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Does Illiberal Democracy Exist?

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Modern liberalism has become obsolete
Vladimir Putin

I. ILLIBERAL THEORIES

Illiberalism can be understood as a critical reaction to liberalism. The subjects of illiberal criticism are both liberal theories and liberal societies. As Stephen Holmes argues, illiberals or anti-liberals are unwilling to examine liberal theories and liberal societies separately, because they assume that liberal societies perfectly embody liberal ideas, therefore the failing of liberal societies follows directly from the inadequacy of liberal principles. This chapter will discuss the current state of play of both illiberal theories and illiberal societies in East Central Europe.

Illiberal critics of liberalism also portray and demonise liberalism as a single coherent phenomenon. However, conservative liberals have little in common with social democratic ones, nor neo-liberals with classical ones. As Ralf Dahrendorf has rightly pointed out, Friedrich von Hayek and Karl Popper may well both be seen as liberal thinkers, but their views are quite different from each other.

While discussing illiberalism the focus of this chapter will be institutional. From this perspective the main object of illiberal critique is liberal democracy, which in my view is not merely a limit on the public power of the majority, but also presupposes rule of law, checks and balances, and guaranteed fundamental rights. This means that there is no democracy without liberalism, and there also cannot be liberal rights without democracy. In this respect, there is no such a thing as an ‘illiberal or
anti-liberal democracy. Those who perceive democracy as liberal by definition claim that illiberalism is inherently hostile to values associated with constitutionalism, as an institutional aspect of liberal democracy: separation of powers, constraints on the will of the majority, human rights, and protections for minorities. Therefore, the also oxymonoric ‘illiberal’ or ‘populist’ constitutionalism is necessarily authoritarian in character.

Distinct from illiberal theories, the second part of the chapter discusses three main relations of illiberal societies: the social, the economic and the political. Among other things, I want to figure out whether the backsliding of liberalism in East-Central Europe is a proof or consequence of failure of liberal ideas.

A. Autocratic Leaders’ Rhetoric

In a speech delivered on 26 July 2014, before an ethnic Hungarian audience in the neighbouring Romania, Prime Minister Viktor Orbán proclaimed his intention to turn Hungary into a state that ‘will undertake the odium of expressing that in character it is not of liberal nature’. 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 and Alfred Stepan assert that if governments, even being freely elected violate the right of individuals and minorities, their regimes are not democracies. See JJ Linz and A Stepan, ‘Toward Consolidated Democracies’ (1996) 7(2) Journal of Democracy 14, 15. Similarly, János Kis claims that there is no such thing as nonliberal democracy, or non-democratic liberalism. See J Kis, ‘Demokráciából autokráciába. A rendszertipológia és az átmenet dinamikája’ [From Democracy to Autocracy. The System-typology and the Dynamics of the Transition] (2019) 1 Politikatudományi Szemle 45–74. Those critics, which argue that liberalism as a 300-year-old concept predates liberal democracy, forget that not only democracy but also liberalism presupposes general and equal suffrage.


2 For instance, Paul Blokker considers ‘populist constitutionalism’ as an alternative, conservative understanding of constitutional order, which, among other things, is a reaction to injustices resulting from liberal democratic politics, to unbalanced emphasis on formalistic liberal institutions, rights, and norms, and an aggressive institutionalisation of a liberal understanding of law in the post-1989 transformation. See P Blokker, ‘Populist Constitutionalism’ in C de la Torre (ed), Routledge Handbook of Global Populism (Routledge, 2018); P Blokker, ‘Populism As a Constitutional Project’ (2019) 17(2) ICON. Using Isaiah Berlin’s terminology on ‘false populism’ I argue somewhere else that this ‘authoritarian populist constitutionalism’ is only a rhetoric, and not a real populist appeal to the ‘people’. See G Halmai, ‘Populism, Authoritarianism and Constitutionalism’ (2019) 20(3) German Law Journal.

