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Illiberal Constitutional Theories

I. ARE THERE SUCH THINGS AS “ILLIBERAL OR NONLIBERAL CONSTITUTIONALISM”?

In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in the neighboring 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 reorganize 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 interests¹.

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 center-right party family, EPP (European People’s Party) has set up a special committee to examine the Fidesz party’s adherence to democratic standards. One of the questions the members of

¹ See V. ORBÁN, “Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014,” *The Budapest Beacon*, July 29, 2014 [<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 29th Bálványos Summer Open University and Student Camp, July 28, 2018, Tusnádfürdő (Băile Tuşnad) on the PM’s website: “Prime Minister Viktor Orbán’s speech at the 29th Bálványos Summer Open University and Student Camp,” *Miniszterelnok.hu*, July 28, 2019 [<http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/>].

the committee, former Austrian Chancellor Wolfgang Schüssel, former European Council President Herman Van Rompuy and former European Parliament President Hans-Gert Pöttering addressed to Viktor Orbán has been: “Please explain what you mean by the expression ‘illiberal state’?” Here is the Fidesz chairman and Hungarian Prime Minister’s response:

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 illiberals 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

In July 2019 in the yearly Băile Tușnad/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 he 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

³ The leaked letter has been published by Politico: L. BAYER, “Orbán rejects EPP concerns on rule of law,” *Politico*, June 13, 2019, [<https://www.politico.eu/article/viktor-orban-rejects-epp-concerns-rule-of-law/>].

⁴ B.-H. LÉVY, “How an Anti-totalitarian Militant Discovered Ultrnationalism. After 30 years, I spoke with Viktor Orbán again,” *The Atlantic*, May 13, 2019, [<https://www.theatlantic.com/ideas/archive/2019/05/bernard-henri-levy-interviews-viktor-orban/589102/>].

⁵ Magyar Távirati Iroda (MTI; the Hungarian public news agency), “‘Yes’ to democracy, ‘no’ to liberalism,” *Miniszterelnok.hu*, July 28, 2019, [<http://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’re in An Anti-Liberal Moment. Liberals Need Better Answers,” *The Washington Post*, June 21, 2019.

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.”

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.⁷

Another new element of the speech that Orbán puts “Christian liberty” at the center of the “Christian democratic state,” “a new and authentic model of state and political theory,” which has been reached in the last thirty years by 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

⁶ “Orbán Viktor beszéde a Keresztény Értelmiségiek Szövetségének (KÉSZ) XII. Kongresszusán,” (September 14, 2019), *Miniszterelnok.hu*, [<http://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: [<http://www.miniszterelnok.hu/viktor-orbans-rede-auf-dem-kongress-des-verbandes-der-christlichen-intellektuellen-kereszteny-ertelmisegiek-szovetsege-kesz/>].

⁷ As Eva S. Balogh points out this passage is taken from the Gospel of Matthew, (5:13-15), without identifying it. See E.S. BALOGH, “Orbán, the New Jesus Delivers His Sermon on the Mount,” *Hungarian Spectrum*, September 15, 2019, [<https://hungarianspectrum.org/2019/09/15/orban-the-new-jesus-delivers-his-sermon-on-the-mount/>].

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.⁸

Orbán's rejection of liberal constitutionalism entails his attitude towards its two main components, human rights and separation of power. He made clear his stance on issues of human in a speech at the Hungarian Diaspora Council in December 2, 2015:

There is a political discourse that treats the world on the basis of the philosophy of human rights, and we are obliged to account for anything and everything within the framework of this kind of thinking. And whoever steps outside of this canon commits treason against the wonderful values of the world. This era is coming to an end... We are in the endgame of the period that is based on the export of democracy and human rights.⁹

In his speech at the congress of Fidesz on December 13, 2015 he labels human rights as a secondary value:

Today, Europe's mainstream and its key people pursue superficial and secondary values such as human rights, progress, openness, new family types, and tolerance. These are nice and cute things, but in reality, they are secondary, because they are derivative values.

According to him, the "primary values" that are missing in Europe today are "Christianity, common sense, military virtues, and national pride."¹⁰ Orbán also consequently refuses the separation of powers, checks and balances as concepts alien to his illiberal constitutional system:

Checks and balances is a U.S. invention that for some reason of intellectual mediocrity Europe decided to adopt and use in European politics¹¹.

