

## SOCIETY, CONSTITUTIONALISM AND DEMOCRACY

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### The Constitution of Illiberal Democracy as a Theory About Society\*

*Abstract:* Relying on Grażyna Skąpska's theory of the constitution as a theory of the society, the paper considers the 'theory of the society' provided by the constitutions (public law) of illiberal political regimes, applying a socio-legal perspective. Illiberal democracies are understood as electorally endorsed regimes produced by populism. The present paper concentrates on EU member states, using Hungarian examples. The constitution is understood as a symbolic order with a vision of society that changes social and political realities. The paper argues that illiberal constitutions do not need to depart from mainstream liberal constitutions, notwithstanding the strong nationalist element. The constitutional reality is mostly sub-constitutional and it operates at the level of statutes. The emerging political structure is based on the primacy of the executive branch which in turn serves personalistic rule in the tradition of Weberian Caesarism. The rule is centralistic and creates and consolidates social, cultural and economic dependencies. Following Szelényi and Max Weber, this traditionalist, and therefore antiliberal society (or the selection of these social structures among competing formations by the political management of the society) is described in terms of neo-feudalism. The emerging social relations are reflected in and enabled by public law. The illiberalism of the regimes is not imposed on society and it is greeted as liberation by a considerable part. This genuine sentiment, together with electoral and media manipulation is capable to sustain the illiberal personalistic regime through formally democratic processes.

*Keywords:* Constitution, illiberal democracy, society, Caesarism, Hungary, Poland.

### Introduction

Among contemporary authors Grażyna Skąpska and Chris Thornhill have considered the legal constitution as a social phenomenon which at the same time provides a theory of society (Skąpska 2010, 2012; Thornhill 2012). The constitution is relevant beyond law "at the political level, for it is there that social relations take shape and are symbolically ordered" (Mouffe 1993: 11) This symbolical order offers a theory of society; it is an odd theory as it has regulatory effects. Moreover, the constitution provides a theory of society in the sense of determining its own subject, the people. The written document by that name is central in the present concept of the constitution, but constitution hereinafter entails other public laws, public institutions and institutional practices which determine the use of and access to political power exercised by or in the name of the state.

The constitution with its representation of the society creates new social facts. In fact, it is a social fact: "the view men have of themselves forms part of the reality for which such theories provide an account" (Unger 1975: 24). Finally, the constitution is relevant as

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a theory of society because it functions as social reflection (or, quite often: imagination) of social relations, and thereby coordinates social political and legal action.

The constitutional self-presentation of political power influences the operations of the state both in liberal and illiberal democracies. The emerging public law regime of illiberal democracies enables and mobilizes a deeply illiberal self-understanding of society (of the citizens in their interactions).

This paper reviews the emerging constitutional theory of society of illiberal democracies. The paper proceeds as follows. First, the place of the constitution (and public law) in illiberal democracy is discussed. This is followed by a survey of the social theory of society of the illiberal constitution, or more specifically the theory of the use of political power in the society that is emerging in illiberal democracies, based on the Hungarian experience. Third, I will discuss the social reality behind, and generated by illiberal constitutions.

### **Illiberal Democracy and its Constitution**

In a growing number of the EU member states (and accession countries)<sup>1</sup>—illiberalism is emerging on the basis of a socially endorsed and internationally tolerated constitutional chicanery that permeates society. The current shift towards illiberalism is an ongoing process. Shifting targets make an inconvenient object for a proper social analysis. But even if premature, a socio-legal analysis of illiberal democracies (as political *and* social regimes) is necessary for the protection of liberal democracy. I offer below elements of such a tentative socio-legal analysis before our initial shock has numbed into indifference. In this analysis constitution is understood in a broad sense: beyond a formal document that is deemed the supreme law of the country, its interpretation and related practice are also considered under this heading, and also those elements of public law, which are decisive for the operation of political power in the state.

In the following pages illiberal democracy is discussed as an ideal type which relies above all on Hungarian developments.<sup>2</sup>

It is argued that an illiberal system cannot be democratic, and that the term ‘illiberal democracy’ is an oxymoron. Without entering into a debate on the nature of democracy and its compatibility with illiberal political structures, fact is that this is the term of choice used by the political architects of the system to describe it. This is a good enough reason to use the term. But there is merit too in that self-description. For the illiberal structuring of law, culture, and society, it is essential that the political (legislative) power be confirmed through elections. It is legitimate in the eyes of a popular majority exactly for being both elected and illiberal, and for its daring counter-cultural denial of what is felt unauthentic and imposed. The affirmation of illiberal positions (national purity, anti-Western cultural identity, authoritarianism, etatism) offers an appropriate and socially attractive everyday social theory and many people recognize themselves in what is cherished by the political system. Illiberalism appeals to authoritarianism and the closed mind.

<sup>1</sup> EU accession countries are Albania, the former Yugoslav Republic of Macedonia (FYRoM), Montenegro, Serbia and Turkey.

<sup>2</sup> Illiberal democracy is not a recent phenomenon and its autocratic constitutional version originates in Singapore. Many of the legal tricks of the Hungarian regime were invented in Russia.

The sociological question formulated by the constitution as social theory is exactly this: is there a social reality — a set of decisive social relations and mindsets—that finds expression in an illiberal or even autocratic constitutional regime?

Illiberal regimes do enjoy popularity not only at the elections (even if these may become more and more unfair) but also in public opinion polls and in everyday life. The illiberal regime, with its false certainties satisfies the needs of the closed mind (Fournier 2018). Mass manipulation is widespread in the emerging regimes, but the majority does not feel that government supported values and policies are imposed upon them. On the contrary, they are considered by many as authentic, a return to authenticity; what the government presents as a proper political view and behavior is perceived by many people as a liberating recognition of their own thought and identity.

