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Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism

1. Introduction

We live in an age of populist resentment toward the liberal international order and its core constitutional form—liberal constitutional democracy.¹ Populists not only attack the policies that are based on core institutional pillars of this order, but quite often they also challenge the very foundations of liberal order as such. In other words, economic openness, political multiculturalism, respect for human rights, the technocratic nature of international organizations, and a liberal understanding of the rule of law are, among other things, blamed for intolerable levels of inequality, declining trust in democracy, rising danger of terrorism, and increasing fear of loss of one's "national" and "cultural" identity. Rival theories point to a variety of different factors, ranging from the effects of globalization and global trade on income distribution,² to a decline in the subjective social status of white men,³ and, last but not least, to culture—where populism is a reaction against progressive cultural change.⁴

¹ G. John Ikenberry, *The End of Liberal International Order*, 94 (1) *INTERNATIONAL AFFAIRS* 7-23 (2018); Edward Luce, *THE RETREAT OF WESTERN LIBERALISM* 13 (2017); Stefan Rummens, *Populism as a Threat to Liberal Democracy*, in *THE OXFORD HANDBOOK OF POPULISM* 568 (Cristobal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, Pierre Ostiguy eds., 2017); Jan Zielonka, *COUNTER-REVOLUTION: LIBERAL EUROPE IN RETREAT 2* (2018). Here, liberal democracy is understood as a political system marked not only by free and fair elections, but also by the rule of law, the separation of powers and the protection of basic freedoms. Andrew Heywood describes liberal democracy as a form of democratic rule "that balances the principle of limited government against the ideal of popular consent." See Andrew Heywood, *POLITICS* 30 (2002).

² Dani Rodrik, *Populism and the Economics of Globalization*, draft, August 2017. available at: https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf

³ Noam Gidron, Peter A. Hall, *The Politics of Social Status: Economic and Cultural Roots of the Populist Right*, 68 (1) *British Journal of Sociology* 57-84 (2017)

⁴ Ronald F. Inglehart, Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, Faculty Research Working Paper Series, Harvard Kennedy School, August 2016, RWP16-026.

The populist surge is global. Political parties, movements or leaders such as Trump, Kaczynski, Orban, Erdogan, Putin, Morales, Maduro, Marine Le Pen, Wilders, to name just a few, claim to be the sole “true” representatives of their peoples against the corrupt elites.⁵ Populism is an ideology or political movement that “considers society to be ultimately separated into two homogeneous and antagonistic groups, the pure people versus the corrupt elite, and which argues that politics should be an expression of the *volonte generale* of the people.”⁶ Populism seeks to speak in the name of the common people. Its distinctive features are the prioritization of popular sovereignty, direct democracy and a strong emphasis on anti-elitism. Beyond these shared common features, populism emerges in a variety of forms. While populism is hostile to elites, it is also vague and moralistic and as such quite easily instrumentalized by almost any type of ideology, both left and right. Following Paul Taggart's definition of populism,⁷ I argue that populism is chameleon-like, ever adapting to the colors of its environment. It has no core values and a very thin ideology. Hence, there exist several rather different varieties of populism: agrarian, socio-economic, xenophobic, reactionary, authoritarian and progressive populism.⁸ In order to fully understand the logic of the different populisms, we have to approach them as socially and historically contingent categories. Besides the global factors mentioned earlier, we also have to study local conditions and factors, which help explain a variety of forms that populist movements assume. As Anna Grzymala Busse

⁵ John J. Judis, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016); J.W. Muller, *WHAT IS POPULISM?* (2016); Cass Mudde and Cristobal Rovira Kaltwasser, *POPULISM: A VERY SHORT INTRODUCTION* (2017).

⁶ Cass Mudde, *The populist zeitgeist*, 39 (4) *GOVERNMENT AND OPPOSITION* 543 (2004).

⁷ Paul A. Taggart, *POPULISM* 4 (2000).

⁸ Margaret Canovan, *POPULISM* (1981); Noam Gidron, Bart Bonikowski, *Varieties of Populism: Literature Review and Research Agenda*, Weatherhead Center for International Affairs, Harvard University, Working Paper Series, no.13-0004 (2013), available at: https://scholar.harvard.edu/files/gidron_bonikowski_populismlitreview_2013.pdf; Cass Mudde and Cristobal Rovira Kaltwasser, *Populism*, in *THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES* 495-498 (Michael Freeden and Marc Stears eds., 2013)

argues, rather than analyzing populism per se, we should recognize that it takes a variety of guises.⁹

This article considers the constitutional implications of the populist rise in East-Central Europe (ECE), situating them in a broader theoretical legal framework. First, specific features of populism in ECE are identified, and second, their variegated impact on core constitutional structures of liberal democracy is analyzed.

The second section offers a brief description of the particular type of populism that has evolved in ECE, most notably in Hungary and Poland. The new populism in ECE differs from other populisms because it combines the elements of populism, ethno-nationalism and authoritarianism. While ethno-nationalism is present in most of Western European cases, it is the third element, authoritarianism, which sets the ECE type of populism apart from other European cases.¹⁰ Authoritarianism in the ECE context does not mean only the adoption of certain authoritarian values¹¹, such as stringent security, intolerance of multiculturalism and pluralism, but also a “style of governance that attempts to circumvent the rule of law and democratic norms in favor of centralized authority and limited political freedom”.¹² Authoritarian populists in Hungary and Poland are explicitly anti-liberal but not necessarily anti-democratic.¹³ They embrace the “form” of democracy and claim to speak for the people themselves, but, at the same time—by undermining its liberal constitutional foundations—they erode the substance of democracy and gradually transform it into various forms of illiberal and authoritarian regimes.¹⁴

⁹ Anna Grzymala Busse, *Global Populisms and Their Impact*, 76 (1) *SLAVIC REVIEW* 3 (2017).

¹⁰ The left- wing populism of Syriza in Greece and Podemos in Spain does not fall into this category. On this point, see Judis, *supra* note 5; Rodrik, *supra* note 2 at 23.

¹¹ Pippa Norris and Ronald Inglehart adopt such approach in defining authoritarian populism, see Pippa Norris, Ronald Inglehart, *CULTURAL BACKLASH: THE RISE OF AUTHORITARIAN POPULISM*, forthcoming 2019.

¹² Bart Bonikowski, *Ethno-nationalist populism and the mobilization of collective resentment*, 68 (1) 189-190 *THE BRITISH JOURNAL OF SOCIOLOGY* (2017).

¹³ Grzymala Busse, *supra* note 9 at 8.

¹⁴ Muller, *supra* note 5 at 60-64.

By comparing populist approaches of Orban and Kaczynski in the third section, I examine how the authoritarian ideals of the new populists translate into (constitutional) law. I show that authoritarian populists in Hungary and Poland have successfully institutionalized, through legal reforms, a new version of semi-authoritarian regime, which is halfway between “diminished democracy” and “competitive authoritarianism”.¹⁵ Adhering to a similar script, which consists of sustained attacks on rule of law institutions, civil rights and freedoms, the media and electoral rules, both leaders in a relatively short period of time dismantled almost all the key cornerstones of democracy in Hungary and Poland.¹⁶ The comparison also shows that variations in the institutionalization of populist preferences can largely be explained by the political resilience of liberal (anti-populist) parties, the vibrancy of civil society, and continuing democratic support for liberal democracy. While the battle for democracy in Hungary appears to have been largely lost, the Polish opposition parties and civil society groups still have a functional capacity to fight for democratic values and institutions.

