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Constitutional Changes in Populist Times

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Abstract

The article examines the impacts of populist government in Hungary on constitutional law since 2010. The criterion of the analysis is whether the comprehensive and radical changes that took place during this time have been characterized by the distinctive traits, ambitions and values that the scholarship attributes to populism and 'populist constitutionalism', above all anti-elitism, anti-institutionalism, anti-pluralism, the emphasis on popular sovereignty and direct democracy, and an instrumental conception of law. For this purpose, it examines the major changes in the constitutional rules and practice of sovereignty issues, the system of separation of powers, and fundamental rights. The article consists of four parts. In the first chapter, sovereignty issues are discussed including the changing approach of constituent power, constitutional identity, and the interpretation of sovereignty through an analysis of the 2011 Fundamental Law and its eight amendments. The study then reviews the changes in the system of separation of powers, that is, the transformation of the legal status and operational practices of the most important public law institutions. The next chapter provides a qualitative analysis of the situation of fundamental rights, in particular the trends in the renewed regulation of constitutional liberties and political freedoms. In addition, this part gives an assessment of the current state of institutional protection of constitutional rights. Finally, the last chapter seeks to answer the question of how the cumulative effects of these changes can be assessed; whether Hungary follows a new, specific path of constitutional development, or the constitutional changes can be interpreted within the framework of the constitutional democracy formed after the 1989/90 regime change.

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Keywords

populist constitutionalism – 2011 Fundamental Law of Hungary – constitutional development – constitutional changes

1 Introduction

After the collapse of communist systems in Central and Eastern Europe, from the early 1990s Hungary was a champion of the democratization process and also a frontrunner in the move to EU accession in the region. However, the deep and comprehensive transformation of the constitutional and political system that has taken place since 2010 are usually seen by international public opinion and the academic literature as a systematic breakdown of the rule of law, and an authoritarian transition. This surprising and unexpected turn is in itself remarkable, but these changes are even more interesting from a legal point of view, given that over the last ten years, owing to the overwhelming majority enjoyed by the government parties, there has been a continuous process of constitution-making in this country and the whole legal system, including constitutional law, has been thoroughly transformed.

The constitutional and political changes in Hungary since 2010 have been called by many names, including "abusive constitutionalism",[1] "illiberal democracy",[2] "populist constitutionalism" or "constitutional populism",[3]

1 David Landau, "Abusive Constitutionalism," 47(1) *UC Davis Law Review* (2013), 189–260, at 191.

2 Cesare Pinelli, "Populism and Illiberal Democracies: The Case of Hungary," in Zoltán Szente, Fanni Mandák, Zsuzsanna Fejes (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary* (L'Harmattan, Paris, France, 2015), 211–219; Tímea Drinóczi and Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland," 20(8) *German Law Journal* (2019), 1140–1166.; Renata Uitz, "Can You Tell When an Illiberal Democracy Is in the Making?" 13(1) *International Journal of Constitutional Law* (2015), 279–300.

3 Manuel Anselmi, *Populism. An Introduction* (Routledge, London, UK, 2018) 90; Gábor Halmai, "A Coup Against Constitutional Democracy. The Case of Hungary," in M. A. Graber, S. Levinson and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, New York, US, 2018), 243–256, at 243; Neil Walker, "Populism and Constitutional Tension," 17(2) *International Journal of Constitutional Law* (2019), 515–535, at 521, 524; Théo Fournier, "From Rhetoric to Action, a Constitutional Analysis of Populism" 20(2–3) *German Law Journal* (2019) 362–381.

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"semi-authoritarian state",[4] "authoritarian populism",[5] "electoral" or "competitive"[6] "authoritarianism",[7] and so on. However, it is a common feature of the various classifications that the transformation is considered a challenge to the Western-style constitutional (liberal) democracy that emerged after the 1989/90 regime change, a challenge brought about by successive populist governments over the last ten years.

In this study, I examine the impacts of populism on Hungarian constitutional law. The criterion of the analysis is whether these impacts have been determined by those traits, ambitions and values which are attributed by the scholarship to populism and "populist constitutionalism", above all anti-elitism, anti-institutionalism, anti-pluralism, the emphasis on popular sovereignty and direct democracy, and an instrumental conception of law.

The article consists of four parts. In the first section, formal constitutional changes and sovereignty issues are discussed, including the changing approach to constituent power and the emergence of constitutional identity. The study then reviews the changes in the system of the separation of powers, that is the transformation of the legal status and operational practices of the most important public law institutions. The next section provides a qualitative analysis of the situation of fundamental rights, in particular the trends in the renewed regulation of constitutional liberties and political freedoms. Finally, the last section seeks to answer the question of whether the major trends in the very recent constitutional development of Hungary can be explained by the conception of populist constitutionalism, or not. In other words, the crucial theoretical issue is whether the changes in constitutional law have a populist character, or their elements or cumulative effects should be evaluated in a different analytical framework.

In this article, I will argue that in Hungary the constitutional changes accomplished by consecutive populist governments have primarily resulted

4 Bojan Bugarič, Tom Ginsburg, "The Assault on Postcommunist Courts," 27(3) *Journal of Democracy* (2016), 69–82, at 70; Bojan Bugaric, Alenka Kuhelj, "Varieties of Populism in Europe: Is the Rule of Law in Danger?" 10(3) *Hague Journal on the Rule of Law* (2018), 21–33, at 25.

5 Simone Chambers, "Democracy and Constitutional Reform: Deliberative Versus Populist Constitutionalism" 45(9–10) *Philosophy and Social Criticism* (2019), 1116–1131, at 1117; Bojan Bugarič, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism," 17(2) *International Journal of Constitutional Law* (2019), 597–616.

6 Daniel R. Kelemen and Laurent Pech, "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland," 21 *Cambridge Yearbook of European Legal Studies* (2019), 59–74.

7 B. Guy Peters and Jon Pierre, "A Typology of Populism: Understanding the Different Forms of Populism and their Implications," *Democratization* (2020), 928–946.

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in a semi-authoritarian transition, and the constitutional structure that has developed does not have any special features that would make this regime a "populist" constitutionalism. Undoubtedly, most characteristics of populism have been realised in the area of political communication or, possibly, in government policy-making, but these traits as such have not been transferred into the constitutional law. Indeed, if we disregard the features of populist constitutionalism that have not prevailed in the latest Hungarian constitutional development, that is, we only take into account the real constitutional changes, we must conclude that they are peculiarities of authoritarian constitutionalism in general terms, and they cannot be specifically linked to populism. If this is true, the concept or theory of "populist constitutionalism" does not provide an effective analytical framework for describing and understanding the Hungarian constitutional changes, even if the political system is pervaded with populist ideas and practices.

