

**The Role of Undemocratic Constitutionalism in the  
Hungarian Autocratisation.  
Review of Roberto Gargarella, *The Law As a  
Conversation among Equals*, Cambridge University  
Press, 2022.\***

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SUMMARY: 1. Preliminary Remarks – 2. Undemocratic Democratic Transition? – 3. What and Who Is to Blame?

*1. Preliminary Remarks*

The book discusses the oldest and, in the times of democratic erosion, still the most topical tension in constitutional theory between constitutionalism and democracy. While looking for reasons of the crisis and approaches to resolve it for the benefit of both concepts, Gargarella from the outset rejects three options: a) to hold exclusively the would-be autocratic leaders responsible, and placing all hope in their removal, b) to condemn only the institutional system and to trust in the reestablishment of the old one, and c) to blame the apathy, indifference, or distaste of ‘people in general’, and aspire more effective elitist solutions. The result of this book’s analysis about the possible reasons of the current constitutional crisis is that it rather has to do with democratic deficit, the way leaders and institutions resist and block citizen control and decision-making power. Therefore, the author seeks after the possibilities how the people, as equals can review, reform or alter their constitutions to save the idea of constitutionalism.<sup>1</sup>

The limited ambition of this review is to apply the book's main claim to explain why the Hungarian government of Prime Minister Viktor Orbán’s Fidesz party was able to undermine the independent checks on its power so quickly and without

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\* Commissioned article.

<sup>1</sup> Such democratic critique of constitutionalism is part of the broader theory of deliberative constitutionalism challenging traditional constitutionalism in the name of democracy. See R. Levy et al. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge, 2018. Martin Loughlin’s book, published almost at the same time as Gargarella’s also considers constitutions as democratic instruments, without aiming to serve the principle of constitutionalism. See M. Loughlin, *Against Constitutionalism*, Cambridge, Mass., 2022. Emphasizing the importance of the counter-majoritarian checks of democracy by reviewing the books of Loughlin and Gargarella see Mark Tushnet, *Review Essay: For Constitutionalism*, 4 September 2022, available at SSRN: <https://ssrn.com/abstract=4209674> or <http://dx.doi.org/10.2139/ssrn.4209674>.

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*  
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meaningful pushback, transforming what until 2010 looked like a stable but imperfect democracy into an autocracy.<sup>2</sup>

In chapter 18 of the book, Gargarella uses mostly Latin American examples when writing about democratic erosion, but some scholars analysing the failure of traditional Western liberal democratic constitutionalism in other countries of 'third wave democratisation' come to similar conclusions. For example, Cas Mudde explains the regression in Hungary (and Poland between 2015 and 2023) with the undemocratic tools of legal constitutionalism used by the liberal elite during the democratic transition in 1989-1990. He claims that the undemocratic nature of resolving the most important economic and political issues of the transition, which were also the subject of the constitution-making process became legal issues (legalisation), and were taken out of the political arena, with no serious public debate and popular control (depoliticisation).<sup>3</sup> The liberal nature of this process is due to the fact that the anti-communist elite wanted to copy the Western idea of both economic and political liberalism, without being sure whether the population was aware of the social costs of economic liberalism, and the institutional consequences of political liberalism, and if they were, how many of them would have opted for economic and political liberalism.<sup>4</sup>

## 2. *Undemocratic Democratic Transition?*

This undemocratic legalism or legal constitutionalism after the Hungarian democratic transition, which the first Constitutional Court not coincidentally called a 'revolution of the rule of law',<sup>5</sup> was used against the explicit or assumed public opinion either with reference to provisions of the new comprehensively amended constitution of 1989, or even in the absence of constitutional rules for institutional approaches allegedly more coherent with the Constitution. The first occurred in the case of the abolition of the capital punishment in 1990,<sup>6</sup> and the second when the Parliament decided on the indirect election of the President of the Republic. In declaring the death penalty unconstitutional, the Constitutional Court referred to the constitutional provisions on the right to life and on human dignity, while in the second case it used

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<sup>2</sup> I am not claiming that the democratic deficit is the most important reason for the backsliding, but maybe one of them. The two main causes discussed by the literature, and not unrelated to the reasons I describe here are: a) preference of economic development and the speedy increase of living standards, b) the lack of liberal democratic traditions.

