



The decline of liberal democracy in Europe's midst

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Fidesz's constitutional counter-revolution has reversed the process of democratization begun in Hungary in 1989. Seeking reasons for Hungary's 'backsliding', Gábor Halmai argues that democratic culture is more crucial than formal legality to guaranteeing rule of law. Hungary challenges the EU's ability to prevent illiberal democracies emerging in its midst.

Hungary's illiberal turn, which has significantly weakened the rule of law safeguards instituted by the 1989-1990 constitutional process, can be described as a 'constitutional counter-revolution'. [1] At the same time, it has not resulted in the restoration of either a single-party or police state structures. Rather, the Hungarian system since 2010 is better characterized as a 'democradura'. [2] In the following, I describe the elements and possible reasons for Hungary's political transformation. [3] The failure of the elite (myself included) that built liberal democracy in Hungary is one of the issues discussed. Another is why the first twenty years of regime transition did not see the emergence of greater respect for constitutional values. This would have prevented the rapid deconstruction of democracy or, at the very least, have made the collapse more difficult.

Especially after the refugee crisis, the Hungarian situation is also a test as to whether, and to what extent, the civilized world, especially Europe, can enforce global values in countries that are members of the international community, and of value-based communities such as the European Union and the Council of Europe. So far, the results by no means qualify as a success. The Hungarian government's minor concessions have been due not to the resolve of European institutions, nor to the power its value-enforcement mechanisms, but to the exigencies of Hungary's economic situation. Europe's inability to defend its values in Hungary set off a process of unravelling that, in the summer of 2012, threatened to do away with Romanian constitutionalism and, since autumn 2015, has also been underway in Poland. If, in the wake of the economic and the refugee crises, in which Hungary has taken sides with the other eastern central European member states, the European Union is unable to force these countries to respect European values, then the prospects for rule of law and democracy will be even worse than they are now.



The constitutional revolutions of 1989 and 2010

Like other countries undergoing system change after 1989, Hungary had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all at the same time. [4] Plans for amending the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law' document were outlined during the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. The 'old-new' constitution was ratified by the illegitimate parliament and went into effect on the first anniversary of the revolution in 1990. Since then it been the basis of Hungary's 'constitutional revolution.'

The 'old-new' constitution followed the model of a consensual democracy accepted in continental European systems. This assumes the presence of more than two parties in parliament as well as coalition government. The institutional aspects of the Hungarian constitutional structure emerged as a reflection of the will of the 1989-1990 roundtable. However, the consensus upon which this structure was based has gradually eroded. A requisite political culture never took shape, either among the political elite or the public as a whole.

By 2010, most voters had become dissatisfied not only with the government, but also with the transition, more so than in any other east central European country. [5] Fidesz encouraged these feelings by claiming that there had been no real transition in 1989-1990, and that the previous nomenklatura had merely converted its lost political power into economic influence. Fidesz's populism was directed against all elites, including that which designed the 1989 constitutional system (to which Fidesz also belonged). Fidesz claimed that it was time for a new revolution. Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a 'revolution of the ballot boxes.' His intention was to eliminate any kind of checks and balances, even the parliamentary rotation of governing parties.

Orbán's vision for a new political order - in which his 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. Formally called the Fundamental Law of Hungary, it was ratified in April 2011 with the votes of his political bloc alone, and aims to keep the opposition at bay for a long time. Entering into force on 1 January 2012, it does not recognize a separation of powers and does not guarantee basic rights. The new Hungary (which is no longer even referred to as a republic) cannot therefore be deemed a state governed by the rule of law. Its constitutional system 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 Fundamental Law was drafted without any regard for elementary political, professional, scientific, and social debates. Effectively, the debate took place with the sole and exclusive participation of representatives of the governing political parties. In June 2011, the Council of Europe's Venice Commission expressed similar concerns about the document. Fidesz's response was that the other parliamentary parties excluded themselves from the ratification process with their boycott.

