

AN ILLIBERAL DEMOCRACY IN THE MIDDLE OF EUROPE

WORKING PAPER DRAFT—NOT FOR CITATION

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Introduction

In this paper, I describe the elements and possible reasons for Hungary's recent transition from a liberal to an illiberal democratic system, and to explain both the unique and the more typical features of this change.¹ I have been reproached by many voices for bidding farewell to the rule of law, presumably precipitately, as well as for characterizing this illiberal turn as a counter-revolution. Alas, it appears that this assessment of the Hungarian constitutional process has been borne out by the harsh criticisms levied by the Council of Europe and the European Union. In an op-ed published in 2010, I predicted the end of the rule of law,² and in 2012, I used the term “constitutional counter-revolution” to describe the Hungarian constitutional restoration.³ At the same time, my view is that the illiberal turn, which significantly weakened the rule of law

¹ I am aware, of course, that there are assessments quite worthy of serious consideration that differ from my own, which argue that despite its problematic elements, the new constitutional regime continues to comply with European values. See, for example, H. Küpper, ‘Mit Mängeln. Ungarns neues Grundgesetz’, *Osteuropa*, December 2011. Our differing assessments caused the editors to contrast Küpper's study, which emphasizes the deficiencies of the new Fundamental Law, with my own article, which immediately follows his in the volume and points to the rather problematic character of the new constitution: G. Halmai, ‘Hochproblematisch. Ungarns neues Grundgesetz’, *Osteuropa*, December 2011. At the same time I do not think that the English language study by L. Csink, B. Schanda & A.Zs. Varga (Eds.), *The Basic Law of Hungary. A First Commentary*, Clarus Press – National Institute of Public Administration, Dublin, 2012, is scientifically grounded analysis. For a vitriolic critique of the aforementioned, see B. Majtényi, ‘Alkotmánypropaganda. Megjegyzések az Alaptörvény barátainak “első kommentárjához”’ [‘Constitutional Propaganda. Comments on the “First Commentary” by the Friends of the Fundamental Law’], *Fundamentum*, Vol. 2, 2012, pp. 147-150.

² See G. Halmai, ‘Búcsú a jogállamtól’ [‘A Farewell to the Rule of Law’], *Élet és Irodalom*, Vol. LIV, No. 29, 2010. After the adoption of the Fundamental Law, Péter Tölgyessy wrote the following regarding this article: “*Half of country, the opposition half bases its identity, with ever more resolve, on denying Fidesz's Hungary. Once again, the opposition in the Hungarian National Assembly is an anti-system opposition whose adherents have an interest in exaggerating to the utmost any real faults of the new constitution.*” See P. Tölgyessy, ‘A magyar parlamentáris hagyomány íve és az újabb alkotmányozás’ [‘The Trajectory of Hungarian Parliamentary Tradition and the Renewed Constitution-Making’], in A. Jakab & A. Körösi (Eds.), *Alkotmányozás Magyarországon és máshol* [Constitution-making in Hungary and Elsewhere], MTA TK PTI, Új Mandátum Kiadó, Budapest, 2012, pp. 284-285.

³ See G. Halmai, ‘From the “Rule of Law Revolution” to an Illiberal Democracy in Hungary,’ in *Festschrift für Klaus Stern*, Duncker & Humblot, Berlin, 2012; G. Halmai, ‘From the “Rule of Law Revolution” to the Constitutional Counter-Revolution in Hungary,’ in Benedek *et al.*, *European Yearbook on Human Rights*, Neuer Wissenschaftlicher Verlag, Wien, 2012; G. Halmai, ‘Towards an Illiberal Democracy. Hungary's New Constitution,’ *Eurozine*, 25 January 2012.

safeguards instituted by the 1989–1990 constitutional process, has not resulted in the restoration of either the single-party state or police state structures.⁴

I think that the Hungarian constitutional system after 2010 is better characterized as a kind of ‘democradura,’ rather than as a dictatorship.⁵ Also, the research project with which I was involved at the Transatlantic Academy of the German Marshall Fund of the United States on the future of the Western liberal order, classifies the nature of the Orbán era as a ‘hybrid’ regime, which is neither democratic nor authoritarian.⁶

Concerning the most intriguing questions of the current processes in Hungary, the failure of the elite (myself included) that built liberal democracy in Hungary is only one of the issues discussed here.⁷ The other crucial question is why the first twenty years of regime transition had not seen the emergence of greater respect for constitutional values (which would have prevented the rapid deconstruction of democracy, or at the very least, would have made the deconstruction process more difficult).

At the same time, the Hungarian situation, especially after the recent refugee crisis is a test that would reveal whether, and to what extent, the civilized world, especially European institutions, would be able to enforce global values in those countries that are members of the international community as well as value-based communities such as the European Union and the Council of Europe. Not by any standard do the results of this test qualify as a success. The Hungarian government’s minor concessions were not due to the resolve of European institutions or the grit

⁴ Here I part ways with my Princeton colleague, Kim Lane Scheppele. For my discussion with her, see “‘In their own interest, Hungarians need to realize their constitutional renewal themselves.’ Gábor Halmi in conversation with Princeton University Professor Kim Lane Scheppele” (*Fundamentum*, No. 1, 2012). This despite the fact that during our joint work our views on the Hungarian constitutional state were similar enough that in the springs of 2012 and 2013, we jointly edited two amicus briefs for the Venice Commission (M. Bánkúti *et al.*, ‘Vélemény Magyarország új alkotmányos rendjéről: amicus brief a Velencei Bizottságnak az Alaptörvény átmeneti rendelkezéseiről és a legfontosabb sarkalatos törvényekről’. [‘Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws’], *Fundamentum*, No. 1, 2012, and M. Bánkúti, ‘Amicus Brief a Velencei Bizottságnak az Alaptörvény Negyedik módosításáról’ [‘Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary’], *Fundamentum*, No. 2, 2013). Our differing assessments probably stem from differences in temperament.

⁵ See A. Arato, ‘Is There a Dictatorship in the E.U.?’ (booksandideas.net, 1 May 2012.). The term was drawn from Guillermo O’Donnell & Philippe Schmitter, who used it to describe certain Latin American regimes in the 1970s and 1980s. In 2011, Arato and I jointly edited an amicus brief for the Venice Commission on the newly adopted Fundamental Law (Z. Fleck *et al.*, ‘Vélemény Magyarország Alaptörvényéről’ [‘Opinion on Hungary’s Fundamental Law’], *Fundamentum*, No. 1, 2011). Generally, the similarities between Arato’s and my own assessment of the situation extended even to terminology. See G. Halmi, ‘I Speak of a “Counterrevolution” in the Dimension of Constitutionality’. ‘Beszélgetés Arató András szociológus-politológussal’ [‘Conversation With the Sociologist/Political Scientist Andras Arato’], *Fundamentum*, No. 1, 2011.

⁶ See S. Benhabib, D. Cameron, & A. Dolidze, *et al.*, *The Democratic Disconnect, Citizenship and Accountability in the Transatlantic Community*, Transatlantic Academy, Washington, DC, 2013, Chapter 7.

⁷ Naturally, I do not conflate the elite with politics here. I agree with Helmut Schmidt’s wise assertion that it is not incumbent on politics – and much less on reigning governments – to make the public accept a set of ‘proper’ values, even though in reality there are political leaders from time to time who also wish to be cultural leaders of their respective peoples. See H. Schmidt & F. Stern, *Unser Jahrhundert*, C. H. Beck Verlag, München, 2010, p. 139. Still, I am also aware of the intellectuals’ historic responsibility in conveying value systems. The literary icon, Paul Auster, makes a similar observation on the total absence of any influence exerted by intellectuals, especially in anti-intellectual America. See ‘Dies ist ein geteiltes Land. Der amerikanische Autor Paul Auster spricht über seinen neuen Roman, Sunset Park’ und über Amerika vor der Präsidentenwahl im Herbst,’ *Die Zeit*, 19 July 2012.

of its value-enforcement mechanisms, but stemmed rather from the imperatives of Hungary's economic situation. Europe's inability to properly defend its common values set off an avalanche that, in the summer of 2012, threatened to bury Romanian constitutionalism, after having done the same to Hungary. If, in the wake of the economic and the recent refugee crisis, in which Hungary seemed to set its side other East Central European member states, the European Union is unable to offer these countries even the potential for recovering from the effects of the crisis, then the prospects for rule of law and democracy will be even worse than they seem right now.⁸

The “Rule of Law Revolution” of 1989 and the “Constitutional Counter-Revolution” after 2010

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all at the same time.⁹ Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a “rule of law” document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only sealed the comprehensive amendment to the Constitution, which went into effect on the anniversary of the revolution, and which has since been the basic document of the “constitutional revolution.”

The constitutional amendment inserted new content into the 1949 framework, which may be considered a rule of law document. Apparently, the negotiations-based drafting explains that the “old-new” Constitution principally follows the model of a consensual democracy widely accepted in the continental European systems. This is a system of government that assumes the presence of more than two parties in parliament and coalition governance. Therefore, the institutional aspects of the basic Hungarian constitutional structure emerged as a reflection of the will of the 1989–1990 roundtable participants. The consensus surrounding this structure has gradually eroded, however, as a result of the fact that the requisite political culture, which would have rendered compliance with the Constitution's rules and principles unquestionable, was never able to take shape in either the political elite or the masses of their supporters.

⁸ This is the danger that Andrea Capusella alerts us to in discussing the European Union's potential disintegration and the possible introduction of second-class EU membership (‘Why the Eurozone Crisis Threatens Liberal Reform in the East,’ *Guardian*, 5 August 2012).

⁹ The terms ‘single’ and ‘dual’ transitions are used by A. Przeworski, 1991. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. See C. Offe, *Varieties of Transition: The East European and East German Experience* (New York: MIT Press, 1997).

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.¹⁰ Fidesz strengthened these feelings by claiming that there were no real transitions in 1989–1990 and that the previous *nomenklatura* had just converted its lost political power to economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich after the transition owing to privatization. Fidesz’s populism was directed against all elites, including the elite that designed the 1989 constitutional system (of which Fidesz had also been a part), claiming that it was time for a new revolution. That is why Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a “revolution of the ballot boxes.” His intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In a September 2009 speech, Orbán predicted that there was “a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests.” Orbán’s vision for a new constitutional order—one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has now been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws fulfills this plan perfectly; it does not recognize a separation of powers and does not guarantee fundamental rights. Therefore, the new Hungary (not even a republic in its name anymore) cannot be deemed a state governed by the rule of law. The new constitutional system also does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on European Union (TEU).

The center-right government of Fidesz (the Alliance of Young Democrats), with its tiny coalition partner, the Christian Democratic People’s Party, received more than 50 percent of two actual votes, and due to the disproportional election system with this two-thirds of the seats in the 2010 parliamentary elections. With this overwhelming majority, they were able to enact a new Constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional paradigm.¹¹ This new Constitution, entitled the Fundamental

¹⁰ In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic detected worsening, and 70% and 75%, respectively, perceived improvement.). Eurobarometer, 2009.

¹¹ As early as 2009, before the parliamentary elections PM candidate Viktor Orbán in a speech, held in the small vilklage, Kötse had already expressed his party’s illiberal intentions by saying: “[There is] a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests.” Later in an interview on Hungarian public radio on 5 July 2013, elected Prime Minister Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim at producing a liberal Constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For

Law of Hungary, was passed by the Parliament on April 18, 2011.¹² The Fundamental Law, which entered into force on January 1, 2012, supersedes the previous constitution (hereinafter 1989 Constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989–1990 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). The Fundamental Law was drafted without regard to any of the elementary political, professional, scientific, and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. Effectively, the debate took place with the sole and exclusive participation of representatives of the governing political parties. In its opinion, approved at its plenary session of June 17–18, 2011, the Council of Europe’s Venice Commission also expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civil organizations.¹³ According to the declaration set forth in Article B, the document seeks to maintain that Hungary is an independent, democratic state, governed by the rule of law, and furthermore (according to Article E), that Hungary contributes to the creation of European unity. In many respects, however, the document does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty of the European Union TEU.

The latest violation of these European values has been the Hungarian government’s shameful behaviour in the ongoing refugee crisis, leaving thousands of refugees to languish on fields and in the streets, forcibly herding others into squalid detention camps, and firing water cannons and teargas at refugees gathered against the razor wire fence it had herected first on its border with Serbia, and later with Croatia, another EU Member State as well. Viktor Orbán, styling itself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion managed to encourage other eastern European governments to follow his example violating EU norms.

This new wave of anti-rule-of-law populism is a direct consequence of the continuous decline of the governing party’s popularity. The latest defeat in a by-election in the Sprint 2015 from the neo-Nazi Jobbik, the strongest opposition party signaled that the most serious political opponent to Fidesz in the 2018 election will come even further far right from Fidesz. This is the very reason Fidesz more and more fulfils the agenda of Jobbik, what they have already started before 2010 with a lot of nationalistic, anti-Roma, and anti-Semitic policies. Unfortunately there are voters out there in Hungary who buy these values hostile to that of Europe. In May this year, a few days after many hundreds of refugees have drowned in the Mediterranean Viktor Orbán

this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there.” See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió.
<www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>

¹² For the ‘official’ English translation of the Fundamental Law, see

<www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

¹³ See <[www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf)>. Fidesz’s counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

announced that ‘We need no refugees’, arguing that Europe does not need immigrants at all, and the European Union should be sealed and defended against intruders by the army, and should not overreach in its immigration and refugee policies, rather the member states should formulate its own policies and deal with its unwanted immigrants as it best sees fit. Needless to say, Jobbik warmly welcomed the PM’s statement. What makes this anti-immigrant hatred special in Hungary, is the fact that in the country in January 2014 only 1.4% of the population consisted of foreign nationals, in 2014 only 360 political refugees received permission to stay, and it has always been just a transit point for would-be immigrants, whose final destination isn’t Hungary but countries in Western Europe. On the other hand, since Fidesz’s victory in 2010 at least half a million Hungarians emigrated to Western Europe, who now work as ‘economic immigrants’ (as Orbán called those coming from Kosovo, Syria or Iraq) mostly in the UK, Germany, and Austria.

