

# The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash

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## Abstract:

This chapter argues that exceptional measures of post-communist constitutional transitions and transitional justice are not applicable to the potential transitions of illiberal populist regimes currently in power in Hungary and Poland. This specific transition can be described as *the liberation of democracy* from illiberal policies. A hypothetical electoral victory of the anti-populist opposition would be different from the regime change associated with the process of post-authoritarian democratic transitions. Rather than legitimized by broad societal and political consensus, the transition would have to be enforced in a deeply divided society with populist parties and authoritarian politicians now in opposition, yet still enjoying strong popular support. Transformative measures, therefore, would have to be limited and its finality should be the re-establishment of democratic constitutionalism. The concept of social justice and solidarity, successfully exploited by populists in many different countries, has to be an intrinsic part of transformative constitutionalism if it is to secure popular legitimacy in the post-populist political and societal condition.

**Keywords:** illiberal democracy, authoritarianism, democratization, democratic constitutionalism, populism, transformative constitutionalism

## I. Introduction

Studies of constitutional transitions used to be a simple endeavour analysing different countries moving from authoritarian or totalitarian rule to the system of constitutional democracy based on the rule of law, human

rights and liberties. The opposites of authoritarianism and democracy had clear classifications and typologies describing the general process of democratisation at the end of which the system of consolidated constitutional democracy was to replace the original authoritarian rule.

The concept of democratic transition signified a systemic change achieved through political reforms dismantling authoritarianism and replacing it with democracy. Constitution-making and democratic state-building were both intrinsic parts of this change. The concept of transformative constitutionalism was coined to highlight this function of constitution during the process of social and political transformations of post-authoritarian societies in former Soviet bloc States, South Africa, Latin America and other countries in the 1990s.<sup>1</sup>

Nevertheless, modern history is full of stalled, reversed and failed democratic transitions.<sup>2</sup> The recent history of Europe is no exception as European constitutional politics and democratic institutions experience what is commonly and often superficially described as the authoritarian backlash and democratic backsliding in EU Member States and elsewhere.<sup>3</sup>

The growing popularity and power of populist and authoritarian leaders leave defenders of the Constitutional Democratic State protecting civil rights and liberties with difficult choices. Some want to instrumentalize constitutionalism to either prevent authoritarian populists from coming to power or confront those already in power. Constitutionalism thus becomes a battlefield between populists abusing constitutional institutions to entrench their authoritarian practices and democrats hoping that constitutional systems and bodies can effectively stop populists from their power abuses.

In this chapter, I argue that exceptional measures of post-communist constitutional transitions and transitional justice are not applicable to the potential transitions of illiberal populist regimes currently in power in

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1 See, for instance, Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights* 14(1) (1998), 146–88; for more general reflections on constitutionalism and social transformations, see particularly Richard Bellamy and Dario Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford: Blackwell 1996).

2 John S. Dryzek and Lesley T. Holmes, *Post-Communist Democratization: Political Discourses Across Thirteen Countries* (Cambridge: Cambridge University Press 2002).

3 Cas Mudde and Cristóbal R. Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge: Cambridge University Press 2013); Paolo Cossarini and Fernando Vallespín (eds), *Populism and Passions: Democratic Legitimacy after Austerity* (London: Routledge 2019).

Hungary and Poland. This specific transition can be described as *the liberation of democracy* from illiberal policies. I argue that a hypothetical electoral victory of the anti-populist opposition would be different from the regime change associated with the process of post-authoritarian democratic transitions. Rather than legitimized by broad societal and political consensus, the transition would have to be enforced in a deeply divided society with populist parties and authoritarian politicians now in opposition, yet still enjoying strong popular support. Transformative measures, therefore, would have to be limited and its finality should be the re-establishment of democratic constitutionalism.

In the opening part of the chapter, I discuss specific historical, political and legal aspects of the rise of illiberal populism and its impact on the constitutional rule of law in different European countries, particularly Hungary and Poland. After highlighting potential problems with the external assistance of EU institutions and the ambivalence of confronting illiberal populist politics by the rule of law and constitutional democratic values, I proceed to discuss more general and theoretical distinctions between constitutionalism and populism. I argue that post-illiberal transformative constitutionalism has to avoid the conceptual trap of simplistically identifying populism with the autocratic rule and opposing it to the constitutionalism as a beacon of democratic rule.

The populist rule depends on what Kelsen described as the absolute concept of the constitution which considers the authenticity of constituent power its ultimate legitimation principle. Identity politics employed by populists is merely a consequence of this concept of constitution which eventually turns all political conflicts into culture wars. I argue that transformative constitutionalism's power depends on its capacity to stop these wars and replace them with deliberative politics and civil liberties manifested beyond the constitutional system in the public and private spheres of a democratic polity.

The concept of social justice and solidarity, successfully exploited by populists in many different countries, has to be an intrinsic part of transformative constitutionalism if it is to secure popular legitimacy in the post-populist political and societal condition. In the final part, I argue that the problem of illiberal and anti-constitutional populism is a specific form of the systemic tension between popular *doxa* and expert *episteme* which translates into the tension between democratically generated public opinion and authoritative judgements of legal and constitutional reasoning. Outlining different options in the post-populist rule of law and societal

transitions, I criticize the distinctions between juristocracy and democracy or autocratic legalism and democratic mobilization from the perspective of sociologically informed theories of the rule of law and constitutionalism. This theoretical shift leads to the general conclusion that transformative constitutionalism has the potential to reconstitute individual polities as the rule of law based communities of democratic values and social justice.

## II. Transformative Constitutionalism: Preliminary Questions

In some EU countries, most notably Hungary and Poland, democratically elected and popular political leaders weakened and even dismantled some checks and balances of constitutional democracy. In Hungary, this process was steered through controversial constitution-making in the democratically elected Parliament in 2010. In the wake of these political and constitutional developments, a general question arises whether these self-described 'illiberal democracies'<sup>4</sup> are outcomes of the same transitional process which started after the collapse of communism and now merely goes in the opposite direction of another authoritarian rule.

Are those countries just the most recent examples of stalled or reversed democratic transitions which, following the interim period of backlash or backsliding, still can be reasonably assumed to reach the safe haven of consolidated democratic statehood in the future? Is this merely a specific situation of another 'catch-up revolution' (*nachholende Revolution*) to stop backsliding and resolve the temporary weakening of legitimation in the countries which have relatively new constitutional democratic institutions and the lack of both expertise and experience in them?