In 1989, Fidesz and Viktor Orbán, together with SZDSZ (the Alliance of Free Democrats),



played a key role in avoiding a kind of semi-presidential system by not signing the agreement of the National Roundtable, and by initiating a successful referendum on the procedure for electing the president. After Fidesz's election victory in 2010, many argued that Orbán wanted to introduce a presidential system in order to concentrate power in the hands of the presidency. [6] Supporters of Fidesz argued that the new constitutional system follows the Westminster model, in which the 'winner takes all' and where the principle of the unity of power prevails. However, it would be wrong to see Fidesz's constitutional system as a monistic democracy, as typified by the British doctrine of parliamentary sovereignty, which does not entail strong judicial review. [7] By contrast, the new Hungarian constitutional system has retained the institutions of a dualist democracy, such as a Constitutional Court, but deprived these of their power. It has also kept the mixed electoral system, but made it more majoritarian.

Consequently, the new Hungarian constitutional system fits into none of the existing models of government, with their various concepts of the separation of powers. For instance, Arendt Lijphart differentiates between majoritarian and consensual models of democracy, the prototype of the first being the British, that of the second being the continental European parliamentary and US presidential systems. [8] Giovanni Sartori discusses presidentialism and semi-presidentialism, as well as three forms of parliamentarism: the premiership system in the United Kingdom, *Kanzlerdemokratie* in Germany, and the assembly government model in Italy. [9] Bruce Ackerman uses the model of constrained parliamentarism to describe the form of separation of powers that exists in Germany, Italy, Japan, India, Canada, South Africa, and elsewhere, where both popular referenda and constitutional courts constrain the power of the parliament. [10] Between 1990 and 2010, Hungary conformed to the consensual and constrained parliamentary models, and approximated to the German *Kanzlerdemokratie*. However the 2011 Fundamental Law abolished almost all possibility of institutional consensus and constraints on parliamentary power. Since then, the system has moved towards a system of absolute parliamentary sovereignty, without the cultural constraints of the Westminster form of government.

In recent decades, moreover, the traditional British model of constitutionalism has also changed drastically with the introduction of a bill of rights by left-of-centre 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 legislative still enjoys the final word. A similar model has emerged in Israel, where the Basic Law, 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. [11] Comparative constitutional studies have shown, however, that parliamentary sovereignty tends increasingly to be 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'. This trend applies even to cases of regime change, or the establishment of substantially and formally new constitutional arrangements. [12] The Hungarian constitutional system stands in marked contrast. Here, the parliamentary majority decides every single issue without any control mechanism; the independence of



both the ordinary judiciary and the Constitutional Court has been abolished.

Reasons for Hungary's backsliding towards illiberal democracy

(a) Like other east central European countries, Hungary's history contains unexpected moments in which liberal democracy flourished, followed by an equally quick process of delegitimization. The first such moment was from the 1860s and '70s to the end of the century; the second was after WWI, during the short liberal democratic period led by Mihály Károlyi. The third occurred after 1945, before the communist parties' took over in 1948. The fourth was after 1989, when liberal democracy again seemed to be the 'end of history'. [13]

Some elements of a representative system existed before World War II, during the regime of Miklós Horthy, which was characterized by strong nationalism and anti-Semitism, and the absence of any kind of human rights culture. According to the political scientist István Bibó, who served as Minister of State in the government of Imre Nagy during the Hungarian revolution of 1956, pre-war 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 on the part of the people themselves'. [14]

During the 1920s and 1930s, when Hungary had a far-right government that flirted seriously with fascism, Horthy governed not only as admiral without a sea, but also as a regent without a king. He based some of his authority on his public reverence for the Holy Crown, with which he associated himself whenever possible. While he himself could not claim the title of king, he nonetheless appeared 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 such as that which existed in the Third Republic between 1990 and 2010.

