

ARTICLE

Populism, authoritarianism and constitutionalism

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Abstract

The paper deals with the relationship of different types of populism with authoritarianism and constitutionalism. In the first part, I try to define various approaches—Left and Right-Wing, “good” or “bad”—to populism, especially from the point of view of whether they aim at changing the liberal democratic constitutional system to an authoritarian one. The following part discusses the rhetoric of authoritarian populists, which makes this type of populism distinct from non-populist authoritarians. The paper also explores the question of whom to blame for the success of authoritarian populisms, and the final part investigates, whether the use of legal tools by an authoritarian populist to dismantle liberal constitutional democracies means that we can speak about a special populist constitutionalism. While the paper tries to find out the joint characteristics of authoritarian populism, it heavily relies on the Hungarian experiences as a kind of model approach in East-Central Europe and maybe even beyond.

Keywords: authoritarian populism; liberal constitutionalism; political constitutionalism; populist constitutionalism

A. Is there a single formula to define populism?

“To Define Populism” was the title of a conference held at the London School of Economics and Political Science (LSE) in London on May 20–21, 1967, with the participation of Richard Hofstadter, Ernest Gellner, and Isaiah Berlin, among others. Regarding a definition, Isaiah Berlin warned the participants “that a single formula to cover all populism everywhere will not be very helpful,” and also “that we must not suffer from a Cinderella complex, by which I mean the following: That there exists a shoe—the word ‘populism’—for which somewhere there must exist a foot.”¹ At the same time, he was convinced that the word “populism” is not simply a homonym, meaning that totally different items sharing the same name—and therefore nothing but confusion—can be improperly sown together by using a general description.² As a general

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¹Isaiah Berlin, *To Define Populism*, in THE ISAIAH BERLIN VIRTUAL LIBRARY 6 (1968), <http://berlin.wolf.ox.ac.uk/lists/bibliography/bib111bLSE.pdf>.

²*Id.*, at 7. In an op-ed piece, Roger Cohen, the opinion columnist of The New York Times suggested that the word “populism” should be retired altogether because the “overused epithet for multiple manifestations of political anger became sloppy to the point of meaninglessness.” Roger Cohen, *It's Time to Depopularize 'Populist'*, THE NEW YORK TIMES, July 13, 2018.

description, Berlin uses the same attributes as experts do nowadays, saying that populism “whether falsely or truly, it stands for the majority of men who have somehow been damaged . . . by an elite, either economic, political or racial, some kind of secret or open enemy: Capitalism, Jews and the rest of it.”³ When talking about the true version, Berlin asserts that, “the essential elements of populism [are] fraternity, freedom from imposed authority, above all equality.”⁴ In opposition to true populism, Berlin also uses the term “false” populism, defining it as

the employment of populist ideas for the ends other than those which the populist desired. That is to say – Berlin argues –, their employment by Bonapartists or McCarthyists, or the ‘Friends of the Russian people,’ or Fascist and so on. This is simply the mobilization of certain popular sentiments – say hostility to capitalism or to foreigners or Jews, or hatred of economic organization or of the market society, or of anything you like – for undemocratic ends.⁵

In the current political science literature, one can find a similar definition of populism, provided by Mudde and Kaltwasser who define populism as a “thin-centered ideology that considers society to be ultimately separated in two homogeneous and antagonistic camps, ‘the pure people’ and the ‘corrupt elite,’ and which argues that politics should be an expression of the ‘volonté générale’ (general will) of the people.”⁶ Mudde and Kaltwasser also observe that some forms of populism have been combined with authoritarianism and nativism,

[W]hereas the former refers to the belief in a strictly ordered society, and is expressed in an emphasis on ‘law and order’ issues, the latter alludes to the notion that states should be inhabited exclusively by members of the native group (‘the nation’) and that non-native (‘alien’) elements are fundamentally threatening to the homogeneous nation-state.⁷

Similarly, Pippa Norris differentiates between populism and authoritarianism, and argues that not all populists pose threats to liberal constitutional democracy. She lists Bernie Sanders’ Democrats, Spain’s Podemos, and Italy’s Five Star Movement to the non-autocratic, and Recep Tayyip Erdogan in Turkey, Viktor Orbán in Hungary, Rodrigo Duterte of the Philippines, the late Hugo Chávez and Nicolás Maduro in Venezuela to the authoritarian populists.⁸ Also, Robert Howse, using almost the same examples, distinguishes between “good” and “bad” populism, characterizing the claims of the first as pluralist, while that of the second as anti-pluralist.⁹ In another writing, Howse—referring to Bernie Sanders—claims that this kind of anti-establishment grassroots political movement of national significance is not the enemy of liberal democratic constitutionalism.¹⁰

In economics, Dani Rodrik addresses the issue of populism. Rodrik introduces a binary similar to Howse’s by differentiating between economic and political populism. Political populists abhor restraints on the political executive, which Rodrik calls as a dangerous approach that allows a majority to ride roughshod over the rights of minorities. These political autocrats, such as Erdogan detest separation of powers, an independent judiciary, or free media, and they see limits

³Berlin, *supra* note 1, at 10.

⁴*Id.*, at 11.

⁵*Id.*, at 12–13.

⁶CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 6 (2017). Berlin also refers to Rousseau, pointing out that the doctrine begins in the 18th century. Berlin, *supra* note 1, at 18.

⁷*Id.*, at 34.

⁸Pippa Norris, *Is Western Democracy Backsliding?, Diagnosing the Risks*, HKS Working Paper No. RWP17-012 (2017). Today, one should certainly add Jaroslaw Kaczynski from Poland to the list of authoritarian populists.

⁹Robert Howse, *Populism and Its Enemies*, manuscript presented at a Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 3, Sept. 15–16, 2017.

¹⁰See Robert Howse, *Thirteen Theses on Trump and Liberal Democracy*, VERFASSUNGSBLOG, Nov. 10, 2016.

on their exercise of power as automatically undermining the popular will.¹¹ In economics, populists reject restraints on the conduct of economic policy, which is—in Rodrik’s view—not necessarily bad. For instance, Rodrik claims that Franklin D. Roosevelt’s New Deal—as FDR explained—was needed not only to serve people better, but also for the “survival of democracy.”¹² Rodrik also uses the terms right-wing and left-wing populism: In the case of the first, the “enemies of the people” are minorities, while in the case of the latter the enemies are financial elites. Even though I think that for certain left-wing populists—like those in Venezuela, Bolivia or Ecuador—minorities can also be considered “enemies of the people,” but these targeted minorities do not belong to the elite. Therefore, this “populism” isn’t anti-elitist, in other words, it can be considered as “false,” not corresponding to this main definitional criteria.

In a related manner, Mark Tushnet compares left- and right-wing populism: Describing left-wing populism as supporting restrictions on capital movement, and right-wing populism as restrictions on the movement of the people rather than capital, using anti-cosmopolitan, ethno-nationalist “we-they” rhetoric.¹³ But again, the latter can really be considered as authoritarianism rather than populism.