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 Láncki, a political scientist. It is easy to prove that Orbán in his 2014 speech on "illiberal democracy" recited a study of Tellér published earlier on that year,

⁸ See the following interview in the Hungarian Public Radio with PM Orbán: "A Tavares jelentés egy baloldali akció" (The Tavares report is a leftist action), Interview with PM Viktor Orbán, *Kossuth Rádió*, July 5, 2013.

⁹ See the Hungarian language record of the speech: "Orbán Viktor beszéde a Magyar Diaszpóra Tanács V. ülésén," *Magyarország Kormánya* YouTube channel, December 2, 2015, [<https://www.youtube.com/watch?v=STZCp8jTEvo&feature=youtu.be&t=10m15s>]. Quoted by E.S. BALOGH, "The Mad World of Orbán's Hungary," *Hungarian Spectrum*, September 15, 2020, [<https://hungarianspectrum.org/2020/09/15/the-mad-world-of-orbans-hungary/>].

¹⁰ The Hungarian language speech is also quoted by Eva S. Balogh: *ibid.* [<https://www.youtube.com/watch?v=XJ9-k-kxHbw&feature=youtu.be&t=20s>].

¹¹ Interview with *Bloomberg News*: Z. SIMON, "Orban Touts Hungary's Economy With Eye on Bank-Tax Cuts," *Bloomberg*, December 15, 2014, [<https://www.bloomberg.com/news/articles/2014-12-14/orban-touts-hungary-s-economic-flight-with-eye-on-bank-tax-cuts>]. Similarly, Tünde Handó, head of the National Judicial Office, a close ally of Orbán said "The rule of law over the State, like, for example, in the United States, is not the right way" (V. ANDRÁS, "Handó: Nem kell a bíróságoknak szembehelyezkedniük az állammal," *Népszava*, March 22, 2019, [https://nepszava.hu/3029940_hando-nem-kell-a-birosagoknak-szembehelyezkedniuk-az-allammal]).

what Orbán assigned as compulsory reading for all his ministers.¹² Tellér claims that the “system of regime-change” has failed because the liberal constitution did not commit the government to protect 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 against the moral command of the liberal rule of law regime, according to which “everything is allowed, what does not harm others’ liberty”.

Lánczi’s antiliberal 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 victory¹³. Lánczi’s critique is an outright rejection of liberalism as a utopian ideology, which is—similar to Communism—incompatible with democracy.

Similarly to Orbán, the that time Polish Prime Minister Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), have described the actions of the PiS government 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 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.¹⁴ Witold Waszczykowski, Poland’s minister of foreign affairs expressing his own and his governing PiS party’s antiliberalism went as far as to mock liberalism as “a world made up of cyclists and vegetarians, who only use renewable energy and fight all form of religion.”¹⁵

Ryszard Legutko, the main ideologue of PiS, similarly to his Hungarian counterpart, Lánczi, also likens liberal democracy with Communism both being fuelled by the ideas of modernization and progress.¹⁶ Both Lánczi and Legutko assert together with other antiliberals with one voice that liberalism and Communism, or

¹² See G. TELLÉR, “Született-e ‘Orbán-rendszer’ 2010 és 2014 között? [Was an Orbán System Born between 2010 and 2014?],” *Nagyvilág*, Vol. LIX, No. 3, March 2014, pp. 346-368.

¹³ See A. LÁNCZI, “The Renewed Social Contract—Hungary’s Elections, 2018,” *Hungarian Review*, Vol. IX, No. 3, May 2018, [http://www.hungarianreview.com/article/20180525_the_renewed_social_contract_hungary_s_elections_2018]. A detailed analysis of Lánczi’s arguments see K.L. SCHEPPELE, “The Opportunism of Populists and the Defense of Constitutional Liberalism,” *German Law Journal*, Vol. 20, No. 3, 2019, pp. 314-331, [<https://doi.org/10.1017/glj.2019.25>].

¹⁴ Sławomir Sierakowski even speaks about an “illiberal international”. See S. SIERAKOWSKI, “The Polish Threat to Europe,” *Project Syndicate*, January 19, 2016, [<https://www.project-syndicate.org/commentary/poland-illiberalism-threat-to-europe-by-slawomir-sierakowski-2016-01>].