2 The Partisan Constitution and the Incessant Constitution-making

The general elections of 2010 brought about a landslide victory for the conservative parties that had been in opposition for the preceding eight years. The main government party, Fidesz and its satellite coalition partner, the Christian Democrats, gained a two-thirds parliamentary majority as a result of the disproportionate election system. The new coalition government immediately started to change the constitutional landscape of the country; within less than a year of coming into power, it amended the Constitution of 1949/89[8] 12 times. Subsequently, Parliament, after a rapid and non-transparent preparatory phase, adopted a new constitution in April 2011, named the "Fundamental Law", with the votes of the government party MPs. However, the era of constitution-making was not finished; in recent years, the government majority has amended the Fundamental Law eight times, due to the fact that the government parties have obtained two-thirds majorities in the last three parliamentary elections, and (except between 2015 and 2018) have preserved their constitution-making power throughout the period.

As a consequence, the Fundamental Law of 2011 appears to be an ever-changing constitution. In fact, on the same day it entered into force, a number

8 Hungary was the only post-communist country in Central and Eastern Europe where, following the defeat of communist rule, no new constitution was adopted. However, during the period of democratic transition, the communist constitution, originally adopted as Act XX of 1949 was substantially revised by a constitutional amendment (Act XXXI of 1989), which is why it was frequently referred to in this way after 1989.

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of amendments were attached to the new constitutional text by a dubious legal act named the 'Transitional Provisions of the Fundamental Law', containing a political manifesto condemning the communist dictatorship in Hungary before the system change, and declaring the full responsibility of the largest opposition party (the Hungarian Socialist Party) for communist crimes. Although most of the Transitional Provisions were repealed by the Constitutional Court within a year,[9] most of its parts were built into the constitutional text later on. In practice, populists unscrupulously exploited their unlimited power and unilaterally, without any real consultation with the opposition parties, shaped the constitutional framework in accordance with their own political objectives.

2.1 *Changing the Constitutional Landscape*

By means of the new constitution and a whole series of constitutional amendments the government majority re-established the constitutional landscape by urging a new approach to the concept of a constitution, entrenching conservative-rightist ideological values in the constitutional text, and evolving the notion of constitutional identity.

The so-called "historical constitution", an unwritten constitution of medieval origin[10] that was in force until World War II, played a crucial role in all three exercises. After 2010, considerable efforts were made by the constitution maker to link the new constitution with the historical constitution. This was not entirely surprising given that both the Holy Crown and the historical constitution have been important parts of the political ideology of the domestic conservative right (and the far right) since the collapse of the communist regime and the transition to democracy in 1989/1990.

In the spirit of these aspirations, the new constitution was named the "Fundamental Law". Arguing for the compatibility of the unwritten, historical constitution and the new, complete written charter, it was said that

> [t]oday's Fundamental Law (…) is part of a larger whole, part of a newly created historical continuity (…). We wanted to preserve the phrase "constitution", or to give it back to a living legal body with a thousand-year history, which is to be revived.[11]

9 Decision 25/2012. (V. 18.) of the Constitutional Court.

10 For a detailed analysis of the Hungarian historical constitution and the doctrine of the Holy Crown, see Zoltán Szente, "The Doctrine of the Holy Crown in the Hungarian Historical Constitution," 4(1) *Journal on European History of Law* (2013), 109–115.

11 József Szájer, *Szabad Magyarország, szabad Európa: Újabb tizenöt év. Beszédek, írások, dokumentumok 1998–2013* (Budapest, 2014) 840–841.

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In this view, the concept of "constitution" covers a whole constitutional system, including both the ancient constitutional traditions and the rules of the newly adopted Fundamental Law. Moreover, as the argumentation continues, this re-conceptualization was necessary because the communist constitution "expropriated, [and] deprived the term 'constitution' of its original historical meaning".[12] In any case, the Fundamental Law is only a part of the constitution, and the revived constitutional concept incorporates the Fundamental Law. It is to be noted, however, that this approach was not put into practice; constitutional jurisprudence and scholarship use the terms "constitution" and "Fundamental Law" interchangeably.

Nevertheless, the attempts to revive the historical constitution has not been completely unsuccessful. The Preamble of the Fundamental Law declares that

> [w]e honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation,

and the constitutional text provides that

> [t]he provisions of the Fundamental Law shall be interpreted in accordance with (…) the National Avowal [the preamble] and the achievements of our historical constitution.[13]

These references are treated as interpretative aids requiring the Constitutional Court to pay attention to the ancient constitution when it reveals the meaning of the Fundamental Law.

Another trend has been to lay down certain conservative and Christian commitments in the constitutional text. In particular, the Preamble of the Fundamental Law, the so-called "National Avowal" contains certain ideological values, such as a reference to the role of Christianity in "preserving nationhood", or expressing the nation's honor of "the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation". Other conservative values also emerge in the normative text of the Constitution, such as the traditional concept of family and marriage,[14] or the enhancement of religion, nation, community, work and family.

12 *Ibid.*

13 Article R Section (3) of the Fundamental Law.

14 "Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children." Art. L Section (1) of the Fundamental Law.

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The introduction of the concept of constitutional identity was also an innovation, as this notion had been completely unknown in Hungarian constitutional law before 2016. In that year, the Constitutional Court discovered this concept[15] at the peak of the government's anti-migrant and anti-EU campaign, which sharply opposed the refugee policy of the European Union. In this decision, the Court, interpreting the so-called EU-clause of the Fundamental Law,[16] reserved the power to consider whether the joint exercise of powers between Hungary and the EU institutions violates Hungary's sovereignty and self-identity based on its "historical constitution". The Court said that for this purpose, it may carry out a so-called "sovereignty control" on the one hand, and an "identity control" on the other. Unfortunately, the Constitutional Court did not define the concept of constitutional identity, but only stated that it will determine the meaning of constitutional identity on the basis of the whole Fundamental Law and its provisions, in accordance with their purpose, the preamble of the Constitution, and the achievements of the historical constitution, on a case-by-case basis.