In the fourth section, I look at factors that explain the rise of populism in ECE. Populists in both countries responded to the grievances of the angry and disappointed citizens with what was perceived to be a compelling offer: A nationalist, authoritarian populism, combined with either economic protectionism or almost left-wing-oriented social policy, promised to protect the ordinary people abandoned by the liberal elites.¹⁷ With the eruption of the migration crisis in 2015, such socially-oriented xenophobic nationalism provided an ideal fit connecting the demand and supply side factors and driving increasing numbers of voters away from the political center to more right-wing extremes.

¹⁵ On diminished democracy, see David Collier, Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49(3) *WORLD POLITICS* 430-451 (1997), on competitive authoritarianism, see Steven Levitsky, Lucian A. Way, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2010).

¹⁶ Grzegorz Ekiert, *How to Deal with Poland and Hungary*, *Social Europe*, Occasional Paper No.13/2017, p.2

¹⁷ David Ost, *Thoughts on the Hungarian and Polish New Right in Power*, September 2016, available at: <http://www.publicseminar.org/2016/09/thoughts-on-the-hungarian-and-polish-new-right-in-power/>

Finally, the current surge of populism in ECE demonstrates that constitutional democracy is in great danger when its core principles no longer enjoy wide democratic support.¹⁸ Paradoxically, constitutional democracy can play its “counter-majoritarian” role only when a majority of the people believe that it is the only game in town. But such support cannot be presumed; it must be continuously fought for in a democratic political arena. Ultimately, democratic political parties, social movements with credible political ideas, and a solid core of staunch democrats offer the best hope for the survival of constitutional democracy. The role of law and constitutional checks and balances is less of an essential bulwark against democratic backsliding than is traditionally presumed in the legal literature.¹⁹

2. *Varieties of Populism: Authoritarian Populism in East-Central Europe*

In Europe, the main populist threat comes principally from the East. Less than 15 years after accession to the European Union, Hungary, Poland, Slovakia, the Czech Republic, and Bulgaria have witnessed populists come to power. As a recent empirical study shows, the appeal of these populist parties has increased quite rapidly in the last two decades.²⁰ Since 2000, when populist parties took an average of 9.2% of the national vote, their vote share has tripled, reaching 31.6% in 2017.²¹ An alarming finding of the Freedom House Study *Nations in Transit*²² report shows that for the first time since 1995, there are now more consolidated authoritarian regimes

¹⁸ See Steven Levitsky, Daniel Ziblatt, *HOW DEMOCRACIES DIE* (2018).

¹⁹ See Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, *UCLA LAW REVIEW*, forthcoming (2018); Daniel Ziblatt, *CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY* (2017), arguing that “the evidence supporting the idea that such institutions bring large returns to democracy, even in Western Europe, as we have noted, turns out to be surprisingly inconclusive.” (p.365); See also Alicia Adsera, Carles Boix, *Constitutions and Democratic Breakdowns*, Working Paper, December 21, 2006, available at:

<https://www.princeton.edu/~cboix/Constitutions%20and%20Democratic%20Breakdowns.pdf>

²⁰ *European Populism: Trends, Threats, and Future Prospects*, Report. Institute for Global Change (2017).

²¹ *Id.*

²² Freedom House, *Nations in Transit 2017 Report* (2017) *The False Promise of Populism*, available at: <https://freedomhouse.org/report/nations-transit/nations-transit-2017>

than consolidated democracies in the region. Hungary now has the lowest ranking in the Central European region. Poland's score reached its lowest point in the survey.

Shortly after the global financial crisis in 2008, which served as a catalyst for change, alternative economic and political ideas emerged and spread through the region.²³ Neoliberal economic policies were gradually replaced with various statist models of development, combining economic protectionism with elements of leftist social welfare policies.²⁴ At the same time, political liberalism has been challenged by open flirtation with illiberal²⁵ and authoritarian forms of government.²⁶

Despite sharing many of the core elements of populism, not all populists in ECE are the same.²⁷ Authoritarian populism has so far emerged only in Hungary and Poland, the two front-runners of democratic transition.

Roughly a decade after Vladimir Putin steered his country toward "Putinism"²⁸, a new ideology aspiring to represent a Russian alternative to Western liberal order, Hungary followed in these footsteps. Spearheading this trend is Hungarian Prime Minister Viktor Orbán, whom

²³ Tony Barber, An illiberal streak spreads further across central Europe, *Financial Times*, December 8, 2015.

²⁴ Anne Applebaum, Europe's new right sounds like the old left, *Financial Times*, January 27, 2016; Mitchell Orenstein, Reassessing the neo-liberal development model in Central and Eastern Europe, in *RESILIENT LIBERALISM IN EUROPE'S POLITICAL ECONOMY* 374-402 (Vivien Schmidt and Mark Thatcher eds., 2013).

²⁵ Illiberal democracies are understood here, following Fareed Zakaria definition, as: "democratically elected regimes, often ones that have been reelected or reaffirmed through referenda are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms." See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 (6) *FOREIGN AFFAIRS* 22(1997).

²⁶ Jan Werner Müller, Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Member States, 93 (2) *FOREIGN AFFAIRS* 14-19 (2014).

²⁷ See Ben Stanley, *Populism in Central and Eastern Europe*, supra note 1, at 140-160; Grzymala Busse, supra note 9.

²⁸ Putinism represents a mixture of economic statism, political authoritarianism and Russian Orthodox fundamentalism. Putin's economic nationalism is strongly embedded in his "conservative revolution", emphasizing the importance of Russian national "character" being at odds with traditional liberal values and principles. See Anne Applebaum, *Putinism: The Ideology*, LSE, February 2013.

EU Commission President Jean-Claude Juncker half-jokingly called a “dictator.” Orbán has denounced the West as decadent and obsessed with money, and outlined a future Hungarian state—a “work based society”. Orbán called his approach, adopted after his 2010 election victory, the ‘Eastern winds’ approach to economic policy, to distinguish it from Western liberalism.²⁹ The key pillars of Orbán’s new economic policy were re-nationalisation of certain private companies, mostly in what he considered to be strategic sectors like oil (MOL), gas, utilities and banks, punitive taxation of foreign banks and insurance companies, and economic protectionism. The Orbán government’s Eastern Opening, while officially an economic policy, has from the beginning been heavily imbued with the implication of political and social transformation away from Western liberalism and individualism toward Eastern authoritarianism and collectivism. After Viktor Orbán's speech in Tusnádfürdő, it became more than clear that he wants to create an illiberal state, a different kind of constitutional order from liberal democracy.³⁰ The Orbán government has transformed Hungary into a semi-authoritarian regime that limits freedom of speech and assembly, curtails media pluralism, and undermines protection of minorities. Orbán has also curbed the independence of the courts, the civil service, and of other institutions essential to the rule of law.³¹

At the moment, the Hungarian version of authoritarian populism represents the most problematic example of this trend in the region. The Fidesz government achieved a fundamental revision of the rules of the constitutional and political order in Hungary. In a scant eight years, it managed to transform Hungary from one of the success stories of the transition from socialism

²⁹ The Economist, Orbán and the Wind from the East, November 14, 2011.

³⁰ Kester Edy, EU urged to monitor Hungary as Orbán hits at ‘liberal democracy’, *Financial Times*, July 30, 2014.