¹⁵ H.-J. VOGEL, “Haben die Polen einen Vogel?,” *Bild*, January 3, 2016, [<https://www.bild.de/politik/ausland/polen/hat-die-regierung-einen-vogel-44003034.bild.html>].

¹⁶ See R. LEGUTKO, *The Demon in Democracy: Totalitarian Temptations in Free Societies*, New York, Encounter Books, 2016, pp. 2-9.

for that matter its ideology, Marxism are secretly allied and share a common ancestry that they are two offshoots of an Enlightenment tradition.¹⁷ This critique of liberalism goes back to Carl Schmitt.¹⁸

This critical stance of the new illiberals towards liberal constitutionalism is also 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."¹⁹ 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 democracy²⁰ based on the homogeneity of the nation is the only true form of democracy.

¹⁷ This anti-liberal political theory is present outside East-Central Europe as well. For instance, Patrick Deneen's book, *Why Liberalism Failed* (London, Yale University Press, 2018) is directed at the left in the US targeting both contemporary progressivism and "classical liberalism" of conservatives. The Israeli political theorist Yoram Hazony, whose book *The Virtue of Nationalism* (New York, Basic Books, 2018) also criticizes those conservatives who defend liberal democracy. As Marc Plattner convincingly argues, 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. See M. PLATTNER, "Illiberal Democracy and the Struggle on the Right," *Journal of Democracy*, Vol. 30, No. 1, January 2019, pp. 16-17.

¹⁸ Stephen Holmes rightly refers to Schmitt's work, *Römischer Katholizismus und politische Form* (Stuttgart, Klett-Cotta, 1984, p. 22), in which he claims that "American financiers and Russian Bolsheviks join forces in fighting for the triumph of economic thought." See S. HOLMES, *The Anatomy of Antiliberalism*, Cambridge, Harvard University Press, 1993, p. 2, n.1.

¹⁹ See C. Schmitt, *Constitutional Theory*, ed. and transl. J. Seitzer, Durham, Duke University Press 2008 [1928], pp. 125-126. This idea is also shared by a part of the 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.

²⁰ The Hungarian political scientist, András Körösiényi, implementing the Weberian concept calls the Orbán regime as "plebiscitary leader democracy," where the activity of the leader (or Führer?—G.H.) is posteriorly approved by the people, but since this approval can be withdrawn this is still a democratic system. See A. KÖRÖSIÉNYI, "Weber és az Orbán-rezsim: plebiszciter vezéremokrácia Magyarországon [Weber and the Orbán-regime: Plebisciter Leader Democracy in Hungary]", *Politikatudományi Szemle*, Vol. XXVI, No. 4, 2017, pp. 7-28. In a more recent interview however, Körösiényi admitted that the for the withdrawal of approval currently a miracle is needed. See P. HAMVAY, "Csak a csoda segít [Only the Miracle Helps]," Interview with András Körösiényi, *HVG*, June 20, 2019, [<https://hvg.hu/360/hetilap360/2019/25/20192505magyar2>]. 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. See W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press, 2019, pp. 242-243.

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.²¹ Consequently, I equate constitutionalism with liberal democratic constitutionalism.²² 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,²³ but I do not agree with the use of the term “authoritarian constitutionalism”²⁴ or “constitutional authoritarianism”.²⁵ Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal.²⁶ Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.²⁷ In communitarian

²¹ M. KUMM, “Demokratie als verfassungsfeindlicher Topos,” *Verfassungsblog on matters constitutional*, September 6, 2017, [<https://verfassungsblog.de/demokratie-als-verfassungsfeindlicher-topos/>].

²² In contrast, others also regard other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See for instance M. TUSHNET, “Varieties of Constitutionalism,” *International Journal of Constitutional Law*, Vol. 14, No. 1, 2016, pp. 1-5, [<https://doi.org/10.1093/icon/mow021>]. Similarly, Gila Stopler defines the state of the current Israeli constitutional system as ‘semi-liberal constitutionalism’. Cf. G. STOPLER, “Constitutional Capture in Israel,” *I-CONNECT. Blog of the International Journal of Constitutional Law*, August 21, 2017, [<http://www.iconnectblog.com/2017/08/constitutional-capture-israel/>].

²³ T. GINSBURG and A. SIMPSEY, *Constitutions in Authoritarian Regimes*, Cambridge, Cambridge University Press, 2013.