However, this practice did not continue after the basic elements of constitutional identity had been constitutionalized, i.e. built into the text of the Fundamental Law through constitutional amendments. This mission was accomplished by the Seventh Amendment to the Fundamental Law in May 2018. This modification inserted a new sentence in the Preamble saying that "the protection of our identity rooted in our historical constitution is a fundamental obligation of the State". Almost the same requirement was repeated in a normative text stating that "[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State".[17] In parallel, the EU-clause was complemented by a constitutional stipulation providing that the joint exercise of competences with EU institutions must "comply with the fundamental rights and freedoms provided for in the Fundamental Law", and it may "not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."

In sum, the deep transformation of the constitutional landscape reflects partly the ideological commitments of the government coalition, and partly its current political interests.[18]

15 Decision 22/2016. (XII. 5.) of the Constitutional Court.

16 This clause determines the constitutional conditions of Hungary's membership in the European Union. See Art. E of the Fundamental Law.

17 Art. R Section (4) of the Fundamental Law.

18 Fruszina Gardos-Orosz, "Why Does a Constitutional Change Emerge and Who Has a Say in It? Constitution Making, Constitutional Amendment and their Constitutional Review in

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2.2 *Constitutional Changes and Populist Aspirations*

Although "populism" is a contested concept,[19] there is a broad consensus that one of the distinguishing features of modern populism is its "constitutional project", that is, the ambitions of populists to pursue constitutional changes to achieve their goals when they come to power.[20] However, it is not easy to identify the most important populist ideas or ambitions regarding constitutionalism and constitution-making. Some of them are too abstract to be tested by real and formal constitutional changes, such as the "specific readings of the theories of constituent power, popular sovereignty and constitutional identity",[21] "a procedural vision of democracy",[22] "institutionalized populism",[23] or, similarly, "constitutional practices that emphasize their populist character".[24] Others, however, refer to specific features of constitutional policy whose validity or relevance can be checked in relation to Hungary. Some of these features can indeed be found in the recent development of the Hungarian constitution, but others are completely absent.

First, according to an often cited view, populism is a specific political phenomenon, which can be compared to a chameleon that adapts to the color of its environment.[25] Accordingly, it only provides a framework that can be filled with substantive ideologies such as socialism or conservatism.[26] This means that although it can be considered an ideology, it is not a system of ideas that provides a comprehensive explanation for social coexistence or that defines the ideal of the best political system.

Hungary between 2010 and 2018", in Martin Belov and Antoni Abat i Ninet (eds.), *Revolution, Transition, Memory and Oblivion* (Cheltenham, Edward Elgar, UK, 2020), 184–209.

19 Cas Mudde and Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, Oxford, UK, 2017); Zoltán Szente, "Populism and Populist Constitutionalism", in Fruzsina Gárdos-Orosz and Zoltán Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge, London, UK, 2021).

20 Paul Blokker, "Populism as a Constitutional Project," 17(2) *International Journal of Constitutional Law* (2019), 536–553.

21 Luigi Corrias, "Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity," 12(1) *European Constitutional Law Review* (2016), 6–26, at 9.

22 Fournier, *op.cit.* note 3, 381.

23 Anselmi, *op.cit.* note 3, 90.

24 Oran Doyle, "Populist Constitutionalism and Constituent Power," 20(2–3) *German Law Journal* (2019), 161–180, at 164.

25 Paul Taggart, *Populism* (Open University Press, Buckingham, UK, 2000), 4.

26 Axel Mueller, "The Meaning of 'Populism'," 45(9–10) *Philosophy and Social Criticism* (2019), 1025–1057, at 1029; Bojan Bugaric, "The Two Faces of Populism: Between Authoritarian and Democratic Populism," 20(2–3) *German Law Journal* (2019), 390–400, at 392; Cas Mudde, "The Populist Zeitgeist," 39(4) *Government and Opposition* (2004), 541–563, at 544.

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Nonetheless, without disputing the view that populism cannot be considered a political ideology equivalent to liberalism, conservatism or other classical theories, as regards the constitutional representation of political ideologies, the Hungarian Fundamental Law undoubtedly has a firm ideological character inasmuch as it contains many explicit archaic and conservative values and references. The construction of the Hungarian constitutional identity, based on the Christian culture of the Hungarian state and the ancient historical constitution, the constitutionalization of the traditional conception of the family and marriage, and the declared anti-communist nature of the constitutional text all provide sufficient evidence for this conclusion.

Some scholars attribute a special approach to constituent power to populist constitutionalism. According to this view, the people is the constituent power, which "is ultimately not bound by constitutional constraints because it is the source from which the constitution receives its legitimacy".[27] Although the Preamble of the Fundamental Law, by way of certain solemn declarations, some filled with pathos (beginning with the words that "we the members of the Hungarian nation", and stating that the Constitution is promulgated by "an alliance among Hungarians of the past, present and future"), seems to represent this approach, the constitutional text clarifies that the National Assembly has an exclusive constituent power, and this is clearly also stated in the postambulum of the text,[28] as well.

Another characteristic attributed to populist constitutionalism is the instrumentalization of law. According to this view, the major function of law is to realize political will and to preserve power.[29] Besides this, in authoritarian populist systems, the formal legitimization of political decisions and the maintenance of the appearance of democracy and the rule of law are also important functions of the legal system.[30] Since 2010, this feature has prevailed to the greatest extent in Hungary. Despite a frequently quoted 2012 statement of the Prime Minister Viktor Orbán that the Fundamental Law will be "as firm as granite", the Fundamental Law of 2011 is probably the most flexible constitution in the world. So far, it has been amended nine times in its ten years of existence. The amendments were, in many cases, actually packages of modifications,

27 Corrias, *op.cit.* note 21, 9.

28 "We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constituent power, hereby adopt this to be the first unified Fundamental Law of Hungary."

29 Blokker, *op.cit.* note 20, 545; Landau, *op.cit.* note 1, 532; Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press, Philadelphia, US, 2016) 91.

30 Gábor Attila Tóth, "Constitutional Markers of Authoritarianism," 11(2) *Hague Journal on the Rule of Law* (2019), 37–61.

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changing various parts of the Constitution, among which there were no logical connections. These changes did not follow a coherent constitutional policy, but largely served current political needs. In fact, all the constitutional amendments were direct reactions to current political developments, which means that the constitution-making power has always been used as an effective tool to achieve political goals and as an ultimate political weapon of the government to destroy any resistance to its political stance.

