

## Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism

Paul Blokker\*

Counter-revolution by law in Hungary and Poland – Populism as a distinctive political project that mobilises anti-liberal conservative forces in society – Populist attempt to dismantle liberal-constitutional institutions in the name of a conservative, illiberal project – Populist critique of legal fundamentalism, understood as an excess of liberal legal norms, as a key dimension in the conservative, populist project

### CONSERVATIVE COUNTER-CONSTITUTIONALISM

The momentous changes in East-Central Europe<sup>1</sup> around the year 1989 have been widely understood as ‘legal revolutions’ or ‘legalistic revolutions’,<sup>2</sup> ushering

\*Associate professor, Department of Sociology and Business Law, University of Bologna, Italy; email: paulus.blokker@unibo.it. The author acknowledges the funding received from the European Union’s Horizon 2020 Research & Innovation programme under Grant Agreement no. 770142, project RECONNECT — Reconciling Europe with its Citizens through Democracy and Rule of Law.

<sup>1</sup>I follow Johann Arnason here in identifying a distinctive historical region in the form of East-Central Europe, distinct from both a Germanic *Mitteleuropa* and Russian-controlled Eastern Europe proper, see J.P. Arnason, ‘Introduction: Demarcating East Central Europe’, 8(4) *European Journal of Social Theory* (2005) p. 387.

<sup>2</sup>Jiří Příbáň, for instance, spoke of the ‘fiction of legal revolutions’ (see J. Příbáň, *Dissidents of Law* (Ashgate 2002) p. 89, and together with Wojciech Sadurski of a ‘self-limiting and legalistic revolution’ (see J. Příbáň and W. Sadurski, ‘The Role of Political Rights in the Democratization of Central and Eastern Europe’, in W. Sadurski (ed), *Political Rights under Stress in 21<sup>st</sup> Century Europe* (Oxford University Press 2006) p. 196–238, 299), while Andrew Arato referred to ‘gentle’ and ‘legal’ revolutionaries (see A. Arato, ‘Dilemmas Arising from the Power to Create Constitutions in Eastern Europe’, 14(3-4) *Cardozo Law Review* (1993) p. 661) and the former Chief Judge of the Hungarian Constitutional Court László Sólyom related to the ‘revolution under the rule of law’ (see L. Sólyom, ‘The role of constitutional courts in the transition to democracy: with special reference to Hungary’, 18(1) *International Sociology* (2003) p. 133).

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in the transformation of the former communist countries into liberal-democratic regimes. Close to 30 years have passed since the regime change, and the opposite appears to be occurring in parts of the region. We are witnessing *counter-revolution by law*, or *counter-constitutionalism*.<sup>3</sup> Observers identify, in Hungary and Poland, in particular, constitutional ‘capture’ by populist forces as well as defiance of and attacks on judicial institutions in the name of popular sovereignty and with a strong critique of liberalism.<sup>4</sup> What seemed to have been robustly institutionalised (‘consolidated’) constitutional-democratic regimes now appear to be grounded in fragile political and judicial institutional systems that are rapidly being replaced by rather different configurations of illiberal, or what some even see as autocratic, political design.<sup>5</sup> The current constitutional politics of the populists go strongly against the tide of 30-odd years of building constitutional democracy according to the liberal, legal-constitutional blue-print and point to a radically different type of constitutionalism.

The scholarly analysis of these developments largely emphasises the opportunistic, instrumentalist, and destructive nature of the populist projects.<sup>6</sup> As argued by Kim Scheppele, for instance: ‘Populists, in short, are opportunists who, in practice, put themselves and their eternal hold on power above any democratic appeal that they may have in particular moments’.<sup>7</sup>

The argument in this paper is that too much emphasis is placed on the ‘power-realist’ and ‘opportunist’ approach taken by populists and too little attention for the ideational foundations and forms of critique present in populist counter-constitutional projects,<sup>8</sup> their relation to long-standing conservative narratives

<sup>3</sup>K.L. Scheppele, ‘The Social Lives of Constitutions’, in P. Blokker and C. Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017) p. 35; A. Sledzinska-Simon, ‘The Polish Revolution: 2015-2017’, *Int’l J. Const. L. Blog*, 25 July 2017, ([www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017](http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017)), visited 5 September 2019.

<sup>4</sup>See Krygier, Kosař, Baroš, and Dufek, and Suteu (all in this special section). But as attested by Kosař et al., not dissimilar developments are occurring in Czechia and Slovakia, too. See further W. Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019).

<sup>5</sup>See, e.g., R.D. Kelemen and L. Pech, ‘Why Autocrats Love Constitutional Identity and Constitutional Pluralism’. No. 2. Reconnect Working Paper, 2018.

<sup>6</sup>See, e.g., D. Landau, ‘Abusive constitutionalism’, 47 *UCDL Rev.* (2013) p. 189; W. Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’, No. 18/01 *Sydney Law School Research Paper* (2018); W. Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’, *Hague Journal on the Rule of Law* (2018) p. 1; K.L. Scheppele, ‘Autocratic Legalism’, 85 *University of Chicago Law Review* (2018) p. 545.

<sup>7</sup>K.L. Scheppele, ‘The Opportunism of Populists and the Defense of Constitutional Liberalism’, 20(3) *German Law Journal* (2019) p. 331.

<sup>8</sup>It should be noted that Scheppele is a clear exception in that she does engage in the systematic study of the ideas and forms of critique of the conservative populists, see Scheppele, *supra* n. 7.

on liberal democracy, and the distinctive telos of populist politics. As Ewa Dąbrowska argues in the case of Poland, ‘There is scant academic literature on the *ideas behind* the political change realized by PiS since 2015’.<sup>9</sup>

The paper argues that the current developments in Hungary and Poland need to be understood as an anti-liberal project and a conservative reaction to the liberal-legalist domination of the post-communist transformation process.<sup>10</sup> Conservative intellectuals and civil society groups have been gathering strength since the early 1990s, have increasingly radicalised and have become significant political forces which mobilise society and provide intellectual support, expertise, and legitimacy to populist projects. As Balázs Trencsényi et al. argue:

