RIVISTA DI
DIRITTI COMPARATI

# Dismantling Constitutional Review in Hungary*

*Gábor Halmai*

CONTENTS: 1. Silencing the Constitutional Court. – 1.1 Shrinking Jurisdiction and Standing – 1.2. The Court's Packing. – 1.3. Levelling Down the Case Law. - 2. Dismantlement versus Populist Constitutionalism. -3. Conclusions.

## 1. *Silencing the Constitutional Court*

The weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the centre-right FIDESZ party in the 2010 parliamentary elections. What happened in Hungary resonated with some less successful, similar attempts to weaken constitutional review in other East-Central European countries that took place roughly around the same time. In the Summer of 2012 there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.[1] From 2014 there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has also worked two—and from February 2016 three—judges

* Relazione presentata al IV Convegno annuale di Diritti Comparati, *L'indipendenza delle Corti nel diritto costituzionale, comparato ed europeo*, Milano - Università Bocconi, 18 – 19 ottobre 2018. Il contributo è stato inviato su richiesta della direzione e pertanto non è stato sottoposto a referaggio, in conformità con il regolamento della Rivista.

[1] About the Romanian crisis see V. Perju, *The Romanian double executive and the 2012 constitutional crisis*, 13 *I•CON* 1, 246 (2015); B. Iancu, *Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts,* in A. von Bogdandy, P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area*, London, 2015, 153 ss.

short, because the President of the Republic refuses to fill the vacancies.[2]

### 1.1. *Shrinking Jurisdiction and Standing*

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called 'cardinal' – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure.[3] These laws affect the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, elections to Parliament, and most importantly the functioning of the Constitutional Court.

The Fundamental Law of 2011 has changed the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

The considerable restriction of ex-post control has caused great controversy in Hungary and abroad. The withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those

[2] T. Lálik, *Constitutional Crisis in Slovakia: Still Far from Resolution*, in *ICONnect,* 5 August 2016. http://www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/

[3] See a detailed discussion of the laws M. Bánkuti, G. Halmai. K. Lane Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, in A.G. Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, Budapest, 2012.

rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that financial laws typically cannot breach. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled. This also clearly represents a breach of the guarantees, set out in Article 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respect of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court's powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the *actio popularis*, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two decades or more this unique instrument has provided not only private individuals but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that they regard as unconstitutional. It could of course be argued that this toolkit has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that had been achieved but which is now diminishing.

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament. This makes any such petitions much more difficult, since the government is hardly likely to use this opportunity against their own bills, while a quarter of MPs' votes would assume a coalition between the two democratic opposition

parties and the extremist right-wing party, which supports the government.[4]

The cardinal Act on the Constitutional Court, passed in October 2011, decided on the fate of the several hundred petitions that were already lying in the court's in-tray, submitted in the form of an *actio popularis* by private individuals entitled to do so prior to the entry into force of the Fundamental Law, but who would be subsequently divested of this right. It applies the *in malam partem* retroactive effect, so willingly applied by the present government in other cases, with the result that the Constitutional Court did not pass judgement on previously submitted petitions.

Private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions.

### 1.2. *The Court's Packing*

There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the

[4] Indeed, in 2012 it was only the ombudsman, who filed such petitions in 35 cases (12 petition files were still pending earlier, and there were 23 new ones). The Constitutional Court decided on 11 of these cases, 6 cases in favour of the petitions, and 5 rejections. There are still 24 petitions pending. See: Ombudsmani indítványok az Alkotmánybíróság előtt. (Petitions of the ombudsman before the Constitutional Court), at http://www.jogiforum.hu/hirek/28922.

other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating constitutional court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from eleven to fifteen, which makes it possible to select five more new judges, after the two judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous nine; in other words, for three parliamentary cycles. In future the president of the constitutional court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes could not wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the new members were selected at the end of July based on an amendment to the existing constitution, passed on 6 July 2011, and also the Parliament re-elected the same President, who had previously been elected by his peers .[5]