3 Following Juan José Linz’s classical categories authoritarianism is in between democratic and totalitarian political systems. See JJ Linz, Totalitarian and Authoritarian Regimes (Lynne Riener, 2000). Writing about Franco’s Spain, Linz has already outlined the following four main characteristics of authoritarianism: limited, not responsible political pluralism, without elaborate and guiding ideology, without political mobilisation, and with formally ill-defined, but quite predictable limits of power. See JJ Linz, ‘An Authoritarian Regime: the Case of Spain’ in E Allard and Y Littunen (eds), Cleavages, Ideologies and Party Systems (Helsinki, 1970). Regarding the constitutional markers of authoritarianism as a pretence of democracy, such as the lack of procedural rights, institutional guarantees and public discourse, see G Attila Tóth, ‘Constitutional Markers of Authoritarianism’ (2018) 11(2) Hague Journal on the Rule of Law.
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 interests.⁸

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.⁹

In June 2019, after Fidesz was suspended from the centre-right party family, EPP set up a special committee to examine the Fidesz party’s adherence to democratic standards. One of the questions the members of 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 was: ‘Please explain what you mean by the expression “illiberal state”? ’ The Fidesz chairman and Hungarian Prime Minster’s response was:

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 Leitkultur, 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.¹⁰

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.¹¹

In July 2019 in the yearly Bâile Tușnad/Tusnádfürdő Free University camp 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

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⁹See Prime Minister Viktor Orbán’s Speech at the 28th Báylvanos Summer Open University and Student Camp, 28 July 2018. Tusnádfürdő (Bâile Tușnad).
¹⁰The leaked letter has been published by Politico at www.politico.eu/article/viktor-orban-rejects-epp-concerns-rule-of-law/.
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.\textsuperscript{12}

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 \textit{On Liberty} – which can only be infringed upon if the exercise of one’s liberty harms others. Christian liberty, by contrast, holds that we ought to treat others as we want to be treated.\textsuperscript{13} ‘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 a 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 of ‘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.\textsuperscript{14}

Another new element of the speech is where Orbán puts ‘Christian liberty’ at the centre of the ‘Christian democratic state’, ‘a new and authentic model of state and political theory’, which has been reached in the last 30 years by 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

\textsuperscript{12}See www.miniszterelnok.hu/yes-to-democracy-no-to-liberalism/. As Yale law and history professor, Samuel Moyn pointed out President Trump had also begun to nudge the political culture in the same direction. He quoted Sohrab Ahmari, a conservative journalist, who approvingly explained Trump’s policy as re-ordering the common good and ultimately the Highest Good, ‘that is, the Christian God’ – Moyn argues. See S Moyn, ‘We Are in An Anti-Liberal Moment. Liberals Need Better Answers’ \textit{The Washington Post} (21 June 2019).

\textsuperscript{13}See www.miniszterelnok.hu/orban-viktor-beszede-a-kereszteny-ertelmisegiek--szovetsegenekekkesz-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: www.miniszterelnok.hu/viktor-orbans-rededem-kongress-des-verbandes-der-christlichen-intelletuellen-kereszteny-ertelmisegiek-szovetsegkekesz.

\textsuperscript{14}As Éva S Balogh points out this passage is taken from the Gospel of Matthew, (5:13-15), without identifying it. See ÉS Balogh, ‘Orbán, the New Jesus Delivers His Sermon on the Mount’ \textit{Hungarian Spectrum} (15 September 2019).
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.15

Orbán also refused 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 politics’.16

B. Illiberal Democratic Ideology

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 Láncai, 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, that Orbán assigned as compulsory reading for all his ministers.17 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’. Láncai’s anti-liberal concept can be found in his book Political Realism and Wisdom, which was published in English in 2015, as well as in an article published in 2018, after Fidesz’ third consecutive electoral victory.18 Láncai’s critique is an outright rejection of liberalism as a utopian ideology, which is – similar to communism – incompatible with democracy.

Similarly to Orbán, the at that time Prime Minister Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), described the actions of the PiS Government dismantling the independence of the Constitutional Tribunal and

15 See ‘A Tavares jelentés egy baloldali akció’ (The Tavares report is a leftist action), Interview with PM Viktor Orbán in the Hungarian Public Radio, Kossuth Rádió, 5 July 2013.
16 Interview with Bloomberg News, 14 December 2014.
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 four countries demanded a structural change of the EU in favour of the nation states.\textsuperscript{19} Witold Waszczykowski, Poland’s minister of foreign affairs, expressing his own and his governing PiS party’s anti-liberalism went as far as to mock liberalism as ‘a world made up of cyclists and vegetarians, who only use renewable energy and fight all form of religion’.\textsuperscript{20}