In order to legitimate this policy against Hungary’s unwanted immigrants the government announced to held a ‘national consultation’. (A similar consultation was held in 2011 shortly before the enactment of the new Fundamental, the results of which have never been made public.) The government sent out eight million questionnaires to the voting-age population, in the expectation that one million will be filed and returned. Due to lack of legal requirement to make the responses public, they were seen again exclusively by government officials.¹⁴

After this psychological preparation the government also tried to convince the public that the only way to enforce EU and protect both the Hungarian and the Schengen border of Europe is to build a 175-km long razor-wire fence along the entire border with Serbia, and later along the 377-km long border with Croatia.¹⁵ In July the Parliament amended the asylum law, and adopted a National List of Safe Countries, considering Serbia as a safe third country for asylum-seekers (in contradiction with the clear position of the European Court of Human Rights and the Hungarian Supreme Court). These changes, which entered into force on 1 August accelerated the asylum proceedings rendering an ineffective one-instance judicial review with unreasonably

¹⁴ To see the demagogy and populism behind the ‘consultation’, it is worth to quote all its twelve questions without any comments: “1. How important is the spread of terrorism as far as your own life is concerned? 2. In your opinion could Hungary become the target of terrorism in the next few years? 3. Do you agree that mistaken immigration policies contribute to the spread of terrorism? 4. Did you know that economic immigrants cross the border illegally and that lately their numbers have increased twentyfold? 5. Do you agree with the opinion that economic immigrants endanger the jobs and livelihoods of the Hungarian people? 6. In your opinion did Brussels' policies on immigration and terrorism fail? 7. Would you support the government in its effort to introduce stricter immigration regulations in opposition to Brussels? 8. Would you support a new regulation that would allow the government to place immigrants who illegally entered the country into internment camps? 9. In your opinion should those immigrants who illegally enter the country be returned to their own countries in the shortest possible time? 10. Do you agree that those economic immigrants who stay in Hungary should have to work to cover the cost of their keep? 11. Do you agree that the best means of combating immigration is to give economic assistance to the countries of origin of the immigrants? 12. Do you agree with the government that instead of allocating funds to immigration we should support Hungarian families and those children yet to be born?”

¹⁵ The Serbian border was closed after the completion of the fence on 15 September, while the Croatian border on 16 October.

short deadline resulted in the quasi-automatic rejection at first glance of over 99% of asylum claims (as 99% of asylum-seekers enter Hungary from Serbia)¹⁶.

Another legislation, which came into effect on September 15 - by the time Hungary registered over 170.000 asylum claims – allowed for the construction of so-called transit zones, where immigration and asylum procedures are conducted. On September 15, when the border to Serbia was closed, two transit zones started to operate: one in Röszke and another in Tompa. The one in Röszke is a compound of approximately 50 smaller containers, which are integrated into the border fence.¹⁷ The introduced border procedure is a specific type of admissibility procedure, which can only be initiated if the applicant submitted the asylum claim in the transit zone. The inadmissibility decisions are delivered partly by judges appointed for a fixed term or by court clerks¹⁸ in less than an hour (!), and they immediately expel the rejected asylum seeker and order a ban on entry and stay for one or two years.¹⁹ In parallel with this regulation the law also amended the Criminal Code, creating new crimes, including illegally entering the country and damaging state property, such as the fence. Under basic definition these criminal acts are punishable by up to three years imprisonment, but in aggravated cases sentences can increase up to 20 years to life imprisonment. According to Article 31 of the 1951 Geneva Convention relating to the Status of Refugees a substantive decision on the asylum claims is a prerequisite for the determination the culpability of asylum-seekers. In other words, the adjudication of the asylum claim should precede any criminal procedure.²⁰

The same amendments also entitled the government to declare the ‘state of migration emergency’, if more than 500 migrants seek asylum per day for a month, or if 2000 migrants are in transit camps for a week, or if migrants riot anywhere in the country²¹. The emergency situation entitles the government to send soldiers to guard the borders, fully armed, to use dogs, rubber bullets, and teargas in addition to the police, which is normally authorized to do that.²² An

¹⁷ The transit zones are only able to register a maximum of 100 asylum claims per day. On 15-16 September only 185 asylum-seekers were allowed to enter the transit zones, while in Röszke many hundreds of others – mainly Syrian war refugees – were waiting outside without any services provided by either the Serbian or the Hungarian authorities. See No Country for Refugees – New Asylum Rules Deny protection to Refugees and Lead to Unprecedented Human Rights Violations in Hungary, Information Note of the Hungarian Helsinki Committee, 18 September 2015. <http://helsinki.hu/en/no-country-for-refugees-information-note>.

¹⁸ Menekültügyi válsághelyzetben a bíróságok [Courts in refugee crisis situation], Eötvös Károly Intézet, 2015. október 19.

http://ekint.org/ekint_files/File/menek%FClt%FCgyi%20v%E1ls%Elghelyzetben%20a%20b%EDr%F3s%Elgok_elenz%E9s_okt19_final.pdf

¹⁹ On 21 September 9 people were expelled for 1 year, three people for 2 years. (8 men, 4 women, 4 Syrians, 3 Afghans, 2 Albans, 1 from Bangladesh, 1 from Algeria, and 1 from Pakistan. They came illegally through Roszke, climbing underneath or over the fence or through a cut that was done by others, previously. All decisions are final, were translated to the asylum-seekers’ mother tongue.

http://vs.hu/kozelet/osszes/tiltott-hataratlepes-miatt-tizenket-embert-utasitottak-ki-hetfon-0921?utm_source=hrkrs&utm_medium=rss&utm_campaign=main

²⁰ See <http://helsinki.hu/en/tightening-criminal-rules-targeting-refugees>

²¹ On the very first days of its effect the government declared the ‘state of migration emergency’ for two counties (Bács-Kiskun and Csongrád) bordering Serbia for half a year, renewable for another half a year if necessary. Three days later three other counties (Baranya, Somogy, and Zala) bordering with Croatia, as well as another (Vas) having no immediate Schengen border were also included.

²² On 18 September 2015 the police used rubber bullets and teargas against migrants assembled at the Serbian side

amendment to the Law on the Police the police is authorized to enter any house in Hungary without a warrant, searching for illegal migrants.

The fence and the new laws not only violate Fidesz's own Fundamental Law, which does not regulate this emergency situation, and does not allow to use the army within the country except in an emergency situation prescribed in the constitution,²³ but also international treaties, especially Article 31 of the Geneva Convention of 1951 signed by Hungary, and at least three different EU law: a) the 2006 EU regulation requires “[b]order checks should be carried out in such a way as to fully respect human dignity”²⁴; b) the 2013 EU Asylum Directive requires “standards for the reception of applicants that will suffice to ensure them a dignified standard of living”²⁵; and c) under the EU's Dublin III Rules, “Member States shall not hold a person in detention for the sole reason that he or she is an applicant [for asylum].”²⁶

These new measures were criticized both by national and international actors. More 150 Hungarian attorneys at law created a Facebook-group, which argued in a proclamation that “the legal measures the Hungarian government has just introduced are going to be insufficient. The Hungarian judiciary is not an immigration authority. It is incapable of dealing with this amount of cases under such conditions. Impartial, just and equitable decisions are severely threatened by the new legislation”. The lawyers state that the new legislation constitute a direct breach of treaties signed by Hungary, the directly applicable EU law, the Hungarian constitution and principles of rule of law. Their main concerns regarding the lawfulness and constitutionality of the regulation are as follows: juveniles will not receive the same protection in these proceedings as Hungarian or any other juveniles do in the normal procedures; the defendant will not receive the indictment and the judgment in his or her mother tongue; the defendant will be put to “house arrest” in a refugee camp where he or she will be deprived of the rights even arrested people have in the Hungarian legal system (meeting the attorney, phone calls); even the identity of the defendant can be uncertain but the court has to act anyway; the documents will be delivered to the defense counsel so the defendant might not receive the documents of his or her own case; in cases where otherwise the court would sit as a panel of three there will be a single judge; people caught in the act of the border crossing will receive a treatment only convicted criminals do and

of the fence near Röszke hurting not only migrant, but also foreign journalists. Former PM of Hungary, Ferenc Gyurcsány accused the government that the attack was provoked by the police, which opened the fence inviting migrants to enter to Hungarian soil, where they have beaten them up.

https://www.youtube.com/watch?app=desktop&persist_app=1&v=4bfPcYm5rfQ. After an internal meeting of Fidesz's parliamentary fraction, MPs reported to the press that Orbán told them he wanted Hungarians to experience ‘first hand’ the seriousness of the migration situation, and this is why he allowed it to become grave and desperate at Keleti railway station and in other places in the country earlier in September. Press report about the Fidesz fraction meeting in Velence held on 16-17 September: <http://vs.hu/kozelet/osszes/orban-a-menekultvalsag-a-kellemetlen-ugyekrol-elterelte-a-figyelmet-0920#!s53>

²³ About the unconstitutionality of the use of army see Cs. Tordai, Honvédek a menekültek ellen? [Soldiers against refugees?], *Így írják mi. Átlátszó*, 26 August 2015. <http://igyirnakmi.atlatszo.hu/2015/08/26/honvedek-a-menekultek-ellen/>

²⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R0562&rid=5>

²⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

²⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN>

will be deprived of their rights as asylum-seekers.

Consequently, the attorneys ask their colleagues working as judges and prosecutors upon noticing the anomalies to refer these cases to the Constitutional Court and the European Court of Justice.²⁷

Among the international critics one of the harshest was that of the UN High Commissioners for Human Rights. Zeid Ra'ad Hussein deplored the xenophobic and anti-Muslim views that appear to lie at the heart of current Hungarian Government policy, and which were reflected in a blatantly xenophobic Government poster campaign earlier in the year. "The package of measures brought in is incompatible with the human rights commitments binding on Hungary. This is an entirely unacceptable infringement of the human rights of refugees and migrants. Seeking asylum is not a crime, and neither is entering a country irregularly." - the High Commissioner said.²⁸

After an Austrian court, which deemed Hungary as a non-safe third country for asylum-seekers, also the European Court of Human Rights decided to apply Rule 39 (interim measures) of the Rules of Court temporarily and asked for factual information from the Austrian Government in a case concerning a Syrian national facing removal from Austria to Hungary. Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.²⁹

Among European leaders, it was Chancellor Werner Faymann, who has gone farthest in criticizing Hungary's, and particularly PM Orbán's stance comparing it to that of European fascists: "Refugees put on trains in the belief they are going somewhere else entirely brings back memories of the darkest period of our continent." – said Faymann in an interview with Germany's Spiegel magazine³⁰.

On 22 September the Hungarian Parliament with the votes of Fidesz and Jobbik enacted a resolution titled 'Message to the leaders of the European Union', "whose irresponsible policies are responsible for the death of people." The resolution was submitted by seven Fidesz and two Christian Democratic politicians. The text, without naming clearly refers to the German chancellor, Angela Merkel by saying: "We must declare that every European politician who encourages the immigrants with the hope of a better life to leave everything behind, to imperil their lives, and to begin their journey toward Europe is irresponsible." The document, speaking in the name of all Central European countries, goes on to say that they "cannot be the injured party as a result of the mistaken policies of Brussels." Furthermore, they have "the right to

²⁷ https://www.facebook.com/permalink.php?story_fbid=1468108746829248&id=1468058366834286

²⁸ Hungary violating international law in response to migration crisis: Zeid Ra'ad Al Hussein, Sep 17, 2015. press-info@ohchr.org

²⁹ See <http://blog.atlatszo.hu/2015/09/az-emberi-jogok-europai-birosaga-rendkivuli-eljarasban-tiltotta-meg-egy-szir-menekult-magyarorszagra-kuldeset-ausztriabol/>

³⁰ <http://www.spiegel.de/politik/ausland/werner-faymann-ueber-ungarn-fluechtlingspolitik-erinnert-an-holocaust-a-1052448.html>

defend [their] culture, language, [and] values.” Therefore they “call on the leaders of the European Union to listen to the voice of the people. Get their senses back and defend Europe and the European citizens.”

The accusation of EU leaders in the resolution is hypocritical, since the Hungarian government – together with its Central European counterparts - in the last month has blocked proposals of the European Commission to reform the EU’s immigration and asylum systems by introducing a new system of mandatory burden sharing, in which all member states would agree to take in a quota of the refugees, determined on the basis of the country’s size and wealth. Hungary, who has led a coalition of Central European states – alongside the UK – in opposing it, now is complaining about the failing of the EU reforms.