³¹ Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *From Separation of Powers to a Government Without Checks: Hungary’s Old and New Constitution*, in *CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY’S 2011 FUNDAMENTAL LAW 268* (Gábor Attila Tóth, ed., 2012); Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *Disabling the Constitution*, 23(3) J. DEMOCRACY 138 -141 (2012).

to democracy into a semi-authoritarian regime, where the new constitutional structure vests so much power in the centralized executive that no real checks and balances exist to restrain this power.

In Poland, the new right-wing and populist Law and Justice (PiS) government has also set out to exploit a mix of ethnic nationalism and anti-capitalism reminiscent of that present in the interwar period, when authoritarianism—masquerading as democracy—prevailed in Admiral Miklós Horthy’s Hungary and Marshal Józef Piłsudski’s Poland. After winning the majority of votes in 2015 elections, Poland joined Hungary on its path to authoritarian populism.³²

Like in Hungary, the first target of the new Polish government was the Constitutional Tribunal. After adopting six new statutes on the Constitutional Tribunal, the populists transformed it into “a positive aide” to the government.³³ Nevertheless, in March 2016, the Polish Constitutional Tribunal unexpectedly struck back, declaring many of the new provisions to be in violation of the constitution. In a decision that deepened Poland’s constitutional crisis, the tribunal ruled that the reorganization called for by the new legislation prevented the Tribunal from working “reliably and efficiently.” Shortly afterward, Poland’s Supreme Court (the country’s highest appellate court) passed a resolution stating that the rulings of the Constitutional Tribunal should be respected, despite its stalemate with the government. The government, however, announced that it would ignore the Tribunal’s ruling and refused to publish it in the official Gazette, as required by the constitution. An enraged Kaczyński addressed the Sejm, condemning both high courts for opposing reforms passed by parliament. “[We] will not permit anarchy in Poland,” Kaczyński declared, “even if it is promoted by the

³² R. Daniel Kelemen, Poland’s Constitutional Crisis: How the Law and Justice Party is Threatening Democracy, *Foreign Affairs*, Snapshot, August 25, 2016.

³³ Wojciech Sadurski, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding in Poland, Sydney Law School Research Paper no.18/1 (2018).

courts.”³⁴ A year later, Poland's parliament approved the new Supreme Court legislation aimed at curtailing the judiciary, the country's last bastion of independence. The new Law and Justice government also undermined Poland's independent civil service and adopted a new legislation seeking to bring the media under direct government control.³⁵

At the same time PiS economic policy focused on making life and work more secure—on supporting workers and unions. Its two main policy proposals were monthly payments of 500 zloty to parents with two or more children under 18, and rolling back the retirement age from 67 to 60.³⁶ These legal and economic changes are part of a broader conservative political program founded upon a set of moral values that purportedly serve the protection of the Polish nation. As Leszek Koczanowicz argues, PiS “aims not only to transform certain external conditions, but also to accomplish a comprehensive re-invention of mentality and radically re-direct the trajectory of social thinking”.³⁷

The authoritarian populism in Hungary and Poland consists of certain core elements. The first element of this version of populism is what Jan Werner Muller calls moralized anti-pluralism. Leaders like Orban and Kaczynski claim that “they, and they alone, represent the people.”³⁸ In their worldview, there are no opponents, only traitors. The opposition leaders are delegitimized through being cast as not caring about ordinary Polish and Hungarian citizens, but only about the interests of various “liberal” elites. While moralized anti-pluralism is a relatively standard populist trope, in the ECE context it gets profoundly illiberal connotations.

³⁴ Kaczyński Announces Aim to Change Polish Constitution, Radio Poland, 2 May

2016.³⁵ Jan Werner Müller, The Problem with Poland, *The New York Review of Books*, February 11, 2016, available at <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/>

³⁵ Jan Werner Müller, The Problem with Poland, *The New York Review of Books*, February 11, 2016, available at <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/>

³⁶ Joanna Fomina, Jacek Kucharczyk, Populism and Protest in Poland, 27 (4) JOURNAL OF DEMOCRACY 61 (2016).

³⁷ Leszek Koczanowicz, The Polish Case. Community and Democracy under the PiS, 102 NEW LEFT REVIEW 94 (2016)

³⁸ Muller, *supra* note 10 at 20.

As Rogers Brubakers shows, ethno-nationalism in Northern and Western Europe has shifted from nationalism to “civilizationism”.³⁹ This shift has been driven by the notion of a civilizational threat from Islam and has given rise to identitarian “Christianism”, which internalizes liberalism, secularism, philosemitism, gender equality, gay rights, and free speech as “an identity marker of the Christian West vis-a-vis a putatively intrinsically illiberal Islam”.⁴⁰ In ECE, on the other hand, ethno-nationalism remains fundamentally nationalist and deeply illiberal. As a result, the ECE version of nationalist populism externalizes liberalism, “construing it as a non-national and even anti-national project that subordinates the interests of the nation to foreign capital, on the one hand, and to foreign models of multiculturalism, Roma rights, LGBT rights, and refugee protection, on the other hand.”⁴¹

The second element, the noninstitutionalized notion of the people, means “that the populist asserts or assumes that there is a singular and morally privileged understanding or will that has not been manifest through the formal structures of democratic choice.”⁴² The role of the populist leader is to do what the people want. The formal structures of liberal democracy have to be put aside if they are preventing the populist leader to fulfill his role. Populist leaders distrust all the traditional institutions of liberal democracy that stand between them and the wishes of the people. As a result, many of the ECE nationalist populist parties openly flout the rule of law and explicitly reject the values of liberal democracy. A corollary of this view is the strong personalization of power, reflected in the fact that strong leaders like Orbán and Kaczyński have managed to concentrate almost unlimited political power in their hands. What differentiates Orbán and Kaczyński from other populists in Europe is the extent to which they

³⁹ Rogers Brubaker, *Between nationalism and civilizationism: the European populist moment in comparative perspective*, 40 (8) *ETHNIC AND RACIAL STUDIES* (2017).

⁴⁰ *Id.*

⁴¹ *Id.* at 1208.

⁴² Aziz Z. Huq, *The People Against the Constitution*, 116 *MICHIGAN LAW REVIEW*, forthcoming, p.12.

oppose liberal democracy. They have gone much further in subverting liberal democracy than most of the other populists in East-Central Europe. It is the third element, a conservative and authoritarian ideology, combined with the absence of a strong opposition, that led them to this crusade against liberalism. Irena Grudzinska-Gross writes about “the revival in Poland, Hungary and ... some other countries of the region, of the very old conservative style of government, including the resurrection of the extreme right wing movements and, in Poland, of religious fundamentalism.”⁴³ Iván Szelényi and Tamás Csillag argue that this drift to illiberalism and authoritarianism has also a legitimating ideology, a traditionalist/neoconservative ideology, which emphasizes the value of patriotism, religion, and traditional family values. They maintain that a combination of political illiberalism, economic statism and conservative ideology represents the building blocks of a new type of order in post-communist world: A managed illiberal capitalism.⁴⁴ Because of these additional features, this form of populism has strong authoritarian inclinations. In next section, we turn from populist rhetoric to populist action. We look at legal strategies and techniques the populists use in order to turn their rhetoric into action.

3. The Legal Face of Authoritarian Populism in Eastern Europe

For the first time, based on two separate research projects, we have a systematic comparative evidence about what happens to democracy when populists come to power.⁴⁵

⁴³ Irena Grudzinska-Gross, The Backsliding, 28 (4) EAST EUROPEAN POLITICS AND SOCIETIES AND CULTURES 664 (2014).