Equally in the work of Pierre Rosanvallon, we find a differentiation between rightist and leftist populism. Rosanvallon states that rightist populists are nationalists, who attack non-nationals—such as migrants—and violate principles of constitutionalism.¹⁴ Leftists, like Syriza in Greece or Podemos in Spain—or Bernie Sander’s “left-wing egalitarianism” in the US for that matter—care more about poverty. Consequently, their enemies are the wealthy, the banks, the bourgeoisie, and they pose no threat to constitutionalism. Again, this does not necessarily apply to all forms of leftist populism, such as populism in Venezuela both under President Chávez and Maduro, who are also following an authoritarian agenda and do not tolerate opposition parties. That is the reason that when referring to Venezuela, Bolivia, Ecuador, Hungary, and Poland, Samuel Issacharoff speaks about an authoritarian streak in both left and right populism.¹⁵ But, perhaps because of the authoritarian tendency of left and right-wing populism, Kim Scheppele’s argument that the left/right political spectrum is now overwritten by a cosmopolitan/globalist vs. nationalist/localist dichotomy,¹⁶ applies to the concept of populism as well, and the left/right binary does not really help to understand populism.

Based on these definitional attempts, we can conclude on the one hand that only the “good” sort of populism can be considered as real, attempting to pursue popular sovereignty in a meaningful way as Mudde and Kaltwasser, Norris, or Howse use the term. On the other hand, the anti-pluralist, anti-democratic “bad” populism, which cannot comply with the requirements of liberal democracy and constitutionalism is not a real one. This understanding of “bad” populism corresponds with Berlin’s mentioned terminology of “false populism,” which uses, or rather misuses or abuses populism in its rhetoric as an instrument for the pursuit of authoritarian goals, despite keeping democratic institutions—particularly more or less competitive elections alive—and largely abstaining from violence against opponents. The good or true populism can be democratic, while the bad or false is authoritarian.

¹¹Dani Rodrik, *Is Populism Necessarily Bad Economics?*, 108 AEA PAPERS AND PROCEEDINGS 196 (2018).

¹²Franklin D. Roosevelt, *Acceptance Speech for the Renomination for the Presidency*, Philadelphia, Pennsylvania, June 27, 1936. Cited by Rodrik, *supra* note 11, at 199.

¹³See Mark Tushnet, *Comparing Right-Wing and Left-Wing Populism*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

¹⁴See Pierre Rosanvallon, *Penser le populisme*, Leçon inaugurale au Collège de France 18 (2011). Thanks to Théo Fournier, my PhD researcher at the EUI, for drawing my attention to this.

¹⁵Samuel Issacharoff, *Populism versus Democratic Governance*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

¹⁶Kim L. Scheppele, *The Party’s Over*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

B. Authoritarian populist rhetoric

Let us now turn to the emergence of populism in Central and Eastern Europe, which manifests itself predominantly as authoritarian populism, even if often using anti-representation and pro-direct democracy arguments.¹⁷ In reality, this is only rhetoric which does not necessarily correspond with these populists' practice. For instance, Viktor Orbán's FIDESZ party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections.¹⁸ He refused to concede defeat, declaring that "the nation cannot be in opposition, only the government can be in opposition against its own people." After the 2010 electoral victory, he claimed that through the "revolution at the voting booths," the majority has delegated its power to the government representing it. This means that the populist government tried to interpret the result of the elections as the will of the people, viewed as a homogenous unit. Furthermore, the Orbán government—after overthrowing its predecessor as a result of a popular referendum in 2010—made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 percent of the voters to cast a vote, the new law required at least 50 percent of those eligible to vote to take part, otherwise the referendum is invalid.¹⁹ The ambivalence of authoritarian populists towards representation and referenda in government and in opposition applies to their attitude regarding established institutions. While they readily attack the "establishment," while in opposition, they very much protect their own governmental institutions. The situation is different with transnational institutions, like the EU, which are also attacked by these autocratic populist governments as threats to their countries' sovereignty.²⁰ A good example is again the Hungarian Parliament's reaction to the European Parliament's critical report from July 2013 on the constitutional situation in Hungary. The Hungarian parliamentary resolution on equal treatment reads:

We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.

These words very much reflect the Orbán government's view of "national freedom," the liberty of the state—or the nation—to determine its own laws: "This is why we are writing our own

¹⁷Wojciech Sadurski goes as far as calling the new Polish system of Jaroslaw Kaczynski "plebiscitary autocracy." See Wojciech Sadurski, *Populist Challenges to Liberal Constitutionalism: A Case of Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

¹⁸About the use of populist rhetoric by Viktor Orbán and his government, see a more detailed description in Gábor Halmai, *Is There Such A Thing As 'Populist Constitutionalism? The Case of Hungary*, 11 FUDAN JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCES 323 (2018).

¹⁹It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated—one against the EU's migration policy—failed. On October 2, 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?" Although 92% of those who casted votes and 98% of all the valid votes agreed with the government by answering "no" (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

²⁰Andrea Pin in the parallel special issue argues that supranational courts are partially also responsible for the rise of populism by judicialization of political choices and replacing national debates and rules. In my view, this critique does not apply in the case of Member States of the EU, such as Hungary and Poland, where the democratic process is not operating satisfactorily, and the political institutions of the EU seem to be unable or unwilling to act. Here the CJEU or the ECtHR for that matters—despite their otherwise problematic de-politicized language—can be the last resort to enforce compliance with European values. See Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of the Courts*, 20 GER. L. J. (2019), forthcoming.

constitution . . . And we don't want any unconsolidated help from strangers who are keen to guide us . . . Hungary must turn on its own axis, . . . ”²¹

Orbán repeated the same populist, nationalist mantra at the plenary debate of the European Parliament on September 11, 2018, when defying the Sargentini report, on the basis of which the Parliament launched Article 7 TEU proceedings against Hungary:

. . . [Y]ou are not about to denounce a government, but a country and a people. You will denounce the Hungary, which has been a member of the family of Europe's Christian peoples for a thousand years; the Hungary which has contributed to the history of our great continent of Europe with its work and, when needed, with its blood. You will denounce the Hungary which rose and took up arms against the world's largest army, against the Soviets, which made the highest sacrifice for freedom and democracy, and, when it was needed, opened its borders to its East German brothers and sisters in distress. Hungary has fought for its freedom and democracy. I stand here now and I see that Hungary is being arraigned by people who inherited democracy, not needing to assume any personal risk for the pursuit of freedom. [. . .] the report before you is an affront to the honor of Hungary and the Hungarian people. Hungary's decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves.²²

If autocrats' populism is false and they only use populist rhetoric—but their decisive characteristics is authoritarianism—what makes them distinct from non-populist autocrats? The first distinction is the democratic elections through which they come to power, but once they get into the government they often change the electoral law to keep their power. For example, certain Latin-American presidents' have made various efforts to get rid of the limits of presidential terms. Furthermore, Viktor Orbán's FIDESZ party which received more than 50 percent of the actual votes—and due to the disproportional election system—got two-thirds of the seats in the 2010 parliamentary elections, before the next election—according to OSCE's independent election observers—made “undue advantages” for the governing party provided by the amendment to the electoral system. As a result, they once again secured a two-thirds majority both in the 2014 and the 2018 parliamentary elections with only 45 and 49 percent of the votes respectively.²³

But despite the tricks with the electoral law, it is true that Orbán—and other populist autocrats—have a substantial and growing support in the electorate, which raises the question, whom to blame for the backsliding to authoritarianism: The authoritarian populists, the elite which is unable to provide convincing alternatives to populism for the people, or “the people” themselves. Obviously, autocrats always have their responsibility for authoritarian regimes, also if they use populist rhetoric to keep the power. The elite, including the lawyers, are also responsible not being able to convince the majority about the advantages of a liberal democratic system. According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, which blunted the development of civic constitutionalism, civil

²¹The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, March 16, 2012.