If Hungary and Poland are still considered unconsolidated democracies of 'new Europe', how come they could join the European Union in the first place? If not, is the current 'backlash' in Hungary and Poland only a specific example of the general legitimation crisis of constitutional democracy? Furthermore, can these countries be recursively democratized by internal political forces as much as with the external assistance of EU institutions?

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4 The public speech invoking 'illiberal democracy' was made by Viktor Orbán in 2014. For details, see Aron Buzogány, 'Illiberal democracy in Hungary: authoritarian diffusion or domestic causation?', *Democratization* 24(7) (2017), 1307–25, 1307; for a general theoretical and comparative view, see, for instance, Boris Vormann and Michael D. Weinman (eds), *The Emergence of Illiberalism: Understanding a Global Phenomenon* (London: Routledge 2020).

Can this democratization of illiberal democracies use the same forms of transitional justice which are commonly applied in democratic transitions of post-authoritarian and post-totalitarian societies? How far can the EU's legal and political assistance go in rebuilding and stabilizing these countries without paradoxically further undermining the democratic legitimacy of their constitutional systems?

These long lists of general and specific questions raise doubts about the simple populism/constitutionalism distinction and the authoritarianism/democracy scale along which countries allegedly can move forwards and backwards. Contrasting populist politics to democratic constitutionalism may be popular among legal and political theorists,<sup>5</sup> yet populism hardly can be defined as the realm of the political will without constitutional constraints<sup>6</sup> because it has its specific constitutional forms.<sup>7</sup>

Typologies and contrasts between populism/authoritarianism and constitutionalism/democracy fail at theoretical, institutional and procedural levels. Constitutionalism has potentially authoritarian tendencies as powerful and risky as plebiscitarian democracy driven by populist politics.<sup>8</sup> Similarly, the alleged democratic backsliding often paradoxically has popular support achieved through democratic elections. For instance, the constitutional majority support of successive Orbán Governments hardly can be explained as mere consequences of the clientelist State and its money, unfair election rules, vitriolic political propaganda and media control.

The structural analysis of the constitutional and democratic transitions shows several important general features of these political and societal processes. The first is the coordination of external and internal agencies and forces behind the transition. The second is the systemic tension between legitimation by constitutional procedures and political outcomes which explains why even the illiberal state run by a government in breach of the most fundamental rule of law principles and procedures can relatively easily uphold its popular legitimacy by delivering policy promises and responding to the public expectations. Finally, the success and extent of

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5 Jan-Werner Mueller, 'Populism and Constitutionalism' in: Cristóbal R. Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford: Oxford University Press 2017).

6 Jan-Werner Mueller, *What is Populism?* (Philadelphia: University of Pennsylvania Press 2016).

7 Paul Blokker, 'Populism as a constitutional project', *International Journal of Constitutional Law* 17(2) (2019), 536–53.

8 Mark Tushnet, 'Authoritarian Constitutionalism', *Cornell Law Review* 100(2) (2015), 391–461.

transitions depend on political and social consensus and the popularity of political and societal changes and their agencies.

Any study of transformative constitutionalism subsequently has to adopt this structural analysis and examine both external and internal agencies involved in the process of transition as well as popular consensus, the concept and telos of political constitution, and the difference between legal and political legitimization procedures and outcomes.

The first lesson of transformative constitutionalism is the untenability of defining constitutionalism and populism as merely the conceptual opposites. Populism hardly can be identified as the ultimate reason behind the authoritarian backlash because there are numerous authoritarian risks and policies associated with unelected anti-majoritarian institutions including courts, banks, and other bodies of public and political economy in any constitutional democracy.

Similarly, the populist rule is contrasted to the rule of law as if plebiscitarian democracy were just another name for arbitrary rule. However, the rule of law always can be usurped by politicians and the laws can be written and interpreted in ways to enhance corruption and appropriation of public goods by private parties associated with the ruling political elite. Populist mobilization typically uses the anti-corruption rhetoric and the establishment accusations of nepotism as much as incompetence.<sup>9</sup>

The popularity of populist policies is often closely linked to the corruption, social injustice and growing inequality, clientelism and power abuses of political elites and parties operating within the system of constitutional democracy. Cynicism, illegalities and selective uses of constitutional procedures by former governments of Hungary and Poland paved the way to the current illiberal and autocratic rule of Orbán and Kaczyński Governments.

The paradox of illiberal and authoritarian populism, therefore, consists in its capacity to mobilize against corruption and clientelism while accumulating power exactly through the same economic activities and constituting the clientelist state in which public assets are both factually and legally controlled by servants loyal to the ruling party. Classic warnings of economic power threats to the Constitutional Democratic State materialize in this perpetuation of political power through economic control which per-

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9 Anti-corruption policies and their risks are well discussed in the global context by Staffan Andersson and Paul J. Heywood, 'Anti-Corruption as a Risk to Democracy: On the Unintended Consequences of International Anti-Corruption Campaigns' in: Barry Hindess, Peter Larmour and Luís De Sousa (eds), *Governments, NGOs and Anti-Corruption: The New Integrity Warriors* (London: Routledge 2009), 33–50.

meates civil service institutions as much as electoral processes. Rather than populism per se, the real opposite of constitutionalism is the arbitrary rule embedded in legal, economic, and social practices and power constellations and affecting both liberal and illiberal democracies and their constitutions.

Post-illiberal democratization, therefore, will have to respond to the problem of economic inequalities and social justice typically neglected in the post-1989 democratic transitions. The liberation of illiberal democracies has its economic, educational, cultural and other societal dimensions which will require moving beyond institutional and textual levels of constitutional politics to the contextual and everyday practices of democratic constitutionalism and social solidarity.

### III. The Liberation of Democracy from Illiberal Politics: Theory and Practice

The first problem to be addressed by transformative constitutionalism is the paradox of democratically elected leaders who undermine democracy. Stopping this democratically legitimized backsliding of democracy by the authority of the constitution widens the legitimacy gap between majoritarian and anti-majoritarian institutions of the Constitutional Democratic State and increases the tensions between constituent and constituted powers.<sup>10</sup>

Furthermore, transformative constitutionalism has to address the problem of autocratic legalism<sup>11</sup> established when anti-majoritarian institutions such as constitutional and other top courts, prosecution offices, national banks and other independent bodies already are captured by governing populists such as Orbán, Modi, Erdogan and others.