The radicalization of conservatism, which characterized the political and discursive landscape of the region after 2000, can be properly understood only in relation to the liberal ascendancy of the 1990s. This is not only because neoconservatives constructed their own identity in opposition to liberalism, but also because their efforts to define the political divide in terms of exclusive cultural-ideological dichotomies can be traced back to the postdissident discourse, defining liberal politics in terms of a broad consensus.<sup>11</sup>

It is, in my view, crucial to analyse distinctive manifestations of right-wing populism as distinctive political projects that mobilise anti-liberal, conservative forces in society, and to elucidate such populist rhetoric and practice as attempts to dismantle liberal-constitutional institutions in the name of a conservative, illiberal project which resonates with similar political developments elsewhere.<sup>12</sup>

The aim of the paper is to contribute to a more systematic analysis of the ideas underpinning conservative populism in order to analyse its *critical stance* towards liberal understandings of the law and liberal constitutionalism. Such an exercise is important for at least two reasons: it exposes potentially weak or contradictory

<sup>9</sup>E. Dąbrowska, ‘New conservatism in Poland: The discourse coalition around Law and Justice’, in K. Bluhm and M. Varga (eds.), *New Conservatives in Russia and East Central Europe* (Routledge 2018) p. 92 at p. 93 (emphasis added).

<sup>10</sup>I do not wish to imply that this is the case throughout the region. The Czech populism of Andrej Babiš is, for instance, often defined as ‘technopopulism’, lacking in a strong nationalist or conservative component. Also, in the case of Romania, the populism of the governing PSD appears less conservative and nationalist.

<sup>11</sup>B. Trencsényi et al., *A History of Modern Political Thought in East Central Europe Volume II: Negotiating Modernity in the ‘Short Twentieth Century’ and Beyond* (Oxford University Press 2018) p. 277.

<sup>12</sup>One prominent example in Europe is the recent ‘yellow-green’ populist coalition of the Lega and the Movimento Cinque Stelle in Italy, which pursued similar policies against universal, individual human rights, criticised powerful judicial institutions, displayed scepticism towards minority rights, and openly defied the European integration project.

dimensions of liberal-constitutional and legal ideas and institutions but equally highlights the weaknesses, problematic dimensions, and forms of closure within conservative reasoning itself.

The paper will discuss, first, theoretical critiques of liberalism, taking as a significant example the works of Ryszard Legutko, a political theorist and a Member of the European Parliament for the Polish Law and Justice party (PiS). Second, I will identify the populist project of PiS in Poland (and to a lesser extent that of Fidesz in Hungary) as a conservative, counter-constitutional project which dismantles liberal institutions but equally attempts to institutionalise alternative constitutional orders. Third, I will discuss the populist critique of the liberal understandings of constitutionalism, the rule of law, and human rights, focusing on the PiS project of a Fourth Republic in Poland, and, fourth, I will engage with the populist critique of legal fundamentalism – understood as an excess of liberal legal norms – as a key dimension in the conservative, populist project of PiS.

#### A GENERAL CRITIQUE OF LIBERALISM

While many observers regard the Hungarian and Polish populists as opportunistic, cynical, and power-grabbing politicians, it is difficult to deny that there is a distinctive normative and ‘ideological’ thrust to the discourse and policies of the Fidesz and PiS governments. The analytical state of the art reflects a classical distinction in the social sciences in which (predominantly) realist approaches emphasise power politics and its rational/materialist/interest bases, whereas interpretative approaches stress the substantive, ideational, and justificatory dimensions of politics. In this paper, I stress the importance of the second approach. It is my contention, following some of the insights in the recent literature in the fields of political science and sociology,<sup>13</sup> that the root of the populist constitutional projects in Hungary and Poland, and possibly elsewhere in East-Central Europe, lies largely in its ideational basis of anti-liberalism and conservatism.<sup>14</sup> Populists single out liberalism as the main enemy and display

<sup>13</sup>Cf. J. Rupnik, ‘The Crisis of Liberalism’, 29(3) *Journal of Democracy* (2018) p. 24; Bluhm and Varga, *supra* n. 9; M. Bucholc, ‘Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015’, 11(1) *Hague Journal on the Rule of Law* (2019) p. 85; A. Buzogány and M. Varga, ‘The ideational foundations of the illiberal backlash in Central and Eastern Europe. The case of Hungary’, 25(6) *Review of International Political Economy* (2018) p. 811; J. Zielonka, *Counter-revolution: Liberal Europe in Retreat* (Oxford University Press 2018).

<sup>14</sup>Cf. Scheppele, *supra* n. 7; T. Csillag and I. Szelenyi, ‘Drifting from liberal democracy. Neo-conservative ideology of managed illiberal democratic capitalism in post-communist Europe’, *Intersections. East European Journal of Society and Politics* (2015) p. 1; K. Jasiński, “‘Conservative modernization’ and the rise of Law and Justice in Poland”, in Bluhm and Varga, *supra* n. 9, p. 130; W. Grzebalska and A. Pető, ‘The gendered modus operandi of the illiberal transformation in Hungary and Poland’, 68 *Women’s Studies International Forum* (2018) p. 164.

it as ‘evil and threatening’.<sup>15</sup> Anti-liberalism forms, in this, a core dimension of the ideational foundations of conservative populism. Returning to Trencsenyi et al.:

The new [conservative] ideological paradigm which questioned the legitimacy of the posttransition regime, while inheriting some elements from the anti-communist discourses of the early 1990s, targeted not only the inheritors of the communist power structures, but also those former dissidents who maintained that the fight against the vestiges of the communist regime was not their main priority. Many of the discursive patterns of the transition period [...] could be incorporated into the new anticommunist ideological frameworks. While these concerns were originally advanced by liberal or moderate conservative authors, they were eventually transformed into arguments in favor of some combination of populism and authoritarianism. [...] Political struggle was not framed in terms of a competition within a democratic procedural framework, but as a clash of fundamentally incompatible *Weltanschauungen* that aimed at changing the outlook, and often the very composition, of the political community once for all. Hence, any means, including the subversion of the procedural structures and constitutional rules, became legitimate to prevent the victory of the opponent.<sup>16</sup>

For Polish conservatives,<sup>17</sup> liberalism – with its promotion of modernity and Western civilisation, and grounded as it is in moral decline, consumerist thinking, and negatively understood pluralism and multiculturalism – is undermining culture, religion, and national identity.<sup>18</sup> In Hungary, a similar conservative mindset is at the forefront of public debate as well as in politics.<sup>19</sup> In the words of

<sup>15</sup>A. Wolff-Powęska, ‘Trommler der Revolution Jungkonservative und Polens Rechte’, 3-5 *Osteuropa* (2018) p. 57 at p. 59. Krzysztof Jasiński speaks of a ‘conservative modernization’ strategy: Jasiński, *supra* n. 14.