²²<http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report>.

²³In December 2011, the Parliament enacted a controversial election law with its gerrymandered electoral districts—making the electoral system even more disproportional—which favored the governing party in the elections to come. The main changes in the system were as follows: Shift to the majoritarian principle by increasing the proportion of single-member constituency mandates, eliminating the second round, introducing a relative majority system instead of the absolute majority, and introducing “winner-compensation.”

society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.²⁴ Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.²⁵ In other words, according to the proponents of participatory constitutionalism, 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.²⁶ Critics of this approach say that it does not sufficiently take into account the lack of civic interest in constitutional matters and the lack of constitutional culture in new democracies.²⁷

Knowing this lack of civic interest and constitutional culture, the most challenging question is, how much we can blame the people for the success of populist authoritarians. On the one hand, Kim Scheppelle argues that politics has failed “the people,” who were only choosing an option that they were offered, and not the other way around.²⁸ On the other hand, Ronald Inglehart and Pippa Norris, trying to explain the attitudes of voters who support authoritarian, populist leaders—such as Orbán—suggest that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia agendas, reject outsiders, and uphold old-fashioned gender roles.²⁹ We should not go as far as Daniel Goldhagen in his book, *Hitler’s Willing Executioners*—on the responsibility of ordinary Germans in the Holocaust³⁰—or Sándor Márai, who in 1945—before emigrating from Horthy’s Hungary—wrote in his diary³¹ that the “Nazi-Friendly” Hungarian Christian middle class will never change, to observe that many voters of the right-wing authoritarian populist parties are aware of those parties’ exclusionary, nationalistic, homophobic, autocratic ideas and aims, and they still support them.

Both good/true and bad/false populists, like to refer to popular sovereignty. In the case of the first, it is genuine, while authoritarian populists use the reference as a pretext. As we saw, populist authoritarians are as anti-pluralist as their non-populist counterparts. The difference is again rather rhetorical. The first refers to “pure people,” the second to the Aryan Volk, as the German Nazis, or to the “proletarian working class” as the Communists, but both have in mind the exclusion of minorities in societies, including religious, ethnic and other minorities such as migrants in the case of populist authoritarians.

²⁴See this argument by PAUL BLOKKER, *NEW DEMOCRACIES IN CRISES? A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA* (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 Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 9 (Adam Czarnota, Martin Krygier and Wojciech Sadurski eds., 2005). About this and other possible reasons of populism in East-Central Europe see Gábor Halmái, *Populism and Constitutionalism in East-Central Europe*, *COMPARATIVE JURIST*, Nov. 22, 2017.

²⁵See Richard Albert, *Counterconstitutionalism*, 31 *DALHOUSIE LAW JOURNAL* 4 (2008).

²⁶See Sadurski, *supra* note 24, at 23.

²⁷See the reviews of Blokker, *supra* note 24, by Jiri Priban & Bogusia Puchalska, *ICONNECT*, www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism.

²⁸See Scheppelle, *supra* note 16, at 495.

²⁹Ronald Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, HKS FACULTY RESEARCH WORKING PAPER SERIES (2016). But economic and psychological factors are often related and there is a lot of criticism of Inglehart’s and Norris’ cultural explanation of populism. The critics claim that their theory neglects the fact that populists often (ab)use economic vulnerability to play the nationalist/racist card.

³⁰DANIEL GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS. ORDINARY GERMANS AND THE HOLOCAUST* (1996).

³¹SÁNDOR MÁRAI, *MEMOIR OF HUNGARY 1944–1948* (1996).

C. Can populist authoritarianism be constitutionalist?

A significant difference between populist and non-populist autocrats is that the former extensively rely on legal tools.³² Some of them violate their own old constitution with their legislative acts, like the Polish PiS party's government, which was unable to gain a constitution-making majority in the Sejm, but those such as the Hungarian FIDESZ government, which enjoys a two-thirds majority, need not necessarily set aside its "illiberal" constitution, the Fundamental Law of 2011. The question remains, can authoritarian populism and illiberalism be reconcilable with constitutionalism at all?

I. Political constitutionalism has nothing to do with populism

It is striking, and of significance, how the populists in Central and Eastern Europe attempt to legitimize their actions by referring to political constitutionalism as their approach to constitutional change. The main argument of Central and Eastern European populists to defend their constitutional projects is grounded in a claim to political constitutionalism, which favors parliamentary rule and weak judicial review. To be clear, despite some academics' efforts to apply the concept of political constitutionalism in defense of illiberalism, I do not consider political constitutionalism, based on republican philosophy, or all of the concepts rejecting strong judicial review, or judicial review altogether, as populist.³³ Some scholars and constitutional court justices both in Hungary and Poland have attempted to interpret the new constitutional system as a change from legal to political constitutionalism. In my view, these interpretations are simply efforts to legitimize the silencing of judicial review. One of the "fake judges" of the Polish Constitutional Tribunal, the late Lech Morawski, emphasized the republican traditions, present both in Hungary and Poland, mentioning the names of Michael Sandel, Philip Pettit, and Quentin Skinner.³⁴ Also, constitutional law professor Adam Czarnota explained the necessity of the changes, with the argument that "legal constitutionalism alienated the constitution from citizens."³⁵ In Hungary, István Stumpf, constitutional judge, nominated without any consultation with opposition parties by the new FIDESZ right after the new government took over in 2010, and elected exclusively with the votes of the governing parties' votes, in his book argued for a strong state and claimed the expansion of political constitutionalism regarding the changes.³⁶ In the scholarly literature, Attila Vincze argued that the decision of the Constitutional Court accepting the Fourth Amendment to the Fundamental Law—which among other things also invalidated the entire case-law of the Court prior to the new constitution—was a sign of political constitutionalism prevailing over the legal one.³⁷

Political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from one another significantly, emphasize the role of elected bodies instead of courts in implementing and protecting the constitution, but none of them reject the main principles of constitutional democracy, as populists do. Even Richard D. Parker, who announced a "constitutional populist manifesto" wanted only to challenge the basic idea, central to constitutional law, "that constitutional constraints on public power in a

³²See on the various legal toolkits of populist autocrats Kim L. Scheppelle, *Autocratic Legalism*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018).

³³See for the opposite view Lucia Corso, *What Does Populism Have to Do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, RIVISTA DI FILOSOFIA DEL DIRITTO 443 (2014).

³⁴Lech Morawski, *A Critical Response*, VERFASSUNGSBLOG, June 3, 2017.

³⁵Adam Czarnota, *The Constitutional Tribunal*, VERFASSUNGSBLOG, June 3, 2017.

³⁶See ISTVÁN STUMPF, ERŐS ÁLLAM – ALKOTMÁNYOS KORLÁTOK [STRONG STATE – CONSTITUTIONAL LIMITS] 244–249 (2014).