Analyses of the links between modernization and democracy show that a society's historic and religious heritage leaves a lasting imprint. [15] Formerly agrarian societies, such as Hungary, emphasize religion, national pride, obedience, and respect for authority, while industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality. [16] However, modernization is not irreversible: economic collapse can undo the changes it brings, as happened during the early 1990s in most former communist states, including Hungary. According to one study, Hungary has had a low level of social cohesion ever since the postcommunist transformation, ranking twenty-seventh among the thirty-four countries in the EU and the OECD, between Poland and Slovakia. [17] Another study showed that dissatisfaction with the state of democracy after twenty years of transition was widespread in eastern and central Europe. [18] Majorities in many countries are unhappy with the way democracy is working, amounting to more than three out of four in Hungary. As a result, only a slight majority (56 per cent) still approves the change to a multiparty system, as opposed to the 18 per cent higher approval rate in 1991. [19]

Existential instability in eastern and central European countries means that prosperity, a strong economy and strong leaders are considered more important than democracy or



democratic government. In Hungary, more than 7 in 10 say they would prefer a strong economy. However, this is not necessarily equivalent to support for capitalism, which in Hungary dropped from 80 to 40 per cent between 1990 and 2009. This is an even sharper decrease than support for democracy (from 74 to 56 per cent). The majorities in western Europe and in three central European countries (Czech Republic, Slovakia and Poland) prefer a democratic government over a strong leader, while in eastern Europe and Hungary they prefer the latter (the ratio in Hungary is 49:42). Only 39 per cent of Hungarian students feel that democracy is the best model of government; 28 per cent see no difference between democracy and dictatorship, and 33 per cent claim to prefer dictatorship to democracy. [20]

Does the dissatisfaction of Hungarians with the democratic and economic transition mean that Hungary can be considered a failed nation? If so, what are the main reasons for this failure? Daron Acemoglu and James A. Robinson, in their famous book *Why Nations Fail*, [21] argue that it is not geography, disease, or culture that explains why some nations develop and others do not, but the connection between political and economic institutions: the extent to which political institutions determine the character of economic ones, and whether economic and political institutions are shaped in response to external factors and contingencies. It might be argued that the political institutions established after the transition of 1989-1990 failed to develop corresponding economic elements, meaning that they failed to fulfil their task. As Ralf Dahrendorf put it: 'It takes six months to replace a political system, six years to transform an economic system, and sixty years to change a society.'

(b) Although Hungary's transition to democracy was driven by the fact that a large part of the population gave high priority to freedom, one of the legacies of the Kádár-regime ('the happiest barrack in the camp') was that people expected the new state to produce speedy economic growth, so that the living standards of neighboring Austria would be attained overnight, without painful reforms. In other words, while the average Hungarian looked towards the West in 1989, this was not so much in terms of the western economic and political system, but in terms of living standards. Claus Offe predicted in 1994 that the economic transformation would bring a decline in living standards, and warned that this could undermine the legitimacy of democratic institutions and unravel the process of democratization. [22] Disappointment caused by the failure to attain western standards of living gave combined with other factors: the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by former members of the communist nomenclature, and unresolved issues concerning the communist past - particularly the failure to persecute perpetrators of grave human rights violations, the lax process of lustration and the delayed restitution of confiscated properties.

(c) Despite the absence of a rule of law tradition in Hungary, some kind of legalism has maintained a strong presence since the Dual Monarchy with Austria. This facilitated the construction of an institutional framework of constitutionalism after the transition. However, this development does not mean that the other levels of legality - the relations between state and citizen and between citizens - also changed. At the state-citizen level, corruption and bribery still illustrate a general problem with rule-of-law values, while the weakness of citizen to citizen interaction prevents the emergence of a strong civil society. [23] Constitutionalism eroded as a result of this disequilibrium among the different levels of rule of law.



Similarly, the prospects for democracy in Hungary (and the other newly independent states of central and eastern Europe) after the 1989-1990 transition can be said to have been diminished by the loss of civic constitutionalism, civil society, and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism. [24] Legal constitutionalism, while consistent with the aim 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, it reduces the constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems, and thus undermines the formation of a robust constitutional democracy based on the idea of civic self-government.

The theory of civic or participatory constitutionalism, which is based on 'democratic constitutionalism' (James Tully), emphasizes that structural problems in new democracies include the relative absence of institutions for popular participation, as well as 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, nor elite disdain for participatory institutions. Moreover, it does not account for the increasing irrelevance of domestic constitutionalism resulting from Europeanization and globalization, and especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.