The problems of both popular legitimacy and autocratic legalism and different scenarios of transformative constitutionalism represent a big challenge to democratic constitutionalism as an open, neutral and impartial space for the resolution of partisan conflicts emerging in democratic politics. Transformative constitutionalism may be protecting the classic function of the constitution as power limitation, yet it also operates as power confronting anti-constitutional authoritarian politics by constitutional means.

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10 Joel Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge 2012).

11 For the concept, see Kim L. Scheppelle, 'Autocratic Legalism', *University of Chicago Law Review* 85 (2018), 545–83.

In the early 2000s, Stephen Holmes commented that 'Democracy does not exist, but degrees of democratization do. A society becomes more democratic if more citizens become routinely able to use legal instruments to protect their vital interests.'<sup>12</sup> The statement clearly associates democratic government with judicial independence and the rule of law.

According to this view, the success of constitutional transitions, rather than formal and institutional reforms, depends on the change of civic culture and the adoption of democratic values and practices. Nevertheless, promulgating the principles of judicial independence is not enough because it can paradoxically lead to the judiciary's corruption and pursuit of corporate advantages rather than the reassertion and protection of liberal and democratic values. Examples such as the Slovak judicial reforms establishing judicial autonomy and self-governance and effectively perpetuating undesired judicial practices and promoting the existing corrupt and clientelist networks through the officially independent bodies should serve as clear warning signs in this respect.<sup>13</sup> The democratic cultivation of the judiciary expert knowledge — *doxa*, therefore remains as important as during post-communist democratic and constitutional transitions.<sup>14</sup>

Courts are the most important constitutional institutions regarding civic empowerment through rights. Because of their anti-majoritarian design, they can be used by the populist opposition in the hypothetical post-illiberal political condition and judges appointed by populist governments may prefer to exercise their political loyalty instead of adhering to the rule of law. These risks, however, cannot be mitigated by personal vetting and as was the case in post-communist transformations of the 1990s. Instead, strict requirements of legality should be applied and individual disciplinary procedures initiated in the cases of power abuse and arbitrary decision-making by the judiciary during the populist period of autocratic legalism.

The function of transformative constitutionalism is *the liberation of democracy* from illiberal politics. This situation does not amount to the regime change associated with the process of post-authoritarian democratic transitions as it is likely to fall short of what Linz and Stepan describe

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12 Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion', in: Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis* (Budapest: CEU Press 2004), 3–14 (14).

13 Peter Čuroš, 'Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence', *German Law Journal* 22 (2021), 1247–81.

14 Jiří Přibán, 'Varieties of Transition from Authoritarianism to Democracy', *Annual Review of Law and Social Science* 8 (2012), 105–12.



as general social and political consensus.<sup>15</sup> Power limitation proceeds as power enhancement in transformative constitutionalism. This may be easily done at times of revolutionary change benefiting from strong social and political consensus. However, the scale and force of any transformative constitutional measures will be profoundly limited without such consensus.

Policies described as transformative constitutionalism, therefore, must be limited due to the persisting political, economic, social and cultural divisions associated with identity politics.<sup>16</sup> Newly elected government will not have the legitimacy to generate sweeping institutional and personal changes across the executive, legislative and judicial power. Nevertheless, laws and judgements in breach of the constitution should be repealed by post-illiberal governments through established parliamentary procedures.

Furthermore, the abusive application of legal and constitutional rules by illiberal populist governments and their officials at all levels of governance needs to be tackled by transformative constitutionalism. It, therefore, is an important task for new post-illiberal governments to address these abuses disguised under the mask of legality and described as discriminatory legalism<sup>17</sup> while avoiding the temptation of using formal legality and constitutional rules as a partisan tool of a political fight which defined the populist illiberal rule.

Remedies of these abuses stretch beyond the realm of constitutional and legislative policies and incorporate both positive and negative legal and political sanctions. Nevertheless, these remedies should be possible to apply within the limits of current constitutional and ordinary laws and without the need to resort to exceptional measures of transitional justice. Post-illiberal transformative constitutionalism should not be mistaken for post-communist transitional justice which, by definition, is 'partial and limited' and 'implies compromise'.<sup>18</sup> Transformative constitutionalism, rather, has to proceed on the basis of impartiality and unlimited application and

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15 Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press 1996).

16 John S. Dryzek, 'Deliberative Democracy in Divided Societies', *Political Theory* 33 (2005), 218–242.

17 The term 'discriminatory legalism' is used to describe selective and corrupt uses of legality by populists to strengthen their clientelist networks and attack their enemies. See, for instance, Kurt Weyland, 'The Threat from the Populist left', *Journal of Democracy* 24 (2013), 18–32.

18 Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2000), 230.

avoid negotiated political compromises to return to the fully-fledged constitutional democratic system.

Transitional justice is both retrospective justice responding to the historical injustices of autocratic regimes, and prospective justice constituting rights, freedoms and democracy in post-authoritarian society. It combines elements of general justice based on the rule of law with political realism and pragmatic compromises required by the process of political transition.

The post-illiberal political condition is different from the post-authoritarian one because retrospective and prospective goals are the same, namely, to apply the principles and rules of democratic constitutionalism and formally sanction their breaches during the period of illiberal politics. As such, it can apply all measures of retributive, rehabilitative, and restitutive justice, yet it hardly can resort to any special judicial tribunals or legal and non-legal institutions dealing with historical injustices such as truth and reconciliation commissions or political crime tribunals.

In short, no more transitional justice in post-illiberal constitutional transitions but the strict and principled application of the formal rule of law breaches and power abuses committed through the practices of autocratic legalism of the clientelist and corrupt state constituted and controlled by illiberal populist governments.

#### IV. External Assistance or Internal Threat? On the EU's Ambivalent Rule of Law, its Democratic Deficit and Dividend in 'New Europe'

The transformative constitutionalism's finality is the re-establishment of constitutional democracy, yet it should not be mistaken for a simple political enforcement of *status quo ante*. After removing illiberal politicians from power in democratic elections, new post-illiberal governments in EU Member States such as Poland and Hungary, indeed, will have to restore the constitutional rule of law and institutional checks and balances of democracy. However, this general telos has to go beyond the constitutional restoration of the post-1989 political and societal order and all measures taken to address illegalities and abuses of the constitutional rule of law will have to rigorously comply with general constitutional and democratic values as much as the specific laws of the EU. At the same time, the EU's external assistance to these Member States will have to be carefully calibrated and limited due to the Union's internal democratic legitimacy deficits.