<sup>16</sup>Trencsenyi et al., *supra* n. 11.

<sup>17</sup>It is important, but somewhat beyond the scope of this paper, to recognise the important differences between conservatives. Whereas some, such as Ryszard Legutko and András Láncki, have strongly criticised liberal constitutionalism, individual rights, and related judicial institutions (such as independent apex courts), others, such as István Stumpf, take a more moderate position. Lech Morawski, one of the ‘pseudo-judges’ of the Polish Constitutional Tribunal (who died in 2017), endorsed a view of ‘judicial restraint’, in which the Constitutional Tribunal takes a less active role and parliament (and government) become more prominent. See, in general, for extensive discussions of different conservative currents, R. Matyja, ‘Songs of innocence and songs of experience’, in M. Kopeček and P. Wciślik (eds.), *Thinking Through Transition* (CEU Press 2015) p. 201; Dąbrowska, *supra* n. 9; Trencsenyi et al., *supra* n. 11, ch. 6; Buzogány and Varga, *supra* n. 13.

<sup>18</sup>Wolff-Powęska, *supra* n. 15, p. 59.

<sup>19</sup>Kim Scheppele has discussed the anti-liberal ideology of the Hungarian Fidesz party in-depth, see Scheppele, *supra* n. 7.

Frank Furedi, the ‘political outlook of Fidesz is best described as a synthesis of conservative nationalism and Christian democracy’.<sup>20</sup>

The focus on populist constitutional projects in Hungary and Poland reflects the contemporary prominence of those projects, but should not hide significant differences between the developments in the two countries. The nature of political and social forces in the two countries appears to be somewhat different. In Poland, the religious-conservative dimension and the role of the Catholic Church are more prominent, and both conservative and anti-populist liberal forces are strongly represented in civil society. In Hungary, in contrast, the ethno-nationalist, and less religious, dimension is most prominent, both politically and in greater society (e.g. ‘Civic Circles’), whereas anti-populist civil forces remain fragmented and weak. Factors that make the Hungarian and Polish trajectories, however, similar include the fact that both countries were front-runners in the process of democratisation, not least due to prominent manifestations of dissidence before 1989 and the fact that both countries were considered consolidated liberal democracies early on. A further significant and contrasting factor is that both countries were slow in adopting a new constitutional framework; in Hungary, the amended 1948 constitution remained formally in force until 2011 and in Poland, the new constitution was adopted only in 1997. Bruce Ackerman, for instance, has recently argued that the late adoption of the Polish Constitution and its limited societal support are main factors that serve to explain the current situation.<sup>21</sup> A further element of similarity (which is, in fact, the main focus of this paper) is the emergence of a strong critique of the liberalism and *liberal-constitutional design* of the post-1989 orders endorsed by politically conservative majorities, as evidenced by the ‘backsliding’ in those countries.

Before discussing the legal and constitutional dimensions of the conservative populist critique in greater detail in the second part of this paper, I suggest that it is useful to explore the general critique of liberalism raised by conservative thinkers. One comprehensive source – taken here as an exemplary instance of theoretical exploration of the conservative-populist critique<sup>22</sup> – is the work of Ryszard Legutko, who is both a political theorist and a Member of European Parliament for PiS. In particular, the recent book *The Demon in Democracy* (as well as other works by the same author, not least the short essay ‘What is

<sup>20</sup>F. Furedi, *Populism and the European Culture Wars: The Conflict of Values Between Hungary and the EU* (Routledge 2017) p. 5.

<sup>21</sup>B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019).

<sup>22</sup>The critique present in populist discourse and practice will be discussed in the second part of the paper.

Wrong with Liberalism?') form a fruitful starting point for the analysis of the ideational bases of conservative populism.<sup>23</sup>

In *The Demon in Democracy*, Legutko crafts an extensive argument in which communism and liberalism are depicted as overlapping in their ideological and politicising dimensions. That argument should not be taken lightly, because, as I will try to show in the second part of the paper, some of the conservative lines of argument are reflected in the political discourses and practices of the PiS party and hence reverberate in, or even affect the nature of, the populist project.<sup>24</sup> While I do not claim that conservative ideas are the only factor influencing populist politics in cases like Hungary and Poland, my contention is that we cannot understand those populist projects without paying systematic attention to conservative ideas and values. As Jeffrey Isaac argued in a debate on 'illiberal democracy', it is important to take populist declarations seriously and to attempt to understand what is meant by terms like 'illiberal democracy' in order to analyse the contested meaning of democracy. In a further step, he suggests 'unpacking' such terms in order to trace their 'likely practical ramifications' (as I try to do below with regard to PiS' political project).<sup>25</sup>

Legutko is surely not the only conservative intellectual who has provided ideas for the conservative populist project. In Poland, Marek Cichocki, Marcin Król, Dariusz Gawin, Lech Morawski, Zdzisław Krasnodębski and others are recognised as prominent intellectuals, whereas in Hungary *inter alia* András Láncki and György Schöpflin, as well as constitutional court judges Béla Pokol and István Stumpf, perform a similar role.<sup>26</sup> The argument here is that Legutko and other like-minded intellectuals-cum-political/judicial elites have been playing an important role in legitimating and articulating the ideological underpinnings of the populist project, and have been at the basis of the upsurge in conservative ideas and related societal networks.

Legutko is a clear example of this; he has played an important role in the development and promotion of conservative ideas in Poland since the early 1990s. Rafał Matyja refers to Legutko as one of the 'founding fathers' of new Polish conservatism and a leader of conservative 'meta-politicians' – in other words, a critical figure allegedly at a distance from ordinary politics.<sup>27</sup> In the view

<sup>23</sup>Jacques Rupnik, a renowned historian and expert of the East-Central European region, equally identifies Ryszard Legutko, together with Marcin Król, as important sources of critique of liberalism, not least in terms of a decoupling of democracy and liberalism, see Rupnik, *supra* n. 13.