For example, in 2013, the strongly criticized[31] Fourth Amendment incorporated into the constitutional text a number of legislative provisions which had been enacted by Parliament since 2010, but had been declared unconstitutional by the Constitutional Court. The function of this amendment was to correct the constitutional defects of the above-mentioned Transitional Provisions and the parliamentary legislation, and to eliminate the possibility of their future constitutional review. In this way, the government majority, among other things, incorporated into the constitutional text the political statement originally contained in the Transitional Provisions which stigmatized the Hungarian Socialist Party, the largest opposition party of the day and its legal predecessors as "criminal organizations" serving the communist dictatorship before the system change, set in stone the discriminative definition of marriage, removed constitutional obstacles to the political classification of religious communities, and reversed the Constitutional Court's decision which had repealed the legislative provisions restricting political campaigns. Then, in order to avoid any later constitutional review of the amendments of the Fundamental Law, the amendment made it clear that the Constitutional Court may only review them only from a procedural point of view. In 2016, the Seventh Amendment introduced the concept of constitutional identity and a new rule explicitly prohibiting the settlement of a 'foreign population' in Hungary to provide a political weapon for the Government to oppose the EU's refugee and immigration policy.

3 Moderate Formal, Substantial Informal Changes: State Capture in the System of the Separation of Powers

The Fundamental Law of 2011 has not brought about significant changes in the institutional system of public power. The major constitutional rules

31 See e.g. Imre Vörös, "The Constitutional Landscape after the Fourth and Fifth Amendments of Hungarian Fundamental Law," 55(1) *Acta Juridica Hungarica* (2014), 1–20; Imre Vörös, "A

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governing the executive power, including the system of public administration have remained unchanged. Despite the ardent efforts to theorize the revival of the historical constitution and to discredit the former Constitution, the new constitutional regulation has not restored the institutional setting of the pre-war era, but has by and large preserved the system of separation of powers as it developed after the 1989/90 regime change. Nevertheless, both the new constitution and the subsequent laws governing the legal status of these institutions have resulted in more and more minor changes which, in the end, have greatly influenced and transformed their functioning.

3.1 *Towards Pseudo-parliamentarism?*

Some changes affecting the National Assembly had been desired for a long time, such as the establishment of a smaller Parliament or the introduction of parliamentary disciplinary rules. Both were accomplished from the beginning of the parliamentary term in 2014, when the number of members of Parliament was reduced from 386 to 199, and a well-elaborated system of parliamentary discipline was adopted.

More significant changes have taken place in the committee system of the National Assembly. One of them was the establishment of the Legislative Committee, which became a key player in the legislative process. In fact, this committee is the watchdog of the parliamentary majority, a kind of "small parliament" that practically performs the tasks of a plenary session behind closed doors and makes the involvement of the plenary in the legislative process almost entirely formal.

Since 2010, the changes in the legal status of MPs – such as the new disciplinary rules – have mainly been aimed at limiting opposition rights. In 2014, an amendment to the Act on the National Assembly introduced a rule prohibiting deputies from "holding a demonstration by material, image or sound media" in plenary or committee sittings of the Parliament. This regulation, as well as the parliamentary usage developed within its framework, is clearly in conflict with the case law of the European Court of Human Rights.[32] The restrictions of access to public interest data (by imposing fees for data provision and extending its deadline) as well as the restriction of the right of MPs to enter public institutions have also resulted in the limitation of opposition rights. From

'Constitutional' Coup in Hungary between 2010–2014", in Bálint Magyar and Júlia Vásárhelyi (eds.), *Twenty-Five Sides of a Post-Communist Mafia State* (Central European University Press, Budapest, Hungary, 2017), 41–68, at 48–51.

32 ECtHR, *Karácsony and Others v. Hungary,* ECtHR Judgment (17 May 2016) Appl. No. 42461/13 and 44357/13; ECtHR, *Szél and Others v. Hungary,* ECtHR Judgment (17 May 2016) Appl. No. 44357/13; ECtHR, *Szanyi v. Hungary,* ECtHR Judgment (8 November 2016) Appl. No. 35493/13.

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2020, MPs can request information only from the heads of public bodies in a "pre-agreed manner", but these requests have recently often been rejected. In 2019, the National Assembly also tightened the regulations relating to parliamentary factions. Although the right of deputies to join parliamentary groups has been restricted since the democratic transition, this regulation became even more restrictive by the regulation prohibiting an MP who has left his or her political group from joining another parliamentary faction during his or her term of office.

Important changes have also taken place in parliamentary procedures. Although the plenary session of the deputies is the decision-making body of the Parliament, it plays a merely formal role; in the legislative process, due to special procedural rules some of which are unusual in constitutional democracies, Parliament does not have the opportunity to have a substantial influence on the content of laws, but in fact, automatically adopts bills submitted by the government or pro-government deputies, while opposition-initiated proposals are ignored. Among the parliaments of European countries, the Hungarian legislature is the only one where the main decision-making body of the legislature, the plenary sitting of MPs, does not have the opportunity for a second reading of legislative proposals.[33] In other words, Parliament does not have the power to discuss in detail the bills submitted to it, which means that it cannot debate individual motions. According to the procedural rules, the second reading of bills is carried out only by the standing committee appointed for that purpose. The Parliament can only discuss the compiled, unified proposal of amendments supported by the Legislative Committee. In this respect, the standing committees are no longer advisory bodies of the plenary, but substitute it.

The so-called block vote, which is the voting method for bills introduced in 2014, logically fits with the exclusion of the second plenary reading. Accordingly, as a general rule, the National Assembly may not vote on individual amendments submitted to bills, but may only adopt or reject a single package containing all the amendments supported by the Legislative Committee. The same is true of the legislative text, because Parliament can only vote *en bloc* on the whole text of the consolidated bill (i.e. completed by the supported amendments). If MPs can only vote on the whole proposal, they will not be

33 In other parliamentary systems, it is – exceptionally – possible not to hold a plenary debate before the committee stage of the legislative process. But usually, the bill shuttles between the plenary and the appointed committee. Lieven De Winter, "Government Declarations and Law Production," in Herbert Döring and Mark Hallerberg (eds.), *Patterns of Parliamentary Behaviour. Passage of Legislation Across Western Europe* (Ashgate, Farnham, UK, 2004), 35–56, at 45.