Talking on behalf of Central European countries by the Hungarian Parliament isn’t totally unfounded, since the governments of the so-called Visegrád countries seem to support Viktor Orbán’s zero tolerance approach regarding refugees. Poland’s new president, Andrzej Duda also has complained about ‘dictates’ from the European Union to accept migrants flowing onto the Continent from the Middle East and Africa, and Slovakia’s prime minister, Robert Fico said, his country will accept only Christian refugees as it would be a ‘false solidarity’ to force Muslims to settle in a country without a single mosque.³¹ Also the Czech Republic’s Europe minister, Tomas Prouza, described the quotas idea as ‘nonsensical.’³²

This united front of the Visegrád Group has been broken on 22 September when at a meeting of the European Union’s interior ministers, which called for relocating 120,000 refugees throughout the 28 Member States, Poland accepted the quotas³³. The Czech Republic, Slovakia and Hungary joined by Romania voted against accepting mandatory quotas. Czech President Milos Zeman said: “Only the future will show what a mistake this was.”³⁴ Robert Fico, PM of Slovakia was even harsher by saying: “I would rather go into infringement than accept the quotas.”³⁵ Hungary also voted against the plain PM Orbán contending that forcing a country to accept refugees amounted to ‘moral imperialism’, but he also added that Hungary would be willing to accept a

³¹ See Rick Lyman, ‘Eastern Bloc’s Resistance to Refugees Highlights Europe’s Cultural and Political Divisions’, *The New York Times*, Sept. 12, 2015.

³² See Ian Traynor, ‘Refugee crisis: Juncker calls for radical overhaul of EU immigration policies’, *The Guardian*, Sept. 9, 2015.

³³ That time PM Ewa Kopacz, who initially criticised the quotas, then made a U-turn to accept 12,000 people from Greece and Italy, saying that „we can’t afford taken in economic migrants. But we have to show solidarity with people who are looking for a safe place to live”. Jaroslaw Kaczynski, the head of the right-wing Law and Justice Party, which won the election on 25 October said: „We have to find out if information about some kind of [EU] deal to bring 100,000 Muslims to Poland is true...It’s also a question for the health minister...There are already signs of the emergence of very dangerous diseases which haven’t been seen in Europe for a long time: cholera on Greek islands; dysentery in Vienna; various types of parasite, protozoas, which aren’t dangerous in the organisms of these people [Middle East refugees], but which could be dangerous here. It doesn’t mean to discriminate against anyone. But we have to check it.” <https://euobserver.com/political/130672>

³⁴ <http://www.bbc.com/news/world-europe-34331126>

³⁵ R. Lyman, ‘Opposition to Refugee Quotas Softens in Europe’s Old Communist Bloc’, *The New York Times*, Sept. 23, 2015.

voluntary quota, if his proposal submitted at the EU summit on 23 September are accepted.³⁶ The six points of his plan are as follows: (1) EU countries should offer help to Greece in defending its own borders. (2) Determination of asylum status should be determined outside of the Schengen borders. (3) The European Union should draw up a list of safe countries. (4) In order to gain additional monies each member state should raise its contribution to the EU budget by 1% while they should reduce their expenses by 1%. This would produce three billion euros. (5) Certain countries should create ‘special partnership agreements’. For example, such a partnership could be developed between Turkey and Italy. (6) The refugees should be distributed worldwide to ease the pressure on Europe.³⁷

As it was expected, the summit vetoed Orbán’s main idea of a common defense of Greece’s border, instead they opted to strengthen Frontex, an agency whose mission “promotes, coordinates and develops European border management in line with the EU fundamental rights charter applying the concept of integrated border management.” The summit also rejected the suggestion to set up ‘hot spots’ outside of the EU borders, to create an official EU list of safe countries, and to determine worldwide quotas. Moreover, due to Hungary’s behavior, there were recommendations for the EU to use the strongest sanction against a Member State, Article 7 of the Treaty. The London Office of Amnesty International proposed the European Commission to submit a reasoned proposal to the European Council to activate the preventive mechanism foreseen under Article 7(1) TEU, in the light of the evidence of “a clear risk of a serious breach of the values referred to in Article 2 TEU”, including “the respect for human dignity... and respect for human rights”³⁸. Also the Liberal faction ALDE of the European Parliament – supported by Greens, far-left parties and Italy’s Five Star Movement - “given the dramatically worsening situation of fundamental rights in Hungary, most recently illustrated by the laws which grant the police the right to search for immigrants in people’s homes without authorized permission and allow the army to use force against refugees” demanded in the Parliament’s civil liberties, justice and home affairs committee (LIBE) that the European Parliament starts the article 7.1 procedure against Hungary for its behavior towards refugees.³⁹ The move was blocked by the two big parties, who instead voted for a Socialist proposal to request that the Commission follow through on a June request that it “present a proposal to establish an EU mechanism on democracy, rule of law and fundamental rights”. On 6 October, 2015 the Commission sent a letter to the Hungarian government, in which they ask information about the recent amendments adopted by the Hungarian Parliament in July and September 2015, relating in particular to the law on asylum, the penal code, the law on criminal procedure, the law on the border, the law on the police and the law on national defense in order to allow the Commission's services to finalize the examination of their compatibility with EU law, in particular with the EU asylum and borders acquis and the Charter of Fundamental Rights. The Commission’s preliminary assessment revealed a number of concerns and questions on substance and implementation.⁴⁰

³⁶ N. Thorpe, ‘Migrants Crisis: Hungary’s Orbán Urges EU Rethink’, BBC News, 22 Sept., 2015.

³⁷ http://hvg.hu/itthon/20150923_Brusszeli_mutatvanyra_keszul_Orban_Viktor

³⁸ Fenced Out. Hungary’s Violations of the Rights of Refugees and Migrants. Amnesty International, October 8, 2015.

³⁹ <http://ceciliawikstrom.eu/en/hungarian-laws-to-hunt-down-refugees-are-a-reminder-of-europes-dark-past-alde-group-to-maintain-demand-for-7-1-procedure/>

⁴⁰ Letter of the Directorate-Generals Migration and Home Affairs, and Directorate-General for Justice and

Although there are signs of another East-Central Europe not only with refugee-friendly politicians, such as Andrej Siska, the President of Slovakia, but with a lot of solidarity by the civil society⁴¹, the bulk of public opinion in these countries is either silent or hostile towards immigrants. Whereas 96% of Germans approve in principle of taking in refugees (and 59% support even more) 71% of Czechs are against taking any.⁴² Also in Hungary a recent survey shows the majority (55%) rejects the proposition that the country, according to her ability, should accept a number of refugees, and only roughly four out of ten respondents (37%) evince support for the quota system.⁴³ Even less, one out of ten Hungarians would like to have any refugees settle among themselves. 41% of the respondents agree with the option to use weapons to defend Hungary from refugees. In accordance with this, in September 40% of those asked answered yes to the question, “if it had been up to you whether to build the fence along the Serbian-Hungarian border, then what would you have decided?” This result is especially surprising considering the responses to the question: “How do you think, is the fence that is being built along the Serbian-Hungarian suitable for stopping refugees?”. In July 46% said it is not at all suitable, and 21% not very, while in September these figures even increased to 56 and 22 % respectively. According to another survey 2/3 supported the idea of the fence, and 79% suggested even harsher measures than those of the government.⁴⁴ Another seeming contradiction that while 66% of the respondents realized that what Viktor Orbán is doing is harmful to the country’s image, in the same period, between June, when the refugee crisis started to escalate, and September 2015, Fidesz won 300.000 supporters with its militants stance towards migrants,⁴⁵ and its popularity has been increased from 28 to 32%, while the government’s confidence index has been raised from 36 to 43%.⁴⁶ In other words: a large part of the Hungarian population do not care about the country’s reputation, or at least finds the ‘freedom fight’ of the PM against Europe more important.

What is this ‘freedom fight’ all about? It is a cultural war. In the beginning of the refugee crisis the government started a nationwide billboard campaign, saying among other things: “If you come to Hungary, you must respect our culture”. At first sight it looked that the addressees are migrant, but since the slogans were only in Hungarian, they were addressed first of all to Hungarians who do not agree with the Viktor Orbán, who in the beginning the crisis claimed that “Christian culture is the unifying force of the nation... [and] Hungary will either be Christian or not at all.”⁴⁷ In another speech held in early September Orbán went further by stating that: “The

Consumers. Ref. Ares(2015)4109816 - 06/10/2015

⁴¹ See Keno Verseck, ‘Flüchtlingskrise: Das andere Osteuropa’, Spiegel-online, 21. Sept. 2015.

<http://www.spiegel.de/politik/ausland/fluechtlinge-osteuropa-kann-auch-menschlich-a-1053950.html>

⁴² See ‘Orbán the Archetype’, *The Economist*, Sept. 19 2015.

⁴³ Refugee Crisis: Hungary, a Divided Country, Publicus Research, Sept. 19, 2015.

http://www.publicus.hu/blog/refugee_crisis_hungary_a_divided_country/

⁴⁴ Jobb félni? [Is it better to be afraid?], Medián, Oct. 7 2015. <http://median.hu/object.c38fa2c9-5bc2-40c9-ae38-bab515a5f172.ivy>

⁴⁵ <http://dailynewshungary.com/fidesz-wins-300000-supporters-jobbik-has-1-1-million-supporters-over-summer/>

⁴⁶ http://hvg.hu/itthon/20151001_Median_A_Fideszhez_loki_a_jobbikosokat_a_nyomtat

⁴⁷ Orbán’s speech in Debrecen on 18 May 2015.

http://index.hu/belfold/2015/05/18/orban_magyarorszag_kereszteny_lesz_vagy_nem_lesz/#

Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe.” This new era should follow ‘the age of liberal blah blah,’ because the origin of the mass migration and the consequent refugee crisis is ‘the crisis of liberal identity’: “For years we have told them that ‘the world is a global village’ ... we have talked about universal human rights to which everybody is entitled. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology.... We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do.... We sent our TV stars into their homes.... they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. ... These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past.”⁴⁸

In the end of September new governmental posters appeared on the streets of Budapest, claiming that “The people decided, we must defend our country.” Even though the people of Hungary were not really asked about the cruel treatment of the refugees, not only the governing party’s but also Orbán’s personal popularity as a ‘captain of border-protection’⁴⁹ of both Hungary and the entire Europe, mainly against the will of European Union as a ‘freedom fighter’ has grown substantially within the country.⁵⁰

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In 1989, Fidesz and Viktor Orbán together with SZDSZ (the Alliance of Free Democrats) played a crucial role in avoiding a kind of semi-presidential system with a former communist president by not signing the agreement of the National Roundtable and by initiating a successful referendum on the process to elect the president. Following Fidesz’s election victory in 2010, many argued that Orbán was willing to introduce a presidential system in order to concentrate power in the hands of the presidency. Others claimed that Orbán would not want a presidential system since he prefers a system containing checks and balances against the executive.⁵¹ Proponents of Fidesz, such as Béla Pokol, argued that Fidesz’s new constitutional system envisages the Westminster parliamentary model, in which the “winner takes all” and where the principle of the unity of power prevails. In my view, the Westminster model also works with checks and balances, even if different from that of a presidential system. Therefore one cannot treat Fidesz’s new constitutional system as a monistic democracy, which just gives priority to

⁴⁸ Speech in Kötöcs on 5 September 2015. <http://vastagbor.atlatszo.hu/author/zero/>

⁴⁹ CSU chef Horst Seehofer called Orbán ‘Grenzschutzkapitän’, during his visit in Munich on 23 September 2015. See <http://www.spiegel.de/politik/deutschland/viktor-orban-bei-csu-ungarns-premier-fordert-abriegelung-europas-a-1054351.html>

⁵⁰ According to opinion polls conducted by Századvég, Orbán’s popularity increased from 43% in June to 48% in September 2015. http://index.hu/belfold/2015/09/16/szazadveg_jelentose_nott_orban_nepszerusege/

⁵¹ See the discussion in the Hungarian weekly, *Élet és Irodalom*, initiated and concluded by my articles: G. Halmi, *Búcsú a jogállamtól* (Farwell to the Rule of Law), 23 July 2010, and *Jogállami ellenforradalom – illiberális demokrácia* (Rule of Law Counter-Revolution and Illiberal Democracy), 24 September 2010.

democratic decision-making over fundamental rights.⁵² The institutional arrangement of this model is best embodied by the British doctrine of parliamentary sovereignty, which does not entail the usual institutional elements of a dualist democracy, such as strong judicial review. By contrast, the new Hungarian constitutional system has kept these institutional arrangements, such as the Constitutional Court, but deprived them of their power. They also kept the mixed electoral system, but made it more majoritarian.

Consequently, the new Hungarian constitutional system does not fit into any of the models of government, all of which are based on a different concept of separation of powers. The more traditional models of government forms are based on the relationship between the legislature and the executive. For instance, Arendt Lijphart differentiates between majoritarian (Westminster) and consensual models of democracy, the prototype of the first being the British, while that of the second being the continental European parliamentary and U.S. presidential systems.⁵³ Giovanni Sartori discusses presidentialism and semi-presidentialism, as well as two forms of parliamentarism—namely, the premiership system in the United Kingdom, Kanzlerdemokratie in Germany, and the assembly government model in Italy.⁵⁴ Besides the Westminster and U.S. separation of powers systems, Bruce Ackerman uses 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 referendum and constitutional courts constrain the power of the parliament.⁵⁵ Hungary between 1990 and 2010 belonged to the consensual and constrained parliamentary systems, close to the German Kanzlerdemokratie. But the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints on parliamentary power, and the system has since 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 few decades, the traditional British model of constitutionalism has also changed drastically with the introduction of a bill of rights by left-of-center governments (and opposed by right-of-center opposition parties) in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004), and the State of Victoria (2006). Unlike the traditional Commonwealth model of constitutionalism, this codified bill of rights limits legislation, even though the legislature still enjoys the final word.