Ryszard Legutko, the main ideologue of PiS, similarly to his Hungarian counterpart, Láncai, also likens liberal democracy with communism, both being fuelled by the ideas of modernisation and progress.\textsuperscript{21} Both Láncai and Legutko assert together with other anti-liberals with one voice that liberalism and communism, or for that matter its ideology, Marxism are secretly allied and share a common ancestry that they are two offshoots of an Enlightenment tradition.\textsuperscript{22} Legutko also accuses liberalism’s aim to root out all forms of inequality, and asserts that human right, as legal norms that promote equality become ‘arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good’.\textsuperscript{23}

This critique of liberalism goes back to the concept of Volksgemeinschaft (national community), or völkisches Recht, one of the core principles of National Socialist law, which can be characterised negatively by rejection of the individualistic, normative concept of the people (Volk) as the sum of nationals of the state, as presented in the 1918 Weimar Constitution.\textsuperscript{24} Volksgemeinschaft together with the Führerprinzip, the other main principle of National Socialist Weltanschauung aim to overcome individualism, hence it means strong anti-liberalism. Due to Carl Schmitt’s well-known flirts

\textsuperscript{19}Slawomir Sierakowski even speaks about an ‘illiberal international’. See S Sierakowski, ‘The Polish Threat to Europe’ Project Syndicate (19 January 2016).

\textsuperscript{20}‘Haben die Polen einen Vogel’, Bild (3 January 2016).


\textsuperscript{22}This anti-liberal political theory is present outside East-Central Europe as well. For instance Patrick Deneen’s book, Why Liberalism Failed (2018) is directed at the left in the US targeting both contemporary progressivism and ‘classical liberalism’ of conservatives. See also the Israeli political theorist Yoram Hazony, whose book The Virtue of Nationalism (2018) also criticises 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’ (2019) 30(1) Journal of Democracy 16–17.

\textsuperscript{23}Legutko (n 21) 135. In a recent article, Paul Blokker characterises both Legutko and Láncai as conservative intellectuals who have provided ideas for the conservative populist project, and important contributions to rethinking/re-imagining constitutional democracy in the contemporary European context. See P Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15(3) European Constitutional Law.

with National Socialism it is not surprising that the critical stance of the new illiberalists towards liberal constitutionalism is also related to a Schmittian understanding of the Constitution, and to his critique of liberal constitutionalism and its conception of the rule of law.25 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. The absolute authority of the political will of the people overrides all constitutional requirements, which according to Schmitt are signs of depoliticisation tendencies caused by liberal democracies. This is the reason that he elaborated on The concept of the Political26 (Das Politische) based on the distinction between friend and enemy, which is precisely the opposite of liberal neutrality.27

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 ‘remains alongside and above the constitution’.28 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 democracy29 based on the homogeneity of the nation is the only true form of democracy. But Schmitt is talking about these intermittent plebiscites as a tool to tap the resource of consent by the governed within a ‘qualitative’ and strong totalitarian state, the authority of which rests on the military and the bureaucracy, and which

28 See C Schmitt, Constitutional Theory (Duke University Press, 2008) 125–26. 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.
29 The Hungarian political scientist, András Körösenyi, implementing the Weberian concept describes the Orbán regime as a ‘plebiscitary leader democracy’, where the activity of the leader (or Führer? – GH) is posteriorly approved by the people, but since this approval can be withdrawn this is still a democratic system. See A Körösenyi, ‘Weber és az Orbán-rezsim: plebiscitier vezéremokrácia Magyarországon’ (Weber and the Orbán-regime: Plebiscitier Leader Democracy in Hungary) (2017) 4 Politikatudományi Szemle 7–28. In a more recent interview however, Körösenyi admitted that the for the withdrawal of approval currently a miracle is needed. See ‘Csak a csoda segít’ (Only the Miracle Helps), hvg, (20 June 2019). In contrast, Wojciech Sadurski using Guillermon O’Donnell’s ‘delegative democracy’ concept characterises the Polish system after 2015 as a ‘plebiscitary autocracy’, in which the electorate approves of governmental disregard of the constitution. See W Sadurski, Poland’s Constitutional Breakdown (OUP, 2019) 242–43. Similarly, Juan José Linz, to avoid confusion, proposes the addition of adjectives to ‘authoritarianism’ rather than to ‘democracy’ for such regimes: eg ‘electoral authoritarianism’. Also, Larry Diamond refers to ‘electoral authoritarianism’ in hybrid regimes. See L Diamond, ‘Thinking About Hybrid Regimes’ (2002) 13(2) Journal of Democracy 21, 24.
cannot accept the existence of political opposition.\textsuperscript{30} In other words the strong state cannot be liberal.\textsuperscript{31}