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able to enforce their real preferences, but they are forced to cast a so-called strategic vote, avoiding the worst decision (e.g., the rejection of Government bills for government party MPs), rather than passing the best text of the law.[34]

Since 2010, the legislative process has been accelerated in many other ways as well. For instance, it has been a well-known technique that deputies of the government parties have submitted bills to Parliament that otherwise were prepared by the ministries or other central government agencies, in order to circumvent the procedural requirements of the law-making process of government bills. As a consequence of these procedural changes, the quality of parliamentary legislation has significantly decreased since 2010. The illustrative examples of this low-level law-making are the frequent adoption of "personalized laws" (statutes tailored to individuals), the growing number of so-called omnibus (in Hungarian terminology: "salad") laws (a codification technique by which several laws on very different topics are modified by a single Act of Parliament), or the fact that since 2010, far more laws have been enacted in much less time.

Due to these procedural changes, in legal terms, the Hungarian National Assembly is surely one of the weakest legislative powers in Europe. So it is often regarded in constitutional scholarship as a "rubber-stamp" parliament.[35]

3.2 *Popular Sovereignty in Constitutional Theory and Practice*

For most scholars, populism claims to represent the "real" interests of the people,[36] as opposed to the political elite that holds (or usurps) power.[37] In this view, popular sovereignty has a paramount importance and, consequently, the various forms of direct citizens' participation, especially general elections and referendums, are given special significance.

The election rules have been rewritten a number of times since 2010. The changes were usually favorable for the government parties, which have always unscrupulously exploited their two-thirds parliamentary majority which is necessary for amending these rules. Thus, the new election rules introduced a one-round method instead of the earlier two-round voting system, which

34 Bjørn Erik Rasch, "Parliamentary Floor Voting Procedures and Agenda Setting in Europe," 25(1) *Legislative Studies Quarterly* (2000), 3–23, at 6.

35 See e.g. Kim Lane Scheppele, "Autocratic Legalism," 85(2) *The University of Chicago Law Review* (2018), 545–584, at 552; Zoltán Szente, "How Populism Destroys Political Representation (Anti-)Parliamentary Reforms in Hungary after 2010," 39(2) *Diritto Pubblico Comparato ed Europeo* (2019), 1609–1618, at 1618.

36 Julian Scholtes, "The Complacency of Legality: Constitutionalist Vulnerabilities to Populist Constituent Power," 20(2–3) *German Law Journal* (2019), 351–361, at 352.

37 Margaret Canovan, "Trust the People! Populism and the Two Faces of Democracy," 47(1) *Political Studies* (1999), 2–16, at 3; Mudde, *op.cit.* note 26, 543.

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served the interests of the ruling government coalition that had successfully integrated the moderate right-wing parties in the preceding years, while the opposition was (and has remained) hopelessly fragmented. Then, in particular, the practice of gerrymandering (redrawing the constituency boundaries in favor of the government party candidates), the discriminatory election rules (allowing postal voting for citizens living beyond the state borders, but denying it to those who are abroad only on the day of the vote), the legal restrictions on political campaigns (allowing only free political advertisements to the commercial media), and the activity of the public media (functioning as a tool of government propaganda) has led to serious concerns and criticism.[38]

The diminishing importance of Parliament has not been accompanied by the rise of direct democracy. In fact, the procedural rules of the national referendum have been tightened, as the relevant law raised the turnout required for its validity from 25% to 50% of voters. In addition, the National Election Commission, whose membership was renewed after 2010, has followed a practice beneficial for the government parties, of refusing the vast majority of referendum initiatives. As a result, in the last decade, only one national referendum has been held, in 2016, which had been proposed by the government, although the constitutionality of that initiative was contested.[39]

3.3 *Reconfiguring Constitutional Review*

In the dawn of the democratic transition process in 1989, the Constitutional Court was established, as one of various new institutions. In its formative years, the Court played a decisive role in constitutional development, elaborating the constitutional standards of the rule of law. The Court was often labelled as being among the most activist courts, both in terms of its jurisdiction and its interpretive practice,[40] which was the most effective counterbalance of the

38 See in detail, Hungary Parliamentary Elections 6 April 2014 OSCE/ODIHR Limited Election Observation Mission Final Report, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 11 July 2014.; Hungary parliamentary elections 8 April 2018 OSCE/ODIHR Limited Election Observation Mission Final Report, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 27 June 2018.

39 See Zoltán Szente, "The Controversial Anti-Migrant Referendum in Hungary is Invalid," available at https://www.constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/.

40 Gábor Halmai, "The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court," in Wojciech Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, The Hague, London and New York, 2002), 189–211; Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (The University of Chicago Press, Chicago, 2000) 87–108.

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legislative and executive power. However, the position of the Court changed profoundly after 2010. Within just a few months of the elections in 2010, the government majority transformed the method of nominating Constitutional Court judges, practically introducing partisan elections of the members of the Court. As a result, since 2010, the Fidesz government has been able to appoint solely its own people to the Constitutional Court. In addition, the number of constitutional judges was increased from eleven to fifteen on the grounds of the expected growth in its workload in parallel with the Court's extended function of handling constitutional complaints. In fact, this measure opened the way for a "court packing", as the government majority exploited the possibility of choosing the new judges without compromising with the opposition. In this way, judges loyal to the government quickly became the majority, which was immediately reflected in the case-law of the Court.[41] This partisan control of the Court was extended by the new Fundamental Law, empowering Parliament to elect the head of the Court (before that, he or she was elected by the justices themselves).

The changes deeply affected the jurisdiction of the Court. Its core activity was essentially restructured so as to become the controller of the judiciary, moving away from its original role as a counterweight to the legislative power. By abolishing the so-called *actio popularis* (i.e., the right of everyone, even without any personal interest, to turn to the Court to review the constitutionality of a statutory act), the most effective tool to launch a judicial review procedure in constitutionally controversial cases ceased to exist, and only some public authorities were granted the right to initiate a constitutional review procedure.[42] Furthermore, the range of constitutional review itself was curtailed, and since 2011 the Court, with a few irrelevant exceptions, has not been able to review and annul public finance legislation. Nevertheless, the Constitutional Court was compensated to a degree for the loss of its fundamental power; the new Constitution, on the German pattern, introduced the politically neutral institution of individual constitutional complaint. Today, the Court largely deals with these cases.

Although the government-friendly judges were already in the majority in the body by 2013, the Fourth Amendment to the Fundamental Law in that year repealed all Constitutional Court rulings prior to the entry into force of the new Constitution.

41 Zoltán Szente, "The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014," 1(1) *Constitutional Studies* (2016), 123–149.

42 Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint," 53(4) *Acta Juridica Hungarica* (2012), 302–315.