Democracy, constitutionalism and the rule of law have become an intrinsic part of global political and economic governance. Organizations such as the United Nations, World Bank and International Monetary Fund have become increasingly involved in external assistance to the individual states undergoing political transition.<sup>19</sup> In this respect, the EU's increasing role in the rule of law policies and accountability of its Member States fits the pattern of external assistance of international and transnational organizations which, nevertheless, also internally constitutes criteria and benchmarks of the rule of law accountability. This process of European constitutional synergies<sup>20</sup> and coeval external assistance and internal constitutionalisation of the EU rule of law conditions requires further analysis and historical contextualisation to better comprehend the current crises in some Member States in particular and the EU in general.

The last three decades can be described as a paradoxical process of the internally growing democratic deficit of the EU and the externally growing democratic dividend which used to be offered to post-communist countries since the Copenhagen criteria had been introduced for candidate states in 1993.<sup>21</sup> The EU's democratic dividend coevally promoted both the process of rebuilding the Democratic Constitutional State in post-communist countries and the accession process eventually leading to their EU membership. The membership was a widely shared political goal enjoying general societal consensus even in more Eurosceptic countries such as the Czech Republic.

Nowadays, the democratic dividend's growth is directly related to the growing threats and infringements of the democratic rule of law in individual countries of Central and Eastern Europe. The reason why the rule of law protection has become a core value and political priority of the Union is given by both the originally tacit assumption that all Member States must be Constitutional Democratic States and the recent threats to the rule of law in some EU countries. This is why the EU has been increasingly focusing on the rule of law compliance and principles of the Constitutional Democratic State in its Member States in the last two decades. In this respect, a main

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19 Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press 2004).

20 Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012), 205–212.

21 Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', *European Law Journal* 10 (2004), 371–401 (374–82).

critical remark may be summarised in the following questions: 'Why so late? Why so little?'

Before the current rule of law conflict between the EU and Hungary or Poland, the EU already had been dealing with the question of democratic legitimacy and constitutional rights infringement by Member States in the case of Austria following the coalition government formation between the conservatives of Chancellor Schüssel and the Right-wing populists of Jörg Haider. At that time, the EU briefly enacted sanctions against Austria on the basis of problematic legal arguments and with dubious and ambivalent effects.<sup>22</sup>

Because of this experience, the Treaty of Nice, approved in December 2000, incorporated the possibility of suspending voting rights of a Member State which would be in breach of human rights — a principle currently regulated by Article 7 of the Treaty on European Union. However, the risks of the authoritarian rule combined with the constitutional counter-revolution in Hungary in 2011 and the increased constitutional conflicts in Poland since 2015 represent another specific crisis of the EU and need to be historically contextualised before their legal and political analysis.

The Constitutional Treaty's rejection by national referenda in France, the Netherlands and Ireland revealed a growing tension between the EU's democratic deficit and legal integration. The Eurozone crisis and Draghi's famous statement that he would save the Euro currency 'whatever it takes' from July 2012 saved the Eurozone's unity and protected individual Member States from a deep fiscal crisis, yet the whole move was made at the expense of democratic values. The Troika and the ECB decided the fate of democratically elected governments and their policies in the countries affected by the Eurozone crisis. Instead of the rule of law, the Eurozone ended up in a paradoxically permanent state of exception.<sup>23</sup>

Similarly, ignoring the constitutional changes in Hungary after 2011, subsequent changes in the election law and the establishment of what Orbán himself declared the regime of 'illiberal democracy' already in 2014 has undoubtedly contributed to the current crisis of the democratic rule of law

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22 Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria', *Journal of Common Market Studies* 39(1) (2001), 55–79.

23 See, for instance, Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance Authoritarian Managerialism versus Democratic Governance* (Oxford: Hart Publishing 2014).

as one of foundational and indisputable values of the EU.<sup>24</sup> In this respect, the EU failed because its institutions ignored for too long constitutional and legal as well as political changes implemented by the Orbán Government which, furthermore, found its support among some politicians in the EPP parliamentary group, especially Austrian and German conservatives.<sup>25</sup>

These views did not change even vis-a-vis the refugee crisis of 2015 and Orbán's policies had been relativised, for instance, during debates in the European Parliament, when some MEPs from the EPP group stated that Hungary was not the only country in breach of the refugees' rights and similar situation was typical of Greece or Slovakia. This soft relativistic approach resulted in a very weak and only mildly critical parliamentary resolution approved in December 2015 and did not start to harden until September 2018 when the European Parliament adopted a report on the rule of law in Hungary warning of a 'systemic threat' to the EU's fundamental principles and unprecedentedly triggering Article 7 of the Treaty on European Union.<sup>26</sup>

In 2015, Poland joined Hungary when its new PiS government started its governing by an attack on the Constitutional Tribunal and unconstitutionally appointed new judges. In this context, Koen Lenaerts, President of the CJEU, made the following remark unrelated to his professional duties:

It was taken as read that national governments would encourage citizens to trust the courts as the ultimate arbiters of any legal dispute, including in situations when a court ruling opposed the political majority of the day [...] Recent developments show that this assumption cannot simply be taken for granted.<sup>27</sup>

Attacks on the independent judiciary have initiated a response from EU bodies. However, this approach is not specifically targeting Hungary and Poland. It is a consistent and general approach and part of the CJEU decision-making.

The CJEU's recent judgements regarding the system of justice and judicial independence are as important as the above mentioned landmark cases *Costa v. ENEL* and *Van Gend en Loos*. The Portuguese judges' case

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24 Marc F. Plattner, 'Illiberal Democracy and the Struggle on the Right', *Journal of Democracy* 30(1) (2019), 5–19 (9–11).

25 *Ibid.*, 13.