<sup>24</sup>Such critique is interesting because it parallels or echoes critical voices regarding liberalism that can be found in the West (more on this below). Trencsenyi et al. draw, for instance, attention to the interest in republicanism and Hannah Arendt amongst Polish populists, Trencsenyi et al., *supra* n. 11, ch. 6.

<sup>25</sup>J. C. Isaac, 'Is there illiberal democracy?' *Eurozine* (2017), ([www.eurozine.com/is-there-illiberal-democracy](http://www.eurozine.com/is-there-illiberal-democracy)), visited 5 September 2019.

<sup>26</sup>See Trencsenyi et al., *supra* n. 11, ch. 6; Matyja, *supra* n. 17; Dąbrowska, *supra* n. 9.

<sup>27</sup>Matyja, *supra* n. 17, p. 203.

of Trencsenyi et al., Legutko ‘exemplifies the evolution from a liberal conservative position in the 1990s towards straightforward anti-liberalism after 2000’.<sup>28</sup> Legutko has participated in various centres and think-tanks of conservative thought, published regularly on related themes, and founded the conservative cultural magazine *Arka* (later *Arcana*). He ‘perceived it as a strategic task to change the dominant political ideology in Poland and to imbue the new Polish democracy with their [conservative] values’.<sup>29</sup> In 2005, Legutko started to play a direct role in politics when he became the minister of education in the first PiS government (2005–07) and vice-marshall of the Senate. In 2009, Legutko entered the European Parliament. Currently, he is the co-Chairman of the European Conservatives and Reformists (ECR) parliamentary group.

Let us now turn to the critique of liberalism expressed by conservative populist thinkers. Liberalism is often understood in rather loose terms in the populist critique, and is frequently equated with neoliberal ideas about market forces as well as cosmopolitan ideas regarding European integration, human rights, and ‘open society’. It is counterposed against native culture, historical ‘roots’, and the traditions of the local community. Legutko, for one, discerns a common dimension in the various expressions of liberalism, ranging from ‘radical free market capitalism to certain forms of the welfare state, from Ludwig von Mises to John Rawls, from Reaganomics to the European Union’.<sup>30</sup> In this liberal narrative, the first aspect that Legutko criticises is its alleged *lack of weight*.<sup>31</sup> In his understanding of liberalism, as expressed in an earlier essay, a ‘liberal is someone who takes a rather thin view of man, society, morality, religion, history, and philosophy, believing that this is the safest approach to organizing human cooperation’. In Legutko’s view, liberals are ‘united in their conviction that *thinness* of anthropological, moral, and metaphysical assumptions is the prerequisite for freedom and peace’.<sup>32</sup> He continues,

The lack of *weight* which one feels whenever one reads liberal works is an obvious consequence of the thinness of liberal assumptions, from which one cannot derive any profound insights.<sup>33</sup>

<sup>28</sup>Trencsenyi et al., *supra* n. 11, ch. 6.

<sup>29</sup>Dąbrowska, *supra* n. 9, p. 97.

<sup>30</sup>R. Legutko, ‘What’s Wrong with Liberalism?’, 50(1) *Modern Age* (2008) p. 7.

<sup>31</sup>Regarding this point, as well as some of the other points of critique discussed here, there is considerable overlap with other conservative thinkers. In the Polish context, Dariusz Gawin has, for instance, observed that liberal ‘tolerance’ does not clearly indicate what is morally right, see Trencsenyi et al., *supra* n. 11, p. 280. Similar ideas can be found in the works of the Hungarian intellectual András Láncki, see Scheppele, *supra* n. 7. As observed above, this is not to say, however, that conservative populism is homogeneous.

<sup>32</sup>Legutko, *supra* n. 30, p. 7, 8; italics in original. See also Rupnik, *supra* n. 13; Dąbrowska, *supra* n. 9; Matyja, *supra* n. 17.

<sup>33</sup>Legutko, *supra* n. 30, p. 8; italics in original.



The liberal approach is thus a ‘thin’ one, in that it understands thicker, non-procedural or more substantive ideas as a matter of private or group preference which ought not to be part of public politics. The argument that liberalism lacks weight is a variation on the well-known critique of liberalism as a formal-procedural idea which portrays liberalism as a dispassionate, instrumentalist view of politics.<sup>34</sup> According to Legutko, this also means that liberalism – in its ‘sterility’ – has little if anything to say about substantive, human moral questions; indeed, liberalism is ‘comparably simplistic and equally impoverishing’ [as was communist thought].<sup>35</sup> For Legutko, liberalism succumbs to a certain degree of hubris when it suggests that liberalism is a ‘higher’ solution for societal problems. Indeed, it places itself in the role of ‘architectonic organizer of society’ and wants to ‘dominate by performing the roles of the guardians of the whole of the social system and the judges of the procedural rules within the system’.<sup>36</sup> The contextual meaning of this view of liberalism is a strong critique of the dominant role of political and economic liberalism in post-communist transformation, criticising both the individualist and imitative/mimetic dimension of the former and the strong market-orientation of the latter.

A related problem is that of *inauthenticity*. While liberal rules are of a procedural, universalist, and inclusive nature, this comes at the cost, according to Legutko, of ‘being more and more remote from reality’.<sup>37</sup> In my view, the paradoxical nature of the argument against liberalism consists of the view that liberalism is both lacking in weight *and* omnipresent; it is penetrating and politicising society at an increasing rate. As I argue below, it is this part of the argument, in particular, that is crucial to an understanding of the populist approach to law and constitutionalism. The impact of liberalism on society is that it increasingly undermines ‘social hierarchies, customs, traditions, and practices that existed prior

<sup>34</sup>Such critical views of liberalism are clearly not confined to contemporary articulations of conservative populism in East-Central Europe. One finds similar points of critique in, for instance, leftist thinking, including critical legal studies, as well as in Western conservative thinking (see J. Skorupski, ‘The conservative critique of liberalism’, in *The Cambridge Companion to Liberalism* (Cambridge University Press 2015) p. 401; Lord Sumption, ‘The Limits of the Law’, in N.W. Barber et al., *Lord Sumption and the Limits of the Law* (Oxford University Press 2016). In my opinion, this indicates a certain critical thrust in the views expressed by populists that needs to be acknowledged (not least because it exposes problems in liberal, legal thinking and practice), even if the practical, political, and normative answers provided by populists as an alternative are too often strongly at odds with democracy and hence fail to properly and convincingly live up to the critique.