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3.4 *Judicial Independence Under Siege*

Despite the lack of a systematic judicial reform after 2010, several changes affected the legal status of courts and judges. The successive measures aimed at achieving personal changes in the judicial corps, as well as establishing a much more centralized system of judicial administration.

From the outset, it was obviously an important goal for the government majority to carry out personal changes in court leadership positions. For this purpose, when the Supreme Court was renamed the *Kúria* in 2011, the mandate of the President of the Supreme Court was prematurely terminated. Although the European Court of Human Rights decided that the removal of the former President violated the European Convention on Human Rights,[43] he did not regain his position. Interestingly, nine years later, an act of Parliament provided that constitutional judges whose terms of office have expired must be appointed judges of the *Kúria* at their request. As a result, in the autumn of 2020, the Parliament elected a former constitutional judge who had never been an ordinary judge before, as President of the *Kúria*.

In parallel with the removal of the President of the Supreme Court, a new act of Parliament[44] in 2012 reduced the compulsory retirement age of judges from 70 to 62. As a result of this law, 274 judges, almost ten percent of all serving judges had to retire within a year. The change affected court leaders to a great extent, since most of them came from the older age group of judges. Albeit the law was invalidated by the Constitutional Court as an unconstitutional piece of legislation,[45] and the European Court of Justice declared it contrary to European Union law,[46] the removed judges and court leaders were not reinstated in their previous offices (instead, the affected judges were offered pecuniary compensation or other posts in the judiciary). In the end, the Parliament amended the law on the legal status of judges, gradually reducing the compulsory age limit of judges to 65 years, to be achieved by 2023 at the latest.

As to the administration of the courts, although the idea of judicial self-government was preserved, a substantial change took place when the functions of the earlier collegiate body were taken over by the highly centralized National Office of the Judiciary (NOJ) in 2012. As a matter of fact, all administrative powers were concentrated in the hands of the President of this office, who is elected from among the judges by the National Assembly for nine years. In practice, as the wife of a founder of the ruling party was elected president

43 ECtHR *Baka v Hungary*, ECtHR Judgment, (23 June 2016) Appl. No. 20261/12.

44 Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

45 Decision 33/2012. (VII. 17.) of the Constitutional Court.

46 ECJ, Case C-286/12, *TDC* (2012) EU:C:2012:687.

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of the NOJ, her work was accompanied throughout by political conflicts. The objections did not prove to be unfounded, as she exercised her powers in an authoritarian and arbitrary way, as evidenced by her conflict with the National Council of Judges, which was set up to oversee the activities of the NOJ.

It is also worth noting that the Fundamental Law contains certain provisions on how courts must interpret the law. Pursuant to Article 28, courts must "interpret the text of laws primarily in accordance with their purposes and with the Fundamental Law". Furthermore, in the course of legal interpretation, it must be presumed that legal norms "serve moral and economic purposes which are in accordance with common sense and the public good", while the Seventh Amendment to the Fundamental Law in 2018 introduced new obligatory interpretative tools. Since then, in the course of legal interpretation, courts have had to take into account primarily the preambles of the legal norms and their explanatory memoranda. Furthermore, the last, unexpected measure was adopted in December 2019, when a new piece of legislation introduced a "semi-precedent system", obliging the courts to treat the decisions of the *Kúria* as a directive from which it is possible to deviate only in duly justified cases.

Over the past decade, the government has been able to assert its influence by putting people loyal to it in high judicial positions. For example, under an omnibus law of 2019, members of the Constitutional Court are appointed as judges by the President of the Republic at their request.[47] This rule paved the way for the election in December 2020 of a former Constitutional Court judge loyal to the governing parties (András Varga Zs.), who has never served as a judge before, as President of the *Kúria*.

3.5 *Reforming or Packing Public Institutions?*

As to the other central institutions, despite the fact that new legislation was enacted in the early 2010s relating to the legal status of the President of Republic,[48] the National Assembly,[49] the Constitutional Court,[50] the ordinary courts,[51] the Public Prosecution,[52] the central administrative bodies,[53] the State Audit Office,[54] the National Bank,[55] local governments[56] and the Government

47 Act CXXVII of 2019.
48 Act CX of 2011.
49 Act XXXVI of 2012.
50 Act CLI of 2011.
51 Act CLXI of 2011.
52 Act CLXIII of 2011.
53 Act XLIII of 2010.
54 Act LXVI of 2011.
55 Act CXXXIX of 2013.
56 Act CLXXXIX of 2011.

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administration,[57] no significant organizational changes have taken place or, if so, they have been of a technical nature. For example, the Fundamental Law restructured the ombudsperson system, and established a single position, the 'Commissioner for Fundamental Rights' instead of the previous four specialized commissioners, while the new rules on the legal status of constitutional judges abolished the possibility of their re-election. However, the restructuring of these institutions in itself proved to be very important because it provided an opportunity for the government parties to replace prematurely the undesirable former high officials (such as in case of the President of the Supreme Court, or the Commissioner for Data Protection) with their own trusted employees, and/or to extend their term of office. Thus, the Prosecutor-General, and the Presidents of the *Kúria*, the National Office of Judiciary, the National Election Commission, and the Budgetary Council have all been elected for an unusually long period of nine years. In a similar vein, the Fidesz government has extended the political spoils system to all leading positions of the central and regional administrative bodies, including high officials of independent regulatory agencies.

As a result, the government has successfully neutralized every counterweight to the executive power, although the principle of separation of powers was explicitly incorporated in the constitutional text.

3.6 *Institutional Changes and Populist Claims*

Populism is often characterized by its distrust of traditional institutions which are seen as obstacles to the will of the people,[58] and/or are identified with a corrupt elite.[59] However, as far as the Hungarian constitutional development under populist rule is concerned, no anti-institutionalism could be experienced. Notwithstanding that some distrust of the practice of certain institutions was expressed by populist politicians, the government majority quickly and unscrupulously transformed them into effective instruments of the executive power. Anti-institutionalism can only be justified in a very specific sense, if this term means the neutralization of countervailing bodies, and a transformation of their practices which puts them under strict political control.