³⁷Attila Vincze, *Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról: az alkotmánymódosítás alkotmánybíróági kontrollja* [The Decision of the Constitutional Court on the Fourth Amendment to the Fundamental Law: The Constitutional Review of Constitutional Amendments], JOGESETEK MAGYARÁZATA 3, 12 (2013).

democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize, and release it.³⁸ Similarly, those who describe a new model of constitutionalism, based on deliberation between courts and the legislator, with the latter retaining the final word, have nothing to do with populist constitutionalism.³⁹ Those scholars realize that parliamentary sovereignty tends to be increasingly restrained, either legally or politically, and that the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant*, conceived as the unrestrained “will of the people,” even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.⁴⁰ In contrast to these new trends, in the Hungarian constitutional system, the parliamentary majority not only decides every single issue without any dialogue, but there is practically no partner for such a dialogue, as the independence of both the ordinary judiciary and the Constitutional Court has been eliminated.

Following Tamás Györfi’s theory, there are three different forms of weak judicial review: each of them is lacking one of the defining features of strong constitutional review, but all of them want to strike a balance between democracy and the protection of human rights that differs from the balance struck by the “new constitutionalism” of strong judicial review.⁴¹ First, judicial review is limited if the constitution lacks a bill of rights, as is the case in Australia. Second, judicial review is deferential if courts usually defer to the views of the elected branches, as in the Scandinavian constitutional systems, or are even constitutionally obliged to do so, as in Sweden and Finland. Finally, and probably most importantly, there is the Commonwealth model of judicial review, where courts are authorized to review legislation, but the legislature has the possibility to override or disregard judicial decisions.⁴²

In my view, neither the Polish nor the Hungarian model fits any of these approaches to weak judicial review, as their aim is neither to balance democracy nor the protection of fundamental rights. The weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the center-right FIDESZ party in the 2010 parliamentary elections. What happened in Hungary resonated with some less successful, similar attempts to weaken constitutional review in other East-Central European countries that took place roughly around the same time. In the Summer of 2012, there was a constitutional crisis also in Romania, where the ruling socialists

³⁸Analyzing Thomas Mann’s novel *MARIO AND THE MAGICIAN*, written in 1929, Parker draws the conclusion for today that, “the point is to get out and take part in politics ourselves, not looking down from a ‘higher’ pedestal, but on the same level with all of the other ordinary people.” Richard D. Parker, *Here, the People Rule: A Constitutional Populist Manifesto*, 27 VALPARAISO UNIV. L. REV. 583, 531-584 (1993). A similar message can be detected in the interview with Mark Lilla, a conservative liberal professor of the humanities at Columbia, who on the day after Donald Trump’s presidential victory declared: “One of the many lessons of the recent presidential election and its repugnant outcome is that the age of identity liberalism must be brought to an end.” Mark Lilla, *The End of Identity Liberalism*. *The New York Times*, November 18, 2016. Later, in an interview on the topic of the most effective tools against the President’s populism, Lilla emphasized the importance that opponents find a way to unify: “We have to abandon the rhetoric of difference, in order to appeal to what we share.” David Remnick, *A Conversation with Mark Lilla on His Critique of Identity Politics*, *THE NEW YORKER*, Aug. 25, 2017.

³⁹See STEPHEN GARDBAUM, *THE COMMONWEALTH MODEL OF CONSTITUTIONALISM. THEORY AND PRACTICE* (2013) about the new model. This model has also come to be known by several other names: “weak-form of judicial review” (Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICHIGAN L. REV. 2781 (2003)); “weak judicial review” (Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1348 (2006)); “the parliamentary bill of rights model” (Janet Hiebert, *Parliamentary Bill of Rights. An Alternative Model?*, 69 MODERN L. REV. 7 (2006)); “the model of democratic dialogue” (ALISON L. YOUNG, *PARLIAMENARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT* (2009)); “dialogic judicial review” (Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUPREME COURT LAW REVIEW, 2nd series 49 (2004)); or “collaborative constitution” (Aileen Kavanaugh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW AND PHILOSOPHY 451 (2003)).

⁴⁰Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in *HOW CONSTITUTIONS CHANGE – A COMPARATIVE STUDY* (Dawn Oliver & Carlo Fusaro eds., 2011).

⁴¹See TAMÁS GYÖRFI, *AGAINST THE NEW CONSTITUTIONALISM* (2016).

⁴²See Garbbaum, *supra* note 39. Similarly, David Prendergast argues in the parallel special issue for the courts as partners of legislators protecting political processes rather than rights or interests in general. See David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GER L. J. (2019), forthcoming.

tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.⁴³ From 2014, there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has also worked with two—and from February 2016 three—judges short, because the President of the Republic refuses to fill the vacancies.⁴⁴ But the most successful follower of the Hungarian playbook on how to dismantle constitutional review has been Jaroslaw Kaczynski's governing party (PiS) and its government in Poland. After the 2015 parliamentary election in Poland, the Law and Justice Party (PiS) also followed the playbook of Viktor Orbán, and started by first capturing the Constitutional Tribunal.⁴⁵

Neither the current Hungarian nor the Polish system of silenced constitutional review comply with the requirements of constitutional democracy; consequently, they do not want to limit the power of the government, do not adhere to the rule of law, and do not guarantee fundamental rights. Their constitutional system cannot be considered as a monistic democracy, which just gives priority to democratic decision-making over fundamental rights.⁴⁶ This means that the new Hungarian constitution and the Polish constitutional practice do not comply with either of the above discussed models of government, 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 of the second the continental European parliamentary, as well as the U.S. presidential system.⁴⁷ Giovanni Sartori speaks about presidentialism and semi-presidentialism, as well as about two forms of parliamentarism, namely the premiership system in the UK, and *Kanzlerdemokratie* in Germany, and the assembly government model in Italy.⁴⁸ Bruce Ackerman uses, besides the Westminster and the US separation of powers systems, the constrained parliamentarism model as a new form of separation of powers, which has emerged against the export of the American system in favor of the model of Germany, Italy, Japan, India, Canada, South Africa, and other nations, where both popular referendums and constitutional courts constrains the power of the parliament.⁴⁹

Hungary and Poland, from 1990 until 2010, and 2015 respectively, belonged to the consensual and constrained parliamentary systems, close to the German *Kanzlerdemokratie*, in Poland with a more substantive role for the President of the Republic. But in Hungary, the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints of the parliamentary power. In Poland, due to the legislative efforts of the PiS government, the 1997 Constitution has become a sham document. In both countries, the system has moved towards an absolute parliamentary sovereignty model without the cultural constraints of the Westminster form of government. Not to mention the fact that in the last decades, the traditional British model of constitutionalism has also been changed drastically with the introduction of a bill of rights by left-of-centre governments—and opposed by right-of-centre opposition parties—in Canada (1982),

⁴³About the Romanian crisis see Vlad Perju, *The Romanian double executive and the 2012 constitutional crisis*, 13 INT'L J. OF CONSTITUTIONAL L. 246–278 (2015); Bogdan Iancu, *Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 153 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

⁴⁴Tomás Lálík, *Constitutional Crisis in Slovakia: Still Far from Resolution*, ICONECT, August 5, 2016. <http://www.icconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>.

⁴⁵The same playbook was also used outside the region, in Turkey by Erdoğan and in Venezuela by Chavez.

⁴⁶Bruce Ackerman distinguishes between three models of democracy: Monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See BRUCE ACKERMAN, *I WE THE PEOPLE* 6–16 (1992).

⁴⁷ARENDT LIJPHART, *PATTERNS OF DEMOCRACY. GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* (1999).

⁴⁸GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* (2nd ed., 1997).