The biggest change to the absolute parliamentary sovereignty system occurred in the United Kingdom after 1998, and some even talk about the “demise of the Westminster model.”⁵⁶ 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 of 1998 came into effect in

⁵² Bruce Ackerman distinguishes between three models of democracy: monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and there impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See Ackerman, 1992a, pp. 6-16.

⁵³ A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven, 1999.

⁵⁴ G. Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, 2nd edn, New York University Press: New York, 1997.

⁵⁵ B. Ackerman, ‘The New Separation of Powers’, *Harvard Law Review*, Vol. 113, 2000, pp. 633-727.

⁵⁶ Cf. P. Norton, ‘Governing Alone’, *Parliamentary Affairs*, 2003, p. 544.

England and Wales.⁵⁷ The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention on Human Rights. This does not allow U.K. 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). It is then up to the government and Parliament to decide how to proceed. In this sense the legislative sovereignty of the British 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.⁵⁸ Others go even further to argue that although the Human Rights Act of 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.⁵⁹

Besides the Commonwealth countries mentioned, a similar new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994, contains a “notwithstanding” provision, similar to the Canadian law. This new model of Commonwealth constitutionalism is based on a dialogue between the judiciary and the parliament.⁶⁰ However, comparative constitutional studies conclude that parliamentary sovereignty tends to be increasingly restrained, either legally or politically, and that the last few decades have witnessed a narrowing scope for the exercise of traditional constituent power conceived as unrestrained, as the sign of the ‘will of the people,’ even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.⁶¹ In contrast to these new trends, in the Hungarian constitutional system, the parliamentary majority decides every single issue without any control mechanism, as the independence of both the ordinary judiciary and the Constitutional Court has been liquidated.

Lessons from Hungary’s Backsliding to Illiberal Democracy

Explanations

⁵⁷ See D. Judge, ‘Whatever Happened to Parliamentary Democracy in the United Kingdom’, *Parliamentary Affairs*, 2004, p. 691.

⁵⁸ Cf. K.D. Ewing, ‘The Human Rights Act and Parliamentary Democracy’, *Modern Law Review*, 1999, p. 92.

⁵⁹ See M. Flinders, ‘Shifting the Balance? Parliament, the Executive and the British Constitution’, *Political Studies*, 2002, p. 62.

⁶⁰ See S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, Cambridge, 2013 about the new model. This model has also come to be known by several other names: (a) ‘weak-form of judicial review’ (M. Tushnet, ‘Alternative Forms of Judicial Review’, *Michigan Law Review*, Vol. 101, 2003, p. 2781.) or just ‘weak judicial review’ (J. Waldron, ‘The Core of the Case Against Judicial Review’, *Yale Law Journal*, Vol. 115, 2006, p. 1354), (b) ‘the parliamentary bill of rights model’ (J. Hiebert, ‘Parliamentary Bill of Rights. An Alternative Model?’, *Modern Law Review*, Vol. 69, No.7, 2006, p. 3.) ‘the dialogue model’, ‘the model of democratic dialogue’ (A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), Hart Publishing, Oxford chapter 5.), or ‘dialogic judicial review’ (K. Roach, ‘Dialogic Judicial Review and its Critics’, *Supreme Court Law Review*, Vol. 23, second series, 2004, p. 49.).

⁶¹ See C. Fusaro & D. Oliver, ‘Towards a Theory of Constitutional Change’, in D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, New York, 2011, pp. 417-418.

Since the new constitutional order has weakened checks and balances and guarantees of fundamental rights, the new Hungary (not even a Republic in its name anymore) cannot be deemed a liberal democracy.

The main reasons for the turn of constitutionalism are as follows:

(a) Historically, in Hungary, as in other East-Central European countries there were some unexpected moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it. First between the 1860-70s and the end of the 19th century, second after WWI, except in Hungary, where the short liberal democratic period led by Mihály Károlyi was soon followed by the red terror of commune, and white terror of the right wing. The third such short moment occurred after 1945, especially in Czechoslovakia and Hungary till the communist parties' take over in 1948. And fourthly after 1989, when liberal democracy again seemed to be the 'end of history'.⁶²

Some elements of a representative system existed before World War II, after Governor Horthy consolidated his regime, with strong nationalism and anti-Semitism, and without any kind of human rights culture. According to the political theorist István Bibó, who also served as Minister of State in the government of Imre Nagy during the Hungarian revolution of 1956, pre-World War II Hungary was a prime example of a 'deformed political culture,' where

nationhood had to be made, re-fashioned, fought for and constantly protected not only from the predations of imperial powers but also from the indifference and fluctuating sense of national identity as a part of the people themselves.⁶³

During the 1920s and 1930s, when Hungary had a far-right government that flirted seriously with fascism, Miklós Horthy governed not only as admiral without a sea, but also as a regent without a king. Horthy relied for some of his authority on his public reverence for the Holy Crown, with which he associated himself whenever possible. He also organized a major national celebration for the Crown in 1937 and took full propaganda advantage of touring the country with the Crown in an open train. While he himself could not claim the title of king, he appeared, nonetheless, in the place of a king governing the country with a toxic mix of nationalism, xenophobia, and disrespect for basic legality and constitutionalism. This means that Hungary had never before had a democratic system, similar to the one of the Third Republic between 1990 and 2010.

As surveys on the links between modernization and democracy show, the society's historic and religious heritage leaves a lasting imprint.⁶⁴ According to these surveys, the public of formerly agrarian societies including Hungary emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism,

⁶² See the results of the research project "Negotiating Modernity": History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council, <https://erc.europa.eu/negotiating-modernity/history-modern-political-thought-east-central-europe>

⁶³ See I. Bibó, *Kelet-európai kis-népek nyomorúsága [The Misery of the Small States of Eastern Europe]*, 1946.

⁶⁴ See R. Inglehart & C. Welzel, 'Changing Mass Priorities: The Link between Modernization and Democracy', *Perspectives on Politics*, 2010, Vol. 8, No. 2, pp. 551-567.

autonomy, and rationality.⁶⁵ Even modernization's changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states, including Hungary. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.⁶⁶ According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the postcommunist transformation, 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. The survey covering the period between 1989 and 2012 showed that Hungary's position has not changed significantly over the years. The country lay in the bottom third of the list except between 1996 and 2003, when it sank to the group of countries with the lowest level of cohesion in the survey. According to the current report, Hungary is in the fourth tier. "It ranks in the bottom tier for perception of fairness as well as for solidarity and helpfulness. Hungary is in the middle tier for acceptance of diversity and respect for social rules, and it ranks as high, in the second tier, for identification with the nation," the report said.

Another study conducted in 2009 within the Pew Global Attitudes Project showed that dissatisfaction with the state of democracy after twenty years of the transitions is widespread within Eastern and Central Europe.⁶⁷ Majorities in many countries are unhappy with the way democracy is working, amounting to more than three out of four in Hungary.⁶⁸ As a result of this dissatisfaction, only a slight majority (56 percent) still approves the change to a multiparty system, as opposed to the 18 percent higher approval rate in 1991.⁶⁹ Owing to the existential instability in the countries of Eastern and Central Europe, even though democratic institutions and freedoms may be as important as in Western Europe, prosperity, a strong economy, and strong leaders are more important than democracy or democratic government. In Hungary, more than 7 in 10 (73 percent) say they would prefer a strong economy.⁷⁰ But strong economy does not necessarily mean capitalism, as the support of capitalism in Hungary between 1990 and 2009 has been dropped from 80 to 40%, which is an even stronger decrease than that of democracy (from 74 to 56%). Concerning the preference between a democratic government and a strong leader, the majorities in Western Europe and in three Central European countries (Czech Republic, Slovakia, and Poland) prefer the former, while Eastern Europe and Hungary the latter. The ratio in Hungary is 49:42.⁷¹ Unfortunately, the results are not better among young Hungarian

⁶⁵ *Id.*, p. 553. Christian Welzel in his recent book argues that fading existential pressures open people's minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand persistent existential pressures keep people's mind closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Ch. Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation*, Cambridge University Press, 2013.

⁶⁶ D. Schiefer, J. van der Noll, J. Delhey, & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, <www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf>

⁶⁷ The Decades After the Wall's Fall. End of Communism Cheered But Now With More Reservations. <www.pewglobal.org/files/pdf/267.pdf>

⁶⁸ Among the eight countries surveyed, those who are satisfied with democracy are as follows: 53% in Poland, 50% in Slovakia and 49% in the Czech Republic; every other country is in clear minority: 35% in Lithuania, 32% in Russia and 21% in Ukraine, Bulgaria and Hungary. *Id.*, p. 32.

⁶⁹ *Id.*, pp. 29-30.

⁷⁰ *Id.*, p. 25. The only exception in Western Europe is Italy, where the ratio is 50:46 for a strong economy.

⁷¹ *Id.*, p. 26.

university students either. Only 39 percent of students feel that democracy is the best model of governance, 28 percent do not see any difference between democracy and dictatorship, and 33 percent prefer dictatorship to democracy.⁷²

The 2009 Pew Global Attitudes [report](#) also suggested that intolerance was greater in Eastern Europe than in Western Europe: Asking whether those surveyed agreed or disagreed that it is ‘good to have different races, religions, and cultures’ in society, Pew found that a higher percentage of respondents said no in Eastern Europe than in countries such as France, Britain, Spain, and Germany. But when Pew’s researchers drilled down to perceptions of specific groups, they encountered different results. Only 15 percent of Czech respondents, 13 percent of Ukrainian respondents, and 29 percent of Hungarian respondents held unfavorable views of Jews (the most controversial minority group in that region). Meanwhile, 27 percent of British respondents and 46 of Spanish respondents copped to unfavorable views of Muslims, whereas 26 percent of French respondents said they had unfavorable views of North Africans. In other words, Western European respondents looked more tolerant in theory, but when pressed on the groups they were most sensitive about, they appeared just as prejudiced, if not more prejudiced, than Eastern Europeans. The broader question may have failed to bring to mind the particular group to which they felt most hostile. None of this is to say that the idea of greater xenophobia in Eastern Europe isn’t plausible: In addition to the abundance of historical and anecdotal evidence, some of the causes of xenophobia that social scientists have identified point to the problem being more pronounced in Eastern Europe.⁷³

As another survey has shown, one of the factors is the history of migration in a country. This means that more experience with open borders tends to produce greater ease about migration. While Western European countries have been immigration targets for centuries, and experienced high immigration rates for much of the 20th century, Eastern European countries have rarely been magnets for migrants, and spent much of the second half of the 20th century with their borders closed thanks to the Cold War.⁷⁴

The failure of the postcommunist threats to democratic development, both in Slovakia under the Meciar government (1994–1998) and in Poland under the Kaczynski government (2006–2007) demonstrate the higher commitment of the Slovaks and the Poles towards democratic values.⁷⁵ Another question is, taking into account this dissatisfaction of Hungarians with the democratic and economic transition, can Hungary be considered a failed nation, and if so, what are the main

⁷² See the survey conducted by the Aktív Fiatalok Magyarországon Kutatócsoport (Young Active People Research Group) in 2011 among 2,214 Hungarian youngsters, <www.hir24.hu/belfold/2013/07/04/a-hallgatok-koreben-kozelit-a-fidesz-a-jobbikhoz/>

⁷³ See ‘Heather Horn: Is Eastern Europe Any More Xenophobic Than Western Europe? Investigating a stereotype of the refugee crisis’, *The Atlantic*, October 16, 2015.

⁷⁴ K. van der Veer, R. Ommundsen, O. Yakushko, L. Higler, ‘Cross-national measure of fear-based xenophobia: development of a cumulative scale’, *Psychol Rep.* 2011 Aug; 109(1):27-42.

⁷⁵ Surveys regarding democratic principles conducted by Focus Institute during the period 1994–2002 show that the majority of the public in Slovakia moved away from Meciar towards a request for a more open society. FOCUS 1994–2002, in *Global Report on the State of Society*, Institut pre verejné otázky, Bratislava. Also, the majority of Polish voters “have been shown to dislike sting operations against political rivals” by the Kaczynski government. See Freedom House, *Nations in Transit*, 2008.

reasons for this failure? Daron Acemoglu and James A. Robinson, in their popular book *Why Nations Fail*,⁷⁶ argue that it is not geography, disease, or culture that explains why some nations develop and others do not, but rather the intimate connection between political and economic institutions— economic institutions being the most important factor in this respect—and the political institutions determining the character of the economic ones, and how these economic and political institutions are shaped in response to external factors and contingencies.⁷⁷ In this regard, one might argue that the political institutions established after the transition of 1989–1990 failed to develop corresponding economic elements, meaning that the political institutions did not fulfill their task. The reason for this may be summed up in the words of Ralf Dahrendorf: “It takes six months to replace a political system, six years to transform an economic system, and 60 years to change a society.”