²⁴ See for instance A. SOMEK, “Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933-1938 and Its Legacy,” in Chr. JOERGES and N. SINGH GHALEIGH (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its legal Traditions*, London, Bloomsbury, 2003; T. ISIKSEL, “Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism,” *International Journal of Constitutional Law*, Vol. 11, No. 3, 2013, pp. 702-726, [<https://doi.org/10.1093/icon/mot024>]; M. TUSHNET, “Authoritarian Constitutionalism,” *Cornell Law Review*, Vol. 100, No. 2, 2015, pp. 392-361, [<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4654&context=clr>]. Somek deals with Austria before the Anschluss, Isiksel with Turkey, while Tushnet tries to generally pluralize 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 latter. Most of the chapters in *Authoritarian Constitutionalism. Comparative analysis and Critique* (H.A. GARCIA and G. FRANKENBERG (eds.), Cheltenham, Edward Elgar Publishing, 2019, 386 pp.)—as the editors’ preface states—“challenge the notion of a single ‘proper sense’ of constitutionalism that is coexistent 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’” (see G. FRANKENBERG, “Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares,” in H.A. GARCIA and G. FRANKENBERG (eds.), *Authoritarian Constitutionalism*, *op. cit.*, p. 7).

²⁵ S. LEVITSKY and L.A. WAY, “The Rise of Competitive Authoritarianism,” *Journal of Democracy*, Vol. 13, No. 2, 2002, p. 51.

²⁶ L.-A. THIO, “Constitutionalism in Illiberal Politics,” in M. ROSENFELD and A. SAJÓ (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 133. Contrary to my understanding, Thio also talks about “constitutionalism” in illiberal politics.

²⁷ 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.

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, 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.”²⁸ In other words, in my view “illiberal constitutionalism” is an oxymoron.

Besides illiberal constitutionalism there are also attempts to legitimate “nonliberal 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.”²⁹ Walker’s main example for the nonliberal, rather local than universal values, is granting group right to native peoples and the distinct society of Québec, but he also mentions the state of Israel, which fails its noncitizen 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.”³⁰ Walker builds up his concept using Charles Howard McIlwain’s understanding of constitutionalism in his 1940 book³¹. According to McIlwain the limitation of government by law isn’t necessarily liberal, because the rights of individuals are not centralized, 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 skepticism about individual rights of all kind. In his notorious articles from 1987³² and 1992³³ respectively, Fish argues that because liberalism conceives its rational principles precisely as supranational and nonpartisan, “one can only conclude, and conclude nonparadoxically, that liberalism doesn’t exist.” According to Walker, nonliberal constitutionalism historically was anticipated in some features of Republican Rome or of medieval Europe, or in the millet system of the Ottoman Empire, while in more recent history in Canada before the 1982 Charter of Rights and Freedoms. He also considers the evolving multiculturalist/tolerant American university campus practices as an embryonic version of nonliberal constitutionalism, and “politically correct” thinkers who promote such policies as hostile to the notion of “individual rights.”³⁴

²⁸ See P. CASTILLO-ORTIZ, “The Illiberal Abuse of Constitutional Courts in Europe,” *European Constitutional Law Review*, Vol. 15, No. 1, 2019, p. 67 [<https://doi.org/10.1017/S1574019619000026>].

²⁹ G. WALKER, “The Idea of Nonliberal Constitutionalism,” *Nomos*, Vol. 39, *Ethnicity and Group Rights*, 1997, p. 155, [<https://www.jstor.org/stable/24219975>].

³⁰ *Ibid.*, p. 157.

³¹ C.H. MCILWAIN, *Constitutionalism. Ancient and Modern*, Ithaca, Cornell University Press, 1940.

³² S. FISH, “Liberalism Doesn’t Exist,” *Duke Law Journal*, Vol. 1987, No. 6, pp. 977-996.

³³ S. FISH, “There’s No Such Thing as Free Speech and It’s a Good Thing, Too,” *Boston Review*, Vol. 17, No. 1, 1992, pp. 3-26.

³⁴ As we have seen earlier, Hungarian PM Viktor Orbán opposes “political correctness” as a liberal concept. See *supra*, his interview with Bernard-Henry Lévy.