In discussing the relationship between legal and civic constitutionalism, or constitutional law and constitutional culture, it is necessary to ask how far (constitutional) courts stand apart from the society in different legal systems. This question is highly relevant in the new democracies of eastern central Europe. The notion of the 'counter-majoritarian difficulty,' the term used by Alexander Bickel, suggests that courts stand apart from society. [26] This means that judges decide cases according to their beliefs and values, using the legalistic form of constitutionalism, thus producing constitutional law. Many of these decisions do not correspond with the constitutional culture of non-judicial actors and, most importantly, that of the people. This was the case 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. Conversely, in 2008, the Hungarian Constitutional Court ruled the institution of registered partnership for heterosexual partners to be unconstitutional. Legal scholarship overwhelmingly identifies this decision, along with some others, as belonging to a constitutional law 'anticanon.' However, closer analysis shows that this and other anticanonical decisions recognize, rather than ignore, the role of popular agency in constructing legal meaning. [27] In other words, the judges in these cases followed the constitutional culture of the time, rather than the constitutional law.

(d) Two birth defects 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 was the disproportional election system, which in 2010 translated 53 per cent of the vote into 68 per cent of seats in parliament and, in 2014, 45.5 per cent of the vote into 67 per cent of seats. The other was to leave unchanged the two-thirds rule for making and amending the Constitution.

(e) At the time of the transition, there was also a lack of consensus about democratic



values. The growing split among the anti-communist coalition partners once the threat of communist restoration had disappeared illustrates that anti-communism does not necessarily lead to shared commitments to democratic values and human rights. In the 1998-2002 legislative period, Fidesz used the far-right opposition party MIEP, 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 an even more spectacular rise of extremist rightwing parties. While an undertow of rightwing extremism had operated throughout the 1990s, the new extremism gained a great deal of public political traction over the next decade years. A new political party, *Jobbik*, won 15 per cent of the vote in the European parliamentary election in 2009, 17 per cent of the vote in the parliamentary elections in 2010, and more than 20 percent in 2014, campaigning on a platform of Eurosepticism, anti-cosmopolitanism and Hungarian nationalism. By 2010, the percentage of fervent anti-Semites had risen to 20 percent, while those who said they held no anti-Jewish feelings had dropped to 50 per cent. [28] An opinion poll of the Anti-Defamation League in February 2012 found that 63 per cent of Hungarians agreed with three out of four anti-Semitic statements about Jews and money, about Jewish disloyalty to the state, and about Jews and the Holocaust. Of the ten European countries polled for anti-Semitism, Hungary was by far the worst. [29] The Fidesz government itself is not anti-Semitic, however it attempts to win over the voters of the openly anti-Semitic *Jobbik* party, and thus to take advantage of the rising anti-Semitism within the population. This is illustrated by the controversial position of Fidesz regarding the memory of the Holocaust. [30]

(g) Dissatisfaction among the 'losers of the transition' encourages nationalism, anti-Semitism, anti-secularism, and Eurosepticism. Populist politicians are able to capitalize on these sentiments. The Fidesz government rejects both liberalism and elitism. Of course, it is not against representation, only representation by the 'wrong people'. This anti-elitism assumes that the will of the majority is inevitably good and wise and establishes a direct relationship between the government and the will of the people. During the 2010 parliamentary elections, Fidesz accused the political and intellectual elites, civil society organizations, bankers and multinationals for frustrating the will of the people. Instead of elite pacts, Fidesz claims to have established a system of 'national cooperation'. This is based on nationwide consultations on political and economic issues via letters sent to households. These have a very low return rate and have barcodes on them 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, in combination with state intervention in the economy and a flat-tax regime. [31]

Revolutionary/non-revolutionary vs. sovereign/post-sovereign constitutions

Revolutionary constitutions – such as those produced by the American and French Revolutions – establish an entirely new order, rather than merely constraining the reigning power. [32] In the order they create, the exercise of public power in all its forms requires an immanent justification. This is provided by the new constitution. The revolutionary constitution determines the form and substance of the sovereign exercise of



power, and in so doing abolishes the previous political order. In other words, it severs continuity. The creation 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 is the basis for the constitution's legitimacy.