Social psychologists in Hungary claim that the Hungarian history is full with failures which is also reflected in the national anthem⁷⁸, therefore the self-image of Hungarians is basically negative.⁷⁹ Hungary was on the losing side of both World War I and World War II. The victim narrative claims that the country has always been a noble and helpless victim of the malevolent forces of history, for instance by the Trianon Treaty of 1920, in which Hungary lost two-third of its territory. The fact that the right-wing governments elected by Hungarians voluntarily joined the losing side, and that Hungary was responsible for a lot of wrongdoings, for instance for the speedy deportation of more than half a million Hungarian citizens of Jewish origin to Auschwitz has been never mentioned.⁸⁰

The many historical fiascos since the middle ages caused a feeling of inferiority Adler sense, which made it necessary of looking for a father figure within the meaning of Freud’s father complex. These ‘Führers’, such as Rákosi, Kádár and also Orbán in the post-WWII history of the country were able to treat the members of the society like their children, and this parent-child transaction made it possible for PM Orbán since 2010 to manipulate people with his government’s very effective campaigns through the loyal media and convince them to follow his

⁷⁶ D. Acemoglu & J.A. Robinson, *Why Nations Fail? The Origins of Power, Prosperity and Poverty*, Crown Publishers, New York, 2012.

⁷⁷ One of the weak points of this theory is China, where authoritarian political institutions introduced a successful system of economic institutions.

⁷⁸ The text of the anthem was written by József Kölcsey in 1823, two years before the Reform Era (1825-1848) started in Hungary. Paradoxically this was probably the last time in the Hungarian history, when the society was tolerant, open to cultural, religious and national diversity.

⁷⁹ ‘Az írás ott volt a falon, de senki sem volt hajlandó elolvasni és megérteni’ [The Scriptum was already on the Wall, but Nobody Dared to Read and Understand It], Interview with Professor György Csepeli, Sept. 25, 2015. <http://www.boon.hu/az-iras-ott-volt-a-falon-de-senki-sem-volt-hajlando-elolvasni-es-megerteni/2922802>

⁸⁰ A sign at an exhibit in the National Museum offer an explanation for opting for the Axis in WWII: “Aside from the expansive Italian Fascist movement and the foreign policy of the German National Socialist state, there were no other powers from whom a revision of the Trianon Treaty could be expected.” A bronze statue commissioned and installed by the current Hungarian government in the summer of 2014 in Szabadság Square in Budapest features an angel, a male figure with his tunic open to his breast, menaced by an eagle whose talons clutched a bar just overhead. The angel is Hungary, and the eagle are the Nazis, who had entered Budapest on March 19, 1944. See James Traub, ‘Hungary’s 500-Year-Old Victim Complex’, *Foreign Policy*, October 28, 2015. https://foreignpolicy.com/2015/10/28/hungarys-500-year-old-victim-complex-nazis-habsburgs/?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2AEditors%20Picks

lead sometimes even against their best interest.⁸¹ The signs of such a parent-child transaction was for instance Orbán's attitude towards the paramilitary far right Hungarian Gárda promising them a slap in the face, or treating all their critics as paid agents of enemy powers. This can also be a part of the explanation, why the majority of Hungarians identified herself with the government's attitude during the refugee crisis. The description of this phenomenon of despotic protectors of the people against their fears goes back to Plato's 'The Republic', in which he warned that a 'towering despot' will inevitably rise in any democracy to exploit its freedoms and seize power formenting fear and representing himself as the protector, just like Orbán did during the refugee crisis.⁸²

(b) Even though the transition to democracy in Hungary was driven by the fact that a large share of the population gave high priority to freedom itself, one of the legacies of the mild version of socialism with the toleration of private businesses, relative social security, no unemployment in the Kádár-regime ("the happiest barrack in the camp") from the 1960s onwards, was that people expected the new state to produce speedy economic growth, with which the country could attain the living standards of neighboring Austria overnight, without painful reforms. In other words, one can argue that the average Hungarian pursued the West in 1989, though not so much in terms of the Western economic and political 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 democratization.⁸³ This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment.

(c) Without the tradition of a state governed by the rule of law in Hungary, some kind of legalism has maintained a strong presence since the Dual Monarchy with Austria, which has helped to build the institutional framework of a constitutionalism after the transition. But this institutional development does not mean that the other levels of legalism—the state–citizen and the citizen–citizen interactions—have also changed. At the state–citizen level, corruption and bribery still display a general problem with rule-of-law values, while the weakness within citizen–citizen interactions prevents the emergence of a strong civil society.⁸⁴ Constitutionalism

⁸¹ This is a long argument of two psychologists, why was Orbán to keep his power in 2014, despite the population's disappointments with his governance in the previous parliamentary term. See T. Halmai – E. Sebestyén, 'Megvédünk az önállóságtól' [We protect you from self-determination], *Élet és Irodalom*, 25 Sept. 2015.

⁸² See Jason Stanley, 'Democracy and Demagogue', *The New York Times*, October 12, 2015. Stanley argues that Plato's prediction is most dramatically exhibited by Weimar Germany, and recently in the cases of Hungary and Russia.

⁸³ Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, p. 15.

⁸⁴ See A. Örkény & K.L. Scheppele, 'Rule of Law: The Complexity of Legality in Hungary', in M. Krygier & A. Czarnota (Eds.), *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, Ashgate, Dartmouth, 2009.

eroded as a result of this disequilibrium among the different levels of rule of law, which remained present after the transition.

According to a similar argument, the prospects for democracy in Hungary (and the other newly independent states of Central and Eastern Europe) following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, as well as the loss of civic constitutionalism, civil society, and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism.⁸⁵ This concept argues 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, jeopardizes the development of participatory democracy.⁸⁶ In other words, this view suggests that legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.⁸⁷

The concept of civic or participatory constitutionalism is based on ‘democratic constitutionalism’ (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to ‘counterdemocracy’ (Pierre Rosenvallon), as well as robust institutional linkage of civic associations and citizens with formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, the elite disdain for participatory institutions. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation, the very topic of this paper.⁸⁸

In discussing the relationship between legal and civic constitutionalism, or constitutional law and constitutional culture, one has to investigate the question of how far (constitutional) courts stand apart from the society in different legal systems. This question is highly relevant in the new democracies of East-Central Europe, including Hungary. The very notion of the “counter-majoritarian difficulty,” termed by Alexander Bickel, presupposes that courts stand apart from society, which is called the canonization of courts.⁸⁹ This means that judges usually decide cases according to their beliefs and values, using the legalistic form of constitutionalism, and producing constitutional law. Many of these decisions do not correspond with the constitutional

⁸⁵ See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a ‘negative effect’ in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, ‘Transitional Constitutionalism: Simplistic and Fancy Theories’, in A. Czarnota, M. Krygier & W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, Budapest, 2005, pp. 9-24.

⁸⁶ See R. Albert, ‘Counterconstitutionalism’, *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, p. 4.

⁸⁷ Cf. Sadurski, 2005, p. 23.

⁸⁸ See the reviews on Blokkers book by Jiri Priban and Bogusia Puchalska in ICONnect. <www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>

⁸⁹ See K. Whittington, *Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton University Press, Princeton, 2007.

culture of non-judicial actors, most importantly, the people. Some cases were decided on a legally correct basis, even though the general public opposed the decisions. This happened in 1990 when the Hungarian Constitutional Court abolished capital punishment on the basis of the Constitution's human dignity clause, despite the fact that most Hungarians favored the death penalty. Other decisions were wrongly decided according to the current view of both constitutional lawyers and ordinary citizens. In a decision by the Hungarian Constitutional Court in 2008, the judges declared the institution of registered partnership for heterosexual partners as unconstitutional. Legal scholarship overwhelmingly identifies this decision, along with some others, as belonging to a constitutional law 'anticanon.' A closer look reveals that this and other anticanonical decisions respect, rather than ignore, the role of popular agency in constructing legal meaning.⁹⁰ In other words, the justices in these cases followed the constitutional culture of the time, rather than the constitutional law.

(d) In addition, two initial failures of the 1989 constitutional changes also contributed to Fidesz's ability to change the entire constitutional system after its electoral success in 2010. One of them is the disproportional election system, which translated the 53 percent vote share into 68 percent in 2010 and 45.5 percent into 67 percent of the seats in Parliament in 2014. The other failure was the unchanged two-thirds rule for making and amending the Constitution.

(e) There was also a lack of consensus about democratic values at the time of the transition. The split among the anticommunist coalition partners once the threat of communist restoration in the region disappeared demonstrates that anticommunism does not necessarily lead to united commitments to democratic values and human rights. In the 1998–2002 legislative period, the central-right government of Fidesz used the far-right-wing opposition party, MIÉP, or the Hungarian Justice and Life Party, to frustrate the ability of the opposition to carry out its constitutional tasks.

(f) After the 2006 parliamentary elections, Hungary witnessed the even more spectacular rise of extremist right-wing parties. While an undertow of right-wing extremism operated throughout the 1990s, this new extremism has gained a great deal of public political traction in the last five years. A new political party, *Jobbik*, won 15 percent of the vote in the European parliamentary election in 2009 and 17 percent of the vote in the parliamentary elections in 2010, and more than 20 percent in 2014, campaigning on a platform of Euroskepticism, anti-cosmopolitanism, and Hungarian nationalism. Regarding the state of anti-Semitism, András Kovács, a sociologist at Budapest's Central European University found that by 2010 the percentage of those who qualified as fervent anti-Semites had risen to as high as 20 percent, and the percentage who said they held no anti-Jewish feelings had dropped to 50 percent.⁹¹ An opinion poll of the Anti-Defamation League in February 2012 found that 63 percent of Hungarians agreed with three out of four anti-Semitic statements about Jews and money, Jewish disloyalty to the state, and Jews and the Holocaust. Of the 10 European countries ADL polled for anti-Semitic sentiments,

⁹⁰ See J. Greene, 'The Anticanon', *Harvard Law Review*, Vol. 125, 2011. Greene lists three decisions of the U.S. Supreme Court as anticanonical: *Dred Scott v. Sanford* (chattel slavery from 1857), *P. v. Ferguson* ('separate but equal' from 1896), and *Lochner v. New York* (labor exploitation from 1905).

⁹¹ See L. Abend, 'Ancient Fear Rises Anew', *Time Magazine*, 1 April 2013.

Hungary was by far the worst. By comparison, on the same scale measuring the prevalence of anti-Semitic attitudes, the Netherlands scored just 10 percent and France, 24 percent.⁹²

The Fidesz government itself is not anti-Semitic, but for its own political purposes it certainly wants to win over the voters of the openly anti-Semitic Jobbik Party, which has got 17 percent of the popular votes in 2010, and 20 percent in 2014, taking advantage of the rising percentage of anti-Semitism within the population. This can be demonstrated by their controversial attitude regarding the memory of the Holocaust.⁹³

(g) The dissatisfaction among the losers of the transition could easily lead to populism, nationalism, anti-Semitism, anti-secularism, and anti-Europeanism, and political actors can capitalize on these sentiments. The populism of the Fidesz government rejects both liberalism and elitism. Of course, they are not against representation, only against representation through the “wrong people;” in other words, they reject only specific types of elites. This anti-elitism assumes that the will of the majority is inevitably good and wise, and creates a direct relationship between the government and the will of the people. As expressed during the 2010 parliamentary elections, Fidesz blamed every intermediary institution, such as the political and the intellectual elites, civil society organizations, bankers, and multinational and civil society organizations, for frustrating the will of the people. Instead of elite pacts Fidesz claims to establish a system of “national cooperation,” based on national consultations via letters sent to households on political and economic issues, with a very low return rate, and with barcodes on the letters that identify the personal data of the respondents. This populist variant of conservative politics rejects liberalism and introduces a new set of policies: austerity and welfare cuts, reminiscent of the ideology of the new right, but with an active role of the state in economy, and with a flat-tax regime.⁹⁴

These nationalistic, populist ideas inserted a lot of emotions into the politics, which also influenced the Constitution-making after 2010. As András Sajó convincingly argues in his book on *Constitutional Sentiments*, “emotions, through complicated mechanisms, do have an actual impact on constitutional design and law. At the same time, constitutional design is a half-conscious venture of emotion management, and constitutional law and politics have unintended consequences in the emotional culture.”⁹⁵

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⁹² <http://archive.adl.org/Anti_semitism/adl_anti-semitism_presentation_february_2012.pdf>

⁹³ Cf. the testimony of Paul Shapiro, of the U.S. Holocaust Memorial Museum before the U.S. Helsinki Commission, held on 19 March 2013. See the transcript of the hearing at <www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=24497186&CFTOKEN=18666051>

⁹⁴ See U. Korkut, 2012, pp. 162-176 about the populist conservatism of the Fidesz government.

⁹⁵ A. Sajó, *Constitutional Sentiments*, Yale University Press: New Haven, 2011, p. 4.