26 Cas Mudde, 'The 2019 EU Elections: Moving the Center', *Journal of Democracy* 30 (2019), 20–34 (31).

27 Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU', *German Law Journal* 21 (2020) 29–34 (30–31).

from 27th February 2018<sup>28</sup> and the series of judgements regarding judicial independence in Poland but also Malta (the Maltese judges' case from 20th April 2021)<sup>29</sup> recall Article 19(1) of the Treaty of the European Union which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' plus Article 2 legislating for common European values and Article 4(3) demanding the Member States to ensure fulfilment of the Treaty obligations.

The Polish case, nevertheless, is different because the situation is related to the escalation of political conflict in the country and the government's attempts to subject the judicial power to its control under the disguise of judicial reform. In three cases, the CJEU ruled that Poland was in breach of the Treaty's Article 19, namely, C-619/18, *Commission v. Poland (the Supreme Court's independence)*;<sup>30</sup> C-192/18, *Commission v. Poland (Independence of ordinary courts)*<sup>31</sup> and C-791/19, *Commission v. Poland (Régime disciplinaire des juges)*.<sup>32</sup>

## V. Why Populism Matters: On Theoretical Misconceptions of Constitutionalism and Populism

Recent developments in Hungary, Poland and other countries of the EU show that constitutional structures and settlements of nation states remain popular among citizens of the EU and may inspire both democratic and authoritarian forms of politics. The EU's external assistance to the internal constitutional and political conflicts in Member States in the realm of constitutionalism and the rule of law, therefore, has its limitations and its application remains risky and ambivalent.

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28 CJEU, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, Case C-64/16, ECLI:EU:C:2018:117.

29 CJEU, *Repubblika v. Il-Prim Ministru*, Judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19, ECLI:EU:C:2021:31.

30 CJEU, *Commission v. Poland (the Supreme Court's independence)*, Judgment of the Court (Grand Chamber) of 24 June 2019, Case C-619/18, ECLI:EU:C:2019:615.

31 CJEU, *Commission v. Poland (Independence of ordinary courts)*, Judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18, ECLI:EU:C:2019:924.

32 CJEU, *Commission v. Poland (Régime disciplinaire des juges)*, Judgment of the Court (Grand Chamber) of 15 July 2021, Case C-791/19, ECLI:EU:C:2021:596. For further details regarding all above mentioned cases, see Katarzyna Gajda-Roszczyńska and Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', *Hague Journal of the Rule of Law* 12 (2020), 451–483.

Theories contrasting populism to constitutionalism and associating the former with authoritarianism and the latter with democracy and human rights typically fail to grasp functional differentiation of law and politics. Constitutionalism is always at risk of diminishing democratic deliberation and will formation by legal procedures and judgments of top courts. Accusations of juristocracy replacing democracy and depoliticisation by legal reason find their way into the ivory tower of constitutional theory<sup>33</sup> and constitutional politics.<sup>34</sup> The concept of transformative constitutionalism subsequently has to tackle this risk at a theoretical level to avoid addressing primarily political questions of democratic legitimacy by instrumental legality and judicial decision-making.

Populism is often perceived as a primal cause of democratic backsliding despite its mobilisation of popular will and public anger. It gets contrasted to modern rational politics as a force which threatens human rights and democracy, distorts the public sphere and weakens its legitimisation capacity.<sup>35</sup> For instance, Sajó and Uitz contrast constitutionalism and populism in these words:

Constitutionalism stands for minorities (at least in the minimum sense that they have the right or legal possibility to be a part of the majority or become the majority). The populist stands for the unity of the people and those who are 'outside' (the others or 'them') do not count. This helpful division is often made on xenophobic grounds: the others are those who do not share the (imaginary) national identity based on immutable characteristics. Such constitutional populism relies on identity politics.<sup>36</sup>

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33 This is nothing new and intellectually original and represents a typical feature of modern constitutional politics. For some typical examples in constitutional theory, see Ran Hirschl, *Towards Juristocracy* (Cambridge MA: Harvard University Press 2004); Martin Loughlin, *Against Constitutionalism* (Cambridge MA: Harvard University Press 2021).

34 For constitutional politics in some countries of Central and Eastern Europe, see particularly Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing 2015).

35 Paolo Cossarini and Fernando Vallespín (eds), *Populism and Passions: Democratic Legitimacy after Austerity* (London: Routledge 2019).

36 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press 2017), 53.

While identity politics is populism's hallmark, these views also typically consider democratic constitutionalism part of modern political rationality threatened by populism.<sup>37</sup>

Critics of liberal constitutionalism then often perceive populism as a necessary anti-dote to the prevailing anti-majoritarian and authoritarian tendencies in contemporary constitutional democracies.<sup>38</sup> According to these critical voices, populism is a force of democratic mobilisation against the ever-growing power of technocracy dominating over the public reason and democratic deliberation. Populism is to expand democratic legitimacy and operate as a counterforce against anti-majoritarian institutions legitimised by expert knowledge and its de-politicisation impact on democratic politics.<sup>39</sup>

Populism is thus associated with direct self-expression of collective will which makes the relationship between the people and its leader unlimited by the principles of democratic representation and constitutional separation of power.<sup>40</sup> Most importantly, populism is driven by the jargon of authenticity because there is always a call for 'true' will and voice of the people unlimited and uncorrupted by institutions of representative constitutional democracy.

Populism represents changes and trends in local, national, European and global politics and political leaders and the general public all around the world face significant shifts in both the style and substance of democratically legitimised politics. The voice of disapproval and disconnection among ordinary citizens has been raised by populist leaders gliding on the anti-establishment rhetoric as much as the weakening legitimacy of liberal democracy and nation state. Populism thus expands its arguments beyond modern statehood and its historical and normative framework.<sup>41</sup>

Populism is a negative response to the powerlessness of both local and global politics vis-a-vis the powerful impact of the global economy on issues of social justice, equality and solidarity built within the framework of

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37 Andrew Arato and Jean Cohen, *Populism and Civil Society: The Challenge to Constitutional Democracy* (2021), 153.

38 Tom Donnelly, 'Making Popular Constitutionalism Work', *Wisconsin Law Review* 159 (2012), at 161–162.

39 See, for instance, Jeremiah Morelock (ed.), *Critical Theory and Authoritarian Populism* (London: University of Westminster Press 2018).

40 Mueller (n.6), 40.

41 Andrew Arato, 'Political theology and populism' in: Carlos de la Torre (ed.), *The Promise and Perils of Populism. Global Perspectives* (Lexington: University Press of Kentucky 2015), 31.



modern nation states. Several observations, therefore, can be made before moving to the analysis of populism as imaginary of the authentically self-constituted polity living under the absolute constitution.