### **Political and Social Relations in the Theory of the Illiberal Constitution**

The central piece of the legal system, the constitution, does not need to be changed where a successful illiberal or even authoritarian regime is to be operated. For the building up and functioning of the illiberal state the text of the pre-existing liberal constitution can be upheld with some creative interpretation, although it may cause minor inconveniences and delays. The Polish constitution has not been changed although this causes difficulties for the current government. On the other hand, the drift towards religious autocracy in Turkey is a story of ongoing constitutional amendments, where the power is constantly legitimated by constitutional change, and the political struggle is *about* constitutional change. It is unlikely, however, that the new presidential powers in Turkey will result in a more personalistic rule than what has been exercised before the amendments.<sup>3</sup> It is also true that in the Hungarian case the parliamentary supermajority could adopt a new Fundamental Law (constitution) in 2011 (it entered into force January 1<sup>st</sup> 2012). It can be amended at will, given that the government has the required majority since 2010. Every time a political institution or social group seriously defied the regime the Fundamental Law was amended.

Constitutional amendment remains, however, unlikely in many illiberal democracies in the making. Does that mean that the social theory of the constitution has not changed while the text remained the same? Not at all: the interpretation and institutional practices have changed.

Be as it may, in Hungary, where a new constitution was enacted, the Hungarian Fundamental Law (except when it comes to terms of office) did *not* change the structure of government. This new constitution did bring into the text traditionalist and nationalist values, but its hard core (government structure, fundamental rights) is either formally identical with the previous arrangement or at least does not differ in any important manner of the constitutional texts of textbook Western democracies. However, small changes can be the source of a major practical transformation. What happened in Hungary is, that the new text with a set of institutional changes enabled personal Caesaristic rule, exercised with little inhibition. Caesarism is a form of government where personal rule is legitimized by

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<sup>3</sup> The last wave of radical populism (Chavez, Maduro, Correa) has resulted in a personalistic rule that required a new constitution resulting in pure presidentialism.

permanent popular support. The Caesaristic leader “responds to his electorate’s psychic, physical, economic, ethical, religious, or political needs; he knows no supervisory or appeals body, no technical jurisdiction” (Casper 2007).<sup>4</sup> Max Weber, who emphasized the plebiscitarian aspects of this rule, advocated Caesarism for the post-imperial German constitution in 1918, assuming that a number of constitutional checks apply and that the ruler leaves his post once he has lost popular support (Weber 1918; Baehr 2008). The novelty of modern Caesarism in illiberal democracies is that the constant popular mobilization is based on a vision that the nation state is in need of protection from malign external and internal forces.

As mentioned, the changes in the constitution and to some extent even at the sub-constitutional level are generally in conformity with what exists in one or another constitutional solution of Western societies; the structure of government is the same (a parliamentary system) and even the list of fundamental rights<sup>5</sup> and the grounds of their limitation follow the previous Constitution. It is the interrelation of the restrictive constitutive elements that points towards a different exercise of political power in the state. Many of these changes are technical corrections to existing institutional arrangements, which very often do not require constitutional amendments. The Hungarians enacted a new constitution (see Fundamental Law, above), but most power perpetuating measures could have been achieved without it; others required ulterior amendments. No law will constrain power where it is that particular power that writes the law. The illiberalism and the problematic nature of democracy comes from the exercise of the political power beyond law or at least below the constitutional text. However, such practices are *enabled* by the constitutional silence, lack of limitation.

Of course, the long ideological part of the new Fundamental Law tells a lot about the anticommunist, nationalist and Christian conservative value preferences of the ruler and this entourage, and also about what the new ruler thought of its nationalist constituency that was equated with the people of the Nation. But these opportunities for identification with the leader do not explain the immense actual power of the leader whose formal legal position is not different from that of other prime ministers in the European Union.

What tilted the regime towards illiberalism was the change in the personnel of the existing institutions. Change in the personnel of the public administration seems to be the gold standard of illiberal regime building; in fact, it is perhaps the essence of the grabbing of the state power in electorally induced ‘revolutions,’ and institutional change is primarily a pretext for such changes. For example, in Venezuela President Chavez used institutional reform for the purposes of change of the guard with gusto. (MJ. Garcia-Serra 2001: 275–76). As to Hungary (just like in Venezuela) the decisive change concerned the Constitutional Court (the Supreme Court in the Venezuelan case) which would have been otherwise in the position to slow down the steamrolling legislation. The powers of the Hungarian Court were

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<sup>4</sup> Kurt Weyland uses a similar definition to describe populism as a political strategy (Weyland 2001). Note that a neo-Marxist analyst of the first Kaczynski regime already described PiS’ populist rule as Caesarist, but in the Gramscian sense, and as a reaction to growing inequality: the Polish populist Caesarism targeted liberalism, “reliant on a political regime ostensibly linked to the peasantry” (Shields 2012).

<sup>5</sup> The only relevant difference is that there is more emphasis on the traditional concept of marriage and (perhaps) unborn life, and increasingly on Christian values. But the definition of marriage that excludes same sex marriage is more conservative than illiberal and registered partnership offers de facto equality to same sex partners. (On migrants, see below).

changed and access to it has been limited, in particular, the *actio popularis*, that would have enabled any citizen to ask for the abstract review of any piece of legislation was abolished. The resulting system closely resembles the one found in Germany. The critical change consisted in the raise of the number of constitutional court judges from nine to fifteen. It is now provided that the President of the Constitutional Court be elected by Parliament. The mandate of the judges was extended to 12 years. With the new appointments the Constitutional Court became more and more government friendly. Nevertheless, in a number of instances in the first years a narrow majority declared some of the crucial legal changes unconstitutional, including the judicial retirement reform, resulting in further restriction of the powers of the Court. By 2015 12 out of 15 judges had been elected by the Fidesz majority. With the *Gleichschaltung* of the Constitutional Court the supermajority was free to legislate in the name of majoritarian democracy.