How to explain the popularity of such an illiberal hatred or - as Ivan Krastev mildly formulates regarding the entire Eastern Europe – ‘compassion deficit’⁹⁶ towards migrants during the 2015 refugee crisis?

a) One of the reasons, mentioned also by Krastev is certainly the widespread disappointment with the pace of economic change since communism’s fall, and the sense that the countries are too poor to offer substantial support to migrants. In Hungary people in 1989 certainly expected the new state to produce speedy economic growth, with which the country could attain the living standards of neighboring Austria overnight.

b) To the disappointment caused by the fact that Austria is much more ahead of Hungary than 25 years ago came the fear that the accepted refugees threaten to steal work opportunities from locals, even though scientific research has shown that this is not the case, not just because the refugees do not want to stay in Hungary, but even if they would most of them have qualifications in jobs, which are not touched by unemployment.⁹⁷ In other words accepting these refugees would be an economic interest of the countries in Eastern Europe. Despite this predicted positive effect on economic growth, the Ministry of Economy in May 2015 reduced its immigrant quota, and does everything in its power to reduce labor opportunities for anyone coming from outside the EU.⁹⁸ According to Medián’s mentioned survey only 13% of the Hungarian respondents think that the immigration would be beneficial to Hungary.⁹⁹

c) This is also an answer to another reason of hatred, namely to the demographic panic from the ‘ethnic disappearance’ in many Eastern European countries, including Hungary. The refugees could be instrumental to solve this problem, too. According to Medián’s survey 54% of the respondents think that there is a likelihood that sooner or later the Muslims will become a majority in Europe.¹⁰⁰ On the other hand the fear that the Muslim refugees with their different culture will overwhelm the local population and its Christian culture is totally unfounded. Even if Europe would accept all the 4 Million possible Syrian refugees, and assuming that 100% of them are Muslims, the percentage of the Muslim population in Europe would rise from 4 to 5 % only, and the birth rate in Syria before the war decreased, and the population was shrinking, not growing, not to speak about the fact that the fertility rates of Muslims in Europe has dropped.¹⁰¹

d) But distrust and fear of Islam¹⁰², possibility of contagion, terrorism, rising criminality even if unfounded¹⁰³ can be caused by a general anxiety over the unfamiliar, and indeed, Hungary

⁹⁶ See I. Krastev, ‘Eastern Europe’s Compassion deficit’, *The New York Times*, Sept. 8 2015.

⁹⁷ The Austrian Wirtschaftsinstitut (Wifo) stated in a study that almost 2/3 of the refugees have a qualification of level 3 or 4 according to the International Standard Classification of Education (ISCED), which is relatively high, and the percentage of this among refugees from Syria is even higher. See W. Osztivics, ‘Österreichs Zukunft’, *Die Zeit*, 17. Sept. 2015.

⁹⁸ http://hvg.hu/gazdasag/20150502_Azok_elott_is_bezarjuk_a_kaput

⁹⁹ Jobb félni? [Is it better to be afraid?], Medián, Oct. 7 2015. <http://median.hu/object.c38fa2c9-5bc2-40c9-ae38-bab515a5f172.ivy>

¹⁰⁰ Ibid.

¹⁰¹ See The European Refugee Crisis and Syria Explained, a video produced by the UN Refugee Agency.

http://hvg.hu/vilag/20150918_Video_Mi_lenne_ha_az_osszes_sziriai_menek

¹⁰² This distrust and fear is not limited to those, who otherwise support Viktor Orbán’s government. Some critics of Orbán’s authoritarian system also share the concerns. See for instance the opinion of Rudolf Ungváry’s, who in many writings characterized the Orbán government as fascistoid. See R. Ungváry, ‘Nincs demokratikus válasz’ [Isn’t there a democratic response?], *Népszabadság*, 9 September 2015.

experienced very little diversity in their history so far. (It was unable to integrate their own Roma population¹⁰⁴, and now it extrapolate its hatred towards Roma to the refugees. It also still faces Anti-Semitism¹⁰⁵, although both Roma and Jews live in the country since many hundreds of years.) In Hungary only 4.5% of the population was born in abroad, and the percentage of the people with foreign citizenship is even lower: 1.4%. Until the end of 2013 only 450.000 people immigrated to Hungary, the overwhelming majority of them is of Hungarian origin from the neighboring countries, having Hungarian as their mother tongue, and according to the official state statistics there are only 141.000 foreigners live in Hungary.¹⁰⁶ Since this small amount of immigrants is more educated than the average Hungarian population, their employment rate is higher than that of the Hungarians.¹⁰⁷ The absence of diversity makes the acceptance of culturally different refugees very difficult, actually everywhere in the region.

e) Another historical peculiarity of the region, which can also contribute to the hate towards refugees, is victimization: “We are the ones who have always been victims of injustice, the ones who have suffered. And now there is somebody trying to grab that status. People find it very difficult to accept that somebody might suffer more than us.”¹⁰⁸ This can also be a part of the explanation, why the majority of Hungarian identified herself with the government’s attitude during the refugee crisis.

External and Internal Challenges

The question for the future is whether constitutionalism can be re-established, or whether the country will slide back even further into an authoritarian system. This section is about possible external and internal agencies of constitutional reform.

¹⁰³ The same video claims that refugees who are allowed to work less likely commit crimes than the native population.

¹⁰⁴ During the crisis PM Orbán in s speech regarded the 800.000 Hungarian Roma as not quite Hungarian, more as a kind of disadvantage that he has so far neglected to loose upon the rest of Europe. See G. Szirtes, ‘What’s the Matter with Hungary?’, The Daily Beast, 20 September 2015.

¹⁰⁵ Interestingly enough, Jewish writers, like Imre Kertész, and György Konrád also feared for the European culture, amd Jewish organizations expressed concerns about the possible Anti-Semitism of Muslim refugees, forgetting the fate of the Hungarian Jews in the Christian Europe and particularly in the Christian-national era of Hungary in the 1920s, 30s and 40s. See the article of Shlomo Köves, chief rabbi of the Egységes Magyarországi Izraeli Hitközség (Chábád Lubavics). S. Köves, ‘Térj vissza, ha menekülne szíved! A menekültválsághoz kapcsolódó félelemről’ [Come back, if your heart would flee. About the fear related to the refugee crisis], *Magyar Narancs*, Sept. 24, 2015.

¹⁰⁶ See International Migration Outlook 2015. OECD, 22 Sept. 2015. http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2015_migr_outlook-2015-en

¹⁰⁷ According to an article in Bloomberg, “in Hungary, foreign-born workers, far from living on the fringes of society, are more likely to be employed than native-born Hungarians. In 2013, the last for which statistics are available, 67.9 percent of the foreign-born aged 15 to 64 had jobs, vs. 58.2 percent of the native-born in that age range.” <http://www.bloomberg.com/news/articles/2015-09-08/what-hungary-can-teach-europe-about-absorbing-immigrants>

¹⁰⁸ These are the words of Csaba Szaló, a professor of sociology at Masaryk University in Brno. See R. Lyman, ‘Eastern Bloc’s Resistance to Refugees Highlights Europe’s Cultural and Political Divisions’, *The New York Times*, Sept. 12, 2015.

(a) With regard to external challenges, the Council of Europe (CoE) and the European Union (EU) can help in the reintroduction of constitutionalism, since, according to Article 2 of the TEU, the Union is based on common values such as democracy, the rule of law, and fundamental rights. Moreover, Article 3 of the Statutes of CoE requires that a member country accept the “*principles of the rule of law, and the enjoyment by all persons [...] of human rights and fundamental freedoms.*” Similarly, Article 2 of the TEU demands “*respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities.*” This article applies to *any* exercise of public authority in the European legal space, be it by the Union or the Member States’ constitutional development (amendments, new Constitutions) precondition for a State to accede to the Union (Article 49 TEU); it is also a standard for Member States, the performance of which can be appraised according to Article 7 of the TEU. This understanding is confirmed by strong historical evidence: Article 2 of the TEU constitutionalizes the Copenhagen criteria, laid down in the decision by the European Council of June 21–22, 1993 to open up a perspective of accession for the transformation countries that still had to overcome authoritarian traditions. As it was impossible to subject new members to a different regime from older members, the standards of Article 2 of the TEU apply to all.

These two sets of obligations are further merged in the EU’s dedication to the ECHR through Article 6 of the TEU, and its imminent accession to the ECHR itself. By joining the CoE and the EU, all member states have committed to these values. But how can these foundational European values be defended if constitutions of certain member states, like Hungary, do not comply with them? Article 8 of the Statutes of CoE opens up for the suspension of a country’s rights of representation, if it has “*seriously violated*” its values. Similarly, Article 7 of the TEU in case of “*serious and persistent violation*” makes it possible to suspend “*certain rights*” deriving from EU membership, including voting rights. But this rather political enforcement mechanism has never been applied in practice. The EU actions taken against Austria in the Haider affair in 2000 were unilateral measures by the member states, and this experience has left the member states and the Union institutions extremely reluctant to use similar mechanisms. (As the “report of the three wise men” after the Austrian affair mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population. Consequently, this perception further fostered nationalist sentiments. The same happened in Hungary after the CoE and the EU criticized the new Hungarian Constitution.)

In the case of Hungary, on February 16, 2012 the European Parliament, instructing the Committee on Civil Liberties, Justice, and Home Affairs (LIBE), called on the European Commission to request the opinion of the Venice Commission on the legislative package consisting of the new Constitution, the Transitional Provisions, and the cardinal laws as a whole, and to continue working together on these matters with the Council of Europe.¹⁰⁹ This was a request for investigation of the necessity of using Article 7, according to its paragraph (1), with a very unlikely positive outcome, which would require a qualified majority. This means that if a country does not comply with the values of the European rule of law, and insists on its own understanding of democracy – one amounting, for instance, to a deeply illiberal democracy, such

¹⁰⁹ European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)).

as Hungary after its new constitutional order was introduced – and does not want to leave voluntarily, then so be it, since there is no procedure for ejecting. But at least a mechanism to enforce the Copenhagen criteria for member states would be advisable. Let us see whether there are other, less serious tools in the hands of either the CoE or the EU to enforce the compliance of member states with European values.

One of the possibilities is the accelerated infringement proceedings over breaches of EU law, which, in the case of Hungary, were initiated by the European Commission on January 17, 2012, over three issues jointly regulated by the Constitution and the new cardinal laws: the independence of the central bank, the independence of the data protection authority, and some measures affecting the judiciary, particularly the sudden and mandatory lowering of the retirement age from 70 to 62 years.¹¹⁰ The problem with this procedure is that if the member state contests the alleged violation of the European law, it can take five steps, and altogether up to four years until the ECJ issues a final decision.

The European Commission also started an over deficit procedure against Hungary over the Stabilization Act with possible financial sanctions, but this proceeding does not exactly aim at enforcing values of the European rule of law. The Venice Commission, the advisory body of the CoE, can be asked both by the CoE and EU institutions to provide expert opinions on constitutional matters of the member states. In the case of Hungary, the Venice Commission was asked, on the one hand, by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), to review the laws on freedom of information, the Constitutional Court, the prosecution, nationalities, and family protection, and, on the other hand, by the Hungarian authorities concerning the laws regulating the independence of the judiciary, the status of churches and elections to Parliament. The request of the Hungarian authorities came as a response to a January 2012 letter from the Secretary General of the Council of Europe, Thorbjørn Jagland, to the Minister of Foreign Affairs, János Martonyi, inviting Hungarian authorities to request the Venice Commission to provide opinions on these controversial laws.¹¹¹ As we could see earlier, in March 2013 the Secretary General of the Council of Europe and the Hungarian Foreign Minister jointly requested the opinion of the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary.

Decisions of the ECtHR can also indirectly influence member states' actions. An astonishing 8,000 individual claims have been filed to the ECtHR since December 2011, after the new Hungarian constitutional order came into effect. But these procedures take many years, and the decisions of the Strasbourg Court – even if they state that Hungary violated the European Convention on Human Rights – do not have direct effect on the national legislation and the Constitution.

During the refugee crisis many suggested that the European Commission should consider bundling together a number of cases into a so-called 'systemic infringement action', which would demonstrate that Hungary is engaged in a systemic breach of the EU's fundamental

¹¹⁰ <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>>

values¹¹². Others argued that the European Union should also invoke Article 7 of the Treaty on the European Union, which would enable it to suspend Hungary's voting rights within the EU for persistent, systematic violations of the union's fundamental values.¹¹³ According to other proposals the leaders of the European Peoples Party, the group Fidesz belongs should begin by denouncing Orbán's actions and announcing that his party will be ejected from their Center-Right coalition if his regime does not change course.¹¹⁴

(b) Among the more decisive, internal challenges, the most powerful institutions to protect the values of rule of law are constitutional courts or other bodies entitled to review the constitutionality of legislative acts. In some countries, constitutional courts are also entitled to review amendments to their country's constitution, which violates either explicit "eternal provisions" of the constitution, like that of the German Grundgesetz, or in the absence of such an explicit clause, the basic principles of the constitutional order. Until the Fourth Amendment to the Fundamental Law explicitly forbade the substantive review of both the Fundamental Law and its amendments, the Hungarian Constitutional Court rejected such requests.

Even if the national Constitutions contain illiberal provisions, Constitutional Courts are always able to use the liberal democratic principles of foreign and international law while interpreting the domestic Constitution. Of course, those judges who are independently elected or appointed are always more likely to stand up against illiberal norms and acts of a government. Therefore, the government's exclusive possibility to nominate both Constitutional Court and ordinary judges – as is the case in the current Hungarian constitutional system – threatens the independent action of the judges.

According to a recent proposal of a group of German legal scholars at the Max-Planck Institute of Foreign and International Public Law in Heidelberg, the citizens of the European Union are protected even against their own states' violating the essence of their fundamental rights.¹¹⁵ This argument is based on the ECJ's interpretation of Article 20 of the TFEU, which precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This substance, the German scholars argue, basically consists of the essence of fundamental rights enshrined in Article 2 of the TEU. If a violation of the European citizen's right by his own state is to be seen as systematic, as it happened with the right to freedom of expression by the Hungarian media law, individuals can rely on their status as Union citizens to seek redress before national courts. In other words, systemic violations of the essence of fundamental rights by *any* public authority in the European legal space amount to infringements of Article 20 of the TFEU, which can be considered by national courts in cooperation with the ECJ.

