Müller (2014). Without exact guidelines one can think about the Swiss direct democracy, or the (more or less failed) Irish and Icelandic constitutional reform experiences with strong people's participation. About these latter attempts see Suiter et al. (2018), and respectively (Bergsson 2018).

government, governed by the rule of law, and protecting fundamental rights.⁹ 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 (Corrias 2016).

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 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 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 (Corrias, 2016, 16).

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 (Corrias 2016, 18–19). But as Pinelli rightly points out, contemporary populists do not necessarily reject representation, nor do they necessarily favour the use of referenda (Pinelli 2016, 11). 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 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 homogenous unit. Also, the Orbán government, which after in 2010 overthrowing its predecessor as a result of a popular referendum, made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25% of the voters to cast a vote, the new law requires at least 50% of those eligible to vote to take part, otherwise the referendum is invalid.¹⁰ The ambivalence of populists towards representation and referenda in government and in opposition applies to their attitude regarding established institutions. While they readily attack

⁹ See these 'essential characteristics' of constitutional democracy in Rosenfeld (2001, 1307).

¹⁰ It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated—one against the EU's migration policy—failed. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: 'Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?'. Although 92% of those who casted votes and 98 of all the valid votes agreed with the government, answering 'no' (6% were spoiled ballots), the referendum was invalid because the turnout was only around 40%, instead of the required 50%.

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'.¹¹

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 legitimize 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'.¹²

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 (Laclau 2005), Blokker claims that the populist critique of liberal constitutionalism does invoke

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 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>.

¹² For a detailed analysis of the decision, see (Halmai 2018).

relevant critical dimensions of the current democratic malaise, and populists claim to represent and give voice to the 'pure' people (Blokker, Forthcoming). 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' (Schmitt, 2008, 125–126).¹³ 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 (Mudde and Kaltwasser 2013). In a more recent work, they argue that populism, by holding that nothing should constrain the 'the will of the (pure) people', is democratic,¹⁴ and at odds with liberal democracy, and with the notion of pluralism (Mudde and Kaltwasser 2017, 81). 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' (Mudde and Kaltwasser 2017, 83).¹⁵ 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 (Mudde and Kaltwasser 2017, 88). 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' (Müller 2016a) 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

¹³ 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.

¹⁴ Also Ruth Gavison calls to celebrate populism as the 'core of democracy rather than condemn it as anti-democratic'. She refers to Michael Kazin's book on *The Populist Persuasion* (Cornell University Press, 2017) as a persuasive analysis of populism as an authentic political movement (Gavison 2017).

¹⁵ Similarly, Tjitske Akkerman argues that not populism, but authoritarian nationalism, is the real threat to democracy (Akkerman 2017).

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 (Müller 2016c). But, as Müller also claims, since 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 (Müller 2014).¹⁶ 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.¹⁷

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' (Blokker 2017). 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 (Blokker 2017).¹⁸

In my view, the 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.¹⁹ As

¹⁶ Müller distinguishes the deeply problematic populist constitutionalism from a legitimate form of popular constitutionalism. Regarding the distinction, he refers to Brettschneider (2015).

¹⁷ Alon Harel argues that in Israel, populism rests on the essentialist characterization of citizenship. See (Harel 2017).

¹⁸ 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.

¹⁹ See, for example, the following definition of constitutionalism in the Stanford Encyclopaedia of Philosophy: 'Constitutionalism is the idea... that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations'. (<https://plato.stanford.edu/entries/constitutionalism/>). In the legal scholarship, Stephen Holmes asserts that the minimalist vision of constitutionalism is achieved if the following requirements are met: the constitution

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 (Kumm 2017). Consequently, I equate constitutionalism with liberal democratic constitutionalism.²⁰ 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 (Ginsburg and Simpser 2014), but I do not agree with the use of the term 'authoritarian constitutionalism' (Tushnet 2013) or 'constitutional authoritarianism' (Levitsky and Way 2002). Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal (Thio 2012).²¹ Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.²² 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 one, to be discussed below, there is no constitutionalism.

2 The Hungarian 'Constitutional Counter-Revolution' After 2010

Before the 2010 elections, the majority of voters was already dissatisfied not only with the government, but also with the transition itself—more than in any other East-Central European country.²³ The centre-right FIDESZ strengthened these feelings by claiming that there had been no real transition in 1989–1990, the previous nomenclature had merely converted its lost political power into an economic one, exemplified by the two last prime ministers of the Socialist Party, who both became rich after the transition due to the privatization process. FIDESZ, with its tiny Christian democratic coalition partner received more than 50% of the actual votes, and due to the disproportional election system, received two-thirds of the seats in the 2010 parliamentary elections. With this overwhelming majority, they were able to enact a new constitution without the votes of the weak opposition parties.

Footnote 19 continued

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 (Holmes 2012).