This explains why most constitutions only make provisions for amendments and remain silent on the formal requirements for comprehensive revision, not to mention abolition. One exception is the German Basic Law of 1949, which holds out the prospect of its own replacement after German reunification (as we know, this went unfulfilled in 1990). Similarly, in Hungary, the preamble of the constitutional amendment act of 1989 promised the adoption of a new constitution. Formally speaking, no new constitution was adopted, however academic literature qualifies this act not as an amendment or revision, but as a 'constitutional revolution, or new founding.' [33]

The non-revolutionary tradition seeks to legalize an existing system of government by adopting a new constitution. In the case of the German and British constitutional evolution, which may be regarded as the prototypes of this model, it strives to constrain royal powers. In contrast to the revolutionary tradition, the non-revolutionary tradition does not necessarily require democratization. Indeed, non-revolutionary constitutions need not even aim to transform the existing power arrangements. It is conceivable that a new constitutional order be established while the former power structures remain in place. According to Ran Hirschl, the constitutional developments in 1982 in Canada, in 1990 in New Zealand, between 1992 and 1995 in Israel, and even the in the UK following the adoption of the Human Rights Act in 1998, are instances of 'no apparent transition.' In these cases the constitutional reforms are neither concomitants of a political-economic transition nor the outcome thereof. [34]

The constitutional process in Hungary in 1989 can be characterized as a revolutionary act, since it produced a new political order, even though neither the Round Table, which drafted the amendment to the old constitution, nor the communist parliament, which rubber-stamped the draft, can be considered a democratic constituent power. On other hand, in procedural terms, 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 on house rules. However, these also belonged to the constitution of 1994, which required a four-fifth majority in any decision to draw up a new constitution. Substantially, however, the Fundamental Law of Hungary can be treated as revolutionary. It introduced a new, illiberal type of constitutional system, in place of the liberal constitution of 1989. Even Viktor Orbán responded to critics in the European Parliament by admitting that his party had not aimed at producing a liberal constitution. The government's intention to change the liberal democratic political order means that this constitution-making can be described as counter-revolutionary.

Rather than a 'revolutionary/non-revolutionary' dichotomy, Andrew Arato has distinguished between sovereign and post-sovereign constitutional processes. [35] A constitutional process is sovereign when it is conducted by parliament, while a post-sovereign process is one in which the constitution-making power is not concentrated in a single body or organ constituted and authorized for the purpose, but spread across various organs that are bound by laws. The roots of the post-sovereign form of



constitution-making reach back as far as the American Revolution, as well as the post-WWII constitutional processes in France and Germany; it had a renaissance in Spain the 1970s, 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 post-sovereign process – especially in the latter cases – is its two-level procedure, to which belong free elections and the use of a provisional constitution. Another feature is that the principle of constitutionalism does not extend to the final product alone, but also to the process whereby the constitution is adopted. Arato believes that, if consistently applied, this model could be a viable democratic alternative to revolutionary constitution-making. However, where the second step fails to take place, in other words the adoption of a final constitution, the entire constitutional process is doomed.

Arato identifies three models of constitution-making in post-communist countries. The earliest (possibly premature) constitutional process took place in Bulgaria and Romania, where parliaments created through democratic elections were given the rights of a constituent assembly, as had been the case in France (the National Constituent Assembly from 1789 to 1791) and in Weimar (in 1918). After the dissolution of Czechoslovakia in 1992, constitution-making in the Czech Republic and Slovakia 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. Here, the process was started by an illegitimate conventional legislature whose task was to approve a text that had been drafted by the state-party and the new democratic movements before the democratic elections.

Assessing the substance and the process together, the 1989 ‘pacted’ [36] constitution-making in Hungary was designed as a two-step, post-sovereign process. The first step was an interim constitution prepared by the National Round Table Talks and enacted by the illegitimate parliament; this was to have been followed by the ratification of final constitution sometime after the first democratic elections. However, the country failed to produce a final constitutionalist constitution, even though the second freely elected, center-left governing coalition of the socialist MSZP and the liberal SZDSZ had sole constitution-making powers. Arato thus referred to a partial failure in Hungary. [37] In 2011, he argued that the adoption of the Fundamental Law was a move against post-sovereign constitution-making. [38] Overall, one can argue that the new constitution is the result of a sovereign, rather than a post-sovereign process.