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.\textsuperscript{32} Consequently, I equate constitutionalism with liberal democratic constitutionalism.\textsuperscript{33} 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 Simper do in their book,\textsuperscript{34} but I do not agree with the use of the term ‘authoritarian constitutionalism’\textsuperscript{35} or ‘constitutional authoritarianism’.\textsuperscript{36} Besides the


\textsuperscript{31}Regarding the revival of Carl Schmitt in the Hungarian political and constitutional theory see A Antal, ‘The Rebirth of the Political – A Schmittian Moment in Hungary’ Transcript of the lecture given at the Constitutional systems in Middle Europe. The cycle of meetings about political ideas of Tadeusz Mazowiecki organised by Polska Fundacja im. Roberta Schumana on 6 November 2017, Warsaw. Also Z Balázs, ‘Political Theory in Hungary After the Regime Change’ (2014) 7(1) \textit{International Political Anthropology} 5–26.

\textsuperscript{32}M Kumm, ‘Demokratie als verfassungsfeindlicher Topos’ \textit{Verfassungsblog} (6 September 2017).

\textsuperscript{33}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’ (2016) 14(1) ICON. On 11 October 2019 Tushnet posted the following message to his Facebook page: ‘My lecture today was on “Varieties of Constitutionalism” and argued that a thin version of constitutionalism requires only (1) that there be some entrenched provisions, (2) that there be some mechanism for resolving disputes about what the law is that is oriented solely to making decision according to law, and (3) that the regime receive popular consent to the regime as a whole measured over some reasonable period of time. (Lots of complexities elided here.) The first subtext, which almost surfaced in the discussion afterwards, is that the Chinese leadership doesn’t really have to fear constitutionalism as such (as it seems to do), if the very thin version I outlined counts as constitutionalism (which I think it does). The second subtext is that, if the idea of thin constitutionalism were accepted the way would be open for discussions about whether thin constitutionalism should be thickened (discussions that are harder to have if the idea of constitutionalism is ruled off the table from the outset)’. Similarly, Gila Stopler defines the state of the current Israeli constitutional system as ‘semi-liberal constitutionalism’. cf G Stopler, ‘Constitutional Capture in Israel’ (2017) ICON.

\textsuperscript{34}T Ginsburg and A Simper, \textit{Constitutions in Authoritarian Regimes} (CUP, 2014).

\textsuperscript{35}See for instance Somek (n 30); Turkuler Isiksel, ‘Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism’ (2013) 11 Int’l J. Const. Law. 702; M Tushnet, ‘Authoritarian Constitutionalism’ (2015) 100 Cornell Law Review 391. Somek deals with Austria before the Anschluss, Isiksel with Turkey, while Tushnet tries to generally pluralise the normative understanding of nonliberal 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 H Alviar Garcia and G Frankenber (eds), \textit{Authoritarian Constitutionalism. Comparative Analysis and Critique} (Edward Elgar, 2019) – 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 Frankenber, \textit{Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares} in Garcia and Frankenber (eds) (ibid) 7.

constitutions in the communist countries, both current theocratic and communitarian constitutions are considered as illiberal.\textsuperscript{37} Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.\textsuperscript{38} 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, 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’.\textsuperscript{39} 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’.\textsuperscript{40} Walker’s main example for the nonliberal, rather local than universal values is the multicultural grant of group rights to native peoples and the distinct society of Québec, but he also mentions the state of Israel, which fails its 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 “neutralities” of the liberal state as a covert form of coercion’.\textsuperscript{41} Walker builds up his concept using Charles Howard McIlwain’s understanding of constitutionalism in his 1940 book.\textsuperscript{42} According to McIlwain the limitation of government by law is not necessarily liberal, because the rights of individuals are not centralised, and there is no need for a public authority to be a neutral arbiter among competing value systems. Among the more contemporary thinkers, Walker relies on Stanley Fish’s scepticism about individual rights of all kinds. In his notorious articles from 1987\textsuperscript{43} and 1992\textsuperscript{44} 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/tolerationist American university campus practices as an

\textsuperscript{37} L-A Thio, ‘Constitutionalism in Illiberal Polities’, in M Rosenfeld and A Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP, 2012) 133. Contrary to my understanding, Thio also talks about ‘constitutioalistism’ in illiberal polities.