It seems that in the European scenario of the illiberal take-over the control over the highest echelons of the ordinary judiciary constitutes another important step.<sup>6</sup> Once again, ‘reforms’ provide opportunity to put into key positions proper cadres. Even after changes in the leadership of the judiciary, there can be some resistance<sup>7</sup> because of professional socialization and values that are enforced through informal group pressure. However, judicial resilience is limited in time and also in its extent: judges are socialized to apply the law and not to be moral heroes, so changes in the law in favor of governmental interests will be observed once the law is enacted.

Once loyalists are in place it makes little difference that the institutions had most, or all standard guarantees of independence because these institutions are at the mercy of the legislative supermajority. This applies to *all* public institutions which shared the fate of the Constitutional Court. In fact, having placed the right cadre in leadership position the autonomy of the institutions which safeguard checks and balances can be left untouched. In some respects, the safeguards of autonomy of state institutions have been even *increased* in Hungary to guarantee protection in case of a possible return of an alternative political power. For example, the Prosecution has strong guarantees of independence vis a vis the political branches of power. Likewise, the powers of the independent Central Bank or of the Media Council were further increased, a lengthy tenure is constitutionally entrenched, etc. It is important to add that this is the strategy in most consolidated illiberal democracies.

From the perspective of the generation and use of political power the decisive novelty is the concentration of power in a single branch, namely the executive, although the parliamentary system can survive formally intact and even without much delegation of law-making power to the executive. However, the changes in the Standing Rules of Parliament in Hungary indicate that leaving intact parliamentary powers does not mean parliamentarism: the Parliament was not only rationalized but deliberations were turned into expedited rituals with increasingly harsher sanctions on opposition members whose acts of criticism ‘offend

<sup>6</sup> Arguably this is preceded by purges in national security services, but national security is under the control of the executive in all constitutional systems and these changes look ‘normal.’

<sup>7</sup> Personal change at the higher echelon of the ordinary judiciary and a new system of court management were high on the agenda of the Hungarian illiberal regime. Nevertheless, in the ninth year of the “constitutional revolution at the voting booths” rule bound judges continued to embarrass the government. It is for this reason that in 2018 the government amended the Fundamental Law enabling the creation of a separate administrative justice system.

the dignity of the institution,' a consideration written into the Fundamental Law. Ministers refuse to respond at question time claiming that the opposition is not worthy of an answer. This reflects a friend/enemy division which makes political community impossible; it also undermines the supervisory role of Parliament. Parliament becomes a legislative factory without deliberation. Just one example: some of the 2018 amendments (including the duty of the state protect Christian values) to the Fundamental Law were submitted as a private amendment to the competent committee on a Friday after 5 pm, to be debated for an hour Monday morning.

But again, the façade of parliamentarism is of little importance: what matters is that the personal rule of a quasi-charismatic party leader heading the executive quickly consolidated itself. A new form of Caesarism is emerging, as understood by Max Weber. Weber was favorable to Caesarism and had no major difficulty with the inclusion of this form of government into his concept of democracy. However, in his permissive qualification he has applied a rather naïve constitutionalist assumption about Caesaristic rule which was based on an English ideal type: "Vis-à-vis the factually caesarist representative of the masses [Parliament] safeguards in England 1) the continuity and 2) the supervision of his power position, 3) the preservation of civil rights, 4) a suitable political proving ground of the politicians wooing the confidence of the masses, and 5) the peaceful elimination of the caesarist dictator once he had lost the trust of the masses" (Weber 1968: 1452). In illiberal democracies of populist origin these safeguards are deliberately disregarded and set aside. What makes majoritarian parliamentarism different from the Westminster ideal is the lack of a relatively strong parliamentary culture, a respect of conventions by the prime minister and a relatively independent or contrarian public opinion that has to be taken into consideration. Further, the Prime Minister does not have to take into consideration the preferences within his parliamentary faction as the majority of parliamentarians depend of the Prime Minister. They have no agenda of their own, except to figure out what the PM will wish from them. And there are less and less independent actors whose views shall be taken into consideration, beyond a general voter maximizing consideration. The parliamentarians of the comfortably sizeable majority depend fully of the prime minister, and there are less and less social and institutional forces capable of mounting resistance to the prime minister.

The main constitutional actor in the constitutional rhetoric remains the hero of electoral democracy, i.e. the people, while at the same time the prime minister may act as 'dictator' (in the classic Roman sense, but without time constraint and without emergency). This trend continues shifting parliamentarism in a non-traditional way towards the Prime Minister (or to someone else who controls the office holders, even without a formal public function). That shift is not reflected in the constitution. However, instead of parliamentarism as representative government, i.e. a system where the governed select their governors, the emphasis is now on an unmediated people expressing its will as majority will. Of course, people means "real" people who by voting for the 'right' party pertain to the majority and who share certain national(istic) value traits. People is an ideologically motivated political and even legal concept or construct, with social consequences of exclusion and inclusion (Kaltwasser et al. 2017). People are the source of power. To this uncontested constitutional point of departure a promise is added: people can exercise political power on a daily basis or, here is a better deal: their power is exercised on a daily basis by the Leader. The democratically

elected Leader promises to rely on his direct relation with the genuine people, including plebiscite, or as in the Hungarian case, in the form of legally non-binding ‘consultations,’ letters sent to the public where they can agree with broad policies returning the survey questionnaire post-paid. The leader of the Nation constantly tries to identify *his* people’s will; of course, he will find what was first manipulated by his media manipulators. The leader finds legitimacy in the wishes of people, or in the Hungarian case “Hungarian men and women.” The very populist term promises a personal bond. The use of the gender neutral term “*magyar ember*” (“Hungarian person”) has a traditional connotation and it contains strong traditional behavior stereotypes about genuine Hungarians, like in the adage “a Hungarian [person] does not speak while eating.”<sup>8</sup> The use of cultural stereotypes embedded in familiar sentences (‘speaking the language of ordinary people’) provides a head start in the fight for hearts and minds.