⁴⁴ Tamás Csillag, Iván Szelényi, Drifting from Liberal Democracy: Traditionalists/Neoconservative Ideology of Managed Illiberal Democratic Capitalism in Post-Communist Europe, 1 (1) INTERSECTIONS: EAST EUROPEAN JOURNAL OF SOCIETY AND POLITICS 1-27 (2015).

○ ⁴⁵ See Christian Houle, Paul D.Kenny, The Political and Economic Consequences of Populist Rule in Latin America, GOVERNMENT AND OPPOSITION, <https://doi.org/10.1017/gov.2016.25>; Saskia Ruth, K.A.Hawkins, Nathaniel Allred; The Impact of Populism on Democracy”, in progress (analyzing the impact of populist rule on liberal democracy in Europe and the Americas in the 21st century).

Although conducted in two different contexts, both studies point to striking similarities regarding how populists undermine democracy. They argue that four essential elements of liberal democracy came under populist attack. The first one includes essential checks and balances on the executive branch, like legislatures, courts, electoral agencies, central banks, and ombudsmen. Populists systematically evade and override these checks on executive power. Houle and Kenny, for example, find that after four years of populist rule, courts have thirty-four percent less independence than they would have under a typical democratic government. The next target of populists is the free media. Populists do not like criticism from the media, which they see as elite subversion of the will of the people, and they frequently threaten or restrict media outlets. The third plank of liberal democracy that comes under populist attack are civil rights and liberties. The studies found that two terms of populist rule resulted in a nine-percent decrease in this sphere, measured by the standard index of civil liberties. The last element of liberal democracy to suffer under populist rule is the quality of elections. Populists both change and violate these rules for their own political advantage.

When compared to these general patterns of subversion of liberal democracy around the world, the Hungarian and Polish case look very familiar. Populist governments in Budapest and Warsaw have largely been following the pattern described in the two studies. The novelty and irony of the Hungarian slide into authoritarianism is that it was achieved entirely through legal means. Due to its two-thirds majority in the Hungarian unicameral parliament (Diet), Fidesz faced few obstacles in achieving this “constitutional revolution.”⁴⁶ When there arose a need to change the rules of the game, the Hungarian parliament was able to simply amend the Constitution. This amendment route was not available to Kaczynski. The PiS invented a new

⁴⁶ Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis*, 23 *Transnational Law & Contemporary Problems* 51-117 (2014).

form of constitutional amendment, where ordinary statutes significantly alter constitutional meaning.

The populists' disdain for the rule of law has manifested itself most forcefully in the form of attacks against constitutional courts. During the first quarter-century after the collapse of communism, constitutional courts became the region's primary defenders of the rule of law. The constitutional courts of Hungary and Poland, as well as those of Bulgaria, Romania, Slovakia, and Slovenia, became extremely influential. Because of the distrust of "ordinary" judges, many of them tainted by their service in the communist regime, constitutional courts became the "centerpiece" of the protection of the rule of law. But, in a centralized model of judicial review, only constitutional courts had the power of judicial review of legislation. That made the constitutional courts an easy target for the populists determined to dismantle the "undemocratic" rule of elite, liberal judges.

In Hungary and Poland, the new populist governments managed with relative ease to render the courts toothless by packing them with loyalists and curtailing their independence. The populists understood very well that by displacing the constitutional court, the core of the rule of law, they removed the major obstacle to the fulfillment of their aspirations. In Hungary, the parliament passed several amendments to the constitution in order to dismantle the Court. First, the parliament changed the rules for nominating constitutional judges so that Fidesz could use its two-thirds majority without needing multiparty backing--contrary to the requirements of the old constitution—to nominate candidates for the Court. The second step was a restriction of the court's jurisdiction over a variety of fiscal matters, allowing the Fidesz government to enact a series of unconventional economic measures, such as nationalizing of private pensions. And the third step, resembling FDR's court packing plan, increased the number of judges from eight to fifteen, allowing the populist government to fill seven new positions with their own candidates. The once powerful and highly respected Court for the moment disappeared from

the political scene.⁴⁷ Almost overnight, Prime Minister Beata Szydło's new administration packed the Constitutional Tribunal with sympathizers and raised the bar substantially: Rulings now have to be approved by a two-thirds majority, making it almost impossible to annul Law and Justice-backed legislation.⁴⁸ Moreover, the so-called Repair Act on the Constitutional Tribunal, as the new amending law has been ironically called, seems to be custom-made to paralyze the Court. Cases will have to wait in a docket for at least six months before they can be decided. As a result of all these changes, the Constitutional Tribunal, »as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and parliamentary majority was born.«⁴⁹

After neutralizing the constitutional courts, the populist governments continued their legal "revolution" with attacks on lower (regular) courts. By lowering the judicial retirement age, Orban first removed most of the presidents of the courts and then replaced them with judges more to his liking. Similarly, the Polish government prepared three bills, recently adopted by the Sejm, which aim to control and capture the Supreme Court and the vast majority of other regular courts.⁵⁰

At the same time as they mounted their attack on the judiciary, the populist governments in both countries engineered a radical transformation of the public media into a government mouthpiece. First, they changed the structure and personnel of key regulatory agencies, and second, they presided over an influx of party loyalists into public mass media outlets. Moreover, with all public media, the second-largest private TV channel, and several online and print outlets (including at least eight regional newspapers) in the hands of government allies,

⁴⁷ Bankuti, Halmai, Scheppele, *supra* note 31 (2012) at 140.

⁴⁸ Tomasz Tadeusz Konieczny, *Constitutional Capture in Poland 2016 and Beyond: What is Next?*, *VerfBlog*, 2016/12/19, <http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>, DOI: <http://dx.doi.org/10.17176/20161219-171200>; Gabor Halmai, *Second-Grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope With Illiberal Member States* (unpublished paper).

⁴⁹ Sadurski, *supra* note 33 at 35.

⁵⁰ Sadurski *id.*

pro-government media is dominating the market.⁵¹ On top of that, the most controversial part of this acquisition process was the shutdown of the newspaper *Népszabadság*, Hungary's leading critical daily.⁵² In Poland, the takeover of the media market reached "only" the first phase (colonization of the state media), while a more radical take-over of the entire media market has only begun.⁵³

Orban's government also changed the election law, captured the Election Commission, the main body in charge of election monitoring, and gerrymandered electoral districts in favor of Fidesz, at expense of traditional left-wing electoral districts.⁵⁴ Together with the media takeover, these changes led one critical analyst to observe that the forthcoming general election in April 2018 is "likely to be less fair" than previous elections.⁵⁵ With the new law adopted in December 2017, the Polish government introduced a series of changes, which, according to Wojciech Sadurski, will lead to complete erosion of integrity of the National Electoral Commission.⁵⁶

The populist distrust of liberal institutions is often accompanied by attacks on the constitutional rights and freedoms of ethnic minorities, Roma communities, Jews, homosexuals, and all those critical citizens who are not seen as "real" Poles, Hungarians etc. However, as Kim Lane Scheppele argues, the Fidesz government does not jail its opponents, it

⁵¹ Freedom House, Hungary, 2017.

⁵² Freedom House, Hungary, 2017.

⁵³ Freedom House, Poland, 2017.