\textsuperscript{38} 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.


\textsuperscript{41} ibid 157.

\textsuperscript{42} CH McIlwain, Constitutionalism, Ancient and Modern (Cornell University Press, 1940).


\textsuperscript{44} S Fish, ‘There’s No Such Thing as Free Speech and It’s a Good Thing, Too’ (1992) 17(1) Boston Review.
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 not. The ‘constitution’ as the configuration of public order defined by Aristotle or Cicero did not require the notion of individual rights, while modern constitutionalism does. 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’. 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, emphasising ‘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”’. Also, András Sajó and Renáta Uitz describe constitutionalism as a liberal political philosophy that is concerned with limiting government. 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. ILLIBERAL SOCIETIES

A. Social Relations

Historically, in the East-Central European countries, there were only some unexpected moments of quick flourishing of liberalism and liberal democracy followed...
by an equally quick delegitimisation of it. For instance shortly after 1945, till the communist parties took over, and also after 1989, when liberal democracy again seemed to be the ‘end of history’. 51 Otherwise, in the national history of the Central and Eastern European countries, authoritarianism, such as the pre-1939 authoritarian Hungarian or Polish politics, played a much more important role in the transformation. 52 Maybe the only exception was the independent Czechoslovakia established after World War I, led by its first President Tomáš Garrigue Masaryk. 53

As mentioned earlier, modernisation is the main enemy of illiberal theory. As surveys on the links between modernisation and democracy show, the society’s historic and religious heritage leaves a lasting imprint. 54 According to these surveys, the public of formerly agrarian societies, like many of the East Central European ones, emphasise religion, national pride, obedience, and respect for authority, while the public of industrial societies emphasise secularism, cosmopolitanism, autonomy, and rationality. 55 Even modernisation’s changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation. 56 According to the study, which examined 34 countries in the EU and the OECD, countries in East Central Europe have had a low level of social cohesion ever since the post-communist transformation, Hungary is ranked at 27th, between Poland and Slovakia. Social cohesion is defined as the special quality with which members of a community live and work together.

Even though the transition to democracy in East Central Europe was driven by the fact that a large share of the population gave high priority to freedom itself, people expected the new states to produce speedy economic growth, with which the country could attain the living standards of West preferably overnight, without painful reforms. In other words, one can argue that the average people in these countries


55 Ibid 553. This is one of the reasons for Czechia’s less religious society. Christian Welzel in his more recent book argues that fading existential pressures open people’s minds, making them prioritise 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 peoples’ minds closed, in which case they emphasise the opposite priorities. This is the utility ladder of freedom. C Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation* (CUP, 2013).

pursued the West in 1989–90, though not so much in terms of the Western political and constitutional system, but rather in terms of the living standards of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, saying that this could undermine the legitimacy of democratic institutions and turn back the process of democratisation.57 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, a mild vetting procedure, and lack of restitution of the confiscated properties, were reasons for disappointment. Again, Czechia has been different both regarding the bourgeoisie and the harsher transitional justice measures.

Trying to explain the attitudes of voters to support populist authoritarian pursuit of illiberal leaders, such as Orbán or Kaczyński, Ronald Inglehart and Pippa Norris suggest that it would be a mistake to attribute the rise of authoritarian 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 emphasise nationalistic and xenophobia appeals, rejecting outsiders, and upholding old-fashioned gender roles.58 Similarly, Will Wilkinson argues that urbanisation is a process that divides society in cultural values. While it creates thriving, multicultural, high-density areas where socially liberal values predominate, it also leaves behind rural areas and smaller urban centres that are increasingly uniform in terms of rather illiberal values.59

B. Economic Relations

Paradoxically, politically illiberal leaders, like Viktor Orbán of Hungary, use (neo) liberal economic policy to support their autocratic (constitutional) agenda.60 As many argue, referring to Karl Polányi’s influential book, The Great Repression, that the resistance to social democracy through authoritarianism in the name of economic liberalism prepared the ground for Fascism, and can lead to autocracy again.61 Other, mostly left-wing populists react to the unfulfilled promise of social-rights constitutionalism, based on TH Marshall’s concept of social rights being continuous to civil and political rights, which turned out to be a lie in most of East Central European countries’ constitutional practice.62 As Samuel Moyn argues, a commitment