<sup>3</sup> See C. Mudde, *Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism*, in *Government and Opposition*, 2021, p. 577 ss., at 585.

<sup>4</sup> See, for this critique, first right after the transition, J. Szacki, *Liberalism After Communism*, Budapest, 1995; see also, subsequently, after the start of the backsliding I. Krastev – S. Holmes, *The Light that Failed. A Reckoning*, London, 2020.

<sup>5</sup> Hungarian Constitutional Court, 11/1992. (III. 5.) AB decision.

<sup>6</sup> Hungarian Constitutional Court, 23/1990. (X. 31.) AB decision.

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*  
Review of Roberto Gargarella, *The Law As a Conversation among Equals*, Cambridge University Press, 2022.

the questionable argument that the indirect election is more coherent with the parliamentary system of government than direct election. In both cases, the majority of the representatives of the people in the Parliament and the Constitutional Court agreed with the outcome, while the public opinion opposed it. In the case of the death penalty, almost a decade after the initial court judgment, the judges also ruled in another decision that it would be unconstitutional to hold a referendum on the capital punishment.<sup>7</sup> This claim of the Constitutional Court's exclusive authority to decide on the death penalty not only denies Parliament's constitutional power to amend the Constitution, but also ignores the fact that a two-thirds majority of the population still supported the capital punishment..<sup>8</sup>

The ignorance of the majority of public opinion and the lack of willingness to deliberate in these cases does not necessarily mean that the measure does not fit better the real interest of the public, as in the case of the statutory introduction of a minimal (equal to one euro) fee for hospital visits, which was rejected by the then opposition party Fidesz's populist referendum in 2008; it just refers to the undemocratic way of the unpopular decision. The list of questions that could not be put to a national referendum reflects this undemocratic legal approach of the 'democratic' transition. This list originally contained the ban on referendum regarding the "obligations set forth in valid international treaties and on the contents of laws prescribing such obligations".<sup>9</sup> In its decision 2/1993. (I. 22.) AB, the Constitutional Court, with a binding interpretation of the constitutional provisions on referendum, prohibited all referendum seeking to amend any provision of the Constitution. The fundamental theoretical question regarding referendum that the judges had to interpret here was how it, as a manifestation of popular sovereignty, related to representative democracy, the other form of popular power. The text of the Constitution, which was comprehensively amended in 1989, established that "in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives." The Constitutional Court first interpreted this passage as follows: "In the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is representation." This approach essentially reflects the position that in a democratic state governed by rule of law the power

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<sup>7</sup> Hungarian Constitutional Court, 11/1999 (V. 7.) AB decision

<sup>8</sup> In 2001, 68 % supported the death penalty. The survey also indicated that younger and higher-educated people were more critical, while religious people were more ready to accept. See TÁRKI, *Közép-európai közvélemény: Lakossági vélemények a közbiztonságról és a halálbüntetésről a közép-kelet-európai országokban*, 2001, available at: <https://www.tarki.hu/adatbank-h/kutjel/pdf/a556.pdf>. A survey conducted in 2015 has shown a slight decrease, when 58 % of the respondents believed that the death penalty would be necessary to use against murderers: Iránytű Intézet, *A Halálbüntetés Társadalmi Támogatottsága 2015 Júniusában*, 2015, available at: <https://iranytuintezet.hu/kutatas/a-halalbuntetes-tarsadalmi-tamogatottsaga-2015-juniusaban/>.

<sup>9</sup> Article 28/C (5) point b) of the Act XX of 1949 as amended by the Act XXXI of 1989.