### 1.3. *Levelling Down the Case Law.*

In On 11 March, 2013 the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in

[5] See: http://www.parlament.hu/irom39/03199/03199.pdf.

those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

## 2. *Dismantlement versus Populist Constitutionalism*

Dismantlement of constitutional review isn't just a Hungarian phenomenon. There has been a successful follower of the Hungarian playbook on how to dismantle constitutional review: Jaroslav 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 first to capture the Constitutional Tribunal. But there is a more The first victim of PiS' capture of the constitutional system was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS' legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly[6].

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil

[6] About the battle for the Constitutional Tribunal see T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, in *ICONnect*, 6 December 2015.

Platform government, even though the nine-year term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them had already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose terms were not yet over by the previous Sejm in October 2015, was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment to the organization of the Tribunal, increasing the number of judges that have to be present in a ruling from 9 to 13 out of 15. As opposed to the previous simple majority, decisions of the Tribunal will be taken by a 2/3 majority. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary 2/3 majority to quash new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which gives power to officials loyal to PiS to institute the dismissal of judges. In early March 2016 the Constitutional Tribunal invalidated all of the provisions of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its

decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect. As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of the government disputing the content of certain judgments. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.[7]

At the end of 2016 the Polish parliament adopted three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President replacing the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in Sejm, to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal. With this the Constitutional Tribunal has been captured. This is what Wojciech Sadurski calls a constitutional *coup d'état.* [8] The next step of the coup was to dismantle judicial independence altogether, and its main targets have been the Supreme Court, the ordinary courts and the National Council for the Judiciary.[9]

Even though both the Hungarian and the Polish dismantlements of constitutional review strengthened the role of political institutions,

[7] http://www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangless.

[8] M. Steinbeis, *What is Going on in Poland is an Attack against Democracy*, Interview with Wojciech Sadurski, at http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/

[9] The reasoned proposal of the European Commission in accordance with Article 7(1) TEU regarding the rule of Law in Poland dated on 20 December 2017 proposes to the Council to recommend to Poland to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution, as well as to guarantee judicial independence. European Commission, Brussels, 20.12.2017 COM(2017) 835, 2017/0360 (APP).

such as the legislature, and especially the executive at the expense of the judiciary, this development cannot be considered as manifestations of political constitutionalism, based on republican philosophy, or of those concepts that reject strong judicial review. 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[10]. Also, constitutional law professor, Adam Czarnota explained the necessity of the changes, with the argument that "legal constitutionalism alienated the constitution from citizens" [11] . 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 claimed the expansion of political constitutionalism regarding the changes[12]. From 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.[13]

[10] L. Morawski, *A Critical Response*, in *Verfassungsblog On Matters Constitutional*, 3 June 2017.

[11] A. Czarnota, *The Constitutional Tribunal*, in *Verfassungsblog On Matters Constitutional,* 3 June 2017.

[12] See his book, I. Stumpf, *Erős Állam – Alkotmányos Korlátok* [Strong State – Constitutional Limits], 2014, 244-249.

[13] A. Vincze, *Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról: az alkotmánymódosítás alkotmánybírósági kontrollja* [The Decision of the Constitutional Court on the Fourth Amendment to the Fundaental Law: The Constitutional Review of Constitutional Amendments], *Jogesetek Magyarázata,* 3 December 2013.

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 rejects 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 democracy are meant to contain or tame the exertion of popular political energy rather than to nurture, galvanize, and release it'[14]. 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[15]. Those scholars realize

[14] Analysing 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(3) *Valparaiso Univ. L. Rev*, 531 (1993), 583. 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 Trumps presidential victory declared: 'One of the many lessons of the recent presidential election and its repugnant outcome is that the age of identity liberalism must be brought to an end'. M. Lilla, *The End of Identity Liberalism*, in *The New York Times*, 18 November 2016. Later, in an interview on the topic of the most effective tools against the President's populism, he emphasized the importance that opponents find a way to unify: 'we have to abandon the rhetoric of difference, in order to appeal to what we share'. (D. Remnick, *A Conversation with Mark Lilla on His Critique of Identity Politics*, in *The New Yorker*, 25 August 2017).