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57 cf C Offe, Designing Institutions for East European Transitions (Institut für Höhere Studies, 1994) 15.
58 R Inglehart and P Norris, Cultural Backlash, Trump, Brexit, and Authoritarian Populism (CUP, 2019).
60 This phenomenon is named by Michael Wilkinson as authoritarian liberalism. See MA Wilkinson, ‘Authoritarian Liberalism as Authoritarian Constitutionalism’ in H Alviar and G Frankenberg (eds), Authoritarian Constitutionalism (Edward Elgar, 2019).
62 Andrew Arato and Jean Cohen, analysing the normative theory of left populist Ernesto Laclau and Chantal Mouffe respectively, go even further by claiming that left populism also cannot avoid the
to material equality disappeared, in its place market fundamentalism has emerged as the dominant force of national and global economics.\(^{63}\)

The new illiberal system of ‘national cooperation’ in Hungary has left behind the vulnerable members of society, homeless people and refugees, and tries to diminish or cut the solidary actions of the members of the Hungarian society. In this respect Orbán’s right-wing authoritarian populism even differs from the policy of other right-wing populists, such as the French National Front or Austria’s Freedom Party, who – similarly to Orbán – mobilise their supporters with exclusion through immigration policy, but as opposed to the Hungarian PM, they often also emphasise inclusion through social rights and economic security.\(^{64}\)

The packed Hungarian Constitutional Court rubberstamps the government’s neoliberal economic policy, changing its predecessor’s practice, which in the mid-1990s was willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was an underdeveloped societal practice from the beginning of the democratic transition for several reasons, the at that time Constitutional Court strongly committed itself to the protection of human dignity and in this way guaranteed a higher profile for social (solidarity) rights, especially in the case of social care based on neediness.

As a contrast, in the ‘non-solidary’ system of the Hungarian Fundamental Law of 2011 social security does not appear as a fundamental right, but merely as something the state ‘shall strive’ for, which is a step backward in comparison with the 1989 Constitution. Social insurance is not a constitutional institution any more, and the provisions of the Fundamental Law do not guarantee equal dignity and the former level of property protection. The recent case law of the Constitutional Court reaffirms the initial concerns, the dignity of social solidarity got lost in the illiberal backsliding of the past 10 years.

C. Political Relations

The expansion of political illiberalism in East Central Europe through the introduction of a new illiberal constitutional regime went the furthest in Hungary and Poland. In the case of the former it was through a brand new constitution enacted in 2010, or through legislative changes that ignore the valid liberal constitution, as has been the case in Poland since 2015. Ironically, both countries are still members of the European Union, a value community based on the principles of liberal democracy.

In 2010 Orbán’s Fidesz party returned to power with the absolute majority of the votes, and due to the inherited disproportional election system that gained a two-third majority of the seats, which made it possible for them to enact a new, ‘illiberal’ constitution. This constitution, entitled the Fundamental Law of Hungary was passed by Parliament on 18 April 2011. The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other.

In December 2011 the Parliament enacted a controversial election law with its gerrymandered electoral districts, making the electoral system even more disproportional, by increasing the proportion of single-member constituency mandates, eliminating the second round, introducing a relative majority system instead of the absolute majority, and introducing ‘winner-compensation’, which favoured the governing party. With this rigged electoral system Fidesz both in 2014 and 2018 was able to renew its two-thirds majority with less than a majority of the popular vote. Beyond the change of the electoral law Fidesz made the playing field even more uneven by dismantling free media, and threatening civil society.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country’s 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court was the decision to annul all Court decisions prior to when the Fundamental Law entered into force. At one level, this would have made sense, but the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonised domestic rights protections to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government undermined legal security with respect to the protection of constitutional rights in Hungary. This regime is not merely illiberal, in not respecting human dignity, minorities’ and individual’s rights, the rule of law, and separation of power, but it is not democratic either, because the outcome of the elections are not uncertain anymore. It can be considered as a ‘pseudo-democracy’.

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65 Steven Levitsky and Lucan Way argued: ‘Clearly, Hungary is not a democracy. But understanding why requires a nuanced understanding of the line between democracy and autocracy ... Orbán's Hungary is a prime example of a competitive autocracy with an uneven playing field’. S Levitsky and L Way, ‘How autocrats can rig the game and damage democracy’ The Washington Post (4 January 2019).