First, the nation state as a formerly central organisation of constitutional democracy is at the centre of attention of populist politics. While the populist Right promises its restoration to the former national glory, the populist Left aims at its radical transformation into the power successfully challenging the negative consequences of economic globalisation.<sup>42</sup> The nation state, its democratic institutions and the public sphere thus appear in the centre of populist protests and contestations.

Second, the rise of populism globally and locally is closely related to the growing public distrust of expert knowledge and anti-majoritarian technocratic governance. Epistemic communities of experts steering economic, legal and other policies are portrayed as enemies of the people and real causes of growing inequality and social injustices and exclusion of the whole population.

Finally, the tension between public opinion and expert knowledge is related to the typical perception of populism and constitutionalism as opposites. The process of juridification of politics and its criticisms highlight this divide between legal experts serving the rule of law and populist leaders declaring to be the authentic voice and servants of the people.

For instance, Ernesto Laclau famously argued that populist reason mobilises the multitudes and speaks for 'the outsiders' of 'the system'.<sup>43</sup> According to this view, the system is controversially considered just another name for totality and homogeneity while the multitudes and their collective identities challenge the totalising coherence of social bonds and replace the logic of equivalence by the logic of difference. Social heterogeneity of the multitudes opposes the homogenising and unifying forces of the system.<sup>44</sup>

The legitimising force of those outside the system is determined by their anti-systemic capacity of alternative social formation, collective identity and political self-constitution. The dynamic between legitimation and delegitimation of the system is reformulated as populist reason's mobilisation

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42 Paolo Gerbaudo, *The Mask and the Flag: Populism, Citizenism and Global Protest* (Oxford: Oxford University Press 2017).

43 Ernesto Laclau, *On Populist Reason* (London: Verso 2005), 153.

44 For a critique of Laclau's concept of 'the system' and 'populist reason', see Jiří Přibáň, 'Constitutionalism, Populism and Imaginary of the Authentic Polity: A Socio-Legal Analysis of European Public Spheres and Constitutional Democratisation', *Journal of Law and Society* 49(S1) (2023), in print.

of the excessive crowds against the common good of a rational political community.

These criticisms of structuralist and functionalist paradigms may be painted with a broad brush. Nevertheless, Laclau's philosophical appraisal of populism has a critical value for theory of constitutionalism because it demonstrates how closely populism gets associated with contemporary identity politics and collective authenticity of the Left as much as the Right.

## VI. The Absolute Concept of Constitution and the Authenticity of Constituent Power in Populism

According to Hermann Heller, the people as constituent power of democratic politics are socially heterogeneous. It is then the legal constitution protecting freedom and social equality that turns the heterogeneous people into the homogeneous unity of a democratically self-governing polity.

Heller's notion of social homogeneity represents a critique of political existentialism and its notions of the culturally homogeneous community externally legitimising the State and its Constitution. According to him, the belief that culturally homogeneous people can be identified as a racial community which can 'demand from the state the breeding of a cultural community by racial means'<sup>45</sup> is a legitimising force of the national socialist concept of the racially constituted and exclusive state.

This tension between the legally substantiated and protected social homogeneity of modern democracy and the cultural homogeneity of the concrete existence and collective will of the people is extremely important and echoes the polemic between Hermann Heller and Hans Kelsen as much as Carl Schmitt.<sup>46</sup> Unlike Heller, Schmitt formulated the absolute concept of the constitution as the complete condition of political unity and order and 'the concrete manner of existence that is given with every political unity.'<sup>47</sup> Homogeneity is guaranteed by the polity's very existence represented by the state and its will.

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45 Hermann Heller, 'Authoritarian Liberalism?', *European Law Journal* 21(3) (2015), 295–301(298).

46 See also Anthoula Malkopoulou and Ludvig Norman, 'Three Models of Democratic Self-Defence: Militant Democracy and its Alternatives', *Political Studies* 66 (2018), 442–458.

47 Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press 2008), 59.

The Constitution is thus referred to as the state's 'soul', concrete life and individual existence.<sup>48</sup> For Schmitt, the state's will depends on the collective will of the German people. Reflecting on the constitutional system of hierarchically ordered norms and provisions of the Weimar Constitution, Schmitt concluded:

The unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people. The will of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and lack of clarity of the individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution."<sup>49</sup>

On this view, the Constitution is constituted by the collective will of a nation and constitutional sovereignty is conditioned by national sovereignty formulated as the concrete existence of a substantively homogeneous people. Collective identity and will are located outside the order of constitutional norms and the authentic sovereign nation determines its existence through this order and unity.<sup>50</sup>

Imaginary of the authentic will and concrete existence of a homogeneous people as the constitution's precondition and ultimate legitimation is matched by the people's collective self-identification with the state as a protector of cultural unity and order. This is a typical imaginary of modern nationalism and nation state which was subsequently racialised and turned into the totalitarian state.

In this context, Kelsen, criticised by both Heller and Schmitt, correctly identified the main reason behind imaginary of the authentic people constituting its collective identity and protecting it through the sovereign State and Constitution. In his treatise *Foundations of Democracy*, he toyed with Lincoln's triadic structure of democracy as the government of the people, by the people and for the people and speculated on the situation in which the people might be misled about their 'true' interests and the 'true' will of the people may be corrupted by political institutions and formal procedures and rules of the legal constitution.<sup>51</sup>

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48 Ibid., 60.