<sup>35</sup>R. Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (Encounter Books 2016) p. 118.

<sup>36</sup>Legutko, *supra* n. 30, p. 9.

<sup>37</sup>Legutko, *supra* n. 30, p. 13. Láncki makes a similar point in *Political Realism and Wisdom* that liberalism fails to engage with reality: A. Láncki, *Political Realism and Wisdom* (Palgrave 2015).

to the emergence of the new system' [i.e. liberal democracy].<sup>38</sup> A key problem for conservatives is liberalism's drive to egalitarianism, which renders 'all social hierarchies [as] immediately problematic because they were, obviously, not natural'.<sup>39</sup> The egalitarian drive in liberalism means that no part of society is safe from liberalism's political interference:

People might generally agree that they are all equal before the law, but this will not dispel the concerns of a dedicated egalitarian, who will argue that this principle is too abstract to be sufficient in every instance. After all, even if we respect equality before the law, other types of inequality and domination continue to exist and their existence is morally repugnant and cannot be tolerated. He will then add that the persistence of inequality and domination has its origin in their being moored in people's customs and habits, which – as can be expected – considerably thwarts the principle of equality before the law.<sup>40</sup>

This communitarian critique of liberalism emphasises the tendency to root out all forms of inequality, thereby destroying social communities: 'Because egalitarianism weakens communities and thus deprives men of an identity-giving habitat, it creates a vacuum around them'.<sup>41</sup>

This argument is consequential for the populist approach to the law. The anti-liberal critique argues that human rights – as legal norms that promote equality – are problematic in their undermining of the common good. Human rights become, in this reading, 'arbitrary claims, ideologically motivated, made by various political groups in blatant disregard of the common good, generously distributed by the legislatures and the courts, often contrary to common sense and usually detrimental to public and personal morality'.<sup>42</sup> The argument is clearly a conservative one by which human rights are portrayed as protecting previously marginalised but now privileged groups against the interests of the traditional community and the 'ordinary people'. One is reminded of Hirschman's 'perversity thesis',<sup>43</sup> i.e. the

<sup>38</sup>Legutko, *supra* n. 35, p. 131.

<sup>39</sup>Ibid., p. 132.

<sup>40</sup>Ibid., p. 134.

<sup>41</sup>Ibid., p. 135. A further aspect of the weakness and inauthenticity of liberalism, according to conservatives, is that it is lacking in 'independent thinking' (for those countries that have 'imported' liberalism) and displays a form of 'voluntary colonialism'. Such inauthenticity is, in particular, inherent to the project of European integration: Wolff-Powęska, *supra* n. 15, p. 60-61. Legutko equally claims that the Polish have not only been made financially, but also mentally dependent on Western mentors and benefactors (Wolff-Powęska, *supra* n. 15, p. 62).

<sup>42</sup>Legutko, *supra* n. 35, p. 140. This inauthenticity argument, in a typically populist manner, also means that intellectual knowledge and any form of expertise is frowned upon, whereas 'popular knowledge' is deemed superior (*cf* Wolff-Powęska, *supra* n. 15, p. 6).

<sup>43</sup>A.O. Hirschman, *The Rhetoric of Reaction* (Harvard University Press 1991).

populist claim that the liberal project achieves the opposite of what it promises (liberation). Rather than leading to a free society for all, the rule of law and liberal constitutionalism result in the dominance of distinct groups within society and their 'oppressive' cosmopolitan, (neo)liberal, individualist culture, to the detriment of large parts of society, understood as the 'ordinary people' with their local culture and mores.

Human rights and law, in general, are perceived as not neutral, but rather as instruments of particular groups in society. In contradiction to Legutko's remarks about liberalism's lack of weight, liberalism (which Legutko understands here as very similar to communism) is equally understood as a *comprehensive* political project which uses law and human rights to politicise society and subject the entire collective to liberal norms. After communism, liberalism emerged as a 'new wave of a new ideology'.<sup>44</sup> This led to a rapid displacement of old ideas by the new liberal ideology or the 'newest tides of modernity'.<sup>45</sup> Liberalism – the project of a constellation of liberal, left-leaning, and pro-EU social forces – endorses a vigorous programme of 'political correctness' that aims for the emancipation of society from all manner of exclusion and repression. Legutko claims, however, that this causes it to evolve into a project with a totalitarian drive or a form of 'dictatorship' which obliges citizens to 'participate in the great collective enterprise, where everyone cooperates with everyone else at all levels and under all circumstances'.<sup>46</sup> Liberalism leads to the politicisation of society or a drive to 'organize the entire fabric of society, communities became a natural object of, first, critique, and then, open attack, because they were seen as power structures of an alien nonliberal and nondemocratic nature'.<sup>47</sup> Law and human rights are utilised by liberals to effectively promote this programme and, by means of the expansion of rights (women's rights, cultural rights endorsing multiculturalism), all of society becomes 'formatted' according to liberal ideas of freedom and tolerance. As I argue below, this politicisation of society by means of the expansion of human rights can be referred to as 'legal fundamentalism'. As argued by Legutko:

It is the state that should incessantly work to impose and improve cooperation policies by removing all real and potential barriers, creating a favorable legal environment, and reshaping public space and education in such a way that the people's minds internalize the rules of politically correct thinking.

Such undertaking carries a high price. When the state takes over responsibility for the rules of cooperation and their enforcement on all layers of society, there will be no limits to its interference in people's lives. The laws it enacts must of necessity be

<sup>44</sup>Legutko, *supra* n. 35, p. 141.

<sup>45</sup>*Ibid.*, p. 141.

<sup>46</sup>*Ibid.*, p. 101.