66 The OSCE election observers were very critical of both the 2014 and 2018 elections, noting that ‘overlap between state and ruling party resources’, as well as opaque campaign finance, media bias, and ‘intimidating and xenophobic rhetoric’ also hampered voters’ ability to make informed choices. See www.osce.org/odihr/elections/hungary.

67 The test of a democracy is not whether the economy is growing, employment is rising, or more couples are marrying, but whether people can choose and replace their leaders in free and fair elections.
ii. Poland

Poland’s 1989 negotiated democratic transition preceded Hungary’s, but it followed Hungary’s constitutional backsliding after the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, regained parliamentary elections in October 2015, after two years of rather unsuccessful governing between 2005 and 2007. PiS returned to power with a vengeance, committed to reshaping the entire constitutional system in order to create a ‘new and virtuous Fourth Republic’.68 This meant a systemic and relentless annihilation of all independent powers that could check the will of the ultimate leader. In that respect, his role model is Viktor Orbán.69 In 2011, PiS published a long document, authored largely by Kaczyński himself, on the party’s and its leader’s vision of the state. The main proposition of this paper is very similar to the one that Orbán described in a speech in 2009: a well-ordered Poland should have a ‘centre of political direction’, which would enforce the true national interest. This illiberal counter-revolution of both Orbán and Kaczyński is based on a communist rejection of checks and balances, as well as constitutionally entrenched rights.70

Unlike FIDESZ in 2011, PiS lacks the constitution-making or amending two-thirds majority in the Polish Parliament. Therefore, it started to act by simply disregarding the liberal democratic Constitution of 1997. The first victim was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS’ legislative agenda, including limits on the privacy of public officials to be screened and freedom of speech and assembly.71 In Orbán’s playbook, which is seemingly followed by Kaczyński, the other major target has been the media, the civil service and the ordinary courts. As opposed to Hungary, for the dismantlement of liberal democratic institutions PiS does not really needed a new constitution because what they have been doing since the autumn of 2015 is already a de facto change to the Constitution through sub-constitutional laws. Wojciech Sadurski calls this a constitutional breakdown resulting in an authoritarian regime.72

This is the test that Hungary’s political system now fails. When Viktor Orbán and his Fidesz party returned to power in 2010 with a parliamentary supermajority, they set about destroying the constitutional pillars of liberal democracy … By the 2014 elections, Orbán had rigged the system. Yes, multiparty elections continued, but his systematic degradation of constitutional checks and balances so tilted the playing field that he was able to renew his two-thirds majority in parliament with less than a majority of the popular vote (and did so again in 2018) … Orbán has transformed Hungary into not an illiberal democracy but a pseudo-democracy’. See L. Diamond, ‘How Democratic Is Hungary?’ Foreign Affairs (September/October 2019).

68 Kaczyński’s conspiracy theory that liberal intellectuals had become allies to former communists led to a final split of the opposition movement Solidarity. The new government parties both in Hungary and Poland rejected ‘1989’ for the same reasons: namely, absence of radicalism of the democratic transition, and for the alleged liberation of the communist elites. See I. Krastev, ‘Walesa, Gorbachev and Freedom’s End’ The New York Times (14 March 2016).


70 Wojciech Sadurski, professor of constitutional law, who was the Kaczyński brothers’ fellow student at the University of Warsaw in the 1970s, says that this vision bears a striking resemblance to the writings of Stanislaw Ehrlich, their joint ex-Marxist professor. See W Sadurski, ‘What Make Kaczyński Tick?’ (2016) I•CON.

71 About the battle for the Constitutional Tribunal see TT Koncewicz, ‘Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense’ (2015) I•CON.

72 See W Sadurski, Poland’s Constitutional Breakdown (OUP, 2019). Professor Sadurski’s harsh criticism of the democratic backsliding both PiS and the Polish government initiated several court procedures.
III. CONCLUSION

In the first part of this chapter, I tried to 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 on the separation of power, or with political constitutionalism, or any kind of weak judicial review, and it misuses the concept of constitutional identity.