⁴⁹Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004) and the State of Victoria (2006). Contrary to the traditional Commonwealth model of constitutionalism, in the new Commonwealth model the codified bills of rights became limits on the legislation, but the final word remained in the hands of the politically accountable branch of government. In this respect, this new Commonwealth model is different from the judicial supremacy approach of the US separation of powers model, as well from the European constrained parliamentary model. The biggest change occurred in the UK, and some even talk about the “demise of the Westminster model.”⁵⁰ The greatest deviation from the system of unlimited Parliamentary sovereignty was the introduction of judicial review. In just over two decades, the number of applications for judicial review nearly quadrupled to over 3,400 in 2000, when the Human Rights Act 1998 came into effect in England and Wales.⁵¹ The Human Rights Act has a general requirement that all legislation should be compatible with the European Convention of Human Rights. This does not allow UK courts to strike down, or “disapply,” legislation, or to make new law. Instead, where legislation is deemed to be incompatible with Convention rights, superior courts may make a declaration of incompatibility under Section 4.2. Then, the government and Parliament decide how to proceed. In this sense, the legislative sovereignty of the UK Parliament is preserved. Some academics argue that, although as a matter of constitutional legality Parliament may well be sovereign, as a matter of constitutional practice it has transferred significant power to the judiciary.⁵²

Others go even further and argue that, although the Human Rights Act 1998 is purported to reconcile the protection of human rights with the sovereignty of Parliament, it represents an unprecedented transfer of political power from the executive and legislature to the judiciary.⁵³

Besides the mentioned Commonwealth countries, a similarly new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994, contains a “notwithstanding” provision, similar to the Canadian one. The new model of Commonwealth constitutionalism is based on a dialogue between the judiciary and the parliament. But also comparative constitutional studies conclude that parliamentary sovereignty tends to be restrained either legally or politically more and more, and the last decades have witnessed less and less scope for the exercise of traditional *pouvoir constituant* conceived as unrestrained “will of the people,” even in cases of regime change or the establishment of substantially and formally new constitutional arrangements.⁵⁴ In contrast to these new trends, in the Hungarian and Polish constitutional system the parliamentary majority not only decides every single issue without any dialogue, but practically there is no partner for such a dialogue, due to the fact that the independence of both the ordinary judiciary and the constitutional courts have been silenced. In summary, the remainders of both Hungarian (and Polish) constitutional review have nothing to do with any types of political constitutionalism or a weak judicial review approach, which all represent a different model of separation of powers. In the authoritarian Hungarian (and in the Polish) sham system of constitutionalism, there is no place for any kind of separation of powers.

In addition, as Bojan Bugarcic argues, populist constitutionalism must be distinguished from popular constitutionalism, “which seeks to preserve the primary role of the people in interpretation and administration of constitutional law and is compatible with liberal democracy.”⁵⁵

⁵⁰Cf. Philip Norton, *Governing Alone*, PARLIAMENTARY AFFAIRS, October 2003, 544.

⁵¹See David Judge, *Whatever Happened to Parliamentary Democracy in the United Kingdom*, PARLIAMENTARY AFFAIRS, July 2004, 691.

⁵²Cf. Keith D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN L. REV. 79, 92 (1999).

⁵³See Matthew Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, POLITICAL STUDIES, March 2002, 62.

⁵⁴See Fusaro & Oliver, *supra* note 40, at 417-418.

⁵⁵See Bojan Bugarcic, *The Populist at the Gates: Constitutional Democracy Under Siege?*, paper presented at a workshop on Public Law and the New Populism, New York University School of Law, Jean Monnet Center for International and Regional Economic Law and Justice, 2017. Unfortunately, Bugarcic does not define popular constitutionalism. Jan-Werner Müller, who also differentiates between populist and popular constitutionalism, admits that we do not know exactly what popular

Other scholars argue that authoritarian populism rejects the basic principles of constitutional democracy,⁵⁶ understood as limited government, governed by the rule of law, and protecting fundamental rights.⁵⁷

II. Does authoritarian populism have a constitutional theory?

If populism cannot lay claim to either political constitutionalism or popular constitutionalism to justify its political legitimacy, how should we then understand its approach to constitutionalism? Luigi Corrias argues that populism's mostly implicit constitutional theory contains three main claims: The first concerns the nature of constituent power, the second involves the scope of popular sovereignty, and the third relates to its approach to constitutional identity.⁵⁸

Regarding constituent power, populists claim not only that it belongs to the people, but also that it is almost absolute, and may potentially be exercised directly in the polity. The absolute primacy of the constituent power of the people applies also vis-à-vis the constitution, which contradicts the concept of the constitution being a "higher law." Unlike liberal constitutionalism, populists claim not only that the power to create a constitution belongs to the people alone, that is, that the people have a monopoly over the original or primary *pouvoir constituant*; but also the derivative or secondary constitutional amending power which for them means that the power of the people to amend the constitution is unlimited. This also means an absolute primacy of politics over the rule of law. By not accepting the authority of the law, populists reject the dualism of law and politics, the common characteristic of both the American and French revolutions, and the German and British evolutionary approaches to constituent power.⁵⁹

For popular sovereignty, as Corrias argues, populism holds the belief that "the people" is a unit, and that, as such, it is present in the polity often only through the means of direct democracy, such as referenda. Representation merely serves as a tool to give voice to the unity.⁶⁰ In contrast, however, as Pinelli rightly points out, contemporary populists do not necessarily reject representation, nor do they necessarily favor the use of referenda,⁶¹ as we have shown in the case of Viktor Orbán's FIDESZ party.

The third element of populist constitutional theory, according to Corrias, is constitutional identity as collective selfhood. Here populists have the tendency to reject what they perceive as threats to the constitutional identity of the people by immigrants, refugees, and minorities.⁶² This is the reason why the Hungarian government, after the above-mentioned failed referendum, introduced the Seventh Amendment to defend Hungary's constitutional identity and politically

constitutionalism is. See Jan-Werner Müller, *The People Must be Extracted from Within the People: Reflections on Populism*, 21 CONSTITUTIONS 483 (2014). Without exact guidelines one can think about the Swiss direct democracy, or the (more or less failed) Irish and Icelandic constitutional reform experiences with strong people's participation. Concerning these latter attempts, see Jane Suiter, David M. Farrell & Clodagh Harris, *Ireland's Evolving Constitution*, in CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND 142 (Paul Blokker ed., 2018), and respectively Baldvin Thor Bergsson, *The Constitution As a Political Tool in Iceland: From the Periphery to the Center in the Political Debate*, in CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND 155 (Paul Blokker ed., 2018).

⁵⁶See for instance Cesare Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 EUROPEAN CONSTITUTIONAL LAW REVIEW 5 (2011).

⁵⁷See these "essential characteristics" of constitutional democracy in Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 SOUTHERN CALIFORNIA LAW REVIEW 1307 (2001).

⁵⁸Luigi Corrias, *Populism in Constitutional Key: Constituent Power, Popular Power, Popular Sovereignty and Constitutional Identity*, 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 6 (2016). See a different approach to Corrias' populist constitutional theory in the parallel special issue by Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 GER. L. J. (2019), forthcoming.

⁵⁹Corrias, *supra* note 58, at 16.

⁶⁰*Id.*, at 18–19.

⁶¹Pinelli, *supra* note 56, at 11.