<sup>47</sup>*Ibid.*, p. 96.

increasingly more detailed and intrusive because what threatens those rules and has to be curtailed is believed to be hidden deeply in social practices and human consciousness. The slippery-slope argument, so often used by liberals, is particularly pertinent here. The logic of liberalism is that whatever seems to be the most obviously non-political, sooner or later will become political. The logic of democracy – with its notions of participation, inclusion, and representation – only strengthened this tendency.<sup>48</sup>

Let us now turn from theoretically informed arguments and explore how some of the theoretical tenets elaborated above are manifested in the discourse and practice of the ‘populist counter-constitutional revolution’.

### POPULIST COUNTER-CONSTITUTIONALISM

The conservative, populist forces now so prominent in Hungary and Poland are reacting directly to the *liberal* and *legal-constitutional project* of the 1990s. Populist critique and legal practice are a reaction to what is seen as the dual domination of liberal and post-communist forces<sup>49</sup> in the post-1989 political landscape. One significant dimension of the manifestation of populism is its conservative, right-wing nature. In Poland, for instance, the media often refer to PiS’ political project as a ‘conservative revolution’, ‘affirmative conservatism’, or the ‘new Right’, thus echoing labels used by German conservative forces in the 1920s while stressing that liberalism is the main enemy.<sup>50</sup>

The somehow difficult to refute populist argument is that the post-1989 transformation has seen an unbalanced emphasis on formalistic liberal institutions, rights, and norms, and an aggressive institutionalisation of a liberal understanding of law in such institutions as the constitutional courts, as well as an embedding of the national order in wider European and international legal regimes. Conservative populists see the liberal predominance as problematic yet ingrained in the institutions and constitutions created in the transformation processes. *Counter-constitutional reform* is hence an essential ingredient of the populist political programmes. In Kim Scheppelle’s words, ‘[c]ounter-constitutions are alternative visions of constitutional order, grounded in different understandings of what a constitution is and should be, understandings that reject the taken-for-granted constitutional vision already in place’.<sup>51</sup> As Scheppelle argues, in the case of Hungary, ‘[d]iscontent with politics in Hungary translated into discontent with

<sup>48</sup>Ibid., p. 101.

<sup>49</sup>Meaning here the continuing influence of ‘post-communists’ (former communists) in politics in the post-1989 era, for instance, in judicial and political positions (cf. Trencsenyi et al., *supra* n. 11).

<sup>50</sup>Wolff-Powęska, *supra* n. 15, p. 57, 59.

<sup>51</sup>Scheppelle, *supra* n. 3, p. 61.

a constitution that seemed to legitimate this dreadful state of affairs [of a malfunctioning democracy and economy],<sup>52</sup> and hence alternative representations of a constitutional order, often referring back to notions of a ‘historical constitution’,<sup>53</sup> have steadily gained ground in the post-1989 period in Hungary. In Poland, too, in a not dissimilar manner, competing visions of constitutionalism, including a conservative understanding of the constitutional order, have been a continuous presence in the post-1989 era.<sup>54</sup>

To understand these *constitutional counter-revolutions* organised by Fidesz in Hungary and PiS in Poland, it is important to have a firm grasp of the legal and constitutional attitudes of the populists in power and the way such attitudes translate into political practice. Only then can we understand the form and shape that the emergence of illiberal democracy has taken and the *telos* of the populist constitutional projects in East-Central Europe.<sup>55</sup>

The general idea is that populism and (the rule of) law are antipodes. I would argue, however, following Jan-Werner Müller in his recent *What is Populism?* that this is too simplistic and unhelpful. Rather than dismissing and dismantling it outright, populists use law for their own purposes in the form of counter-constitutional projects. Populists justify their legal actions by taking issue with legalistic<sup>56</sup> or *liberal* understandings of law and constitutionalism while claiming to provide an alternative.

Right-wing populism displays a critical attitude towards the status quo, a form of legal scepticism aimed against liberalism and legal-constitutional structures which I have defined as *legal resentment*.<sup>57</sup> Resentment appeals to anti-elitism as well as anti-pluralism and equates the political opposition with the enemy of the people.<sup>58</sup> It displays the post-1989 political project of the liberal opposition – a robust rule of law, independent institutions, and a pluralistic (civil) society) – as detrimental to the will of the ‘real’ people or nation and as corroding community norms and traditions. And thus, in constitutional terms, populists claim that legal constitutionalism leads to an excess of power in judicial institutions; strong

<sup>52</sup>Ibid., p. 60.

<sup>53</sup>K.L. Scheppele, ‘Counter-constitutions: Narrating the Nation in Post-Soviet Hungary’, paper given at George Washington University, Washington DC, 2 April 2004.

<sup>54</sup>Cf E. Kowalewska, ‘Competing visions of Constitutionalism in Post-Socialist Poland’, paper presented at conference ‘New constitutionalism? New forms of democracy and rule of law beyond liberalism’, International Institute for the Sociology of Law, Oñati, Spain, 12-13 July 2018.

<sup>55</sup>See also P. Blokker, ‘Populism as a Constitutional Project’, 17(2) *ICON* (2019).

<sup>56</sup>In a legalistic view of law, the rule of law is treated as a ‘political and revolutionary virtue which must be heavily defended’: J. Priban, *Dissidents of Law: on the 1989 Velvet Revolutions, Legitimizations, Fictions of Legality and Contemporary Version of the Social Contract* (Ashgate 2002) p. 88.

<sup>57</sup>P. Blokker, ‘Populist Constitutionalism’, in C. de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2018); Blokker, *supra* n. 55.

<sup>58</sup>T. Konciewicz, ‘Understanding the politics of resentment’, *Verfassungsblog*, 28 September 2017.

constitutional courts and an emphasis on (international) legal norms undermine 'authentic' popular rule in the name of the nation and national values. The argument made by Legutko and others is that 'power has increasingly drained from elected bodies to courts, transnational organizations, domestic bureaucracies, and other nonaccountable institutions with wide regulatory powers'.<sup>59</sup> Populists decry this depoliticisation or loss of political power; they perceive an unjustified weakening of the executive and parliament in the post-1989 liberal design of constitutional democracy accompanied by unjustified political 'meddling' by unaccountable constitutional courts. The populist constitutional 'crusade' inspired by resentment and its unshakeable mission of 'good change' in the name of the true people is meant to undo the injustices resulting from liberal-democratic politics.