49 Ibid., 65.

50 David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press 1997), ch.1.

51 Hans Kelsen, 'Foundations of Democracy', *Ethics* 66 (1955), 1–101 (4).

Discussing the form and substance of democracy, Kelsen thus stated that arguments from the perspective of truth and authenticity of the concretely existing people may be easily twisted and shifted from the participatory 'government by the people' to 'government for the people' because a charismatic leader, an elite, or a revolutionary avant-garde may declare itself to be the only 'true' and ultimate representative of the people's interests.<sup>52</sup>

Kelsen's rejection of the absolute concept of the Constitution as the concrete order and ultimate popular will is important for considering the problems of constitutional populism. In discussions about whether populism is a style of political persuasion or an ideology with its specific set of ideas used as a blueprint for political action,<sup>53</sup> the argument from authenticity makes populism closer to the ideological vision of a 'true' popular will unspoiled by elitist interference governing pure and sovereign people in its 'true' self-government. Authenticity is considered a guarantee of mutual trust between charismatic populist leaders and the general public.<sup>54</sup>

Arguments from constitutional identity and authenticity are typically anti-elitist and emphasise the common sense values and practical wisdom of ordinary citizens. Populism is considered a political style used by political leaders which makes them appear as true representatives and guardians of those popular values and wisdom, especially in struggles against the allegedly corrupt political system and its power holders. Populism is identity politics of constituent power rebelling against the constitutional system.<sup>55</sup> Populists, therefore, can be regarded as authentic in their anti-establishment rhetoric even if their claims are insincere, dishonest and full of lies and overtly false accusations.

Furthermore, when in power, populists, while using the absolute concept of constitution and arguments from the authenticity of the voice and will of the people, can engage in corrupt power techniques and constitutional procedures described by Kim Lane Scheppele in the particular context of post-2010 Hungary in the following way:

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52 Ibid., 5.

53 Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style and Representation* (Stanford: Stanford University Press 2016), 28.

54 Alessandro Ferrara, *Reflective Authenticity: Rethinking the Project of Modernity* (London: Routledge 1998).

55 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', *European Constitutional Law Review* 12 (2016), 6–26.

“[Fidesz party] won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in a year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz Constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named.”<sup>56</sup>

The populist semantics of authenticity and national unity is deeply rooted in the Romantic imaginary of modern society as permanently threatened by moral corruption and alienation which paradoxically legitimises even stronger and more blatant corruption of constitutional democratic principles and political rules which effectively disables the democratic constitution's functions.<sup>57</sup> In the context of Hungary's development since Orbán's seizure of power, György Konrád even used the term *democradura* originally applied to the Latin American regimes combining populist and authoritarian politics in the 1970s and 1980s.<sup>58</sup>

Populist claims of authenticity may be different in terms of their content. The populist Right's notion of the people draws on its concrete historical and ethnic pre-political existence which is allegedly under threat. The populist Left's ideal of homogeneity and authenticity imagines the people as a collective of initially heterogeneous individuals and groups who eventually constitute one sovereign polity of socially equal, politically participating and ethically solidary citizens. At the same time, Left-wing populism, as clearly witnessed in Latin America, can use the same cultural registers and signifiers as the populist Right and incorporate them into the difference between the elites representing the system and the masses representing the multitudes. Leftist leaders, such as Evo Morales and Hugo Chávez, also

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56 Kim L. Scheppelle, 'Testimony: U.S. Commission on Security and Cooperation in Europe hearing on "The Trajectory of Democracy – Why Hungary Matters"', Washington, D.C., 19 March 2013.

57 Miklós Bánkuti, Gábor Halmai and Kim L. Scheppelle, 'Disabling the Constitution', *Journal of Democracy* 23 (2012), 38–46.

58 György Konrád said this in a panel discussion organized by the journal *La Règle du Jeu* in Paris on 19 February 2012. The term *democradura*, or, literally, 'hard democracy', was coined by Guillermo O'Donnell and Philippe Schmitter to describe certain Latin American regimes of the 1970s and 1980s. See Jacques Rupnik, 'Hungary's Illiberal Turn: How Things Went Wrong', *Journal of Democracy* 23 (2012) 132–137, n. 1.

claimed to be the only voice of 'the people-as-one'.<sup>59</sup> Further complicating these differences in style and content, Right-wing populism also promises social equality and solidarity within the ethnically constituted polity. The divide between Right-wing and Left-wing populist politics and movements, therefore, can be blurred such as during the gilets jaunes protests in France in 2020<sup>60</sup> and populist parties and movements in the Central and East European countries.<sup>61</sup>

Populist politics shows that imaginary of the authentic polity existing truthfully and in harmony with its 'real' collective identity is common to the great variety of populist politics and continues to play a profound role in the contemporary globalised political condition including the post-national condition of the European Union. Institutions of representative democracy and popular will legitimised by the public sphere are condemned as failing to represent authentic political voices uncorrupted by the political and social institutions. Populists and their followers then demand alternative forms of political mobilisation and institutional transformation of representative democracy and its constitutional framework.

## VII. Political *Doxa*, Legal *Episteme* and Transformative Constitutionalism's Teleology: Concluding Remarks on Law's Community of Values and Social Justice

Populism draws on the political appeal to the public opinion – the *doxa* and adjustment of political preferences to the popular demand. It is contrasted to the expert knowledge — the *episteme* forming the technocratic rationality and expertise of lawyers, economists and other professional classes. The role of expert knowledge and technocratic legitimation are permanently challenged by the public opinion and democratic legitimation.<sup>62</sup>

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59 Carlos de la Torre, 'Is Left Populism the Radical Democratic Answer?', *Irish Journal of Sociology* 27 (2019), 64–71 (67).

60 Charles Devellenness, *The Gilets Jaunes and the New Social Contract* (Bristol: Bristol University Press 2022), 10.

61 Sarah Engler, Bartek Pytlas and K. Deegan-Krause, 'Assessing the diversity of anti-establishment and populist politics in Central and Eastern Europe', *West European Politics. Issue 6: Varieties of Populism in Europe in Times of Crises* 42 (2019), 1310–36.

62 Eri Bertsou and Daniele Caramani (eds), *The Technocratic Challenge to Democracy* (London: Routledge 2020).

The distinction between the *doxa* of democratic reasoning and the *episteme* of expert decision-making constitutes the specific argumentative balance and tensions within the modern political system.<sup>63</sup> Politicians have to be careful and avoid accusations of being either ignorant populists, or arrogant elitists. Modern democratic politics thus operates through the permanent tension between political reasoning validated by public opinion and expert reasoning validated by its impact on the democratic public.

The distinction between public opinion that steers populists and the expertise that guides the technocrats informs both modern politics and law. Democratic constitutionalism, combining the public reason of democratic mobilisation and legal reasoning controlled by the epistemic community of constitutional experts, uses the distinction between the *doxa* and the *episteme* as its organising principle.