[15] See S. Gardbaum, *The Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge, 2013 about the new model. This model has also come to be known by several other names: 1) 'weak-form of judicial review' (M. Tushnet, *Alternative Forms of Judicial Review*, 101 *Michigan L. Rev.* 2781 (2003), or just 'weak judicial review' (J. Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L. J.* 1348 (2006), 'the parliamentary bill of rights model' (J. Hiebert, *Parliamentary Bill of Rights. An Alternative Model?*, 69 *Modern L. Rev.* 7 (2006), 'the model of democratic dialogue' (A.L. Young, *Parliamentrary Sovereignty and the Human Rights Act*, London, 2000), 'dialogic judicial review' (K. Roach, *Dialogic Judicial Review and its Critics*, 23 *Supreme Court Law Review*, second

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 constituent*, conceived as the unrestrained "will of the people," even in cases of regime change or the establishment of substantially and formally new constitutional arrangements[16]. 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[17]. 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, 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.[18]

In my view neither the Polish nor the Hungarian model fits to any of these approaches to weak judicial review, as their aim is not to balance democracy and the protection of fundamental rights. As I

---

series, 49 (2004), or 'collaborative constitution' (A. Kavanaugh, *Participation and Judicial Review: A Reply to Jeremy Waldron,* 22 *Law and Philosophy* 451 (2003).

[16] C. Fusaro, D. Oliver, *Towards a Theory of Constitutional Change*', in C. Fusaro, D. Oliver (eds.), *How Constitutions change – A Comparative Study*, London, 2011.

[17] See T. Györfi, *Against the new Constitutionalism*, London, 2016.

[18] See S. Gardbaum, *supra* note. Similarly, David Prendergast argues in this issue for the courts as partners of legislators protecting political processes rather than rights or interests in general. See D. Prendergast, *The Judicial Role in Protecting Democracy from Populism,* XX *Ger. L. J.* (2019).

have tried to prove, these systems do not 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.[19] 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.[20] 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.[21] Bruce Ackerman besides the Westminster and the US separation of powers systems, uses the constrained parliamentarism model as a new form of separation of powers, which has emerged against the export of the American system in favour of the model of Germany, Italy, Japan, India, Canada, South Africa and other nations,

[19] Bruce Ackerman distinguishes between three models of democracy: monistic, rights fundamentalism, in which fundamental rights are morally prior to democratic decision-making and there impose limits, and dualist, which finds the middle ground between these two extremes, and subjects majoritarian decision-making to constitutional guarantees. See B. Ackerman, *We the People*, Volume I, 6-16, Cambridge (MA), 1992.

[20] A. Lijphart, *Patterns of Democracy. Government forms and Performance in thirty-six Countries*, New Haven, 1999.

[21] G. Sartori, *Comaparative Constitutional Engineering*, 2nd ed., New York, 1997.

where both popular referendums and constitutional courts constrains the power of the parliament.[22]

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 constrains 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 bill of rights by left-of-centre governments (and opposed by right-of-centre opposition parties) in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (2004) and the State of Victoria (2006). Contrary to the traditional Commonwealth model of constitutionalism in the new Commonwealth model the codified bills of rights became limits on the legislation, but the final word remained in the hands of the politically accountable branch of government. In this respect this new Commonwealth model 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".[23] 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

[22] B. Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000).

[23] Cf. P. Norton, *Governing Alone*, in *Parliamentary Affairs* 544, October 2003.

Human Rights Act 1998 came into effect in England and Wales.[24] 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 it is up to the government and Parliament to 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[25].