The problem with Walker's concept is that he conflates constitutionalism with constitution. While the latter indeed predates the enlightenment, the former, together with liberalism, does not³⁵. The "constitution" as the configuration of public order defined by Aristotle or Cicero did not require the notion of individual rights, while modern constitutionalism does³⁶. For instance Montesquieu in *The Spirit of Laws* argues that the constitutional system based on the separation of power is necessary for securing political liberty and preventing the emergence of "tyrannical laws" and "execution of laws in a tyrannical manner."³⁷ This means that "fettered power", which, according to Walker is the essence of constitutionalism, presupposes guaranteed individual rights. The same applies to definitions of constitutionalism, emphasizing "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'".³⁸ Also, András Sajó and Renáta Uitz describe constitutionalism as a liberal political philosophy that is concerned with limiting government.³⁹ But the main aim of limiting government is to guarantee individual rights. In other words, modern constitutionalism is by definition liberal. Not only the anti- or illiberal version, but also the nonliberal one is oxymoronic.

II. ATTEMPTS TO LEGITIMIZE "ILLIBERAL CONSTITUTIONALISM"

A. Majoritarian (Westminster) System

Proponents of Fidesz' illiberal constitution, as Béla Pokol, professor of law and member of the packed Hungarian Constitutional Court argues that the post-2012 constitutional system envisages the Westminster type of Parliamentary system, in which the "winner takes all," and where principle of the unity of power prevails⁴⁰.

³⁵ "Classic liberalism" in its 19th century European sense means individual liberty and free market. See A. SAJÓ and R. UITZ, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford, Oxford University Press, 2017, p. 13.

³⁶ Carl J. Friedrich, one of the authors Walker refers to, in the later editions of his famous text on *Constitutional Government and Democracy* emphasizes that the single function of constitutionalism is safeguarding each person in the exercise of "individual rights." See C.J. FRIEDRICH, *Constitutional Governance and Democracy: Theory and Practice in Europe and America*, 4th ed., Waltham, Blaisdell, 1968, pp. 24, 27. 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. W.F. MURPHY, "Constitutions, Constitutionalism and Democracy," in D. GREENBERG, S.N. KATZ, M.B. OLIVIERO and S.D. WHEATLEY (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford, Oxford University Press, 1993, pp. 3-25.

³⁷ MONTESQUIEU, *The Spirit of the Laws*, transl. and eds. A.M. Cohler, B.C. Miller and H.S. Stone, Cambridge, Cambridge University Press, 1999, Book XI. Chap. 6 at 157. (Quoted by G.A. TÓTH, "Constitutional Markers of Authoritarianism," *Hague Journal on the Rule of Law*, Vol. 11, 2019, pp. 37-61, [<https://doi.org/10.1007/s40803-018-0081-6>].)

³⁸ See G. SARTORI, "Constitutionalism: A Preliminary Discussion," *The American Political Science Review*, Vol. 56, No. 4, 1962, p. 855, [<https://doi.org/10.2307/1952788>].

³⁹ A. SAJÓ and R. UITZ, *The Constitution of Freedom*, *op. cit.*, p. 13.

⁴⁰ B. POKOL, "Elismerés és kritika [Recognition and Criticism]," *Magyar Nemzet*, March 24, 2011; B. POKOL, "Alkotmánytervezet – Elismerés és kritika" [Constitution Project – Recognition and

But the Hungarian, or for that matter the Polish constitutional system, cannot be considered as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.⁴¹ Actually, the new Hungarian constitution and the Polish constitutional practice do not comply with any models of government, which are based on the concept of separation of powers. The more traditional models of government forms are based on the relationship between the legislative and the executive. For instance, Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while of the second refers to continental European parliamentary, as well as the US presidential system.⁴² 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.⁴³ 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 favor of the model of Germany, Italy, Japan, India, Canada, South Africa, and other nations, where both popular referendums and constitutional courts constrain the power of the parliament.⁴⁴

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 of the governmental power. In Poland, despite the fact that the governmental majority isn't 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 a bill of rights by left-of-centre governments—and opposed by right-of-centre opposition parties—in Canada (1982), New Zealand (1990), the United Kingdom (1998), the 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

Criticism], in K.B. ANETT, T. ANDRÁS, V. ANDRÁS (eds.), *Az új Alaptörvényről: elfogadás előtt: tanulmánykötet* [On the New Fundamental Law: Before its Adoption. Studies], Budapest, Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága, 2011.

⁴¹ 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*, Vol. 1, *Foundations*, Cambridge, Harvard University Press, 1992, pp. 6-16.