Of course, such reliance on the people presupposes a certainty that there is a majority or at least a relative majority of the citizens that is ready to endorse the centralized power and finds its own identity in the illiberal populist rhetoric and rights restrictions. A second precondition for the success of populist nationalism (other than a pre-existing strong nationalism in the population) is etatism. The weakness of civil society, the vulnerability of autonomous institutions and of autonomous citizens with independent means make the society state centered, or at least there is little resilience to state initiative. Control over the state will enable control over society. (Hungary is the only country in the EU where the percentage of people employed in the public sector has increased since 2000 (2016 data) and it is now the highest among non-Scandinavian EU member states (Eurostat 2018). Of course, there are very important differences among the concerned societies, even if the etatistic tradition is strong in most concerned societies.<sup>9</sup> A long tradition of resistance to oppression remains an important social source of coordinated resistance in Poland. As to Italy, given the many sources of independent social existence it is hard to imagine Italian society, economy and intellectual life to be controlled by a populist state to the extent these are controlled in Hungary (or Venezuela, Russia and Turkey) even if the majority public sentiment would be inclined to support state control over autonomous areas of social life.

Illiberal populist governments are ready to cater to popular illiberalism bringing out and endorsing sentiments based on fear, hatred and envy. But again, *so far* the illiberal public discourse did not result in serious *practical* deviation from the constitutional limits of the liberal state: for example, notwithstanding the endorsement by national leaders of the death penalty, this is not going to be reintroduced, notwithstanding popular demand because the circumstances (the pressure of foreign elites and international law) do not allow it. Only when it comes to migrants that the departure from previous constitutional standards is noticeable, but it is not clear to what extent these harsh positions really depart from the emerging European standards (see for example, the increasingly aggressive Danish legislation against integration and migrants).

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<sup>8</sup> The reference to ‘Hungarian person’ appears already in the Fundamental Law. There is no gender difference in the Hungarian language.

<sup>9</sup> All concerned countries (with the exception of Singapore) have economies which depend either on the production of raw materials (Russia) or the added value generated by domestic industry is small.

Of course, the ruler cannot rely only on the emotional bond between him and the electorate. The electoral system is of importance here and gerrymandering, bonus seats to the relative majority, restrictions on the opposition to access to media, financial inequalities, limited review of the legality of the election, etc. are helping the ruler to sustain his majority.<sup>10</sup> But beyond the tailor made electoral rules, it is mind control that turned out to be decisive. Such control requires control over the media which is turned into a propaganda machine.<sup>11</sup>

Private printed and electronic media are increasingly taken over by government cronies who use the revenue generated in their government supported businesses for the acquisition and operation of media outlets. In illiberal democracies and competitive autocracies (Russia, Turkey, Venezuela, or Hungary) a clientelistic network of media ownership has emerged,<sup>12</sup> and public broadcasting is taken over by government loyalists within the frame of existing media laws. The control over the autonomous broadcasting regulatory agency by government appointees enables the acquisition of private media outlets and licenses (frequencies) and facilitates bias in broadcasting which remains unnoticed by loyalist authorities.

The de facto control over public opinion and the public mind enabled by one-sided public broadcasting and government friendly private media result in exuberant praise of the government and the ruler for providing and defending welfare and national identity. Media and cultural outlets become conduits of government propaganda that borders brainwashing. Permanent Orwellian fear and hate campaigns coupled with nationalism are increasingly crucial for mind control. In the government-controlled representation of the world the government is the sole defender against conspiratorial enemies (including the EU, liberals and terrorists). This representation of the threatening world resonates in pre-existing diffuse social representations. A considerable percentage of the population was already waiting for the confirmation of private fears and resentment. The government brought emotional confirmation and liberation to these sentiments. Hence the success of the anti-migrant campaigns, which resonate in pre-existing but earlier officially quarantined racist national purity statements and prejudice. This mentality-forming impact is perhaps enabled by, but certainly not preordained in the constitution: After all, amidst all the anti-migrant policy the Hungarian and the Polish Constitutions still stand for asylum and refugee rights, although the ‘small print’ of the Hungarian Fundamental Law is quite telling: the right to asylum is denied in case a third country would provide protection.

The personal concentration of political power has further consequences. In order to have reliable control over society (which enables the power holder to rely on elections, as

<sup>10</sup> See e.g. OSCE/ODIHR final report on Hungary’s parliamentary elections which recommends ensuring clear separation between state and party. [2014]. <https://www.osce.org/odihr/elections/hungary/121375> (Accessed 28 August 2018).

<sup>11</sup> Of course, there are alternative forms of political control over the media. In the Berlusconi-Babis model media owners obtain elected political position thanks to pre-existing ownership. In both cases, EU and ECtHR reactions were delayed by years. In the Czech case, the control over media by Prime Minister Babis was held not to present a problem for democracy and only his use of EU subsidies became an issue.

<sup>12</sup> This is the case in Russia, Hungary and Turkey. In Poland the threat exists but the government decided so far not to introduce anti-media concentration laws and it did not exercise decisive pressure on foreign owners, partly because of international relations concerns.