Politicians typically rely on legal and other forms of expertise to govern and preserve their power in society. The public sphere is a theatre of permanent conflicts between different values shared in different regimes of the soft *doxa* of public opinion that never have a clear-cut rational solution, but for all that, claim permanent validity. The technocratic sphere, on the other hand, is an expanse of clear, but always temporary, solutions of the *episteme* — expert knowledge.

The paradox of constitutional democratic politics subsequently lies in the rule according to which the authoritative logos of constitutional experts must resound with the pathos of political persuasion and populist reason. The original distinction between public opinion and expert knowledge, *doxa* and *episteme*, thus finds its secondary coding in the distinction between democratic *authenticity* and technocratic *alienation*.<sup>64</sup>

The process of legitimation by democratic mobilisation is conditioned by the possibility of self-identification of members with the true nature and existence of their imagined polity.<sup>65</sup> The paradox of modern constitutional democracy in which constituent power of the sovereign people, by definition unlimited, can materialise only through constituted power of a limiting legal constitution subsequently finds its specific form in imaginary of the authentic polity by stretching the first constitutional question *Who is the*

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63 Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston: Northwestern University Press 1970), 13, 290, 336.

64 Rahel Jaeggi, *Alienation* (New York: Columbia University Press 2014).

65 Cornelius Castoriadis, *The Imaginary Institution of Society* (Cambridge: Polity Press 1987), 101–112.

*people as a political sovereign?* into a pre-political question of *What is the true and honest voice and will of the people?*

The constitutional paradox of modernity offers a number of examples of formal laws legitimizing the will of a tyrant and operating as a tool of political repression, not least in the name of the authentic will of the people and the fight against its enemies. Instead of the classical Aristotelian distinction between the rule of law and men, modern society thus presents us with the paradox of the arbitrary rule of men, legitimized by the legal rule.<sup>66</sup>

The formalist concept of legalism and constitutionalism is applicable even to the authoritarian regimes legitimised by the politics of authenticity<sup>67</sup> because their systems of positive law provide for some elements of social predictability, certainty and stability. Legal and constitutional formalism, therefore, needs to be contrasted to the rule of law based on substantive democratic values.<sup>68</sup> Legitimation by the rule of law is reformulated as the legal process of political liberalization, democratization and constitutionalisation based on the system of power separation and limited government. It is associated with the Constitutional Democratic State based on the protection of human rights protected by an independent judiciary.

Transformative constitutionalism is expected to restore the substantive concept of the rule of law which stretches beyond purely formalistic institutional and procedural conditions and constitutes a broader political and moral imaginary informed by 'the values of equality, individual autonomy and security implicit in it.'<sup>69</sup> The formalistic concept of law thus transforms into a substantive goal informed by political and constitutionally protected values. Legality is not a mere formal technique of the legitimate government. It constitutes 'law's community of values.'<sup>70</sup>

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66 Jiří Přibán, 'The Nation State's Legitimation in Post-National Society: A Social Systems Perspective of Values in Legality and Power', in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press 2019), 137–157 (147).

67 Marshall Berman, *The Politics of Authenticity: Radical Individualism and the Emergence of Modern Society* (London: Verso 2009 [1970]), ch.1.

68 Jiří Přibán, *Legal Symbolism: On Law, Time and European Identity* (Aldershot: Ashgate 2007), 156.

69 Roger Cotterrell, 'The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality', *Social and Legal Studies* 5 (1996), 451–470 (470).

70 Roger Cotterrell, *Law's Community: Legal Theory in Sociolegal Perspective* (Oxford: Clarendon Press 1995).



In this context, Martin Krygier critically distinguishes between the law's anatomy and teleology and formulates his sociological approach to the rule of law and democratic constitutionalism as promoting 'teleology before anatomy'.<sup>71</sup> Apart from criticising the narrowness of analytical jurisprudence and its formalist conceptualisations of the rule of law, this approach moves beyond common jurisprudential analyses of legal principles and structures and emphasises the importance of societal goals and values embedded in the rule of law.

This theoretical perspective is functionalist in the sense that it asks 'what we might want the rule of law for'<sup>72</sup> and what needs to happen in society to achieve it. Specific historical, cultural and social conditions behind universal constitutional principles and values are analysed to understand different ways in which particular polities deal with their social and political problems.

Rather than focusing on the structure of abstract rules and institutional guarantees of law's legitimacy, this perspective explores social conditions of the law's functionality and operative capacity. The rule of law is then analysed as a variable achievement relative to the cultural and social conditions of particular polities.

It has a special value which consists of tempering, constraining and channelling the exercise of all powers evolving in those polities — political, social and economic.<sup>73</sup> While the law's capacity to transform these powers from their arbitrary exercises to the stable and predictable procedures and routine practices remains the first job of constitutionalism, it is clear that this job must tackle political as much as other societal forces, especially those operating within the system of economy and permeating the areas of private and labour law.

Transformative constitutionalism has to address the issue of social justice and solidarity beyond common arguments from growing inequality, corruption and unaccountable power of new oligarchies emerging during post-communist economic transitions, market reforms and privatisation processes. The issue has its clear European dimension because of the

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71 Martin Krygier, 'The Rule of Law and State Legitimacy' in: Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press 2019), 106–136 (111).

72 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in: Gianluigi Palombella and Neil Walker (eds), *Re-locating the Rule of Law* (Oxford: Hart Publishing 2009), 45–69 (46).

73 Krygier (n. 71), 125–126.

history of European integration evolving as the values of prosperity and peace promoted by the economic rationality of market collaborations and productive competition.

Transnational consociation through the European single market is expected to contribute to the common wealth, interests and bonds beyond national economies and politics. The European economic constitution assumes that economic rationality and its expert *episteme* enhances European transnational political *doxa* and the constitution of a transnational polity sharing the values of democracy, freedom, rights and peaceful coexistence of the multitude of European peoples and citizens.

Apart from challenging the absolute constitution promoted by populists with their identity politics, transformative constitutionalism has to address the problem of social justice and solidarity in post-illiberal polities through both internal policies and external assistance. The EU cannot be assisting merely by setting formal standards and conditions of the rule of law modelled on its treaties and policies. It also has to provide for material support of post-illiberal governments to facilitate the re-establishment of the rule of law as much as political and social consensus in those Member States.

To conclude, transformative constitutionalism cannot be limited to the formal rule of law because all constitutional democracies, stabilised or backsliding, have their social dimension guaranteed by both the political and economic constitution at national as much as transnational European levels.