⁶²See Corrias, *supra* note 58, at 13.

legitimize non-compliance with EU law in this area. Because the proposed amendment fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law, the Constitutional Court, loyal to the government, came to the rescue of Orbán's constitutional identity defense of its policies on migration. The Court revived an abandoned petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated, and ruled that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty." Therefore, the Court argued, "the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State." Because sovereignty and constitutional identity are in contact with each other in many points, "their control should be performed with due regard to each other in specific cases."⁶³ Finally, after FIDESZ regained its constitution-making two-thirds majority on June 20, 2018, they enacted the previously failed Seventh Amendment, including the provisions on national constitutional identity.

III. The instrumental role of religion in national legitimation

A strong claim in Central and Eastern European populism is hence that of collective identity and the promotion of the people as an ethno-national, but also religious unit. The above-mentioned Seventh Amendment is again relevant here, as it contains a further provision about the Christian culture as an intrinsic element of the national identity. My argument is that it mainly serves the populist aim of the governing party to instrumentalize religion in legitimating nationalism.⁶⁴ "The protection of Hungary's self-identity and its Christian culture is the duty of all state organizations," says the new provision. The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the governing FIDESZ party, who initiated the new text, were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: "Without Christian culture there is neither Europe nor Hungary." The major points of the recent constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behavior, are deeply contradictory to the very idea of Christian culture. Most likely, the same intention to legitimate his anti-European idea led Prime Minister Orbán to reframe his concept of "illiberal democracy"⁶⁵ as a fulfilment of "Christian

⁶³For a detailed analysis of the decision, see Gábor Halmai, *The Abuse of Constitutional Identity. The Hungarian Constitutional Court on the Interpretation of Article E (2) of the Fundamental Law*, 43 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 23 (2018).

⁶⁴For a more detailed discussion of this part of the amendment, see my blogpost *FIDESZ and Faith: Ethno-Nationalism in Hungary*, VERFASSUNGSBLOG, June 29, 2018.

⁶⁵In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in the 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 abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world Today, the stars of international analyses are Singapore, China, India, Turkey, Russia . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, then it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them If we look at civil organizations in Hungary, . . . we have to deal with paid political activists here [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of it being a liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests This is about the ongoing reorganization of the Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests.

See Viktor Orbán, *Speech at Bäile Tuşnad (Tusnádfürdő) of 26 July 2014*, BUDAPEST BEACON, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>. Kim Lane

democracy.”⁶⁶ But this reasoning does not reveal the compensatory message sent to the European People’s Party, the party family of FIDESZ in the European Parliament, and to its most powerful member, the German CDU-CSU: Even if we may have strange views on European values, we are good Christians, like you are. Besides the political message of the amendment towards Europe, there will be clear internal constitutional law consequences of the new provision, as it can be used as a basis of reference to annul any legal norm allegedly violating Christian culture, a tool that can be useful for the packed Constitutional Court or any court in Hungary.

The text of the Fundamental Law could never have been ideologically neutral. This new constitution, which was passed by the Parliament in April 2011, shows the role of religion in national legitimation through characterizing the nation referred to as the subject of the constitution not only as a community of ethnic Hungarians, but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text, commits itself to a branch of Christianity: The Hungarian Roman Catholic tradition. According to the text of the preamble, “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe,” the members of the Hungarian nation recognize Christianity’s “role in preserving nationhood,” and honor the fact that the Holy Crown “embodies” the constitutional continuity of Hungary’s statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law’s concept of community and its preferred family model, and its provision regarding the protection of embryonic and fetal life from the moment of conception.

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that “we value the various religious traditions of our county.” The choice of words displays its model of tolerance, under which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various “religious traditions,” but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

The refugee crisis of 2015 has demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s “Christian civilization” against an Islamic invasion. In the beginning of the crisis, Prime Minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation . . . [and] Hungary will either be Christian or not at all.”⁶⁷ In another speech held in early September, Orbán went further by stating that: “The 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 to. 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

Scheppel’s article in this issue describes the ideological foundation of Orbán’s illiberalism by court ideologue András Láncki. This populist critique is an outright rejection of liberalism as a utopian ideology, which is—similar to Communism—incompatible with democracy. See Kim L. Scheppel, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, in this issue.

⁶⁶Four years later at the same place Orbán, already preparing himself for the upcoming debate before the European Parliament rephrased the concept, and talked about “Christian democracy.” *Prime Minister Viktor Orbán’s Speech on the 29th Bálványos Summer University and Summer Camp on 28 July 2018*, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp>.

⁶⁷Orbán’s speech in Debrecen on May 18, 2015, http://index.hu/belfold/2015/05/18/orban_magyarorszag_kereszteny_lesz_vagy_nem_lesz/#.

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.⁶⁸

But should the alleged defense of Christianity from the “Muslim hordes” be taken seriously? In a speech on July 26, 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 [than compulsion or force].”⁶⁹ This assessment is very similar to that of the late Imre Kertész, the Nobel laureate in literature, who argued that Hungary’s ill-fate stemmed from its inability to choose between Asia and Western Europe.⁷⁰ Historically in Hungary, the bloody conflicts of the Reformation meant that until the Horthy era no church could fully identify itself with the Hungarian nation. Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church still played little historical role in preserving national consciousness, so that Catholicism has never become equated with Hungarian patriotism. Under communism, the Roman Catholic church neither served as a symbol of national independence, nor as a source of protection for the opposition, as it happened in Poland.⁷¹

Christianity and religion serve as reference points that Orbán’s authoritarian populism uses opportunistically. FIDESZ, although it was once a liberal party with militantly anti-clerical views, started to become conservative from the mid-90s onwards, turning to an openly positive stance towards religion. Nevertheless, religion has never been taken as significant part of the identity of FIDESZ. Instead, religion played a purely instrumental, opportunistic role in the party’s political strategy even after joining the European People’s Party (EPP), the center-right party family of the European Parliament.⁷² 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 Hungarys”: the Western Christian, and the Eastern pagan, tribal one.⁷³ Orbán once voiced his conviction that the Turul bird, a symbol of ancient pre-Christian Hungarians—“the symbol of national identity of living”⁷⁴—is the image Hungarians are born in. 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 nation-religion (*nemzetvallás*) played a crucial role. Another example of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires—Singapore, China, Turkey, India, Singapore, and Russia—all of them are either non-Christian or Orthodox.

The newly adopted amendment to the Fundamental Law of Hungary with the state’s obligation to protect Christian culture—besides its potential to limit fundamental rights—strengthens the

⁶⁸Speech in Kötce on September 5, 2015, <https://vastagbor.atlatszo.hu/2015/09/17/a-vagatlan-kotcsei-beszed/>.

⁶⁹See B. Szabó, *Félázsiai származékoknál, mint mi, csak így megy* [With a half-Asian lot such as ours, there is no other way], NÉPSZABADSÁG, July 27, 2012.

⁷⁰*La Hongrie est une fatalité*, LE MONDE, Feb. 10, 2012.

⁷¹Anna Grzymala-Busse, *Whither Eastern Europe? Changing Political Science Perspectives on the Region*, manuscript, University of Michigan, December 5, 2013, <http://users.clas.ufl.edu/bernhard/whitherpapers/Florida%20workshop%20ECE.pdf>.

⁷²Only 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.

⁷³See András Bozóki & Zoltán Ádám, *State and Faith: Right-wing Populism and Nationalized Religion in Hungary*, 2 INTERSECTIONS. EAST EUROPEAN JOURNAL OF SOCIETY AND POLITICS 98 (2016).