Concerning political decision-making bodies, if one of the main characteristics of populism is really that it

57 Act CXXV of 2018.

58 Bugaric and Kuhelj, *op.cit.* note 4, 27, 69, Scheppele, *op.cit.* note 35, 549.

59 Landau, *op.cit.* note 1, 526.

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> considers society to be ultimately separated into two homogeneous and antagonistic camps', "the pure people" versus the "corrupt elite", and [...] argues that politics should be an expression of the volonté générale (general will) of the people,[60]

the decline of Parliament fits well with the populist narrative. For most scholars, it is a basic idea of populism to represent the "real" interests of the people,[61] as opposed to the political elite that holds (or usurps) power.[62] This approach highlights the concept of popular sovereignty, and prefers direct democracy over institutionalized representation.[63] In contrast with this populist postulate, in Hungary, the populist government has imperiously repressed all forms of citizens' participation. This does not mean, however, the realization of any moral claim to the authentic representation of the people, as is frequently assigned to populists. Although such a claim can be recognized in political communication, it does not emerge in constitutional law, as the downgrading of Parliament illustrates.

The same is true for the presumed anti-elitism of the populist creed. Probably, populists are only in opposition against the ruling elite; once in power, they govern in a very elitist way. In practice, anti-elitism means no more than an unusually extensive change of the elite in the public sphere after populists have come to power.

Moreover, populist constitutionalism is characterized by the absolutization of the majority principle as long as the "right" parties have won the election.[64] This majoritarian conception regards electoral empowerment as an expression of the will of the people and, on that basis, rejects the constitutional restriction of power.[65] This idea may justify the weakening of non-elected controlling institutions, rejecting any veto power against majority decisions, and ultimately contrasting the majority principle with the rule of law.[66] The direction of Hungary's constitutional transformation was fundamentally

60 Mudde and Kaltwasser, *op.cit.* note 19, 5.

61 Scholtes, *op.cit.* note 36, 352.

62 Canovan, *op.cit.* note 37, 3; Mudde, *op.cit.* note 26, 543.

63 Bugaric, *op.cit.* note 26, 392; Bugarič, *op.cit.* note 5, 598; Valerio Fabbrizi, "Constitutional Democracy in the Age of Populisms: A Commentary to Mark Tushnet's Populist Constitutional Law," *Res Publica* (2019), 433–449; Chambers, *op.cit.* note 5, 117, Corrias, *op.cit.* note 21, 12, 19.

64 Blokker, *op.cit.* note 20, 545.

65 Landau, *op.cit.* note 1, 533; Mudde, *op.cit.* note 26, 561; Mueller, *op.cit.* note 26, 1035; Scheppele *op.cit.* note 35, 562; Nadia Urbinati, "Political Theory of Populism," 22 *Annual Review of Political Science* (2018), 111–127, at 113.

66 Fournier, *op.cit.* note 3, 366.

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determined by this kind of extreme majority principle, which considered even the two-thirds-majority procedural obstacles to be merely formal, technical rules and not provisions requiring broad consensus among political parties.

Finally, populist anti-pluralism, which means a criticism of the "functioning of representative democracy and often question[s] the legitimacy and role of traditional parties",[67] has prevailed mainly in political developments, through the restructuring of the media market or the politically biased practice of certain public bodies.[68] However, it does not prevail on the constitutional level, unless we consider unilateral changes in the electoral system, which favors the ruling party as such.

4 Constitutional Rights

4.1 *Lower Standards in Protecting Fundamental Rights*

In terms of the regulation of basic rights, the Fundamental Law does not differ significantly from the previous Constitution. Whereas, on the one hand, the list of constitutional rights was moderately extended by the prohibition of human cloning and the right to self-defense, the relevant chapter of the new Constitution ("Freedom and Responsibility") seems to be fermented by a conservative social philosophy, which connects the justification of fundamental rights with the accomplishment of civic duties.

The later human rights legislation in many respects brought about significant backsliding in the level of protection of fundamental rights. For instance, the discriminatory definition of the family and marriage, as has been said above, self-evidently restricts the right to privacy, because in this way, the State intervenes in the value choices of citizens. Thus, the Fundamental Law defines marriage "as the union of a man and a woman established by voluntary decision", while "family ties" are "based on marriage or the relationship between parents and children".[69] While the constitutionalization of the classical form of marriage *expressis verbis* excludes same-sex marriage, and thus makes a difference on account of sexual orientation, the definition of the family allows

67 Sofie Blombäck, "Populism as a Challenge to Liberal Democracy in Europe," in Antonia Bakardjieva, Engelbrekt Niklas Bremberg, Anna Michalski and Lars Oxelheim (eds.), *The European Union in a Changing World Order. Interdisciplinary European Studies* (Palgrave Macmillan, London, UK, 2020), 217–243, at 221; Urbinati, *op.cit.* note 65, 113.

68 A typical example of this is the activity of the State Audit Office, which regularly fines opposition parties for sham reasons, taking advantage of the fact that there is no appeal against its decisions.

69 Article L Section (1) of the Fundamental Law.

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discrimination on the basis of the private way of life, as the preferred family model is not only constitutionally protected, as opposed to other forms of relationships, but must be expressly favored by the State. It is to be noted that the definition of family was built into the constitutional text by the Fourth Amendment in 2013 after the Constitutional Court had invalidated a provision of the act on the protection of families[70] which defined the family as an emotional and economic relationship based on marriage between women and men, on parentage or adoption. The Ninth Amendment to the Fundamental Law, adopted in November 2020, completed the definition of family with the provision that "the mother is a woman, the father is a man" in it. Beyond this, this amendment constitutionalized the discrimination based on sexual orientation stating that it is the duty of the State to protect "the right of children to self-identity according to their gender of birth and ensures education in accordance with the values based on the constitutional identity and Christian culture of our country". In parallel, new legislation was adopted stipulating that in the future, single parents can only adopt a child with ministerial permission. The purpose of the measure is clearly to prevent gay couples from raising a child in such a way that one of them has formally adopted a child. The same political narrative lies behind the anti-pedophilia and child protection law passed in the summer of 2021,[71] which seeks to protect the children not only by establishing a sex offender registry, but also by banning the "promotion of gender transition and homosexuality" to those under 18 years of age in media and sex education in schools.