Media control did play a crucial role in the efforts to maintain power in Latin American populist regimes too (de la Torre 2017).

dependent people will continuously endorse the ruler) the political power has to eliminate sources of social autonomy. This means that autonomous social institutions are also to be taken over (or abolished) just like it happened with public administration and civil service. Reorganization is occurring in autonomous sectors of public life like the media, education, science, art, religion, and the economy. Local self-government powers are transferred to unelected central administration, self-governments are made financially fully dependent (changing their constitutionally protected status, if necessary) and social services (e.g. education) provided by local self-governments are taken over by the central government. Higher education offers another example of the loss of autonomy. In Hungary universities are financially more dependent than ever, even if autonomy and academic freedom are formally respected. Allegedly relying on a UK model of financial responsibility (service for money), loyal government commissars (so-called chancellors) are appointed to each university. The chancellor has full financial control over university decisions with academic implications which means that academic choices are dictated by politically and ideologically shaped financial dictates. Of course, there is a lot of complicity on behalf of staff and educators, some of them being ideologically motivated, while others are beneficiaries of the reallocation of resources.

Given the importance of making society dependent of the state by legal means in order to perpetuate Caesaristic rule, and given the level of centralization, one would expect increased redistribution and corresponding constitutional or public law mandate. However, according to the OECD data, the level of fiscal redistribution through the budget is not above the OECD average in the case of Hungary.<sup>13</sup> Apparently a high level of redistribution is not a necessary part of the social theory of the illiberal constitution (the redistribution is relatively high in Venezuela but not more than in Uruguay or Argentina, [Lustig 2016](#)). In Hungary solidarity is mentioned in the Fundamental Law only in the context of social security and there is no increased redistribution for the lower (most dependent) strata. The same was true about Poland, at least on the basis of the 2016 OECD data. However, a strongly redistributive measure was introduced favoring the second child and a large family support program was introduced in Hungary in 2019.

Another form of economic centralization increasing government power that could move resources into governmental orbit would be (re)nationalization. Such measures were taken in Hungary in sectors of strategic influence such as energy and finances, but the share of state-controlled economy is not excessive in comparison with Western economies. The control over the economy is realized primarily through a subtler control over the private sphere, at least in the Hungarian model (with strong similarities to Russia and Turkey). It is primarily in the private economy that the political power of the center is converted into economic power which is then used to consolidate political power through elections. The public sector, nurtured by EU monies, is sizeable enough to grant important opportunities. These opportunities are distributed among a small group of clients of the public authorities. This favoritism remains somewhat hidden as contracts and property are allocated in a strictly regulated public procurement process, although the applicable law raises serious concerns

<sup>13</sup> Inchauste–Karver (2018). In Hungary social transfers received are not large enough to mitigate the impact of direct taxes on absolute levels of poverty. The trend was similar in Poland until 2016 when social benefits were increased.

about the respect of the rule of law. The nationalization without compensation followed by the restrictive redistribution of tobacco sale licenses through public bids is a textbook example.<sup>14</sup> Here previously unregulated tobacco distribution with thousands of distributors in grocery stores owned by small entrepreneurs was suddenly subject to a licensing system with a limited number of licenses. These licenses went primarily to ‘friends’ of the regime.

In exchange of the procurement contracts or other perks the clients provide the resources necessary to influence public opinion, including the use of employment opportunities that the government cronies (including political appointees in the public sector) can offer to gain political loyalty of the employees. There is, nevertheless, an important private sector that seems not to depend on government largesse. Large foreign owned companies (so-called multinationals) produce a sizeable and increasing portion of the GDP, e.g. the gross revenue of the car industry sector exceeds 20 percent of the GDP. This seems to be the source of independence. The Hungarian government relies on sticks and carrots. Occasionally the authorities stand up in the name of national sovereignty and consumer protection and try to discipline these entities. Taxation in particular was used both as stick and carrot, with spectacular success in the media sector to the extent that multinationals are reluctant today to advertise in the remaining opposition media. On the other hand, multinationals receive privileged treatment (hidden subsidies, tax advantages) and are in exchange very supportive of the government.

Most scholarly and op-ed papers on illiberal democracy start by stating that there is a backlash to democracy and that the principles of the rule of law are not observed. But the constitutions, from Russia to Hungary continue to define the respective country as a rule of law state (*Rechtsstaat*). Notwithstanding the problems related to judicial independence it is not so simple to identify disrespect of the rule of law on a formal level. The rule of law is respected in political declarations and in terms of its formal requirements, and legalism is important for governmental operations and legitimation. The prevailing legalism is not surprising given the notorious regime-sustaining-nature of the rule of law.<sup>15</sup> At the level of the constitution and even in terms of judicial and administrative procedures the legitimacy of the rule of law as legality is not formally challenged; likewise, security of property, a central element of the rule of law is not denied in the constitutional theory of the society of illiberal democracy. Private property is officially fully endorsed, as the property acquired by government cronies is to be protected and foreign investors too need constitutional and practical guarantees. However, the cronies first have to take possession: this is facilitated by expropriation without compensation. It is in the transition to establish the illiberal regime that ownership and the rule of law have to be disregarded (see the dismissal of judges and civil servants). Once the transformation has occurred the formalities of the rule of law can be observed albeit with important exceptions. The trick is to couch the advantages that sustain the regime and its beneficiaries in sufficiently ambiguous terms. So-called creative interpretation of the law by the authorities serving the interests of the government and gov-

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<sup>14</sup> *Vékony v Hungary*, Application No. 65681/13, Judgment of 13 January 2015 (European Court of Human Rights).