⁴² A. LIJPHART, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, London, Yale University Press, 1999.

⁴³ G. SARTORI, *Comparative Constitutional Engineering*, 2nd ed., New York, New York University Press, 1997 [1994].

⁴⁴ B. ACKERMAN, "The New Separation of Powers," *Harvard Law Review*, Vol. 113, No. 3, 2000, pp. 633-729, [<https://doi.org/10.2307/1342286>].

is different from the judicial supremacy approach of the US separation of powers model, as well from the European constrained parliamentary model. The biggest change occurred in the UK, and some even talk about the “demise of the Westminster model.”⁴⁵ 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.⁴⁶ The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention of Human Rights. This does not allow UK courts to strike down, or “disapply”, legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility under Section 4.2. Then, the government and Parliament 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.⁴⁷

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.⁴⁸

Besides the mentioned 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 system the parliamentary majority not only decides every single issue without any dialogue, but practically there is no partner for such a dialogue, due to the fact that the independence of both the ordinary judiciary and the constitutional courts have been eliminated.

B. Political Constitutionalism

It is striking, and of significance, how the illiberal authoritarians in Central and Eastern Europe attempt to legitimize 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 favors parliamentary rule and weak judicial review. To be clear, despite some academics’ efforts to use the concept of political constitutionalism in defense of illiberalism, I do not consider political constitutionalism, based on republican philosophy, or all of the concepts

⁴⁵ Cf. Ph. NORTON, “Governing Alone,” *Parliamentary Affairs*, Vol. 56, No. 4, October 1, 2003, p. 544, [<https://doi.org/10.1093/pa/gsg118>].

⁴⁶ See D. JUDGE, “Whatever Happened to Parliamentary Democracy in the United Kingdom,” *Parliamentary Affairs*, Vol. 57, No. 3, 2004, p. 691, [<https://doi.org/10.1093/pa/gsh052>].

⁴⁷ Cf. K.D. EWING, “The Human Rights Act and Parliamentary Democracy,” *Modern Law Review*, Vol. 62, No. 1, 1999, p. 92, [<https://www.jstor.org/stable/1097075>].

⁴⁸ See M. FLINDERS, “Shifting the Balance? Parliament, the Executive and the British Constitution,” *Political Studies*, Vol. 50, No. 1, 2002, p. 62, [<https://doi.org/10.1111/1467-9248.00357>].

rejecting strong judicial review, or judicial review altogether, as populist.⁴⁹ 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 legitimize the silencing of judicial review.

One of the “fake judges” of the Polish Constitutional Tribunal, the late Lech Morawski, emphasized the republican traditions, present both in Hungary and Poland, mentioning the names of Michael Sandel, Philip Pettit, and Quentin Skinner.⁵⁰ Also, constitutional law professor Adam Czarnota explained the necessity of the changes, with the argument that “legal constitutionalism alienated the constitution from citizens... The place of excluded citizens was taken by lawyers.”⁵¹ 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 the judicial restraint not judicial activism which was earlier the norm.”⁵² 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,”⁵³ what he considers to be the fulfillment 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’, in his book argued for a strong state and claimed the expansion of political constitutionalism regarding the changes.⁵⁴ It is remarkable that two other members of the current packed Constitutional Court also argue against legal constitutionalism, blaming it as “judicial dictatorship”⁵⁵ or “juristocratic.”⁵⁶ 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 prevailing over the legal one.⁵⁷ Even those, like

⁴⁹ See for the opposite view L. CORSO, “What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions,” *Rivista di filosofia del Diritto* Vol. III, No. 2, 2014, pp. 443-470.

⁵⁰ L. MORAWSKI, “A Critical Response,” *Verfassungsblog on matters constitutional*, June 3, 2017, [<https://verfassungsblog.de/a-critical-response/>].

⁵¹ A. CZARNOTA, “The Constitutional Tribunal,” *Verfassungsblog on matters constitutional*, June 3, 2017, [<https://verfassungsblog.de/the-constitutional-tribunal/>].

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ See I. STUMPF, *Erős Állam – Alkotmányos Korlátok [Strong State – Constitutional Limits]*, Budapest, Századvég Kiadó, 2014, pp. 244-249.