The future of liberal democracy in Hungary

The constitutional system in Hungary today represents a new, hybrid type of regime that is situated somewhere between fully-fledged democracy and dictatorship. What happened in Hungary is less than a total breakdown of constitutional democracy, but more than just a transformation of the way that liberal democracy functions. Hungary has become an illiberal democracy, which was Orbán’s explicit intention. The institutions of a constitutional state still exist (constitutional court, ombudsman, justice and media councils), but their power is heavily limited. As in many illiberal democracies, fundamental rights are listed in the Fundamental Law, however the institutional guarantees of these rights are endangered by the lack of an independent judiciary and constitutional court.



Given this new constitutional system, what is Hungary's current trajectory? In keeping with electoral democracy, a formally competitive election with competing parties was held in April 2014. However, in order for Fidesz to regain its two-thirds majority, it had to increase the disproportionality of the electoral system and gerrymander. Even though the outcome of this election was not determined purely formally, we do not know how much election fraud Fidesz would have used if its simple majority had been in danger. The Budapest municipal elections held in October 2014 showed that they are ready to use fraud. In this respect, Hungarian constitutionalism differs from the 'managed democracy' of Putin's Russia, where opposition parties and candidates have no chance from the outset and where the outcome of parliamentary and presidential elections cannot be deemed as open.

Hungary's democratic backsliding has been proven by many independent ratings. According to Freedom House's *Nations in Transit* ratings, Hungarian democracy has weakened more since its EU accession than that of any other member state, with the largest declines in 2010 and 2011. In 2012, Hungary was downgraded on the basis of its unfair elections and its restrictions of media freedom. [39] By the end of 2013, Hungary's democracy was rated one full point less on the scale of one to seven than in 2004, when the country entered the EU. In the 2015 *Nations in Transit* report, which covers 2014, Hungary was removed from the category of 'consolidated' democracies' and, as a result of its worsening scores in electoral process, civil society, independent media, local governance, and judicial independence, classified as 'semi-consolidated' - a category that includes Bulgaria, Romania, and the better-performing Balkan states. [40] Demos concluded that Hungary was a significant 'backslider' in terms of electoral and procedural democracy, the rule of law, fundamental rights and freedoms; worryingly, it also scored poorly with respect to citizens' attitudes towards democracy. It was also the worst performer in the EU on the measure of active citizenship. Overall, Greece and Hungary have emerged as the most worrying backsliders on measures of healthy democracy. [41]

One of the reasons for the backsliding lie in the attitudes of citizens towards democracy. Although the means-based, institution-focused elements of an ordinary liberal constitutional democracy may exist in Hungary, the ends-based, socio-political elements are absent. In other words the the cultural patterns reflected both in general and in individual behavior. There is no strong normative commitment to democracy on a behavioral and attitudinal level, and there never has been; a broad and deep legitimation of constitutional democracy has never been achieved. This means that significant political actors, at both the elite and mass levels, are not convinced that liberal democracy is better for the society than all other imaginable alternatives.

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 have the right to oppose 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 one that took place in 2011, when Hungary's leaders neglected to consult the people on their opinion of the very nature of the constitution. There is still a significant number of people who consider



themselves liberal democrats or at least represent views consistent with liberal democracy. [42] 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 in the summer of 2014, and a year later during the refugee crisis, then they must accept certain consequences, including leaving the European Union and the wider community of liberal democracies.