⁵⁴ https://budapestbeacon.com/hungarys-2018-general-election-likely-to-be-less-fair-than-2014s-after-fidesz-media-takeover/?_sf_s=electoral+rules

⁵⁵ Benjamin Novak, Hungary's 2018 general election likely to be less fair than 2014's after Fidesz media takeover, Budapest Beacon, February 6, 2018, available at: https://budapestbeacon.com/hungarys-2018-general-election-likely-to-be-less-fair-than-2014s-after-fidesz-media-takeover/?_sf_s=elections+

⁵⁶ Sadurski, *supra* note 33 at 55.

does not ban free travel, but it punishes political dissent, it fires members of the political opposition from state sector jobs and it intimidates families of critical journalists.⁵⁷

Rather than attacking civil rights and liberties directly, both governments use an indirect legalistic approach, adopting problematic measures “concealed under the mask of law”⁵⁸ in order to advance their versions of “autocratic legalism”.⁵⁹ Some of these laws undermine civil rights and liberties indirectly, some directly. A typical example of the first group is so called Lex CEU, which pretends to be a neutral piece of legislation, but in fact disproportionately targets one specific academic institution (Central European University) and has one goal and one goal only—to push CEU out of the country.⁶⁰ On the other hand, certain laws attack civil rights very directly. The most notorious examples are so called “lex Gross” in Poland, which makes it a crime to accuse “the Polish nation” of complicity in the Holocaust or any “Nazi crimes committed by the Third Reich,” punishable by three years in jail,⁶¹ or the so-called Stop Soros laws in Hungary, which, if enacted, would make the work of NGOs that look after refugees difficult if not impossible.⁶²

Even if Hungary and Poland are not yet authoritarian regimes, the combined effects of the described attacks on the four pillars of liberal democracy show strong signs of a slide into authoritarianism. Moreover, both cases confirm that democracies today die slowly,

⁵⁷ Kim Lane Scheppele, *Goulash Post-Communism*, 52(3) NewsNet, News of the Ass’n for Slavic, E. Eur. & Eurasian Stud. 1, 3–4 (2012).

⁵⁸ Ozan O.Varol, Stealth Authoritarianism, 100 IOWA LAW REVIEW 1673 1685 (2015); see also David Landau, Abusive Constitutionalism, 47 U.C.IRVINE LAW REVIEW 189 (2015); Kim Lane Scheppele, Worst Practices and the Transnational Legal Order (or How to Build a Constitutional »Democratorship« in Plain Sight, *UC IRVINE L.REV* (forthcoming 2017); William J.Dobson, THE DICTATOR'S LEARNING CURVE:INSIDE THE GLOBAL BATTLE FOR DEMOCRACY (2012).

⁵⁹ Javier Corrales, Autocratic Legalism in Venezuela, 26 JOURNAL OF DEMOCRACY 37-46 (2015).

⁶⁰ Gabor Halmai, Legally Sophisticated Authoritarians: the Hungarian Lex CEU, *VerfBlog*, 2017/3/31, <https://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu/>, DOI: <https://dx.doi.org/10.17176/20170401-102552>.

⁶¹ Sadurski, *supra* note 33 at 52;

⁶² Ester Zalan, Germany Raises Concerns Over Hungary's »Stop Soros« Bills, *EU Observer*, February 16, 2018.

incrementally: The most pervasive form of democratic decay today is constitutional retrogression that usually unfolds from “slow, incremental, and endogenous decay as opposed to the rapid external shock of a coup or an emergency declaration”⁶³, which are the most frequent forms of authoritarian reversion.

Despite the fact that the Law and Justice government almost perfectly mimics the script used by Orbán, Poland is not yet Hungary. First, Orbán has been successful in capturing all four essential ingredients of constitutional democracy. The Polish populists, on the other hand, have made extensive progress in capturing only some, but not all, rule of law institutions and the media, while most of civil rights and liberties, and the fairness of the electoral system still remain in place. Moreover, Law and Justice has only a small parliamentary majority and not the supermajority needed for a Hungarian-style constitutional rewrite. Furthermore, while Orbán has been in power for two consecutive four-year terms, Kaczynski’s reign started only in 2015.

The Polish case, where the opposition to the new populist government is stronger than in Hungary, and where the new government has not fully yet dismantled all the bulwarks of the rule of law, thus represents only an unfinished version of authoritarian populism.⁶⁴ While heading in the direction of the Hungarian model, the Polish case can hardly be described as a non-democratic regime. This is also reflected in the Freedom House 2017 Report, where Hungary now has the lowest ranking in the Central European region and is considered a “semi-consolidated” democracy. Poland’s score reached its lowest point in the survey, but the country remains a “consolidated democracy.”⁶⁵

⁶³ Huq, Ginsburg, *supra* note 18.

⁶⁴ Ekiert, *supra* note 16 at 9-10. As Ekiert shows, Polish civil society has traditionally been the strongest in the region. See Roberto Stefan Foa, Grzegorz Ekiert, *The weakness of postcommunist civil society reassessed*, 56 (2) 419-439 (2017).

⁶⁵ Nations in Transit, *supra* note 21.

4. *Whence the Populist Rise?*

The examples of democratic backsliding into various forms of authoritarian constitutional populism in Eastern Europe are part of a world-wide trend taking place since the end of the third wave of democratization of the 1990s. The ease with which democratic backsliding has occurred in these seemingly stable democracies in many ways calls into question the supposed sharp divide between the Central European “success stories” and other, more problematic countries from the Balkans and further East. As more recent research on the impact of populism on democracy suggests, populism is more likely to have corrosive effects in unconsolidated democracies than in stable liberal democracies.⁶⁶

How can one then explain the fact that populism has been so successful in weakening some of the most consolidated democracies of the region, Poland and Hungary? In order to understand the populists’ success in ECE, both history and political science offer some important insights. While legal scholars have only begun to grapple with the idea of populism and its legal implications,⁶⁷ other disciplines like political science and history have long cultivated rich debates on populism.⁶⁸

What are the causes of the revival and success of old ethno-nationalist, populist, right-wing political forces? Sean Hanley and James Dawson argue that the major problem of post-communist liberal democracy is that it never was a real liberal democracy. Its liberal institutions have always been merged with existing illiberal narratives, such as ethnic nationalism and social conservatism. Moreover, they argue that despite what appearances may suggest, a

⁶⁶ Gidron, Bonikowski, *supra* note 8.

⁶⁷ The US constitutional scholarship is an exception here. In the last 30 years, it has provided a rich body of literature on populist constitutionalism. In Europe, populist constitutionalism is still considered an oxymoron, mainly because of its devastating political consequences in the interwar period in Europe. See Lucia Corso, What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and its Assumptions, *RIVISTA DI FILOSOFIA DEL DIRITTO* [III, 2/2014, pp. 443-470]

⁶⁸ Huq, *supra* note 43, citing the literature.

commitment to the norms of political equality, individual liberty, civic tolerance, and the rule of law has never been deeply internalized in the region.⁶⁹ Behind a facade of harmonized legal rules transposed from various EU legal sources, several cracks have begun to appear, exposing the fragility of constitutional democracy in these countries. Several recent studies emphasize this aspect and argue that formal democratic institutions operate ‘in the shadow of informal networks’ which undermine formal law and institutions.⁷⁰ This situation is best captured by Gabor Halmai, who argues that

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.⁷¹

ECE democracies were thus born with a “hollow core” and the resulting lack of massive civic and political engagement supporting the liberal ideals.⁷² Furthermore, political liberalism in ECE was often confused with economic liberalism, which resulted in a deep conviction that the (neo)liberal economic reforms “would lead directly to liberal democracy”.⁷³ After the political eclipse of the first torchbearers of political liberalism in Central Europe (Havel, Walensa, Michnik), the new economic (neo)-liberals in Hungary and Poland did not do enough to advance the cause of political liberalism. Their approach to reforms was mostly technocratic

⁶⁹ James Dawson, Sean Hanley, What’s Wrong with East-Central Europe? The Fading Mirage of the “Liberal Consensus, 27 (1) JOURNAL OF DEMOCRACY 21 (2016).