<sup>15</sup> It is quite telling, how the Singapore judiciary justify death penalty and caning: it is claimed that in all those contexts the rule of law applies and therefore these measures are not problematic. See recently *Yong Vui Kong v. Public Prosecutor* [2015] SGCA 11.

ernment cronies are quite common. For example, in Hungarian public procurement the tailor-made bid criteria make it inevitable that the pre-selected bidder wins the tender, often without personal benefit (corruption) to the intimidated officials. The share of tenders with only a single bidder remained notably high in Hungary, varying between 25–33% in 2006–2015. During the same period, the share of tenders without competition did not exceed 12% in the old EU member states (Tóth-Hajdú 2017). The extent of discretionary powers granted to the authorities is not excessive, and within the four corners of the law, but that limited discretion is used in a discriminatory manner when it comes to protect the interests of the new establishment. For example, a violation of the broadcasting code will be held against a politically disloyal (i.e. neutral) owner when it comes to the renewal of the broadcasting license, while the loyal owner's violation remains unnoticed or of limited importance. Likewise, prosecutorial discretion is used to shelter perpetrators of economic crimes who are regime loyalists. Prosecutorial legal inventiveness is most remarkable. For example, when a director of the public media governing body placed a listening device in the office of his boss, the prosecution denied prosecution under the theory that the prohibition of unauthorized private surveillance does not apply to public space like the office of a public body. The boss, for reasons that one can only speculate upon, appointed the person who ordered to place the bug to another important leadership position.

### Is there a Specific Social Reality behind Illiberal Constitutions?

This article is not about the description of the society in illiberal democracy although it is safe to assume that the presence of illiberal mentalities and practices in these societies is considerable and perhaps decisive. The article deals with the theory that the constitution as public law has of the society, where the constitutional imagination is also the origin of important perhaps decisive changes in social structures. In that respect we have seen the way public law structures enable social dependence. In illiberal, and increasingly authoritarian regimes in EU member states political and resulting social power originates from a system of personal dependencies which guarantees the successful manipulation of the population through emotional mobilization for continuous electoral support. The constitution, and more broadly, the political structures enabled by the constitution are the source of the solidification of new social relations of dominance and stratification. The Fundamental Law of Hungary it is not a simple reflection and reinforcement of preexisting social relations. It enables the creation of a new social structure, increasing rent seeking.

Illiberal political regimes are not tied to specific social and economic conditions (de la Torre 2017: 205). It is the 'political' (i.e. the legally unbound will and power) that shapes society by creating specific mindsets and dependencies. The legally enabled dependency reinforced and resuscitated feudal characteristics in Hungarian society. The constitutionally enabled personal dependency within the constitutional structure reminds one of *refeudalization* that occurs through public law means.<sup>16</sup> Refeudalization refers a political-economic

<sup>16</sup> The term refeudalization was used by Habermas and it reemerged among critics of globalized capitalism. The present use of the term as applied to the Orbán regime is obviously different. (Habermas 1962; Jarábik 2017; Ágh 2017).

system where the political power holder maintains domination over a network of loyalists who receive administrative or economic positions and wealth (*prebendium*) on the basis of loyalty that enables the rulers to exercise control over others whose obligation is to be loyal to the supreme power holder and also to the local patron. According to Max Weber “under prebendal authority, property (benefice) [is] given to the followers for their services, but rulers can revoke this property at any time.” In many illiberal centralizing regimes property (as “benefice”) “was redistributed to owners who were believed to loyally serve the political powers. In regard of the Hungarian system neo-prebendalism ... operates with a much-reduced system of legal-rational authority” (Csillag–Szelényi 2015: 21, 27).

Subordination will be legally sanctioned: the disloyal will lose his or her resources or status, most often in a formally legal procedure. Employment relations will be terminated (where the changes in labor law and in civil service law enable termination without cause); licenses will be withdrawn, long overdue criminal prosecutions will suddenly start, etc. Changes in the law (legal reform) are the tool of choice for mass scale disciplining. For example, the rent will not be provided because of change in the legal conditions; civil servants will lose their job because of a legal reform, etc.

Of course, one should be very careful with the use of the term neo-prebendalism. In illiberal democracy personal rule exists hand in hand with a bureaucratic, formal rationalistic system, even if legal security has diminished. The personal ruler exercises his nearly unlimited power to appoint loyalists to control positions in the bureaucracy. These positions are without genuine legal protection: the political appointee can be dismissed without cause.<sup>17</sup> Likewise, economic privileges granted to formerly loyalist businessmen can be revoked without adequate compensation. As Max Weber has remarked in reference to patrimonial rule, opposed to a feudal estate system: “The ruler recruits his officials in the beginning and foremost from those who are his subjects by virtue of personal dependence (slaves and serfs), for of their obedience he can be absolutely sure” (Weber 1968: 1026). In Russia or Turkey, the leader is keen to change regularly the highest echelon of the bureaucracy and the economic favorites, but they are often free to keep the ‘fruit’ of their office as long as their loyalty remains beyond suspicion. These elements are atypical in Western feudalism but resemble certain elements of the Ottoman rule where military and administrative officers were granted possession until the end of the service. “In contrast to bureaucracy, therefore, the position of the patrimonial official derives from his purely personal submission to the ruler” (Weber 1968: 1030). The subordinated bureaucrat acts within a goal oriented rational administration, where the goals may, however, be diverted from public interest for the political interests of the ruler to the detriment of the public interest or for electoral and ideological manipulation.

The neo-feudal relations can emerge in a capitalist system where “domination is independent of market mechanisms” (Adorno 1972: 368). In this politically controlled system loyalty becomes the predominant condition in any strategy in rent seeking. It is the most reasonable form of behavior under the circumstances of personal dependence in most forms of social life from economy to culture, science to healthcare. In Hungary and Russia busi-

<sup>17</sup> There are a few exceptions: the key loyalists (chief prosecutor, head of the judicial office, etc.) are elected for very long terms and formally beyond the reach of the ruler. However, their services rendered to the ruler make them accomplices and the bond is reinforced notwithstanding the legal guarantees of independence.

ness and cultural success, jobs (including minimum wage public labor service<sup>18</sup>) depend on partisan loyalty or submission to the powers to be. Concentrated political power is used to sustain a clientelistic system where in exchange of the goodies the beneficiaries perpetuate the power of their patrons. Contrary to classical feudalism this is democratic or majoritarian clientelism as there is a sizeable number of beneficiaries who express their loyalty in elections. This is true even of the poorest members of the active electorate, even if their conditions do not improve much and certainly much less than the economic possibilities would permit and even if social inequality increases. In Hungary 80 per cent of the voters living in the ten poorest villages voted for the government in 2018; the support for PiS [Law and Justice] is strongest in the poorest South-Eastern and Eastern parts of Poland.