Hungary's democratic backsliding demonstrates that successful democratization cannot be based on an institutional framework alone; political and constitutional culture are as important as institutions. The other lesson is that, on the one hand, the very definition of democracy is changing, and that democracy need not be liberal. On the other hand, the Hungarian example shows that the borders of democratic, authoritarian or dictatorial regimes have become blurred, giving rise to various hybrid systems. Due to a new Cold War situation, these developments are influenced not exclusively by the liberal democratic West. The Hungarian government, which openly admires Putin's authoritarian Russia, and which has been partly supported by other eastern European countries during the refugee crisis, has taught us that the rise of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy. Membership in the European Union is no guarantee for the existence of liberal democratic regimes. Unfortunately, the refugee crisis and its main cause, the Syrian conflict, has strengthened illiberal democracies across Europe (Russia and Turkey), and in the case of Hungary even inside the EU. The division between the old and the new member states is growing, and support for far-right parties is increasing across the board. The inability of EU institutions to enforce compliance to common European values has been proven.

Footnotes

1. See G. Halmai, 'From the 'Rule of Law Revolution' to an Illiberal Democracy in Hungary', in *Festschrift für Klaus Stern*, Berlin 2012; idem, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary,' in Benedek et al., *European Yearbook on Human Rights*, Wien 2012; idem, 'Towards an Illiberal Democracy: Hungary's New Constitution,' *Eurozine*, 25 January 2012.
2. See A. Arato, 'Is There a Dictatorship in the E.U.?' (booksandideas.net, 1 May 2012.). The term 'democradura' is taken from Guillermo O'Donnell and Philippe Schmitter, who used it to describe certain Latin American regimes in the 1970s and 1980s.
3. I am aware, of course, that there are assessments 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.
4. See Claus Offe, *Varieties of Transition: The East European and East German Experience*, New York 1997.
5. In 2009, 51 per cent of Hungarians disagreed that they were better-off after the transition, and only 30 per cent claimed improvements. Eurobarometer, 2009.



6. See the discussion in the Hungarian weekly, *Élet és Irodalom*, initiated and concluded by my articles: G. Halmai, '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.
7. Bruce Ackerman distinguishes between three models of democracy: 1) monistic, 2) rights fundamentalist, in which fundamental rights are morally prior to democratic decision-making and impose limits on this, and 3) dualist, which finds the middle ground between the two extremes, and subjects majoritarian decision-making to constitutional guarantees. See Ackerman, *We the People: Foundations*, Harvard 1992, 6-16.
8. A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven 1999.
9. G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2nd ed., New York 1997.
10. B. Ackerman, 'The New Separation of Powers', *Harvard Law Review*, Vol. 113, 2000, 633-727.
11. See S. Gardbaum, *The Commonwealth Model of Constitutionalism: Theory and Practice*, Cambridge, 2013.
12. See C. Fusaro and D. Oliver, 'Towards a Theory of Constitutional Change', in idem (eds.), *How Constitutions Change -- A Comparative Study*, New York 2011, 417-418.
13. 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>
14. See I. Bibó, *Kelet-európai kis-népek nyomorúsága* [The Misery of the Small States of Eastern Europe], 1946.
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Europe imagined itself to be this multinational union of the free movement of peoples that have previously warred with each other for centuries. What's more, technology and cultural change have increased opportunities for greater choice in every area of life, further fracturing the tribal preconditions of political tolerance for redistribution. The saving of the massive state overlay of the society in Europe has unleashed an anti-liberal nationalism. With a new national consciousness come other problems. How exactly do we define nationhood? How Democratic Decline Could Destroy the Alliance. By Celeste A. Wallander. CELESTE A. WALLANDER is President and CEO of the U.S. Russia Foundation and Senior Adviser at WestExec Advisors. Terrorists have attacked European capitals, migration is putting pressure on border and homeland security systems, Russia is both able and willing to use military force and other instruments of influence in Europe, and U.S. President Donald Trump has threatened to scrap the alliance altogether. But the most serious problem is not one of these obvious threats; rather, it is the breakdown of liberal democracy within the alliance itself. The North Atlantic Treaty Organization has never been a typical alliance. Another is why the first twenty years of regime transition did not see the emergence of greater respect for constitutional values. This would have prevented the rapid deconstruction of democracy or, at the very least, have made the collapse more difficult. Especially after the refugee crisis, the Hungarian situation is also a test as to whether, and to what extent, the civilized world, especially Europe, can enforce global values in countries that are members of the international community, and of value-based communities such as the European Union and the Council of Europe.