²⁰ 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 (Tushnet 2016). Similarly, Gila Stopler defines the state of the current Israeli constitutional system as 'semi-liberal constitutionalism'. Cf. Stopler (2017).

²¹ Contrary to my understanding, Thio also talks about 'constitutionalism' in illiberal polities.

²² 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.

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

The populism of FIDESZ was directed against all elites, including those who designed the 1989 constitutional system (in which FIDESZ also took part), claiming that it was time for a new revolution. That is why Orbán characterized the results of the 2010 elections as a 'revolution of the ballot boxes'. His intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, Viktor Orbán predicted that there was 'a real chance that politics in Hungary will no longer be defined by a dualist power space.... Instead, a large governing party will emerge in the center of the political stage [that] will be able [to] formulate national policy, not through constant debates but through a natural representation of interests.' Orbán's vision for a new constitutional order—one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over values—has now been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfil this plan: they do not recognize the separation of powers and do not guarantee fundamental rights. Therefore, the new Hungary (not even a Republic in its name anymore) cannot be considered a liberal constitutional democracy, but rather an illiberal state.²⁴

In April 2014, FIDESZ, with 44, 5% of the party-list votes, won the elections again, and due to 'undue advantages' for the governing party provided by the amendment to the electoral system, secured again two-thirds majority. In early 2015, FIDESZ lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party received another 20.5% of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism. But, as Jan-Werner Müller argues, with reduced media pluralism and an intimidated civil society, the real 'popularity' of the populist illiberal state has limited meaning. Therefore, we cannot really conclude that 'illiberal democracy' became a genuinely popular idea in Hungary, not to speak about other parts of Europe or the world for that matter (Müller 2017). What we do know is that since the 1989 democratic transition, the Hungarian people have not yet

²⁴ In an interview on Hungarian public radio on 5 July 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said: 'In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there'. See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió. <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.

subscribed to ‘constitutional patriotism,’²⁵ which would have meant that the citizens had endorsed what John Rawls once called ‘constitutional essentials,’ and that they were attached to the idea of a constitution. The core of this kind of constitutional patriotism is a constitutional culture centred on universalist liberal democratic norms and values, refracted and interpreted through particular historical experiences. Instead of this, the Hungarian people found themselves confronted with the populist government’s unconstitutional patriotism, a kind of nationalism that violates constitutional essentials in the name of ‘national constitutional identity’.²⁶

3 Possible Explanations for Backsliding

The main reasons for the turn away from constitutionalism in Hungary are as follows:

- (a) Historically, in the East-Central European countries, there were only some unexpected moments—quick flourishes of liberal democracy—followed by an equally quick acts to de-legitimize them. Examples include the short period after 1945, until the communist parties’ took over, and after 1989, when liberal democracy again seemed to be the ‘end of history’.²⁷ Otherwise, in the national histories of the Central and Eastern European countries, authoritarianism, such as the pre-1939 authoritarian Hungarian state, has played a much more important role (Avineri 2009).

As surveys on the links between modernization and democracy show, a society’s historic and religious heritage leaves a lasting imprint (Inglehart and Welzel 2010). According to these surveys, the publics of formerly agrarian societies, including Hungary, emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality (Inglehart and Welzel 2010, 553).²⁸ Even modernization’s changes are not irreversible: economic collapse can reverse them, as happened during the early 1990 s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers at Jacobs

²⁵ After Dolf Sternberger’s and Jürgen Habermas’ conceptions of constitutional patriotism at the end of 1970s and 1980s, respectively, both of which have been answers to particular German challenges, Jan-Werner Müller developed a new theory of the term, concentrating on universal norms and constitutional culture. See Müller (2007).

²⁶ In 2016, the Orbán government argued with Hungary’s ‘national constitutional identity’ to defy the resolution of European Council to relocate asylum seekers within the Member States of the EU. See Halmai (2017b).

²⁷ See the results of the research project ‘Negotiating Modernity’: History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council, <https://erc.europa.eu/“negotiating-modernity”-history-modern-political-thought-east-central-europe>.

²⁸ Christian Welzel in his recent book argues that fading existential pressures open people’s minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand, persistent existential pressures keep people’s mind closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Cf. Welzel (2013).

University in Bremen and published by the German Bertelsmann Foundation.²⁹ According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the postcommunist transformation. Social cohesion is defined as the special quality with which members of a community live and work together. Hungary was ranked 27th, between Poland and Slovakia.

- (b) Even though the transition to democracy in Hungary was driven by the fact that a large share of the population gave high priority to freedom itself, people expected the new state to produce speedy economic growth, with which the country could attain the living standards of the West overnight, without painful reforms.³⁰ In other words, one can argue that the average Hungarian person looked to the West as a model in 1989, not so much in terms of its economic and political systems, but rather in terms of living standards. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, warning that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.³¹ This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment.

Trying to explain the attitudes of voters who support authoritarian, populist leaders, such as Orbán, Ronald Inglehart and Pippa Norris, suggest that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia agendas, reject outsiders and uphold old-fashioned gender roles (Inglehart and Norris 2016).