The actual centralization in illiberal regimes<sup>19</sup> and the resulting dependency corresponds to an informal social reality and creates new, socially functional relations, notably further personal dependence. However, the constitutional representation of the society remains neutral in terms of social stratification which is replaced with the singling out of some vulnerable groups (see the cult of motherhood, ethnic Hungarians in neighboring countries)<sup>20</sup>, a matter that is not limited to the constitution of illiberal democracies. For post-structuralists this is not surprising at all, as in the post-structuralist perspective social class has been eliminated and social stratification is a matter of social construction: it is the *discourse* that is “the primary terrain within which the social is constituted.” (Laclau 2005: 49)

The actual social differences, and domination or hegemony in social relations are not reflected directly in the illiberal constitution and its public law. As mentioned, the language of the constitution of illiberal democracy is neutral and it corresponds to the liberal standard, although in many liberal constitutions there are hidden social stratification strategies (see the welfare state and equality clauses). Simply by enabling centralization, illiberal discourse, and personal rule, the neutral constitution became an adequate theory of the present constellation and reinforces its feudalistic (prebendial) tendencies. Of course, there is no guarantee that the politically induced feudalistic relations will last in a capitalist market economy and even less that illiberal populist democracies reflect social realities in an economically and socially sustainable manner. (See the current difficulties of Turkey, Venezuela, and the likely forthcoming difficulties of Italy, due to the populist fiscal policy.)

Some political scientists, like Cas Mudde seem to argue that illiberal democracy is (among others) a response to the undemocratic components of existing constitutional democracies: “Crucial economic and financial powers were externalized to independent institutions, like central banks, governed by technocrats and without significant democratic

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<sup>18</sup> In the 2018 Hungarian elections 65 per cent of the voters in the least developed villages (those with the highest occurrence of labor service among residents) voted for the government party.

<sup>19</sup> Centralization does not mean all-inclusive state ownership, although some strategic sectors (in particular public utilities, which are required by government to provide heating or electricity below market price) may be renationalized. Many of the illiberal regimes operate in a very open international market and foreign investment and export-oriented production remains crucial in the EU countries.

<sup>20</sup> The Hungarian Fundamental Law singles out such groups in Article XIX:

(1) Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the event of maternity, illness, invalidity, disability, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.

oversight. Similarly, many controversial issues were legalized out of politics, such as abortion or the death penalty, never to be campaigned on again” (Mudde 2018). Populism is only contesting a constitutionally imposed taboo. For the leftover of the intellectual left, illiberal institutional arrangements would be a correction of a faulty social theory provided by the liberal constitution which places certain fundamental issues on the limitation of public power off limits for popular action.<sup>21</sup> Society, in this perspective, takes its revenge in the populist constitution.<sup>22</sup> However, in view of current European illiberal arrangements created by populism, notwithstanding the importance of electoral democracy and constant reference to people, the exclusion of certain issues from democratic oversight continues, although without the benefit of non-partisanship.

Constitutional lawyers and other people afraid of authoritarianism, that is people who are now labeled as liberals (even worse: neoliberals) or elitists in the standard populist and leftist demonology would argue that a social theory of the constitution that grants unfettered powers to people departs from constitutionalism and such reading of the constitution assumes an unstructured people as permanent constituent power. Such readings are often claimed in the name of some kind of social justice. The current illiberal-populist interpretation of the constitution is that it is an act of uncompromised (‘genuine’) popular sovereignty (of the ‘genuine’ people) where the role of state institutions is to defend constitutional identity reflects such a theory of society.<sup>23</sup> Liberals consider this reading a dangerous, even self-destructive theory (Mudde 2018).

The societies which adopt illiberal political regimes differ considerably, but a similar public law system will result in a cluster of commonalities in cultural, social, and economic relations. In some more ‘advanced’ (i.e. more authoritarian) illiberal regimes the illiberal transformation rapidly led to authoritarian political tendencies and regimes with important social consequences: in particular the shift towards anti-modernism in many sectors of society is remarkable. This can be demonstrated in the increased public role of very traditionalist churches. Even the political structuring of the electorate becomes pre-modern or its pre-modernity is affirmed and celebrated: the government deals with the society as if it were unstructured, unified, and to the extent possible ethnically or at least culturally homogenous, and without interest groups; such representations are welcome by the electorate. Here (see some of the constitutional preambles, in particular the Hungarian Fundamental Law) an artificial community of people is created whose political identity is based on grievances and stories of humiliation, for example loss of territory in the Hungarian and Russian cases, victim status due to communist conspiracy in Poland, martyrs of the Gulenist conspiracy in Turkey, etc. In the prevailing culture of complaint everyone has his/her story of humiliation. Overcoming humiliation is a central component of populist identity

<sup>21</sup> This does not imply that the critiques welcome the populist action, only that they seem to find fault with constitutional entrenchments.

<sup>22</sup> This hypothesis invites further research, but its normative implications are troubling.