⁵⁵ See A.Zs. VARGA, *From Ideal to Idol? The Concept of the Rule of Law*, Budapest, Dialóg Campus, 2019, p. 16.

⁵⁶ B. POKOL, *The Juristocratic State: Its Victory and the Possibility of Taming*, Budapest, Dialóg Campus, 2017.

⁵⁷ 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

Kálmán Pócza, Gábor Dobos and Attila Gyulai who acknowledge that the Court hasn't been confrontational towards the current legislature and the government characterize this behavior as a special approach within the system of separation of powers, best described as a partnership in a constitutional dialogue⁵⁸.

Political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from one another 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 “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, galvanize, and release it.”⁵⁹ 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.⁶⁰ Those scholars realize that parliamentary sovereignty tends to be increasingly restrained, either legally or politically,

Amendments],” *Jogesetek Magyarázata*, Vol. 4, No. 3, 2013, p. 12, [<https://jema.hu/index.php?o=10&tan=245>].

⁵⁸ 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*, London, Routledge, 2018.

⁵⁹ Analyzing 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.” (R.D. PARKER, “‘Here, the People Rule’: A Constitutional Populist Manifesto,” *Valparaiso University Law Review*, Vol. 27, No. 3, 1993, p. 583, [<http://scholar.valpo.edu/vulr/vol27/iss3/1/>]). A similar message can be detected in the interview with Mark Lilla, a conservative liberal professor of the humanities at Columbia University, 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.” M. LILLA, “The End of Identity Liberalism,” *The New York Times*, November 18, 2016, [<https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html>]. Later, in an interview on the topic of the most effective tools against the President’s populism, Lilla 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.” D. REMNICK, “A Conversation with Mark Lilla on His Critique of Identity Politics,” *The New Yorker*, August 25, 2017, [<https://www.newyorker.com/news/news-desk/a-conversation-with-mark-lilla-on-his-critique-of-identity-politics>].

⁶⁰ See S. GARDBAUM, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, (Cambridge, Cambridge University Press, 2013) about the new model. This model has also come to be known by several other names: “weak-form of judicial review” (M. TUSHNET, “Alternative Forms of Judicial Review,” *Michigan Law Review*, Vol. 101, No. 8, 2003, pp. 2781-2802, [<https://scholarship.law.georgetown.edu/facpub/259/>]); “weak judicial review” (J. WALDRON, “The Core of the Case Against Judicial Review,” *Yale Law Journal*, Vol. 115, No. 6, 2006, pp. 1348-1406, [<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5011&context=yjlj>]); “the parliamentary bill of rights model” (J. HIEBERT, “Parliamentary Bill of Rights. An Alternative Model?,” *Modern Law Review*, Vol. 69, No. 1, 2006, pp. 7-28, [<https://doi.org/10.1111/j.1468-2230.2006.00574.x>]); “the model of democratic dialogue” (A.L. YOUNG, *Parliamentary Sovereignty And The Human Rights Act*, Oxford, Hart Publishing, 2009); “dialogic judicial review” (K. ROACH, “Dialogic Judicial Review and its Critics,” *Supreme Court Law Review*, Vol. 23 (2nd series), 2004, pp. 49-104, [<https://ssrn.com/abstract=1144790>]); “collaborative constitution” (A. KAVANAUGH,

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.⁶¹ The remainders 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 separation of powers. In the authoritarian Hungarian and in the Polish sham system 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.⁶² 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 authorized to review legislation, but the legislature has the possibility to override or disregard judicial decisions.⁶³

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 has started in Hungary right after the landslide victory of the center-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 also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.⁶⁴ From 2014, there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has also worked with two—and from February 2016

“Participation and Judicial Review: A Reply to Jeremy Waldron,” *Law and Philosophy*, Vol. 22, No. 5, 2003, pp. 451-486, [<https://www.jstor.org/stable/3505148>]); or “democratic constitutionalism” (R. POST and R. SIEGEL, “Democratic Constitutionalism,” *National Constitution Center*, n.d., [<https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism>]).

⁶¹ 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, pp. 405-433.

⁶² See T. GYÖRFI, *Against the New Constitutionalism*, Cheltenham, Edward Elgar Publishing, 2016.