¹¹² See for instance R. D. Kelemen, 'Europe's Hungary Problem', *Foreign Affairs*, Sept. 20, 2015.

¹¹³ Cf. EU leaders should oppose Hungary's policy on intolerance, Editorial Board of The Washington Post, Sept. 16, 2015.

¹¹⁴ The first such proposal within the EPP came from former vice-president of the European Commission, Vivien Reding. <http://m.welt.de/debatte/kommentare/article146862760/Ex-Vizechefin-der-EU-Kommission-rechnet-mit-Orban-ab.html>

¹¹⁵ Bogdandy, A. von *et al.*, 2012.

Conclusions

Revolutionary/Non-Revolutionary vs. Sovereign/Post-Sovereign Constitution-Making

Revolutionary constitutions – exemplified by the models of the American and French Revolutions – establish an entirely new order rather than merely constraining the reigning power in place.¹¹⁶ In the order created by such constitutions all forms of exercising public power require an immanent justification, which is provided by the new constitution. The new constitution determines the form and substance of the sovereign exercise of power, and in so doing, it liquidates the previous political order; in other words it severs continuity. The establishment of a new political order is associated with the concept of “democratic *constituent power*” which designates the people as the subjects of the founding act. This legality manifests itself in democratic procedures and emerges subsequently as the basis for the constitution's legitimacy. This explains why most constitutions only make provisions concerning the amendment of the existing document, while they are silent on the formal requirements of its comprehensive revision, not to mention the adoption of a new constitution. The Spanish Constitution and the constitutions of some states of the U.S. are exceptions to this general observation, since they also regulate the possibility and procedures of a revision. Another exception is the German Grundgesetz of 1949, which, in its Article 146, holds out the prospect of its own replacement by a new constitution to be adopted following German reunification (as we know, ultimately, this promise went unfulfilled in 1990: the six new federal states joined the Federal Republic within the framework of the Grundgesetz). Similarly, the preamble of the comprehensive constitutional amendment act of 1989 in Hungary also promises the adoption of a new constitution. Nevertheless, even though in the Hungarian case, formally speaking, no new constitution was adopted in 1989 – though substantially speaking it did – academic literature qualifies this act not

¹¹⁶ This *ex nihilo* constitution making is referred to as ‘revolution-based’ by Michel Rosenfeld. See M. Rosenfeld: *The Identity of the Constitutional Subject*, Taylor & Francis, 2009, Chapter 6. Dawn Oliver and Carlo Fusaro in their comparative analysis use another categorization of the birth of new constitutions. They consider the following ways in which new constitutions come into existence: a) granted and patriated constitutions are granted by another state, as happened in the case of New Zealand’s constitution in 1852 by the Constitutional Act of the British Parliament, and patriated first in 1947 by the right to amend the 1852 Constitutional Act, and finally by the New Zealand Constitutional Act of 1986, b) independence constitutions, like India’s, adopted upon independence in 1948, based on the Constituent Assembly formed for that purpose, c) regime change constitutions of the former communist countries or that of South Africa’s in 1996, d) post-war constitutions of both Germany and Italy. See D. Oliver and C. Fusaro, ‘*Changing Constitutions: Comparative Analysis*’, in Dawn Oliver and Carlo Fusaro (Eds.), *How Constitutions Change - A Comparative Study*, Hart Publishing, pp. 381-383.

as an amendment or revision, but as a “constitutional revolution, or new founding.”¹¹⁷ However, this procedure is called “chaste constitution-making: by some academics.”¹¹⁸

Non-revolutionary tradition seeks to legalize an existing system of government. In the case of the German and British constitutional evolution, which may be regarded as the prototypes of this model, it also strives to constrain royal powers by adopting a new constitution. In contrast to the revolutionary tradition that establishes a new order, the non-revolutionary tradition that seeks to reshape power arrangements does not necessarily require democratization. In fact, democratization may be counterbalanced by strong judicial review, as in England, or by the powers of a constitutional court, as in Germany. But those constitutions that are in a political sense non-revolutionary need not even necessarily aim to transform the existing power arrangements. It is conceivable that a new constitutional order is established while the previous power structures continue to prevail. According to Ran Hirschl, the constitutional developments in 1982 in Canada, in 1990 in New Zealand, between 1992-1995 in Israel, and indeed, the UK's situation following the adoption of the Human Rights Act in 1998, are precisely such instances of “no apparent transition.” In these cases the constitutional reforms are neither concomitants of a political-economic transition nor the outcome thereof.¹¹⁹

Taking into account the revolutionary/non-revolutionary dichotomy, we can conclude that the constitution-making in Hungary in 1989 can be substantively characterized as a revolutionary act, since it produced a new political order, even though neither the Round Table, which drafted the comprehensive amendment to the old constitution, nor the communist parliament, which rubber stamped the draft can be considered as a democratic constituent power. Therefore, using the sovereign/post-sovereign binary categories, it was certainly a post-sovereign constitution-making, both procedurally, and due to the promise of a new constitution, also substantially.

On the other hand, procedurally, the 2011 Fundamental Law wasn't a revolutionary act, since it was enacted on the basis of the constitution-making rules of the 1949/1989 constitution, with the exception of the special provision of the house rules. However, it was also incorporated into the constitution in 1994, which required a four-fifth majority for the decision concerning the preparation of a new constitution. Substantially, the new Fundamental Law of Hungary can be treated as revolutionary, as it introduced a new, illiberal type of constitutional system, instead of the liberal constitution of 1989. Even Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim at producing 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?”

¹¹⁷ Cf. S. Holmes & C. R. Sunstein, 'The Politics of Constitutional Revision in Eastern Europe', in S. Levinson (Ed.): *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton University Press, 1995, p. 285.

¹¹⁸ See A. Bozóki, 'Szemérmes alkotmányozás. Rendszerváltás és jogállami forradalom 1989-ben' ('Chaste Constitution-Making. System Change and Rule of Law Revolution'), in A. Jakab András & A. Körösenyi (Eds.), *Alkotmányozás Magyarországon és máshol (Constitution-Making in Hungary and Elsewhere)*, MTA TKPTI, Új Mandátum Kiadó, 2012, pp. 202–239.

¹¹⁹ See R. Hirschl, *Towards Juristocracy*, Harvard University Press, 2004, pp. 7-10.

According to my recollection, more than 80 percent 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.”¹²⁰ Because of this intention of the government to change the liberal democratic political order, I describe this constitution-making as counter-revolutionary.

Instead of a ‘revolutionary/non-revolutionary’ dichotomy, Andrew Arato distinguishes between sovereign and post-sovereign constitution making. By sovereign, he means a constitution-making process conducted by parliament, while the essence of the post-sovereign model is that constitution-making power is not concentrated in a single body or an organ specially constituted and authorized for the purposes of constitution-making, but that each of the organs involved in constitutional politics are bound by laws.¹²¹ According to Arato the roots of this new form of constitution-making reach back as far as the American Revolution, as well as the post-WWII constitutional processes in France and Germany; its renaissance can also be observed in the 1970s in Spain, in the regime transitions in Central and Eastern Europe in the late 1980s and early 1990s, and in South Africa in the mid-1990s. A basic feature of the process - especially in the latter cases - is the two-step constitution making, which features intervening free elections and the use of a provisional constitution. Another basic feature is that the principle of constitutionalism does not extend to the final product only, but also to the process whereby the constitution is adopted. Arato believes that where this model is consistently applied it could be a viable democratic alternative to revolutionary constitution making, which often results in dictatorships. Where the second step fails to take place, however this omission can easily doom the entire constitutional process.

In post-communist countries Arato recognizes three models of constitution-making. The earliest, possibly too early, constitution making took place in Bulgaria and Romania, where the Parliaments that were created as a result of democratic elections, were given the rights of a constituent assembly, as had been the case in France (the National Constituent Assembly between 1789-1791) and in Weimar (in 1918). Meanwhile, in the Czech Republic and Slovakia after the dissolution of Czechoslovakia in 1992, constitution making was carried out by democratically elected legislative bodies, but without the classification of a constituent assembly. The cases of Hungary and Poland represent a third type of constitution making, where the process was started by an illegitimate conventional legislature whose task was to approve a text that had been agreed upon by the state-party and the new democratic movements before the democratic elections.

¹²⁰ See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió. <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio

¹²¹ See A. Arato, *Constitution Making Under Occupation. The Politics of Imposed Revolution in Iraq*, Columbia University Press, New York, 2009, pp. 59–97. Arato himself indicates that the term was first used by Ulrich Preuss in the context of the roundtable talks in the German Democratic Republic that is East Germany. Cf. Arato, 61.

Using this dichotomy, which assesses the substance and the process together, the 1989 “pacted”¹²² constitution-making in Hungary was designed as a two-step post-sovereign process, the first step being an interim constitution prepared by the National Round Table Talks and enacted by the illegitimate parliament, followed by a final constitution sometime after the first democratic elections. However, the country has failed to produce a final constitutionalist constitution, even though in the second, center-left-dominated, freely-elected parliament the governing coalition of the socialist MSZP and the liberal SZDSZ alone had constitution-making powers. Therefore, in the context of Hungary, Arato spoke of partial failure in 2010.¹²³ In 2011 he argued that the adoption of the Fundamental Law was a move against post-sovereign constitution-making.¹²⁴ Altogether, we can argue that the new constitution is a result of a sovereign process.

Present and Future of Liberal Democracy in Hungary

The current Hungarian constitutional system constitutes a new, hybrid type of regime, between a full-fledged democracy and a dictatorship. Even when there is a formal written constitution, a dictatorship is not a constitutional system. Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as William J. Dobson argues in his recent book, *The Dictator’s Learning Curve*, “today’s dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were.”¹²⁵ What happened in Hungary is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal democracy is functioning. Hungary became an illiberal democracy, which was the openly stated intention of PM Orbán.¹²⁶ In this illiberal democracy the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is

¹²² The term is used by Michel Rosenfeld, see M. Rosenfeld, *The Identity of the Constitutional Subject*, Taylor & Francis, 2009.

¹²³ A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010, p. 19.

¹²⁴ Cf. G. Halmai, "Én az alkotmányosság dimenziójában beszélek 'ellenforradalomról.'" 'Beszélgetés Arató András szociológus-politológussal' [I speak of 'counterrevolution' in the context of constitutionalism. Conversation with the sociologist/political scientist Andras Arato], *Fundamentum*, No. 1, 2011.

¹²⁵ W. J. Dobson, *The Dictator’s Learning Curve. Inside the Global Battle for Democracy*, Doubleday, 2012. p. 4.

¹²⁶ In a speech delivered July 26, 2014 before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that “will undertake the odium of expressing that in character it is not of liberal nature.” Citing as models he added: “We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world... Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them . . . If we look at civil organizations in Hungary, . . . we have to deal with paid political activists here. . . . [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests. . . . This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests.” See the full text of Viktor Orbán’s speech here: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>

strongly limited. Also, as in many illiberal democracies, fundamental rights are listed in the new Fundamental Law, but the institutional guarantees of these rights are endangered through the lack of independent judiciary, and Constitutional Court.

As many scholars noted, there is an incredible range of nondemocratic, non-authoritarian regimes and their relationship with each other and democracy is often imperfect and unclear. Countries in this “grey zone” inspired a lot of concepts, which were created to capture the mixed nature of these regimes. Steven Levitsky and Lucas A. Way introduced the term “competitive authoritarianism” for a distinctive type of “hybrid” civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents.¹²⁷

In the democratic changes of the post-1989 East-Central Europe Jacques Rupnik describes three main trajectories: a) the one in Central Europe is characterized by the consolidation of democracy, b) in the Balkan there democratic transition derailed because of the nation state building, and c) in the post-Soviet Eastern Europe (Ukraine, Caucasus) ‘hybrid regimes’ a’la Levitsky-Way has been emerged.¹²⁸ In a more recent publication Rupnik also emphasizes the differences of these trajectories as a consequence of their different political culture originated from the Christian or Orthodox culture. He claims that the countries with an Orthodox culture (Greece, Romania, Serbia, Bulgaria) have more difficulties accepting traditional liberal democracy, which means that - also considering the experiences of the Arab Spring - instead of Fukuyama’s ‘end of history’ approach we should reconsider Huntington’s ‘clash of civilizations’ scenario.¹²⁹

Let me clarify the paradox of Orbán’s alleged defense of Christianity from the ‘Muslim hordes’ and the Orthodox culture of Hungary. In a speech on 26 July 2012 Orbán explains why authoritarianism is needed to treat Hungarians: ‘*Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way* [GH: than compulsion or force].¹³⁰ This assessment is very similar to that of Imre Kertész, the Nobel laureate in literature, who argued that Hungary’s ill-fate stemmed from her inability to choose between Asia and Western Europe.¹³¹ In other words Christianity and religion in general serve as reference point that Orbán’s right wing populism uses instrumentally. Fidesz, in the early 1990s a liberal party with a militantly anti-clerical view from the mid-90s, when it became conservative although turned to an openly positive stance towards religion, but religion was never understood as significant part of its identity, rather played a purely instrumental role in Fidesz’s political strategy, even after they joined the center-right party family of the European parliament, the

¹²⁷ See S. Levitsky and L. A. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, 2010. p. 5.