- (c) According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil society and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.³² Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure

²⁹ Schiefer et al. (2013).

³⁰ As Ulrich Preuss argues, the satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that constitutions did not really make a difference. See Preuss (1993, 3).

³¹ Cf. Offe (1994, 15).

³² See this argument in Blokker (2013). Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See Sadurski (2005).

of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.³³ In other words, legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government (Sadurski 2005, 23).

The concept of civic or participatory constitutionalism is based on 'democratic constitutionalism' (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to 'counterdemocracy' (Pierre Rosenvallon), as well as a robust institutional linkage between civic associations and citizens and formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.³⁴

- (d) There was also a lack of consensus about liberal democratic values at the time of the transition. In the beginning of the democratic transitions in these new democracies, preference was given to general economic effectiveness over mass civic and political engagement.³⁵ The satisfaction of basic economic needs was so important for both ordinary people and the new political elites that constitutions did not really make a difference.³⁶ Between 1989 and 2004 all political forces accepted a certain minimalistic version of a 'liberal consensus' understood as a set of rules and laws rather than values, according to which NATO and EU accession was the main political goal. But as soon as the main political goals were achieved, the liberal consensus died (Krastev 2007), and full democratic consolidation was never achieved (Dawson and Hanley 2016).

³³ See Albert (2008).

³⁴ See the reviews on Blokker (2013) by Jiri Priban and Bogusia Puchalska in ICONnect. www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism.

³⁵ Dorothee Bohle and Béla Greskovits state that East-Central European democracies had a 'hollow core' at their inception. See Bohle and Greskovits (2012).

³⁶ See Preuss (1993, 3).

4 Conclusion: The State of Constitutionalism in Hungary

In Hungary, the system of governance became populist, illiberal and undemocratic³⁷; this was PM Orbán openly stated intention.³⁸ The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacements, because both the internal and the external democratic defence mechanisms against the abuse of constitutional tools failed.³⁹ The internal ones (constitutional courts, judiciary) failed because the new regime managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

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

Although Hungary became a liberal democracy on an institutional level Hungary after 1989, on a behavioural level, the consolidation of the system has always been

³⁷ 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 Müller (2016a).

³⁸ In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighbouring Romania, Orbán proclaimed his intention to turn Hungary into a state that 'will undertake the odium of expressing that in character it is not of liberal nature'. Citing as models he added: 'We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world... Today, the stars of international analyses are Singapore, China, India, Turkey, Russia... and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are... parting ways with Western European dogmas, making ourselves independent from them... If we look at civil organizations in Hungary,... we have to deal with paid political activists here... [T]hey would like to exercise influence... on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians... opposing us, but political activists attempting to promote foreign interests... This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests'. See the full text of Viktor Orbán's speech here: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orban-speech-at-baile-tusnad-tusnadjurdo-of-26-july-2014/>.

³⁹ The category of 'abusive constitutionalism' was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See Landau (2013). 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 USA. 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 Ackerman (2007).

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

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

The behaviour of the Hungarian government, supported by the other three Visegrád countries, among them Poland during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of liberal democratic constitutionalism. We have also learned that membership in the European Union is not a guarantee for maintaining the liberal democratic regimes in all Member States. Unfortunately, an outsized fear of threats, physical and social, lately, for instance, the refugee crisis, strengthened populist illiberal systems, such as Turkey and authoritarian regimes, such as Russia all over Europe. The same tendency can be observed in the case of Hungary even inside the EU,⁴⁰ not to mention the consequences of the Trump presidency in the USA.⁴¹ The division between the old and the new Member States has been strengthened, but the support of the far-right parties has been increased even in the old Member States.⁴² Since the EU institutions have proven incapable of enforcing compliance with core European values at least one populist/illiberal Member State

⁴⁰ At a conference in the Polish town of Krynica in mid-September 2016, Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit, the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favour of the nation states. Sławomir Sierakowski even speaks about an 'illiberal international'. See Sierakowski (2016).

⁴¹ The success of Donald Trump, an authoritarian presidential candidate in the USA, can be explained with the same reasons. See Taub (2016). About the socio-psychological causes of authoritarianism, see Bob Altemeyer's work, which is based on Adorno's 'fascist personality concept explains the 'authoritarian personality' with authoritarian submission, authoritarian aggression, and conventionalism. Cf. Altemeyer (1998) [I'm confused here].

⁴² Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of 'authoritarian liberalism'. See Wilkinson (2013, 527).

has emerged in the EU, which cannot be considered as a constitutional democracy anymore. The current Hungarian constitutional system was made possible by FIDESZ' anti-pluralist nationalist populism, but one can hope that it is not necessarily based on a true commitment of the people to anti-constitutionalist ideas, and the populist government was only able to misuse the country's lack of constitutional culture.

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