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*  
Review of Roberto Gargarella, *The Law As a Conversation among Equals*, Cambridge University Press, 2022.

derived from the people is exercised through constitutional organs, primarily representative bodies. This approach represents an entrenchment of prior policy choices against current ones, which according to the deliberative constitutionalism literature is considered as a deprivation of the ability of the today's people to govern themselves.<sup>10</sup>

Another issue decided against popular will was transitional justice. Without having specific survey results, it became clear that in the first years of the democratic transition measures, such as retroactive justice, lustration, compensation and access to the files of the former secret police were important issues for the general public in coming to terms with the communist past.<sup>11</sup> Some of these issues, like the use of retroactive justice were decided by the Constitutional Court against the will of the parliamentary majority; in other cases, like in that of lustration, compensation, and access to the files, the representative of the people decided in agreement with the Court against public opinion. For instance, after the 2002 scandal of the (at the time) socialist Prime Minister Péter Medgyessy, when he was forced to admit that he had worked for the country's communist-era secret police intelligence services, there was disappointment with both the national approaches of the mild lustration and the limited access to the secret police files. A survey conducted the same year showed that around 60 per cent of respondents thought it was better not to hide but to reckon with the past.<sup>12</sup> Fifteen years later, while the Fidesz government misused the demands for transitional justice measures for its own political justice purposes,<sup>13</sup> they too rejected the calls for opening the files, while in another survey the majority of respondents supported the full publicity of Communist secret police documents.<sup>14</sup>

### 3. *What and Who Is to Blame?*

Also due to the lack of constitutional traditions and culture, in all of the mentioned cases the Hungarian public seemed not to be receptive towards

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<sup>10</sup> As Mark Tushnet interprets Loughlin's and Gargarella's theory of constitutional democracy in his review, both authors say no to this deprivation. See M. Tushnet, *Review Essay: For Constitutionalism*, cit.

<sup>11</sup> See P. Kende, *Igazságtétel*, in *Beszélő*, 1992, no. 3, available at: <http://beszelo.c3.hu/cikkek/igazsagtetel>.

<sup>12</sup> The survey result is quoted in V. László, *Gergő és az árnyéka*, in *Beszélő*, 2002, no. 10, available at: [http://beszelo.c3.hu/cikkek/gergo-es-az-arnyeka#2002-f09-07\\_from\\_1](http://beszelo.c3.hu/cikkek/gergo-es-az-arnyeka#2002-f09-07_from_1).

<sup>13</sup> See G. Halmai, *Rule of Law Backsliding and Memory Politics in Hungary*, in *European Constitutional Law Review*, 2024, p. 602 ss.

<sup>14</sup> Survey of Republicon Institute between April 7-19, 2017, available at: <http://republikon.hu/elemzesek,-kutatasok/170430-ugynok.aspx>.

Gábor Halmai

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*  
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undemocratic legal constitutionalism.<sup>15</sup> The sad experience of Hungary's once pioneer democratic transition is that the initial measures of transitional justice, undertaken without serious public consultation and support, did not help to reconcile the society and consolidate democracy. This also leads to the question of who is to blame for the lack of consolidation and backsliding. One possible argument is that politics has failed 'the people', who were only choosing an option that they were offered, and not the other way around.<sup>16</sup> This applies first and foremost to would-be autocrats, such as Viktor Orbán, who has always used populist arguments to achieve his nationalist, authoritarian aims, but also those benevolent liberal democratic parties and leaders, who imposed their ideas to the people, who were either not interested or ready to accept them. In other words, blaming exclusively the people cannot help to understand the crisis of constitutional democracy.<sup>17</sup>

In his latest book, *Democracy Rules*, Jan-Werner Müller also criticizes the convenient but ultimately very misleading response to democracy's decline: to blame the people.<sup>18</sup> He argues that ordinary folks, even if well-informed and yet plainly irrational, are always ready to be misled by demagogues; however, at the end of the day, the crucial decisions to empower dictators such as Hitler is made by parts of the conservative establishment of the day.<sup>19</sup> Regarding the today's right-wing populists, he claims that none of them has come to power without the collaboration of established conservative elites.<sup>20</sup> Müller also asserts that an increasing number of citizens at the lower end of the income spectrum no longer vote or participate in any other form in politics, and political leaders have no reason to care for those 'disadvantaged

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<sup>15</sup> According to some authors, the potential of democracy in Hungary following the transition in 1989-90, (and also in the other new democracies of Central Europe), was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost. See, for this argument, P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, London, 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: Id., *Transitional Constitutionalism: Simplistic and Fancy Theories*, in A. Czarnota – M. Krygier – W. Sadurski (eds.), *Rethinking the Rule of Law After Communism*, Budapest, 2005, p. 9-24.