⁷⁰ Jacques Rupnik & Jan Zielonka, Introduction: The State of Democracy 20 Years on: Domestic and External Factors, 27(1) East European Politics&Societies&Cultures3, 21 (2013)

⁷¹ Gabor Halmai, The Decline of Liberal Democracy in the Europe's Midst, *Eurozine*, Sept.27, 2016.

⁷² Dorothee Bohle, Béla Greskovits, CAPITALIST DIVERSITY ON EUROPE'S PERIPHERY (2012).

⁷³ See Kocanowicz, *supra*, p.82. For the best historical account of these developments see Philip Ther, *Europe Since 1989: A History* (Princeton, 2016).

and top-down, based on the belief that all that is necessary is to follow the recipes provided by the IMF, World Bank, Washington, and Brussels. Paradoxically, the pro-market social-democratic left was the main advocate for neo-liberal market reforms in Poland, Hungary, and many other ECE countries.⁷⁴ As Abby Innes argues, “these former young communist technocrats had become the region’s most Blairite, pro-market social-democratic parties in order to demonstrate their liberal virtue!”⁷⁵

Responding to Hanley and Dawson, Ivan Krastev argues that the crisis in ECE is not only a crisis of liberal values, but also a genuine crisis of liberal democracy, stemming from major economic failures and the fact that the liberal order simply did not deliver that which it had promised in 1989.⁷⁶ The social contract offered in the early 1990s was a minimum income guarantee to the most vulnerable to prevent a backlash against economic liberal reforms. Instead, Poland today has “British rates of relative poverty but at Chilean income levels, and those in poverty are the young, those with the large families, and those in rural areas.”⁷⁷

The Great Recession of 2008 undermined the optimism of the “return to Europe” ideology built on almost two decades of continuous neo-liberal economic reforms. Impressive economic growth of 4-5 percent per annum gave way to decline throughout the region. Hungary, a successful leader of transformation in the 1990s, had a current account deficit of €1.9 million in 2000, but €5.8 million by 2006, by which time the country had also become highly indebted (debt reached 79 percent of GDP by 2009). Unemployment reached 10 percent by 2010. Hungary was one of the first countries in Europe to have been bailed out by the IMF

⁷⁴ Margit Tavits, Natalia Letki, *When Left is Right: Party Ideology and Policy in Post-Communist Europe*, 103 (4) *AMERICAN POLITICAL SCIENCE REVIEW* (2009); Abby Innes, *Draining the Swamp: Understanding the Crisis in Mainstream Politics as a Crisis of State*, 76 (1) *SLAVIC REVIEW* 33-34 (2017).

⁷⁵ Abby Innes, *Draining the Swamp Understanding the Crisis in Mainstream Politics as a Crisis of the State*, *Slavic Review*, 76, no.1, S34 (2017).

⁷⁶ Ivan Krastev, *What’s Wrong with East-Central Europe? Liberalism’s Failure to Deliver*. 27 (1) *JOURNAL OF DEMOCRACY* 35-39(2016).

⁷⁷ Innes, *ibidem*, p.S32

and the EU. Due to the austerity measures necessary for reestablishing financial order, a great part of the population suffered huge losses.⁷⁸ Voters were angry that, regardless of how they voted, they got neoliberal economic policies, which created vast inequalities and disadvantaged many workers. Populist parties offered to reverse the status quo on economic policy and they delivered. Once in power, populist parties in Poland and Hungary took a new approach to national economic policy, with greater support for national champions, domestic capitalist groups, and redistributive social transfers.⁷⁹

In order to understand and confront populism in ECE, it is necessary to comprehend the enduring appeal of the populist economic model and why many voters consider it to be superior to neoliberalism. Hence, it is no surprise then that even in the best economic performer in the region, Poland, it was primarily the poor and unemployed who helped to elect Poland's new rightwing government, promising a family allowance of 500 zlotys (\$120) a month per child, funded through a tax on banks and big business; a minimum wage; and a return to a retirement age of 60 for women and 65 for men.⁸⁰ Despite the robust economic performance, the neoliberal Civic Platform (PO) left behind many regions like Silesia and working people on so- called junk contracts, offering less than \$200 a month.⁸¹ At the end of 2010, Poland had become the EU's leader in part-time, insecure contracts.⁸² Almost 10% of those under 18 years of age live in absolute poverty, only 16% of unemployed individuals receive any unemployment

⁷⁸ Zoltan Pogatsa, *The Political Economy of Illiberal Democracy*, Social Europe, 20.11.2017; Simeon Djankov, *Hungary under Orban: Can Central Planning Revive Its Economy?* Policy Brief, PB15-11 (July 2015); M.Piasecki, *Was Viktor Orban's Unorthodox Economic Policy the Right Answer to Hungary's Economic Misfortunes?* International Journal of Management and Economics, No.46, April-June 2015, pp.41-71.

⁷⁹ David Ost, *Workers and the Radical Right in Poland*, International Labor and Working Class History, no.93, Spring 2018, pp.113-124.

⁸⁰ It is important to emphasize, however, that this is only one of the three groups providing PiS's base. The other two are guided by ideology. For the first of these two, the traditional conservative Catholics, the strong Catholic Church plays a decisive role. The second group consists of secular intellectuals pushing for defense of »Polishness« and against the EU. See Ost, *Ibidem*, p.120.

⁸¹ Cedric Gouverneur, *Poland's populist revenge*, *Le Monde diplomatique*, March, 2016, available at <http://mondediplo.com/2016/03/02poland>; Karolewski, Benedikter, *ibid*.

⁸² Ost, *ibidem*, p.114

benefits, and only 2% of those working in the private sector are unionized.⁸³ As a result, populist-nationalist parties, which promised to defend small people gained ground and power. In a recent paper, Maria Snegovaya shows that the right-wing populism's rise and center-left parties' decline result from the same process: blue-collar supporters shifting away from the left to embrace the populist right.⁸⁴

. It was the promise of economic security that led PiS to victory in Poland. This is consistent with comparative studies which show that support for extreme right parties and authoritarian rule tends to increase in the years after economic crisis. The Depression, for example, gave birth to some of the 20th century's most radical populist movements.⁸⁵

To make things worse, the economic recession was accompanied by increasing corruption and scandals involving recordings of intra-governmental conversations, which proved to be the catalysts for the release of popular frustration in Hungary and Poland.⁸⁶ Terrorism and immigration are in fact only the latest issues around which populists in Poland and Hungary successfully mobilized. All these "demand" factors together generate potential public support for populist movements and policies.⁸⁷

Nevertheless, demand factors tell only one half of the story. As both Matt Golder⁸⁸ and Dani Rodrik argue, it is important to look at the demand as well as the supply factors behind the rise in populism. Moreover, Dani Rodrik argues that:

⁸³ Gavin Rae, Understanding the Liberal Roots of Polish Conservatism, Social Europe, 5.1.2016.

⁸⁴ Maria Snegovaya, The Party Realignment and the Success of the Populist Right in Eastern Europe, paper (2018).

⁸⁵ The Power of Populists, The Economist, July, 22, 2017; Huq, Ginsburg, supra note 18.

⁸⁶ Ireneusz Pawel Karolewski and Roland Benedikter, Is Poland Really Lost? Poland's Contested Governance Reforms and the further Role of the Central Eastern European area (CEE) in the EU, March 10, 2016 Working Paper for The Europe Center, Freeman Spogli Institute for International Studies, Stanford University.