The second part of the chapter investigated the social, economic and political relations of illiberal societies. Regarding the first issue I found that there has been a very weak historical tradition of liberalism and modernisation in the East-Central European societies, and also the main driving force of the transition to liberal democracy was to reach the living standard of the West. The lack of success to achieve this goal, together with the accumulation of wealth by some former members of the communist nomenclature, and the failures of redistributive justice efforts were the reasons for disappointment also in the liberal democratic pursuits. Regarding the economic relations, the rise of economic inequality and the decline of social security and solidarity has paradoxically also been caused by the neoliberal economic policy of some of the illiberal political forces. These political actors have changed the entire political and constitutional structure into an illiberal system, mostly not based on their ideological conviction, but rather for the sake of building up and keeping an unrestrained power.

One of the reasons of the illiberal turn has been that there was 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.\(^{73}\) 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.\(^{74}\) 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 were the main political goals. But as soon as the main political goals were achieved, the liberal consensus died,\(^{75}\) and full democratic consolidation was never achieved.\(^{76}\)
An initial failure of the 1989 constitutional changes – namely the disproportional election systems – also contributed to the electoral victories of Fidesz in Hungary and PiS in Poland, the illiberal autocratic forces. In the case of Fidesz 53 per cent vote share resulted in 68 per cent in 2010 and even less than the majority of the votes again into two-thirds of the seats in Parliament both in 2014 and 2018. This made Fidesz able to change the entire constitutional system after its electoral success in 2010. PiS in 2015 got 51 per cent of the seats in the Sejm for 37.6 per cent of the votes, and again the majority of seats for 43.6 per cent of the votes in 2019. With their absolute majority they were able to enact laws – after packing the Constitutional Tribunal, even unconstitutional ones – without any need to consult with their parliamentary opposition.

According to some authors, the prospects for liberal constitutional democracy in the newly independent states of Central and Eastern Europe following the 1989–90 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. Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardised the development of participatory democracy. In other words, legal constitutionalism fell 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.

One can raise the hypothetical question whether earlier and more inclusive or participatory constitution-making processes could have ensured the durability of democratic institutions. Indeed, there was no early constitution making, and the amendment processes that happened instead were not participatory. Neither Poland nor Hungary enacted a new constitution right after the democratic transitions of 1989. Instead, in both countries as a result of the Round Table negotiations, between the representatives of the authoritarian communist regime and their democratic opposition, the illegitimate legislature was put in the position of enacting modifications to the old Stalinist constitutions. This was done based on the elite agreement without any consultation with the people. In the case of Poland, the 1952 Constitution was slightly modified in April 1989, while in Hungary the 1949 Constitution was comprehensively amended in October 1989. This was called by Andrew Arato ‘post-sovereign’ constitution-making. It is true that in Poland, the democratically elected...
Parliament enacted the so-called Small Constitution in 1992, but it only changed some elements of the state organisation, without the ambition of becoming the final closing act of the democratic transition. The new constitution was only enacted in 1997, again without participatory process, like a referendum. In Hungary, a similar new constitution-making effort failed in 1996, and even though the content of the 1989 comprehensive amendment fulfilled the requirements of a liberal democratic constitution, its heading had 1949 in it. With that Fidesz, after its electoral victory in 2010, could claim the need to enact a new constitution of the democratic transition and it had all the votes to enact what it wanted. But this was not a liberal democratic constitution anymore.

One can only speculate whether an earlier and more participatory constitution-making process would have been a guarantee against backsliding. There is nothing to suggest that an earlier and more participatory constitution-making process would have prevented the populist turn. As the Polish example proves, even the existence of a liberal democratic constitution does not constitute an obstacle against backlash. In my view, those proponents of participatory constitutionalism who argue that with participation backsliding it would not necessarily have happened, do not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, due to poor constitutional culture. 81

So far, the liberal elite seems to be unable to protect the liberal democratic ideals, which certainly indicates that the special historical circumstances require a longer period of time to build up a liberal democratic political and constitutional culture. But the democratic backsliding is not a proof of the failure of liberal democracy altogether, as illiberal leaders and their court ideologists want people to believe.


82 In their book, Ivan Krastev and Stephen Holmes argue that the fact that liberal democracy had no alternative in 1989, and East Central European countries had to imitate the Western model, contributed to the success of illiberalism in the region. See I Krastev and S Holmes, The Light that Failed: A Reckoning (Allen Lane, 2019). In my view, there was both a rightist nationalistic and a leftist democratic socialist alternative during the post-communist transition, and copying the West could only be harmful if there would have been equally promising scenarios available. After all, the imitation of liberal democracy in Germany after World War II and in Spain, Portugal and Greece did not result in illiberal regimes.