<sup>16</sup> See K. L. Scheppele, *The Party's Over*, in M. Graber – S. Levinson – M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, New York, 2018, p. 495 ss.

<sup>17</sup> For instance, Joseph Weiler blamed the Hungarian people for supporting Orbán: Id. – G. de Búrca, *Editorial*, in *International Journal of Constitutional Law*, 2020, p. 315 ss. See, for a critique, V. Kazai, *Blaming the People is not a Good Starting Point*, in *Verfassungsblog*, 8 August 2020, available at: [https://verfassungsblog.de/blaming-the-people-is-not-a-good-starting-point/?fbclid=IwAR1CJYiPF\\_6uFalCGgHB9TKIDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw](https://verfassungsblog.de/blaming-the-people-is-not-a-good-starting-point/?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKIDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw).

<sup>18</sup> J.W. Müller, *Democracy Rules*, London, 2021, p. IX-XI.

<sup>19</sup> About major – and partly still existing - German firms' support of Hitler, see for instance the novel of É. Vuillard, *Ordre du jour*, Arles, 2017.

<sup>20</sup> J.W. Müller, *Democracy Rules*, cit., p. 18.

Gábor Halmai

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*Review of Roberto Gargarella, *The Law As a Conversation among Equals*, Cambridge University Press, 2022.

communities' who don't care to vote.<sup>21</sup> In Hungary the situation is even worse, since about 40% of the poorest and less educated part of the society overwhelmingly support Fidesz. Some of them do not vote, but some vote for the governing party without acknowledging that its policies are against their interest.<sup>22</sup> The phenomena is described by Claus Offe as participatory inequality, which is especially characteristic in states with high income inequality using austerity measures.<sup>23</sup>

This lack of participatory equality, together with the entrenched institutional system makes the Hungarian autocracy extremely resistant against democratic re-constitutionalisation. And this situation makes my outlook on Hungary as sceptical as Gargarella's general scepticism in the final chapter of the book. In addition to the inertia and lack of constitutional imagination, he mentions the ability of both the old power structures and the constituted authorities to resist, for example in Venezuela under Nicolás Maduro, which is very similar to Viktor Orbán's one-party autocracy in Hungary.

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**ABSTRACT:** This review article aims to apply the main claim of Roberto Gargarella's book about the oldest and, in the times of democratic erosion, still the most topical tension in constitutional theory between constitutionalism and democracy to explain why the Hungarian government of Prime Minister Viktor Orbán's Fidesz party was able to undermine the independent checks on its power so quickly and without meaningful pushback, transforming what until 2010 looked like a stable but imperfect democracy into an autocracy. The reviewer claims that the lack of participatory equality, together with the entrenched institutional system, made the Hungarian autocracy extremely resistant to democratic re-constitutionalisation. And this situation makes my outlook on Hungary as sceptical as Gargarella's general scepticism in the last chapter of his book.

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<sup>21</sup> *Ibid.*, p. 31. Müller refers to the term 'two-third society', coined by Wolfgang Merkel for the bottom third, which has effectively disappeared from political life completely.

<sup>22</sup> See the result of the Medián Institute's survey commissioned by the RTL Klub TV station on the relationship between votes and incomes before the April 3 Parliamentary election on 30-31 March with a nation-wide survey of 1531 respondents. The survey is available at the link: <https://www.facebook.com/photo/?fbid=10220827131740798&set=a.1030493095277>; <https://www.facebook.com/median.hu/photos/a.1378324522412809/3275767579335151/>.

<sup>23</sup> C. Offe, *Participatory Inequality in the Austerity State: A Supply Side Approach*, in A. Schaefer – W. Streeck (eds.), *Politics in the Age of Austerity*, Cambridge, 2013. Also quoted by Müller, *Democracy Rules*, cit., at p. 193.

Gábor Halmai

*The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation.*

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