⁸⁷ On importance of demand and supply factors in analyzing the electoral success of right wing parties in Europe, see Matt Golder, Far Right Parties in Europe, 19 ANNUAL REVIEW OF POLITICAL SCIENCE 477-497 (2016) .

⁸⁸ Id.

[The] economic anxiety and distributional struggles exacerbated by globalisation generate a base for populism, but do not necessarily determine its political orientation. The relative salience of available cleavages and the narratives provided by populist leaders are what provides direction and content to the grievances. Overlooking this distinction can obscure the respective roles of economic and cultural factors in driving populist politics.⁸⁹

In other words, demand factors provide only a fertile soil, a base, for populism, but do not determine whether or how the populists are successful in persuading the voters to follow their promises. The logic of populism can best be understood by looking at the interaction between demand-side and supply-side factors in their empirical context.⁹⁰ It is worth quoting another paragraph from Dani Rodrik's work on populism:

[the] economic anxiety, discontent, loss of legitimacy, fairness concerns that are generated as a by-product of globalization rarely come with obvious solutions or policy perspectives. They tend to be inchoate and need to be channeled in a particular programmatic direction through narratives that provide meaning and explanation to the groups in question. That is where the supply-side of politics comes in. Populist movements supply the narratives required for political mobilization around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are the people who are doing it to you.⁹¹

In light of these observations, I argue that it was the absence of credible liberal alternatives that opened the gates for populist parties in Hungary and Poland. As the mainstream center-left

⁸⁹ Rodrik, *supra* note 2.

⁹⁰ Golder, *supra* note 79.

⁹¹ Rodrik, *supra* note 2 at 6.

discredited itself with its unrelenting pursuit of neo-liberal reforms, the populist parties could claim to fill the void left by other mainstream political parties. In the words of Cass Mudde, “the populist surge is an illiberal democratic response to decades of undemocratic liberal policies.”⁹²

The populists in both countries responded to the grievances of the angry and disappointed citizens with what was perceived to be a compelling narrative: A nationalist, authoritarian populism, combined with an almost left-wing-oriented social policy, promising to protect ordinary people abandoned by the liberal elites. With the eruption of the migration crisis in 2015, such socially-oriented xenophobic nationalism provided an ideal fit connecting the demand and supply side factors and driving increasing numbers of voters away from the political center to more right-wing extremes.

5. What is the Role of Law in Preventing a Breakdown of Democracy?

From the constitutional theory perspective, the surge of populism in ECE teaches us another story, about the role legal institutions have in protecting democracy from backsliding into illiberal and authoritarian regimes. In many ECE countries, the courts have played a major role in building constitutional democracy during the transition and have served as symbols of the rule of law. Samuel Issacharoff, for example, argues that that the most significant bulwark against the return of repression is the presence of strong constitutional courts.⁹³ He acknowledges that perpetuating a democratic order depends on many factors and institutions,

⁹² Cass Mudde, Europe's Populist Surge, 95 (6) FOREIGN AFFAIRS 25-30 (2016).

⁹³ Samuel Issacharoff, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015). For a different argument, emphasizing the importance of the independence of judiciary and potential advantages of a weak-form judicial review, see Stephen Gardbaum, Are Strong Constitutional Courts Always a Good Thing for New Democracies? 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285-319 (2015).

including political parties, but claims that the reliance on constitutional courts “highlight[s] an important institutional shift in the structuring of new democracies ... that has received insufficient attention to date.”⁹⁴ Yet the last few years have exposed the institutional fragility of constitutional courts when they are targeted by populist forces. More broadly, we may be forced to question the capacity of the courts to protect democracy from illiberal majorities.⁹⁵

The notion that judges might not provide the most effective bulwark against the rise of anti-democratic forces is also evident from pre-WWII German history. Before the Nazis came to power in Germany, judges were celebrated for developing an early form of the *Rechtsstaat* (legal state). Yet they did not even try to challenge Hitler’s supremacy. In a 1936 essay, Karl Loewenstein pointed out that a judge would have to be very reckless to challenge Nazi ordinances on legal grounds, and noted that that he knew of no such judge.⁹⁶ On the contrary, the blessing of the German judges, which stabilized the judicial system, was instrumental in legitimizing the Nazi regime.⁹⁷ A majority of German judges eagerly supported extreme nationalism, anti-Semitism and shared the Nazi opposition to Weimar. In other words, the bench and the bar would be the last place to look to for opposition to Nazis.⁹⁸

A recent empirical study finds that “the presence of independent courts alone might not be enough to stop a government determined to curb its citizens’ rights.”⁹⁹ Moreover, the same study offers another finding showing “that constitutional rights do not appear to be better protected in countries with independent courts equipped with the power of judicial review.”¹⁰⁰ The main reason behind this paradox is the fact that rights enforcement ultimately falls on

⁹⁴ Ibid.

⁹⁵ Bojan Bugarcic, Tom Ginsburg, The Assault on Postcommunist Courts, 27 (3) JOURNAL OF DEMOCRACY 69-82 (2016).

⁹⁶ Karl Loewenstein, Law in the Third Reich, 45 YALE LAW JOURNAL 788 (March 1936).

⁹⁷ See Ingo Müller, HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH (1991).

⁹⁸ Richard Miller, NAZI JUSTICE: LAW OF THE HOLOCAUST(1995), p.44.

⁹⁹ Adam S. Chilton, Mila Versteeg, Court’s Limited Ability to Protect Constitutional Rights, 85 The University of Chicago Law Review, 297 (2018).

¹⁰⁰ Ibidem, p.297

citizens themselves. When citizens are organized, they can resist rights violations through various forms of civic action. Where such a mobilization is weak, the protection of rights is less effective.

In other words, when a strong authoritarian leader is in power, the rule of law might not be the most effective tool for curbing the power of the autocrat. It seems that a constitutional court alone is relatively weak against a powerful government determined to dismantle basic rule-of-law institutions, as in Hungary and Poland. Even Issacharoff is willing to concede this point. In a more recent article he argues that “it is doubtful that courts can hold out for long if the institutions of democratic governance do not take root.”¹⁰¹ In such a circumstance, there is little a constitutional court can do to stop the authoritarian drift. In retrospect, we see that the postcommunist reformers who put their faith in the courts were naïve. Constitutional courts and other rule-of-law institutions in Central and Eastern Europe always lacked the necessary support of genuinely liberal political parties and programs, leaving the courts vulnerable to attacks from populists. After reviewing a number of other essential features of liberal constitutionalism (federalism, separation of powers, electoral systems, and bill of rights), Tom Ginsburg, Aziz Huq and Mila Versteeg come to a sobering conclusion: “at best, constitutional design features serve as speed bumps to slow the agglomeration and abuse of political power; they cannot save us from our worst selves completely.”¹⁰²

In a recent comparative study of democratic backsliding, Daniel Ziblatt and Steven Levitsky argue that institutional safeguards like constitutional checks and balances are less effective in protecting democracy than we think.¹⁰³ More important than institutional safeguards are the “unwritten democratic norms”¹⁰⁴ that reinforce democratic institutions. As

¹⁰¹ Samuel Issacharoff, *Safeguarding Democratic Institutions*, Int’l J. Const. L. Blog, Apr. 29, 2017, at: <http://www.iconnectblog.com/2017/04/safeguarding-democratic-institutions/>

¹⁰² Tom, Ginsburg, Aziz Z. Huq, Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, vol. 85 The University of Chicago Law Review, 253, 239-255 (no. 2, March 2018),

¹⁰³ Levitsky, Ziblatt, *supra* note 17 at 7.