⁷⁴*Minden magyar a turulba születik* [All Hungarian Are Born Into the Turul Bird], NÉPSZABADSÁG, Sept. 29, 2012.

role of religion to constitutionally legitimize the concept of an ethnic nation. In this concept of the nation—as the subject of the Fundamental Law—is not just the community of ethnic Hungarians, but is also a Christian community which means that those who do not associate themselves with Christianity can feel themselves excluded from the nation as well. In this constitutional order, the state is not necessarily obliged to tolerate all religions, and the representatives of the Christian religion can feel themselves entitled to intolerance towards the representatives of other religions.

IV. Critique of liberal constitutionalism?

The populist approach to constitutionalism appears as an instrumental one that uses nationalist and religious definitions of the nation to promote an ultimately authoritarian project. In this regard, populism in Central and Eastern Europe can hardly lay claim to a democratic mission. But can we possibly understand its critical dimension as an important critique on the liberal constitutionalism and as revealing significant shortcoming in the liberal democracies that have been constructed since 1989?

Paul Blokker understands popular constitutionalism as a form of constitutional critique and “counter-constitutionalism” rather than an outright denial of liberal constitutionalism and the rule of law. Similar to Ernesto Laclau’s argument that the rise of populism is a consequence of the denigration of the masses,⁷⁵ Blokker claims that the populist critique of liberal constitutionalism does invoke relevant critical dimensions of the current democratic malaise, and populists claim to represent and give voice to the “pure” people.⁷⁶ According to Blokker, this critical stance towards liberal constitutionalism is related to a Schmittian understanding of the constitution, and to Carl Schmitt’s critique of liberal constitutionalism and its conception of the rule of law. As is well-known, the constitution in Schmitt’s view is an expression of “the substantial homogeneity of the identity and the will of the people,” and guarantee of the state’s existence, and ultimately any constitutional arrangement is grounded in, or originates from, an arbitrary act of political power. In other words, in Schmitt’s view the basis of the constitution is “a political decision concerning the type and form of its own being,” made by the people as a “political unity,” based on their own free will. This political will “remains alongside and above the constitution.”⁷⁷ Schmitt also portrays the people as an existential reality as opposed to mere liberal representation of voters in parliament, holding therefore that Mussolini was a genuine incarnation of democracy.

According to Mudde and Kaltwasser, populists critique elitist, judicial constitutionalism, and endorse the participation of ordinary citizens in constitutional politics.⁷⁸ In a more recent work they argue that populism, by holding that nothing should constrain “the will of the (pure) people,” is democratic,⁷⁹ but at odds with liberal democracy, and with the notion of pluralism.⁸⁰ Although they admit that populism can develop into illiberal democracy, they also claim that it is not populism but rather nativism that is the basis for excluding those who they contend are not the

⁷⁵ERNESTO LACLAU, ON POPULIST REASON (2005).

⁷⁶Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK ON GLOBAL POPULISM (Carlos de la Torre ed., 2018).

⁷⁷See CARL SCHMITT, *Constitutional Theory* 125–126 (2008). This idea is also shared by a part of the otherwise not populist French constitutional doctrine, influenced by Rousseau’s general will. This is the reason that the representatives of this doctrine hold that during a constitutional transition a referendum is sufficient to legitimate a new constitution. See the French Constitutional Council’s approval of De Gaulle’s 1962 amendment to the 1958 Constitution, ignoring the Constitution’s amendment provisions. Thanks to Théo Fournier, who called my attention to this.

⁷⁸Cas Mudde & Cristóbal Rovira Kaltwasser, *Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America*, 48 GOVERNMENT AND OPPOSITION 147 (2013).

⁷⁹Also, Ruth Gavison calls to celebrate populism as the “core of democracy rather than condemn it as anti-democratic.” She refers to MICHAEL KAZIN, *THE POPULIST PERSUASION* (2017) as a persuasive analysis of populism as an authentic political movement. See Ruth GAVISON, *What Is the State of Democracy? How to Defend It?*, ICONNECTBLOG, August 26, 2017.

⁸⁰Mudde & Kaltwasser, *supra* note 6, at 81.

“real people.”⁸¹ This understanding of populism presupposes that democracy can be liberal or illiberal (electoral), the latter having a number of institutional deficits that hinder respect for the rule of law and exhibit weaknesses in terms of independent institutions seeking the protection of fundamental rights.⁸² In fact, Carl Schmitt went so far as to claim the incompatibility of liberalism and democracy, and argued that plebiscitary democracy based on the homogeneity of the nation was the only true form of democracy.

By contrast, in my view, liberalism is not merely a limit on the public power of the majority, but also a constitutive precondition for democracy, which provides for the rule of law, checks and balances, and guaranteed fundamental rights. In this respect, there is no such a thing as an “illiberal democracy”⁸³ or for that matter anti-liberal or non-liberal democracy. Those who perceive democracy as liberal by definition also claim that authoritarian populism is inherently hostile to values associated with constitutionalism: Checks and balances, constraints on the will of the majority, fundamental rights, and protections for minorities. Those skeptical about authoritarian populist constitutionalism have a different understanding of populism, as a distinctly moral way to understand the political world, which necessarily involves a claim to exclusive moral representation. This means, as Jan-Werner Müller argues, that this moralistic vision of politics is not just anti-elitist, but it also and foremost anti-pluralist.⁸⁴ But, as Müller also claims, since democracy, which must be pluralist, is an institutionalized uncertainty, populists destroy democracy itself by promising certainty through the use of their own constitutions to make their image of the people and what they regard as the morally right policies as certain as possible.⁸⁵ Another consequence of the exclusionary moral and ideological position of authoritarian populism is that it rests on an essentialist concept of citizenship, which classifies people as citizens who are members of the political community on the basis of their political and social views or their ideological commitments, as opposed to the traditional pluralist liberal concept of citizenship that rests on the place of birth, residence, or the citizenship of parents.⁸⁶

In another of Paul Blokker’s works, he argues that, “while populism can be situated within a modern democratic tradition of constitutionalism, it produces a distorted version, which leads to an undoing of its democratic potential and pushes the populist project towards democratic dictatorship.”⁸⁷ According to Blokker, the “really existing” populist authoritarian constitutionalism, such as those of Poland and Hungary, is not at all universalistic and inclusionary, and stands in stark contrast to democratic constitutionalism. In other words, Blokker acknowledges that the distorted Hungarian and Polish populism can lead to “democratic dictatorship,” but it is still considered as a form of constitutionalism, because its key instrument is the constitution.⁸⁸ This is in

⁸¹*Id.*, at 83. Similarly, Tjitske Akkerman argues that not populism, but authoritarian nationalism, is the real threat to democracy. See Tjitske Akkerman, *Authoritarian Nationalism, Not Populism Is Real Threat to Democracy*, SOCIAL EUROPE, Aug. 9, 2017.

⁸²Mudde & Kaltwasser, *supra* note 6, at 88.

⁸³Jan-Werner Müller, *The Problem with ‘Illiberal Democracy’*, PROJECT SYNDICATE, January 21, 2016.

⁸⁴JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016).

⁸⁵Müller, *supra* note 55. Müller distinguishes the deeply problematic populist constitutionalism from a legitimate form of popular constitutionalism. Regarding the distinction, he refers to Corey Brettschneider, *Popular Constitutionalism contra populism*, 30 *Constitutional Commentary* 81 (2015).