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.[26]

Besides the mentioned Commonwealth countries a similar new model has emerged in Israel, where the Basic Law on occupation, re-enacted in 1994 contains a "notwithstanding" provision, similar to the Canadian 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

[24] See D. Judge, *Whatever Happened to Parliamentary Democracy in the United Kingdom*, in *Parliamentary Affairs* 691, July 2004.

[25] Cf. K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, *Modern L. Rev.* 92, January 1999.

[26] See M. Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, in 62 *Political Studies*, March 2002.

arrangements.[27] 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, as the independence of both the ordinary judiciary and the constitutional courts have been silenced. To sum it up, the remainders of the Hungarian (and Polish) constitutional review has nothing to do with any types of political constitutionalism or weak judicial review approach, which all represent a different model of separation of powers. In the authoritarian Hungarian (and in Polish) sham system of constitutionalism there is no place for any kind of separation of powers.

### 3. *Conclusions*

After 2010 Hungary (and after 2016 Poland for that matter) the system of governance became populist, illiberal and undemocratic[28]; which was openly stated intention of PM Orbán.[29] (Similarly, former

[27] See Fusaro & Oliver, *supra* note, at 417-418.

[28] As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them 'illiberal democracies' we should describe them as illiberal and 'undemocratic' regimes. See J. Müller, *What is Populism,* University of Pennsylvania, 2016.

[29] In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighbouring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." Citing as models he added: "We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world… Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. . . .and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are . . .parting ways with Western European dogmas, making ourselves independent from them . . .If we look at civil organizations in Hungary, . . .we have to deal with paid political activists here.. . . .[T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote

Polish PM Beata Szydło - with Kaczy€ski, ruling from behind the scenes as he holds no official post - have also described their actions as a blitz to install an illiberal state.[30]) The backsliding has happened through the use of "abusive constitutional" tools: constitutional amendments and even replacements, because both the internal and the external democratic defense mechanisms against the abuse of constitutional tools failed.[31] The internal ones, among them—first and foremost the constitutional courts—failed because the new regimes managed to abolish the powers of those courts to check the regimes. The international mechanisms, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

In this populist, illiberal system the institutions of a constitutional state, such as the constitutional courts still exist, but their power is very limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of an

---

foreign interests. . . .This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests." See the full text of Viktor Orbán's speech here: http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

[30] S. Sierakowski, *The Polish Threat to Europe*, in *Project Syndicate*, 19 January 2016.

[31] The category of 'abusive constitutionalism' was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, *Abusive Constitutionalism*, 47 *UC Davis L.Rev.* 189 (2013). Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal is reminiscent of the events in the years after the election of Jefferson, as the first anti-federalist President of the US. On 2 March 1801, the second-to-last day of his presidency, President Adams appointed judges, most of whom were federalists. The federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath, see B. Ackerman, *The failure of the Founding Fathers. Jefferson, Marshall and the rise of Pesidential Democracy*, Cambridge (MA), 2007.

independent constitutional court. And this has nothing to do with political constitutionalism or the concept of weak judicial review, only with the authoritarian ambitions of political leadership of these countries to keep their power as long as possible.

***

**ABSTRACT:** The paper deals with recent deviations from the shared principles of constitutionalism in Hungary, such as limited government, adherence to the rule of law, and guaranteed fundamental rights, especially through substantially limiting the review powers of constitutional courts and packing them. This dismantling of constitutional review was mainly introduced by the new Hungarian constitution enacted in 2011, but the process has already started right after FIDESZ' 2010 electoral victory, and concluded by the 2013 Fourth Amendment to the Fundamental Law of Hungary. After discussing the fate of judicial review in Hungary the paper tries to delimit the treatment of judicial review from the concept of political constitutionalism, and approaches of weak judicial review.

**KEYWORDS**: Hungary, Constitutional Court, Constitutional Review, Case Law, Constitutional Populism

Gábor Halmai - Professor and Chair of Comparative Constitutional Law, European University Institute, Florence (gabor.halmai@eui.eu)