¹⁰⁴ *Id.* at 8.

essential informal norms they identify mutual toleration and forbearance (partisan self-restraint and fair play). Mutual toleration essentially means that competing political parties accept one another as legitimate rivals. Forbearance is the opposite of “constitutional hardball” as defined by Mark Tushnet: playing by the rules but pushing against their bounds.¹⁰⁵ It entails a partisan self-restraint in using one’s institutional prerogatives. The examples Ziblatt and Levitsky mention are the sparing use of the Senate filibuster, a bipartisan consensus on impeachment, or deference of the Senate to the president in nominating Supreme Court justices. Such informal social norms represent the “soft guardrails” of democracy, helping it avoid the extreme polarization and partisan fight to the death that has destroyed numerous other democracies around the world. In addition to informal democratic norms, political parties and civil society play a crucial role in the defense of constitutional democracy. Similarly, Aziz Huq and Tom Ginsburg argue that “the near-term prospect of constitutional liberal democracy hence depends less on our institutions than on the qualities of political leadership and popular resistance.”¹⁰⁶ Moreover, “it is crowds marching the streets, and the people taking it upon themselves to enforce the social contract, that ultimately are the best protector of liberal constitutionalism.”¹⁰⁷ In their book *Why Civil Resistance Works?* Erica Chenoweth and Maria Stephan show that nonviolent resistance in form of boycotts, strikes and protests deters autocratic backsliding. An original, aggregate data set of all known major nonviolent and violent resistance campaigns from 1900 to 2006 is used to test these claims.¹⁰⁸ Similarly, Sheri Berman argues that it is a long-term democratic struggle that should be credited for

¹⁰⁵ Mark Tushnet, *Constitutional Hardball*, 37 THE JOHN MARSHALL LAW REVIEW 550, 523-53 (2004).

¹⁰⁶ Huq, Ginsburg, *supra* note 18.

¹⁰⁷ Ginsburg, Huq, Versteeg, *ibidem*, 253.

¹⁰⁸ Erica Chenoweth, Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (Columbia, 2011); Turkurek Isiksel, *Prepare for Regime Change, not Policy Change*, *Dissent*, Nov. 13, 20016.

development of liberal democracy in most of European states.¹⁰⁹ After reviewing two centuries of turmoil characterizing the development of liberal democracy in England, France, Germany, Italy and Spain, Berman concludes that “[fighting back against the populist tide and avoiding illiberal democracy therefore requires finding ways to remove the barriers that have weakened contemporary democracy and to encourage greater citizen participation.”¹¹⁰

As Larry Diamond argues, “[d]emocracies fail when people lose faith in them and elites abandon their norms for pure political advantage.”¹¹¹ Diamond further argues that Juan Linz, in his classical work on this topic, *The Breakdown of Democratic Regimes*,¹¹² stressed two factors in the failure of democracy. The first one is the growth of “disloyal opposition”—politicians, parties, and movements that deny the legitimacy of the democratic system (and its outcomes), that are willing to use force and fraud to achieve their aims, and that are willing to curtail the constitutional rights of their political adversaries, often by depicting them as “instruments of outside secret and conspiratorial groups.”¹¹³ The second one was “semiloyal behavior” by parties and politicians willing “to encourage, tolerate, cover up, treat leniently, excuse or justify the actions of other participants that go beyond the limits of peaceful, legitimate ... politics in a democracy.”¹¹⁴ Building on Linz’s work, Ziblatt and Levitsky develop a litmus test, consisting of four behavioral warning signs that can help us identify an authoritarian leader. They include a rejection or weak commitment to democratic rules of the game, denial of the legitimacy of political opponents, toleration or encouragement of violence,

¹⁰⁹ Sheri Berman, The Pipe Dream of Undemocratic Liberalism, *Journal of Democracy*, vol.28. no.3, July 2017. For a more comprehensive picture see her forthcoming book *Democracy and Dictatorship in Europe: From the Ancien Régime to the Present Day* (Oxford, 2019).

¹¹⁰ Berman, *The Pipe Dream of Undemocratic Liberalism*, p.38.

¹¹¹ Larry Diamond, It Could Happen Here, *The Atlantic*, October 19, 2016.

¹¹² Juan Linz, David Stepan, eds., *THE BREAKDOWN OF DEMOCRATIC REGIMES* 14-48 (1978).

¹¹³ Id

¹¹⁴ Id

and readiness to curtail civil liberties and media freedom. What is remarkable is how similar these warning signs are to usual strategies populists use to subvert democratic institutions.¹¹⁵

This is exactly what is happening in Hungary and, to a lesser extent, in Poland. In Hungary, increasing numbers of political leaders and citizens are willing to tolerate the authoritarian politics of Orban's government in exchange for better protection of their security, social benefits and political status. Poland is embarking upon such a journey. With the most recent package of legislation aimed at curtailing the independence of the Supreme Court, the PiS government has found itself on the banks of the Rubicon of Polish democracy.¹¹⁶ The strength of the Polish opposition and vitality of Polish democracy are being tested here. If PiS gets its way, the gates for further backsliding of constitutional democracy in Poland will be wide open.

This is not to suggest, however, that during the early stage of the populist turn to authoritarianism, rule of law institutions are not important. The Polish case, where the opposition to the new populist government is stronger than in Hungary, and where the new government has not fully yet dismantled all the foundations of the rule of law, is a litmus test for the capacity of rule of law institutions to prevent democratic backsliding. Two conclusions from this brief review of the literature emerge. One is that law has only a weak role in preventing a breakdown of constitutional democracy when democracy is not the only game in town and when democratic support for constitutional checks and balances is eroding. The second one shows that a constraining role of law differs in different stages of the rise of populism. During the early stage of the rise of authoritarian populism, constitutional design features serve as "speed bumps"¹¹⁷ to slow the deconsolidation of liberal democracy.

¹¹⁵ Levitsky, Ziblatt, *supra* note 17 at 21-22.

¹¹⁶ Rick Lyman, In Poland, An Assault on the Courts Provokes Outrage, *The New York Times*, July 19.2017.

¹¹⁷ Ginsburg, Huq, Versteeg, *ibidem*, p.253.

6. Conclusion

Whether this new trend of authoritarian ethno-populism in the region represents a clear break with the previous hegemony of liberal policies is too early to tell. Moreover, Jan Werner Müller argues that in ECE “something new is emerging: a form of illiberal democracy in which political parties try to capture the state for either ideological purposes or, more prosaically, economic gains.”¹¹⁸ He points to an alarming similarity of these new forms of democracy with Putin’s “managed” democracy: “Like Moscow, the governments of these countries are careful to maintain their democratic facades by holding regular elections. But their leaders have tried to systematically dismantle institutional checks and balances, making real turnovers in power increasingly difficult.”¹¹⁹

As a consequence, ECE countries represent a cautionary tale about how fragile and weak democracies are when confronted with determined authoritarians seeking to subvert democracy into various forms of “competitive authoritarianism”.¹²⁰ What the current surge of populism shows is that the rule of law and liberal democracy are in great danger when their core principles no longer enjoy broad democratic support. Ultimately, democratic political parties, civil society groups and a solid core of committed democrats offer the best hope for the protection of liberal democracy.

¹¹⁸ Müller, *supra* note 25 at 15.

¹¹⁹ Müller, *id* at 15.