⁸⁶Alon Harel argues that in Israel, populism rests on the essentialist characterization of citizenship. See Alon Harel, *The Triumph of Israeli Populism*, ICONNECTBLOG, Aug. 22, 2017.

⁸⁷Paul Blokker, *Populism as a Constitutional Project*. Paper presented at the workshop ‘Public law and New Populism’, NYU School of Law, 2017. Mark Tushnet in his article published in this issue also acknowledges that some populists such as Viktor Orbán do seem to be in the process of transforming their regimes into authoritarian ones, but according to him the ultimate outcome of the process is still unclear. See Mark Tushnet, *Varieties of Populism*, in this issue.

⁸⁸Paul Blokker, *supra* note 87. Besides the proposition that a dictatorship can be democratic, the claim that the use of the constitution as an instrument is a sufficient condition of constitutionalism is highly contested. While most of the “really existed” communist regimes used constitutions to legitimize their systems, the current Polish populist regime, which does not have a two-thirds majority in parliament, uses extra-constitutional tools to dismantle constitutional democracy.

line with the conclusion of his latest work, which claims that some manifestations of populism can be understood as merely a threat to liberal constitutional democracy, while others cannot.⁸⁹ As I argued in this paper, only the latter can be considered true populism.

In my view, the false populists' understanding of the constitution opposes limits on the unity of power, adherence to the rule of law, and the protection of fundamental rights as the main components of constitutionalism. The term "populist constitutionalism" in its authoritarian form seems to me to be an oxymoron altogether. The same applies to "authoritarian" or "illiberal" constitutionalism. If the main characteristic of constitutionalism is the legally limited power of the government, neither authoritarian nor illiberal polities can fulfil the requirements of constitutionalism.⁹⁰ As Mattias Kumm argues, Carl Schmitt's interpretation of democracy, inspired by Rousseau, and used by authoritarian populist nationalists as "illiberal democracy," becomes an anti-constitutional topos.⁹¹ Consequently, I equate constitutionalism with liberal democratic constitutionalism.⁹² This does not mean, however, that constitutions cannot be illiberal or authoritarian. Therefore, it is legitimate to talk about constitutions in authoritarian regimes, as Tom Ginsburg and Alberto Simpser do in their book,⁹³ but I do not agree with the use of the term "authoritarian constitutionalism"⁹⁴ or "constitutional authoritarianism."⁹⁵ Besides the constitutions in the Communist countries, both current theocratic and communitarian constitutions are considered as illiberal.⁹⁶ Theocratic constitutions, in contrast to modern constitutionalism, reject secular authority.⁹⁷ In communitarian constitutions, like the ones in

⁸⁹Paul Blokker, *Varieties of Populist Constitutionalism: The Transnational Dimension*, in this issue.

⁹⁰See, e.g., the classical work of Charles McIlwain: "Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government; the government of will instead of law [...] all constitutional government is by definition limited government." CHARLES H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 21-22 (1947). Stephen Holmes asserts that the minimalist vision of constitutionalism is achieved if the following requirements are met: the constitution emanates from a political decision and is a set of legal norms; the purpose is "to regulate the establishment and the exercise of public power"; comprehensive regulation; constitution is higher law; constitutional law finds its origin in the people. Stephen Holmes, *Constitutions and Constitutionalism*, in *OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 189-216 (Michel Rosenfeld & András Sajó eds., 2012). Similarly, Gábor Attila Tóth claims that specific markers of authoritarianism, such as hegemonic voting practices, imitation of institutional checks, superior executive or restricted fundamental rights make certain constitutional conceptions incompatible with the concept of constitutionalism. Gábor Attila Tóth, *Constitutional Markers of Authoritarianism*, *HAGUE JOURNAL ON THE RULE OF LAW*, first view, September 10, 2018. Oran Doyle in the parallel special issue finds the understanding of constitutionalism as simply the practice of government under a constitution also appropriate, and consequently considers populist constitutionalism not as a contradiction. See Oran Doyle, *supra* note 58.

⁹¹Mattias Kumm, *Demokratie als verfassungsfeindlicher Topos*, *VERFASSUNGSBLOG*, Sept. 6, 2017.

⁹²In contrast, others also regard other models of constitutionalism, in which the government, although committed to acting under a constitution, is not committed to pursuing liberal democratic values. See for instance Mark Tushnet, *Varieties of Constitutionalism*, 14 *INT'L J. CONST. L.* 1 (2016). Similarly, Gila Stopler defines the state of the current Israeli constitutional system as 'semi-liberal constitutionalism'. Cf. Gila Stopler, *Constitutional Capture in Israel*, *ICONNECT*, August 21, 2017.

⁹³TOM GINSBURG & ALBERTO SIMPSE, *CONSTITUTIONS IN AUTHORITARIAN REGIMES* (2014).

⁹⁴See for instance Alexander Somek, *Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933-1938 and Its Legacy*, in *DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* (Christian Joerges and Navraj Singh Ghaleigh eds., 2003); Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 *INT'L J. CONST. L.* 702 (2013); Mark Tushnet, *Authoritarian Constitutionalism*, 100 *CORNELL LAW REVIEW* 391 (2015). Somek deals with Austria before the Anschluss, Isiksel with Turkey, while Tushnet tries to generally pluralize the normative understanding of non-liberal constitutionalism, differentiating between an absolutist, a mere rule-of-law, and an authoritarian form of constitutionalism, Singapore being the main example of the latter.

⁹⁵Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 *JOURNAL OF DEMOCRACY* 51 (2002).

⁹⁶Li-Ann Thio, *Constitutionalism in Illiberal Polities*, in *OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 133 (Michel Rosenfeld, & András Sajó eds., 2012). Contrary to my understanding, Thio also talks about 'constitutionalism' in illiberal polities.

⁹⁷There are two subcategories distinguished here: The Iranian subcategory, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi Arabian subcategory, where Islam is present, without the formal authority of modern constitutionalism.

South Korea, Singapore and Taiwan, the well-being of the nation, the community and society receive utilitarian priority rather than the individual freedom, which is the principle of liberalism. But in these illiberal polities, there is no constitutionalism.

D. Conclusion

In this paper, I tried answer the question, whether there is one single formula of populism, and after discussing different binaries, such as right/left, bad/good, political/economic approaches, came to the conclusion that from the point of view of constitutionalism, the authoritarian category of populism is a not a real one. This “false populism” (Isaiah Berlin) uses populism as a rhetoric, and most of the common characteristics of the real populism, such as anti-elitism, anti-representation, anti-establishment are either not even practiced in authoritarian populist regimes, or at best they are only there as rhetoric to hide the authoritarian aims of those autocratic populists. Consequently, as I argue, the authoritarian type of populism, which rejects liberalism as a constitutive precondition of democracy, cannot be in compliance with the traditional idea of liberal democratic constitutionalism. These populist, illiberal, and allegedly “constitutional” systems, such as the current Hungarian or Polish regimes, maintain some of the institutions of a constitutional state—such as the constitutional courts—but their power is very limited. Also, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary. Populism in its Central and Eastern European manifestation has nothing to do with political constitutionalism, the concept of weak judicial review, or popular constitutionalism. Equally, it offers little in terms of critique on liberal constitutional democracy. We are left with the authoritarian ambitions of the political leadership of these countries in order to keep power as long as possible.