Below, I will link the anti-liberal, conservative mindset to the populist counter-constitutional projects in Hungary and Poland, emphasising the critique of the neutrality of law and the distinctive dimensions of what I refer to as 'legal fundamentalism', i.e. the claim that liberal understandings of the rule of law and human rights have penetrated politics and society to an excessive degree.

#### THE POPULIST CRITIQUE OF THE RULE OF LAW

The populist critique of the rule of law and liberal constitutionalism engages with certain central dimensions of the idea of liberal-constitutional democracy, i.e., the neutrality of law, the emphasis on the rule of law understood as the idea that all forms of exercise of political power are subject to clearly established legal norms and procedures, the promotion of the protection of minorities and avoidance of exclusion by means of human rights, and the delegation of the guardianship of the legal-judicial edifice to specialised courts.

##### *The neutrality of the law*

The populist critique of liberalism, or what I refer to as legal resentment, departs from a wholesale critique of the liberal understanding of the rule of law and the liberal emphasis on the *apolitical, neutral nature of law*. Populists deny the idea of a strong separation between law, on the one hand and politics and morality on the other, that liberalism presupposes. They counter the idea of the constitution as a higher law by promoting a *political* notion of the constitution. The populist understanding of law refutes the notion that it has a superior or aprioristic nature

<sup>59</sup>Trencsenyi et al., *supra* n. 11, p. 282.

that allows it to take precedence over politics or democracy, and emphasises the always already political nature of law. Populists tend to view the idea of a neutral, universalist, individualist, and secularist understanding of law as bordering on 'nihilism' and as denying the 'essence of humanity and the human being'.<sup>60</sup>

As we saw earlier, Legutko, political philosopher and Member of European Parliament for PiS, argued in a piece entitled 'What is Wrong with Liberalism?' that liberals take on the role of 'architectonic organizer of society'. Liberals 'always want to dominate by performing the roles of the guardians of the whole of the social system and the judges of the procedural rules within the system'.<sup>61</sup> Their neutrality 'is impossible to maintain; one cannot be an organiser of everything while at the same time refraining from imposing substantively in specific cases'.<sup>62</sup> Legutko, in line with widely-held populist opinion, sees the emergence of liberalism in post-1989 Central and Eastern Europe with great scepticism and suspicion.

Populist leaders in both Hungary and Poland endorse forms of what they have coined 'illiberal democracies' based on collectivist, traditional, and Christian values. For populists, the law is never neutral or universal. Instead, the law is inseparable from extra-legal sources such as religious values, the societal community, and sovereign power. As such, for populists, the law always needs to be an expression of the 'national interest' and collective, traditional and religious values which express the nation's uniqueness. Kornel Morawiecki, the interim speaker of the Sejm, the Polish lower house, and father of the current prime minister, has explicated this as follows: 'The good of the nation is above the law. If the law conflicts with that good, then we're not allowed to treat it as something that we can't break'.<sup>63</sup> And in the words of president Andrzej Duda (on the far-reaching reform of the Polish Supreme Court in June 2017, which strongly undermined its legal independence),

The reform of the [Supreme] Court contributes to create a really good future for our Fatherland in the form of a lawful and strong state, a state which respects and protects the *ordinary man*.<sup>64</sup>

<sup>60</sup>A. Balcer, 'Beneath the surface of illiberalism: The recurring temptation of 'national democracy' in Poland and Hungary – with lessons for Europe', Warsaw: Wise Europe, Heinrich Böll Stiftung, available at ([wise-europa.eu/en/2017/02/14/beneath-the-surface-of-illiberalism-2/](http://wise-europa.eu/en/2017/02/14/beneath-the-surface-of-illiberalism-2/)), visited 17 September 2019.

<sup>61</sup>Legutko, *supra* n. 30, p. 9.

<sup>62</sup>*Ibid.*, p. 9.

<sup>63</sup>See ([www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/](http://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/)), visited 5 September 2019.

<sup>64</sup>Cited in M. Bucholc and M. Komornik, 'Gewaltenteilung ausgehebelt. Der Umbau der polnischen Justiz', 3–5 *Osteuropa* (2018) p. 7 at p. 9, emphasis added.

If the law, as populists claim, is always an expression of politics – and hence the rule of law is a myth – the liberal claim of the *neutrality* of law becomes an ideological mystification. This is what PiS claims in its ‘vulgar’ political attacks on Tribunal judges and international institutions. Early on in the crisis, PiS questioned the impartiality of the judges of the Constitutional Tribunal, thus justifying its own constitutional project which sought to radically ‘restructure’ the existing constitutional state. The Tribunal, still headed at the time by Chief Justice Andrzej Rzepliński, was portrayed as having close links to, or as having closely collaborated with, the former government of the liberal Civic Platform (PO) (now in the opposition).<sup>65</sup> The current ruling party has expressed equally sceptical remarks on the neutrality of the Supreme Court, which has indeed been subjected to far-reaching judicial reform since the summer of 2017. In the words of Kaczyński:

In our view, the courts are a bastion of post-communism in Poland. At their head is the Supreme Court, which has gained great renown for protecting people who have served the old system, but which has also issued many problematic judgments. At the same time, it is a breeding ground for leftist thinking and subjected to foreign forces.<sup>66</sup>

Foreign actors and institutions are not thought of as part of a positive, universalist and democratic, global programme of the rule of law and human rights but, to the contrary, are displayed as problematic allies of left-liberal and post-communist (former communist) forces which seek to undermine national unity and sovereignty. For conservative populists, both the left-liberal dissidents and the former communists turned social democrats are – not least due to compromises between them – responsible for a transformation process in which external actors have been allowed to play an excessive role. International judicial institutions, not least of which is the advisory body known as the European Commission for Democracy Through Law, or Venice Commission of the Council of Europe, have been criticised in this regard for their allegedly biased and distorted opinions. In recent years, for instance, the Venice Commission was frequently asked to provide external and ‘neutral’ expert advice on, inter alia, domestic processes of constitutional amendment and reform in Central and European countries, including Poland. The reaction by PiS to the Venice Commission’s Opinions has been, in comparison, unusually harsh, in particular in its scepticism regarding the Commission’s neutrality. In a response by PiS to the draft Opinion on the Act

<sup>65</sup>J. Majchrowski et al., *Report of the Team of Experts on the Issues Related to the Constitutional Tribunal of 15 July 2016* (2016) p. 16, ([www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf](http://www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf)), visited 5 September 2019.