It is to be noted that the erosion of the principle of the neutrality of state had already begun with the adoption of the Fundamental Law, which does not explicitly contain this principle, and has become a stronger trend with the subsequent legislation. In fact, religious freedom and the regulation of the legal status of churches have been at the center of intense political and public debates since 2010. In 2011, new legislation deprived more than 300 former churches of their church status, and imposed new requirements for their recognition as churches. This legal re-registration was conditional on prior approval by the legislature by a two-thirds majority vote, although an exception was granted to 'historic churches' and some other religious associations – a total of 14 former churches which did not have to apply for recognition (shortly afterwards, Parliament restored church status to a further 18 former churches). It should also be noted that the new law did not provide any legal remedy for those religious associations whose applications were rejected by

70 Act CCXI of 2011.

71 Act LXXIX of 2021.

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Parliament. Despite the condemning opinion of the Venice Commission,[72] and the decision of the Constitutional Court which invalidated certain provisions of the Church Law in February 2013,[73] the contested legislative provisions were incorporated into the constitutional text by the Fourth Amendment to the Fundamental Law, so all the basic elements of the highly controversial regulation have remained in effect. The European Court of Human Rights also stated that the relevant legislation does not treat the various religious communities as equals, and some measures, such as Parliament's decision on the recognition of churches or the absence of any right to appeal against the legislature's decision violates the corresponding provisions of the ECHR.[74] In addition to this, the different legal status of religious communities also raises the problem of discrimination based on religion, because by treating these communities differently, the State ultimately considers certain religious communities to be more valuable than others.

As to political rights, the most important changes have often been shaped by reactions to current events and political developments. For example, as a consequence of a planned (and banned) demonstration in front of the house of the Prime Minister, the balance between the right to assembly and privacy was restructured. The Seventh Amendment stated that the exercise of the right to assembly may not impair private and family life and the homes of others, and the State has to "provide legal protection for the tranquility of homes".[75] The statutory rules were also renewed accordingly.[76]

The level of the freedom of the press has also badly deteriorated since 2010, although it is true that it has been restricted in an indirect way (making the public media the propaganda machinery of the government parties) and by market tools, rather than legal instruments. The main trend has been the acquisition of a significant part of the media market by businessmen who are allegedly closely associated with government parties. In this way, several opposition media outlets have been silenced or taken over by government-friendly businessmen.

72 Venice Commission, Opinion on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary, CDL-AD(2012)004-e, Opinion 664/2012.

73 Decision 6/2013. (III. 1.) of the Constitutional Court.

74 ECtHR, *Magyar Keresztény Mennonita Egyház and Others* v *Hungary*, ECtHR Judgment (8 Apr 2014) Appl. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12 (2014).

75 Article VI. Section (1)-(2) of the Fundamental Law.

76 Act LV of 2018 on the Right of Assembly.

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Since 2010 the right of association has also been restricted in several respects. For example, several laws have been enacted that made the operation of non-governmental organizations more difficult. In 2017, Parliament adopted legislative measures that required all associations and foundations that receive funding from foreign sources to notify the court in order to be registered as an "organization supported from abroad".[77]

Among cultural rights, academic freedom has been the most exposed to challenges since 2010. After a 2014 law placed university leaderships under the economic control of the government through the chancellors appointed by the Prime Minister, in 2017 new legislation for the operation of the foreign-funded universities imposed unachievable conditions on the Central European University, for openly political reasons,[78] persecuting the American branch of the university from Hungary. Two years later, the government removed all research institutes from the independent Hungarian Academy of Sciences, placing them under central government management. From 2020, most universities have been conversed from public institutions to "public interest asset management foundations", newly created legal entities, in which government-appointed boards of trustees have full autonomy to run universities.

4.2 Public Interests versus Individual Rights?

In populist belief, the public interest and the general will of the people should take precedence over individual and particular interests. In the academic literature, the populist form of constitutionalism is frequently characterized as an "illiberal" constitutional approach which not only rejects power-sharing, but also reduces the protection of minorities and restricts individual rights.[79] This usually affects political rights, especially the freedom of expression, academic freedom, and the right of assembly and association. Presumably, the more authoritarian a populist system becomes, the more likely personal freedom will be restricted. Negative campaigning, and direct and indirect discrimination against Roma, immigrants, LGBTQ communities or certain religious "sects" suggesting that they do not belong to the "people" or they endanger Hungarian culture and identity, are also frequent phenomena.

All of these can be observed in Hungary, even if these features are more common in political practice than in formalized constitutional law. As we have seen above, however, some kind of rights limitations has also emerged in the

77 Act LXXVI of 2017.

78 The founder and sponsor of this American-Hungarian university is George Soros, openly identified as a public enemy by the government and pro-government media.

79 Szente, *op.cit.* note 19.

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legal system. These restrictions were selective in the sense that they did not affect all fundamental rights, but generally met the current political needs of the government. Perhaps only the restriction of privacy rights was ideologically based, reflecting the Christian-conservative values of the new political elite.

5 Conclusions

If we examine the main tendencies of the Hungarian constitutional development of the last ten years on the basis of the characteristics associated with populist constitutionalism, we can find that several of them can be well demonstrated in the constitutional changes that have occurred.

Thus, the Hungarian example confirms the assumption that if populists come to power and have the opportunity to do so, they will also use constitutional means to maintain their power. It is also well illustrated that they also use the concept of constitutional identity, which is defined by their own moral or political values. The instrumentalization of law, including constitutional law, has been particularly prevalent in this country.

The ambitious transformation of the institutional system of the State has also followed current political needs, rather than any ideological ends. In the course of institutional reforms, expediency has clearly overridden all other considerations. The same is true for the changing approach to fundamental rights. The new restrictions of basic rights and liberties did not aim at realizing a specific political philosophy, and they were not systematic and all-encompassing. Only those rights that hindered the power or economic goals and interests of the new political elite were limited.

All in all, since 2010 the constitutional changes under the populist government in Hungary have not been dictated or inspired by a coherent and specific constitutional theory, which appears to confirm the view that even if the recent threat to constitutional democracy is a global phenomenon, no new model of constitutional systems has emerged.[80] Nor has this emerged in Hungary, either.

In addition, if we summarize the main features of the constitutional changes, it is difficult to discover in them a common motif or inherent logic that could

80 Mark A. Graber, Sanford Levinson and Mark Tushnet, "Introduction," in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, New York, US, 2018), 1–9, at 3.

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be identified as "populist". The incorporation of ideological commitments into the constitution, the occupation of the independent, controlling institutions submitting them to strict political control, and the restriction of fundamental rights all characterize authoritarian regimes, their political character being either populist or otherwise. Without questioning the populist political nature of governance, the Hungarian constitutional changes that have occurred in this country since 2010 signify an authoritarian transition challenging the common European constitutional values; first and foremost, the rule of law, fundamental rights and the whole system of liberal democracy.

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