⁶³ See S. GARDBAUM, *The New Commonwealth Model of Constitutionalism*, *op. cit.*

⁶⁴ About the Romanian crisis see V. PERJU, “The Romanian double executive and the 2012 constitutional crisis,” *International Journal of Constitutional Law*, Vol. 13, No. 1, 2015, pp. 246-278, [<https://doi.org/10.1093/icon/mov011>]; 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, pp. 153.

three—judges short, because the President of the Republic refused to fill the vacancies.⁶⁵ 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.⁶⁶ 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.⁶⁷ Also, political constitutionalism emphasizes 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.⁶⁸

C. Constitutional Identity

From the very beginning, the government of Viktor Orbán has justified non-compliance with the principles of liberal democratic constitutionalism enshrined also in Article 2 of the Treaty of the European Union (TEU) by referring to national sovereignty.⁶⁹ Lately, as an immediate reaction to the EU's efforts to solve the refugee crisis, the government has advanced the argument that the country's constitutional identity is guaranteed in Article 4 (2) TEU.

⁶⁵ T. LÁLIK, "Constitutional Crisis in Slovakia: Still Far from Resolution," *I-CONNECT*, August 5, 2016, [<http://www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>].

⁶⁶ The same playbook was also used outside the region, in Turkey by Erdoğan and in Venezuela by Chavez.

⁶⁷ See these requirements of political constitutionalism in P. CASTILLO-ORTIZ, "The Illiberal Abuse of Constitutional Courts in Europe," *European Constitutional Law Review*, Vol. 15, No. 1, 2019, p. 64.

⁶⁸ As Wojciech Sadurski rightly points out the Polish governing party, PiS obtained 18 % of the votes of all eligible voters. See W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press, 2019, p. 1.

⁶⁹ The first reaction of the Hungarian government to the so called "Tavares report" of July 3, 2013, of the European Parliament on the Hungarian constitutional situation (R. TAVARES, "Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))," Committee on Civil Liberties, Justice and Home Affairs, European Parliament, June 24, 2013, A7-0220/2013, [https://www.europarl.europa.eu/doceo/document/A-7-2013-0229_EN.html]) was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary." The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits

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

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

The Constitutional Court in its decision held that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law—it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty."⁷⁰ 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."⁷¹ This abuse of constitutional identity aimed at not taking part in the joint European solution to the

from their monopoly in Hungary. In its conclusion, the Hungarian Parliament called on the Hungarian government "not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families." These words very much reflect the Orbán government's view of "national freedom," which emphasizes the liberty of the state (or the nation) to determine its own laws: "This is why we are writing our own constitution . . . And we don't want any unsolicited help from strangers who are keen to guide us . . . Hungary must turn on its own axis". (For the original, Hungarian-language text of Orbán's speech: "Nem leszünk gyarmat! [We won't be a colony anymore!]" (March 15, 2012), *Miniszterelnok.hu*, [http://2010-2015.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_]. The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g.: "The EU Soviet? Barroso takes on Orban," *Financial Times: Brussels Blog*, March 16, 2012, [<http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban>].)

⁷⁰ Decision 22/2016 AB of the Constitutional Court of Hungary, paragraph 67. See 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," *Review of Central and East European Law*, Vol. 43, No. 1, 2018, pp. 23-42, [<https://doi.org/10.1163/15730352-04301002>].

⁷¹ *Ibid.*

refugee crisis is an exercise of national constitutional parochialism,⁷² which attempts to abandon the common European liberal democratic constitutional whole.

The Constitutional Court in its decision 3/2019. (III. 7.) AB also decided about the constitutionality of certain elements of the “Stop Soros” legislative package, and ruled that the criminalization 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 freedom of association, freedom of expression hiding behind the alleged obligation to protect Schengen borders against “masses entering uncontrollably and illegitimately” the EU⁷³. Besides infringing the rights of the NGOs, 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 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 cases⁷⁴.

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

CONCLUSION

In this paper, I tried answer the question, whether there is a genuine constitutional theory of “illiberal constitutionalism”? I 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. This concept has nothing to do with any majoritarian constitutional model based

⁷² See the term used by M. KUMM, “Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism,” in M. AVBELJ and J. KOMÁREK (eds.), *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart Publishing, 2012, p. 51.

⁷³ 3/2019. (III. 7.) AB, paragraph 43.

⁷⁴ *Ibid.*, paragraph 49.

on the separation of power, or with political constitutionalism, or any kind of weak judicial review, and it misuses the concept of constitutional identity.

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