¹²⁸ See J. Rupnik, ‘Europe and the Democratisation of Its Neighbourhood’, in *Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012. Council of Europe Publishing, 2012. 85-96.

¹²⁹ Gilles Kepel - Jaques Rupnik, ‘Explosive Nachbarn. Demokratie, Revolution und Geopolitik östlich und südlich von Europa’, *Lettre International*, 109, Sommer 2015.

¹³⁰ See B. Szabó, ‘Félázsiai származékoknál, mint mi, csak így megy’ [*With a half-Asian lot such as ours, there is no other way*], *Népszabadság*, 27 July 2012.

¹³¹ ‘La Hongrie est une fatalité’, *Le Monde*, 10 February 2012.

European People's Party (EPP).¹³² Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of 'two Hungary's': the Western Christian, and the Eastern pagan, tribal one.¹³³ Orbán once voiced his conviction that the Turul bird, a symbol of ancient Hungarians is the image into which Hungarians are born, 'the symbol of national identity of living',¹³⁴. This means that Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate-religion. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the national religion ('nemzetvallás') played a crucial role. Another proof of Christianity being instrumental for Orbán is that the marriage rate is the lowest in East-Central Europe. The difference between Hungary and the really deeply Christian Poland, in particular, is especially telling. Hungary's marriage rates are typical of the least religious countries in Europe, which is what the statistics on church attendance also show.¹³⁵ One can also have doubts about the seriousness of Christianity considering the fact that when Orbán listed the illiberal regimes he admires from Singapore through China, Turkey, and Russia all of them are either non-Christian or Orthodox.

Considering its new constitutional system, and its behavior in the refugee crisis, which trajectory Hungary is following right now? As in electoral democracies, a formally competitive election with competing parties was held in April 2014; however, Fidesz needed to strengthen the disproportionality of the election system, to introduce a unique winner compensation, and gerrymandering, which favored the governing party to regain its two-thirds majority. Even though we cannot say that the outcome of this election was determined by the election rules only, but we also do not know how much election fraud Fidesz would have used if its simple majority would have been in danger. The Budapest municipal elections held in October, 2014 proved that they are ready to go further with the fraud.¹³⁶

In this respect the hybridity of Hungarian constitutionalism differs from the "managed democracy" of Putin's Russia, where failing competing parties and candidates, and the results of parliamentary and presidential elections cannot be deemed as uncertain.

The democratic backsliding of Hungary has been demonstrated by many independent ratings. According to Freedom House's *Nations in Transit* ratings, Hungary has weakened more since EU accession than any other member state, with the largest declines in 2010 and 2011. In 2012,

¹³² Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute's research, Budapest, 2012.

¹³³ See Zoltán Ádám and András Bozóki, 'The God of Hungarians'. Religion and Rights Wing Populism in Hungary, Manuscript, 2015. File from the authors.

¹³⁴ 'Minden magyar a turulba születik' [All Hungarian Are Born Into the Turul Bird], *Népszabadság*, Sept. 29, 2012.

¹³⁵ <http://uk.businessinsider.com/eurostat-map-of-married-couples-in-europe-2015-10?r=US&IR=T>. I am thankful to Kim Lane Scheppele for calling this aspect to my attention.

¹³⁶ A new law adopted in 10 June 2014 ended the separate city and district council elections in Budapest, and delegated elected district mayors to the city council. According to the original structure, besides the 23 district mayors, 9 additional seats would have been distributed according to a compensation list. The new law abolished the previous system whereby Budapest city council members were directly elected from party lists. Based on the new law, which secured the majority for Fidesz the 'election' or rather the delegation of the Budapest City Council cannot be considered as free anymore.

Hungary was downgraded both for its electoral process and by losing its “free” status regarding media freedom - the only country to do so. With downgrades in civil society and local democratic governance in 2012, Hungary’s overall democracy score is edging closer to the barrier between consolidated democracies and those classified as ‘semi consolidated’, a category that includes Bulgaria, Romania, and the better-performing Balkan states.¹³⁷ By the end of 2013, Hungary’s democracy score was one full point worse on the 1-7 scale than in 2004, when the country entered the EU. In the 2015 Nations in Transit report, which reflects the period January 1 through December 31, 2014 Hungary was expelled from the category of ‘consolidated democracy regimes’ and classified as ‘semi-consolidated’ by worsening its scores in electoral process, civil society, independent media, local democratic governance, judicial framework independence, and consequently its overall democracy score from 2.96 to 3.18.¹³⁸ Also, Demos concluded that Hungary was a significant “backslider” on the dimensions of electoral and procedural democracy, the rule of law, and fundamental rights and freedoms and, worryingly, it scored poorly with respect to citizens’ attitudes towards democracy. It was also the poorest performer among EU member states on the measure of active citizenship. Overall, Greece and Hungary emerge as the most worrying backsliders on measures of a healthy democracy.¹³⁹

The attitudes of citizens towards democracy lead us to the very reasons for the backsliding. Besides the more means-based, institution-focused elements of an ordinary liberal constitutional democracy in Hungary mentioned earlier, the end-based socio-political elements of the term, namely the cultural patterns as reflected both in general and in specific behavior, are lacking. In other words, in Hungary there is no, and never has been, a strong normative commitment to democracy on a behavioral and attitudinal level; therefore, a broad and deep legitimization of constitutional democracy has not been achieved. This means that the significant political actors, at both the elite and mass levels, are not convinced that the liberal democratic regime is the right and appropriate one for the society, better than any other realistic alternative they can imagine.

The only survey of the new Fundamental Law, conducted by the Institute of Psychology of the Loránd Eötvös University on a 1000 representative sample, shows aversion towards the new document. The survey results indicated that no more than one third of the population believed that a new constitution was needed, and 29.9 percent believed that the old constitution expressed the intent of the people. More than 20.1 percent of those believed the new constitution expressed the intent of the people, and 29.6 percent of people believed that the new constitution was the result of background deals, in contrast to 16.8 percent who believed the same for the 1989-90 constitution. In line with these results are answers regarding the general assessment of the old and new constitutions. The old constitution received a more positive assessment than the new one: it gave more security (24.9 percent versus 16.3 percent); strengthened democracy (24.7 percent versus 22.6 percent); one could identify oneself with it (24.4 percent versus 22.6 percent); united the nation (22.6 versus 18.5 percent); one could like it (20.8 versus 15.4

¹³⁷ Sylvana Habdank-Kołaczowska, *Authoritarian Aggression and the Pressures of Austerity*, Nations in Transit 2013, Freedom House, 2013.

¹³⁸ <https://freedomhouse.org/report/nations-transit/2015/hungary>

¹³⁹ J. Birdwell and S. Feve and Ch. Tryborn and N. Vibla, *Measuring Democracy in the EU*, Demos, 2013, pp. 20-21.

percent); less dictatorial (30.8 percent versus 17.4 percent). At the same time the areas where the new constitution scored better than the old one are revealing: the new constitution is considered to be more nationalistic than the old one, (23.1 percent versus 17.1 percent) and the new constitution is believed to express our most important values (22.4 percent versus 20.7 percent). The last result can be evaluated as a positive one and not necessarily read as an expression of a belief that the new Constitution does not bear on itself the universal values of constitutionalism. The most important values of the population were reflected in answers to other questions too. For example, 11 percent of the population believed that the votes of those who have made special efforts for the nation, should weigh more in elections. According to 6 percent and 9 percent of the people, similar privileges could be given to big families, to those farming Hungarian land and to those paying high taxes. One fifth of the people surveyed believed that it would be worth to revoke voting rights of people with drug addiction. Similar restrictions are believed to be worthy of reconsideration for those who are physically and/or mentally challenged, those who were not born in Hungary, and even those who were born in Hungary but belong to ethnic minorities. Some 10 percent even expressed that those living on welfare should have restricted voting rights. The statement that one needs to use force sometimes against other groups of people to achieve one's goals, was believed to be the case by more than half of the people (on a scale of 7 receiving 4 points). The statement that some groups of people are inferior was believed to be true by almost as many people (scoring 3.48 points). The democratic apprehension of the public was revealed when 40 percent agreed that the country needed to be led by an exceptional leader (with half of the Fidesz-, 27 percent of the Jobbik-, and 35 percent of the MSZP-voters agreeing).

The value system conveyed by the new Fundamental Law could be the reason for the high acceptance (almost two-thirds of the people) of the statement that the condition of rights guarantees is the fulfillment of duties, and that the Constitutional court should not limit government actions (45 percent of all respondents and 56 percent of the FIDESZ-voters thought so). A similar picture can be drawn from another survey that looked at citizens' democratic socialization while examining the reasons why most people were not concerned about the breakdown of the rule of law state. The answer can be traced to several factors that all have contributed to the weak democratic culture and strengthened the position of the (FIDESZ) government: the creation of a closed school system, the increased hardship on civil society, and the exclusion of the most disadvantaged while giving further advantages to the wealthy.¹⁴⁰

Unfortunately, these findings do not support the high expectations expressed by László Sólyom, former President of the Republic and first President of the Constitutional Court, that with a new constitution the damage that occurred may not necessarily be irreparable, because there is a constitutional culture that can maintain the prospect of constitutionalism.¹⁴¹

¹⁴⁰ See: D. Sik, 'Kiből lesz demokrata?' [Who Will Be a Democrat?], *Szuverén*, April, 20, 2012.

¹⁴¹ See L. Sólyom, 'Az alkotmányosság esélyei' [The Chances of Constitutionalism], *HVG*, January 8, 2012. Half a year later (5, August, 2012) Sólyom, in a speech at a cultural festival, repeated his optimistic view on constitutional culture: "there are several elements of constitutional culture that are still present: institutions like the ombudsman's office, local governments, and most importantly the conscious citizen, who is aware of its own balancing role in the political system, and even more, the he is the source of political power."

In order to understand the very foundations of Hungarian constitutional democracy, instead of using Sólyom's overly broad definition of constitutional culture, it is better to differentiate between constitutional law and constitutional culture, as Robert Post uses the latter term referring to the beliefs and values of non-judicial actors, most of all the people. On the other hand, the term "constitutional law," according to Post, refers to constitutional law as it is made from the perspective of the judiciary in the American type of decentralized judicial review system, or in countries with a German type of centralized judicial review and constitutional courts. There is a dialectic relation between the two, as constitutional law is based on constitutional culture on the one hand, and is also its influencer.¹⁴²

The major question regarding the future of Hungary is whether democracy and liberalism should go hand in hand, as is the case in the Western world, including the European Union, of which Hungary is currently a member. As with citizens in any other nation-state, Hungarians certainly have the right to oppose joint European measures on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process, unlike the constitution-making that took place in 2011, when Hungary's leaders neglected to consult the people on their opinions about the very nature of the constitution. There are still a significant number of people who either consider themselves as supporters of liberal democracy, or at least represent views, which are in line with liberal democracy.¹⁴³ Liberal or not, the country's next constitution cannot be the exclusive product of elite-driven negotiations. If Hungarians ultimately opt for a non-liberal democracy, as Prime Minister Viktor Orbán publicly insisted first in the summer of 2014, and a year later during the refugee crisis, they must accept certain consequences, including parting from the European Union and the wider community of liberal democracies.

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The described democratic backsliding in Hungary demonstrates that the institutional framework is a necessary but not sufficient element of a successful democratization. Behavioral elements, among them political and constitutional culture are as important as institutions. The other lesson of this case study is on the one hand that the very definition of democracy is changing, and it is not necessarily liberal, and on the other hand the borders of democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems, such as the current

¹⁴² See R. C. Post, The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, *Harvard Law Review*, Vol. 117, 2003, pp. 4-112, at p. 7.

¹⁴³ See the study of the Republikon Institute saying that in 2013 around 12% of the adult population considered themselves as liberal, there were about 1.5 Million people in Hungary, who supported liberal values in human rights related questions. In certain issues this support is even bigger: the liberty of abortion and euthanasia as well as the separation of state and church enjoy around 2/3 support, and also about 25-28% of the respondents accept gay marriage. See 'Párhuzamos liberalizmusok: Kik a liberális szavazók? Republikon Intézet, 2013. <http://republikon.hu/media/12016/20130522.pdf>. Based on these results, János Kis claims that even if there is no liberal party in the current Parliament, around 8% of the entire adult population would be reachable for liberal politics. See J. Kis, Liberalizmus a 3. Köztársaságban [Liberalism in the Third Republic], *szuveren.hu* and *beszelo.hu*, 2 October 2014.

Hungarian.¹⁴⁴ Another important aspect of these developments that due to a new cold war situation these are not only influenced exclusively by the liberal democratic West. The behavior of the Hungarian government, an admirer of Putin's authoritarian Russia, partly supported by the other East European countries during the refugee crisis has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy, and also the membership in the European Union isn't a guarantee for having liberal democratic regimes in all Member States. Unfortunately the refugee crisis and its main reason, the Syrian conflict strengthened illiberal democracies all over Europe (Russia and Turkey), and in the case of Hungary even inside the EU. The division between the old and the new Member States, and the support of the far right parties has been strengthened even in the old Member States. EU institutions have proven their lack of capacity to enforce compliance to joint European values.

¹⁴⁴ Asking the question, whether liberal democracy is at risk, Ivan Krastev responds that the big difference from the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus, rather they have a problem with the liberal part of it. See I. Krastev, 'Europe in Crisis: Is Liberal Democracy at Risk?', in *Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012. Council of Europe Publishing, 2012. 67-73.