<sup>23</sup> The idea of the duty to defend national constitutional identity and Christian identity was introduced into the Hungarian Fundamental Law in 2018. The idea was already recognized by the Constitutional Court in 2016 (Decision 22/2016. XII. 5. 2016. AB. hat.). Like so many ingredients of illiberalism, the identitarian approach is widespread in constitutional democracies too, see for example the German constitutional position on constitutional identity. Constitutional identity was endorsed by the Polish Constitutional Tribunal before the victory of PiS [Law and Justice]. See also Marine Le Pen’s constitutional agenda in 2016: one of her new fundamental constitutional principles was the “defence of our identity of people.”

politics: The constitutional arrangements are intended to accommodate the dictates of the fears, resentment and rage of the population, resonating in a so far denied humiliation, typically of nationalist nature. These dictates result in a revolt of ‘genuine people’ against elites (including supporters of liberal constitutionalism).<sup>24</sup> In fact, it is the commonality of these sentiments that creates the constituent people of the illiberal constitutional order: the people are those who share the proper sentiments, in particular those of suffering and reverence towards the leader. Like in the ideology of radical Latin American populists—Chavez, Maduro, Correa—the constituent power of people is always present and ready to be used. This is contrary to the constitutionalist idea that “popular sovereignty cannot be exhausted by the electoral process” (Butler 2016: 50). In this populist logic institutions are to be purified to eliminate elite influences, which in the post-communist context are the remnants of former communist or corrupt post-communist and liberal power structures (a typical argument when justifying the ‘reformation’ of the judiciary). Constitutional constraints are the invention and last refuge of the elite and other enemies of the people.

Once political power is legally and socially consolidated, and the liberal/socialist elite is annihilated, the elite-people division is losing some of its relevance and it is replaced to some extent by alien enemies like migrants or, in the case of Hungary and Poland foreign elites (‘Brussels’), and in Russia and Turkey ‘certain Western forces.’ The charismatic leader remains part of the genuine people and the genuine people is the one that exists in the preferences of the leader. The standard reference in constitutions to the people continues to matter and the ‘genuine people’ is in constant need of self-assertion. Hence the need for visible manifestations of the existence of a unified (culturally or even ethnically homogenous) people or ordinary people with ordinary (non-refined) manners and support to the ruler (pro-governmental mass demonstrations, popular consultations, plebiscites).<sup>25</sup> And, increasingly, it will be the ruler who will call for such manifestations, e.g. by calling public consultations, mass demonstrations of support, or simply relying on his propaganda machine which informs the audience of public support of the government.

The illiberal constitutional regime of European Union member states does not correspond to any specific social structure. It is the ‘political’ (i.e. the extralegal power) that imagines and partly creates an emotional image, a kind of emotional constitutional representation for society as well as a new constitutional subject: the unified people that defends its imaginary purity. The community seems to result from emotional mobilizations that rely on country specific cultural patterns (nationalism and religious fundamentalism). These emotional sources are successfully mobilized even at the stage of regime consolidation. There are, of course, social and cultural specificities which explain the emergence and successful popular consolidation of such emotions based constitutional theory of society. For example, in Hungary the prevailing value system is Eastern orthodox (!) coupled with relative secularization (with pragmatic rationality in everyday life) which clearly facilitates the acceptance of a pragmatic authoritarian regime (Keller 2010).

<sup>24</sup> It would be an important critical task for social theory to demonstrate the fallacy of the undifferentiated references to “elites.” The widespread use of the term ‘elite’ in political science analysis only normalizes the populist world view.

<sup>25</sup> In classic Latin American populist rule “populists privileged notions of democracy based on the aesthetic and liturgical incorporation of common people in mass rallies more than the institutionalization of popular participation (Kaltwasser et al. 2017: 197).

Contemporary sociology (in contrast to the Durkheimian tradition) has difficulties with the conceptualization of emotions, although the emotionalism of the illiberal-populist regime and its society is not unique: liberal constitutionalism too selects and consolidates social emotions, giving preference to some. For example, the prohibition of slavery was to a great extent related to empathy with the suffering of the slaves generated by cruelty (Sajó 2012). Illiberal constitutions and the social relations supporting these solutions reflect anti-constitutionalist emotions, namely narcissism, resentment, hate, fear and rage originating in a self-presentation as victim of humiliation, and to quote Pankaj Mishra, “the yearning for reenchantment and the cult of redemptive violence.” In Hungary, according a post-election survey taken in the Spring of 2018, one third of the population feared loss of social status, while the central Angst was becoming ill and getting to hospital, such fear being most common in poor villages and among the lower social strata. Fear is also coupled with hatred. Migration is not among the primary threats (it is nearly non-existent in Hungary), but it scores high among FIDESZ voters. Strong hatred of migrants is present among twenty per cent of the Hungarian population.<sup>26</sup> These sentiments animate and consolidate the political power that promises protection and stigmatizes the objects of hate and are reflected in the respective constitutional amendments (see e.g. the constitutional prohibition of ‘mass settlement of migrants’ to Hungary). It is, of course, a major issue for the future how societies can function with such an emotional baggage. The resentment that animates the acceptance of illiberal democracy is not necessarily translated directly into constitutional structures and legal interpretation but it is becoming the spirit that legitimates institutional restrictions of rights and provides emotional justification of majoritarianism that finds no restriction to the popular will in fundamental rights.

### Conclusion

The constitution as a theory of society is not only descriptive; it also creates reality. The current illiberal democratic regimes and processes create a partly new social and political reality, namely a personal rule based on increasing personal dependence of the members of society. This dependence results from public law practices, without specific constitutional language: it can exist simply by abusing the possibilities inherent to the liberal constitution. It is a deliberate misreading, a systematic lie about the constitution and constitutional institutions, but not necessarily a misrepresentation of the social vision of illiberally minded social majorities. So far, what we can see is that the constitutional theory of society in illiberal democracies relies on a representation of unitary people but it moved towards a division of us and they (a kind of “oni,” to use the title of a book of the late Teresa Torańska’s) (Torańska 1987) and it reflects a nativist-populist vision of the political and social order based on electoral confirmation.. From the perspective of the traditional understanding of the modern constitution as integrative, communication enabling and despotic abuse preventing device, this development is deeply troubling.

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<sup>26</sup> <http://library.fes.de/pdf-files/bueros/budapest/14556.pdf> (Accessed 28 August 2018).

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