<sup>66</sup>Cited in Bucholc and Komornik, *supra* n. 64, p. 9.



on the Constitutional Tribunal, produced by the Venice Commission in July 2016, a range of allegations was made with regard to the partisan nature of the Commission and its relations with opposition members and former judges allegedly close to the former government. Similar allegations had been already made in an earlier report written by Polish constitutionalists at the request of the PiS government in March 2016.<sup>67</sup> This report, too, extensively denounced what it saw as intimate ties between the former President of the Tribunal and members of the Venice Commission delegation.<sup>68</sup> By ‘unmasking’ the political entanglements of judges, the populists attempt to portray the liberal neutrality of law and the international institutions that endorse this liberal vision, as a myth.

PiS criticises judicial actors for defending particular rather than general interests. But there is clearly also a deeper claim. This is the outright rejection of the idea of a neutral and higher law as a *depoliticised framework for politics* as well as the denunciation of liberalism and individual human rights as part of an ideological project which undermines national traditions, values, and unity (the last of these is discussed later in the paper).

Jarosław Kaczyński, the éminence grise of PiS, once claimed, regarding a judgment of the Constitutional Tribunal, that law is always an expression of a ‘specific political direction’.<sup>69</sup> The populists denounce the mere possibility of a neutral, impartial rule of law as pure fiction. Hence, in order to make law ‘transparent’, populists need to ensure that it explicitly reflects the will of the national majority – and not the implicit or hidden will of some internal (liberal) minority or external faction of foreign actors. Perhaps the most extensive exposition of the populist rule-of-law argument can be found in the aforementioned expert opinion written by a team of Polish constitutionalists in reply to the Opinion of the Venice Commission of March 2016. The experts identify two different understandings of the ‘concept of the state’, with either an emphasis on the ‘political community’ or on the ‘significance of the legal order’. They also make a distinction between two political languages, one of ‘participatory democracy’ and one of ‘constitutional

<sup>67</sup>Government of Poland, ‘Position regarding draft Opinion of the Venice Commission on the Act on the Constitutional Tribunal of 22 July’ (2016) p. 5 ([www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2016\)060-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)060-e)), visited 5 September 2019.

<sup>68</sup>In a similar manner, in a Symposium at the University of Oxford in May 2017, the late professor Lech Morawski, one of the judges of the Constitutional Tribunal appointed by PiS, accused the members of the Venice Commission of being experts closely allied to the (now former) president of the Tribunal, Rzepliński, see L. Morawski, Contribution to Symposium ‘The Polish constitutional crisis and institutional self-defence’, Trinity College, University of Oxford, 9 May 2017, p. 6, ([trybunal.gov.pl/fileadmin/content/uoczystosci\\_spotkania\\_wizyty/2017/2017\\_05\\_09\\_Oxford/Wystapienie\\_prof.\\_L.Morawskiego\\_w\\_Oxfordzie.pdf](http://trybunal.gov.pl/fileadmin/content/uoczystosci_spotkania_wizyty/2017/2017_05_09_Oxford/Wystapienie_prof._L.Morawskiego_w_Oxfordzie.pdf)), visited 5 September 2019.

<sup>69</sup>M. Bucholc and M. Komornik, ‘Die PiS und das Recht. Verfassungskrise und polnische Rechtskultur’, 66(1–2) *Osteuropa* (2016) p. 79 at p. 91.

democracy'. The first view emphasises the 'so-called political nation' and its sovereignty (the Polish governmental position), whereas the other recognises the 'legal order as a domain which is not only superior (primary) in relation to the political community and binding for it and all its public bodies, but also a domain which legitimises the functioning of this community and its public bodies' (allegedly, the position of the Venice Commission). In the latter case, the law, in particular, the constitution (rather than the political community itself), is sovereign, and the state is transformed into an 'anonymous entity'. In contrast, according to the experts, the Polish Constitution does not reflect the liberal model of the sovereignty of the law. The constitution is not a 'self-contained source of legitimacy', but rather identifies the 'political nation' as sovereign. Indeed, so the experts claim, the Polish Constitution of 1997 does not even mention the notions of 'liberal democracy', 'representative democracy' or 'constitutional democracy', but rather stresses popular sovereignty.<sup>70</sup> They make the somewhat outlandish claim that the Polish Constitution endorses 'participatory democracy'.

The populists thus problematise the liberal, legalistic idea of the rule of law and claim that it is alien to the East-Central European region. The liberal idea of neutrality and the procedural nature of law is equated with a Western or Western European socio-cultural and legal model being imposed on East-Central Europe although it is not befitting of the region. For Kaczyński, there is an incompatibility between Polish culture and the Western model.<sup>71</sup> The alternative, 'authentic' model grounded in the sovereign nation is what comes naturally to the region. This is also the view promoted by Viktor Orbán, the leader of the Hungarian Fidesz party, in what he calls 'illiberal democracy':

[T]he new State that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a *specific, national, particular approach* in its stead. (emphasis added)<sup>72</sup>

### *Legal fundamentalism*

There is a further critique of the liberal understanding of law similar to but not entirely overlapping with the critique of law's neutrality and universality, which criticises the *politicisation* and *juridification of society* as such. This critique of 'legal fundamentalism' takes on the excessive expansion of law into all domains of

<sup>70</sup>Majchrowski et al., *supra* n. 65, p. 3-7.

<sup>71</sup>See [pis.org.pl/aktualnosci/nie-pozwolimy-na-niszczenie-tradycyjnych-polskich-wartosci](http://pis.org.pl/aktualnosci/nie-pozwolimy-na-niszczenie-tradycyjnych-polskich-wartosci), visited 5 September 2019.

<sup>72</sup>See [budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/](http://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/), visited 17 September 2019.

society.<sup>73</sup> One could alternatively refer to the notion of the ‘legal colonization of the lifeworld’, indicating a ‘flood’ of legal norms into wider society.<sup>74</sup> Contemporary right-wing, populist engagement with law in East-Central Europe includes a reaction to what is portrayed as legal fundamentalism or an excessive juridification of society. Populism is to an important extent driven by the opposite idea, i.e. a significant reduction in the presence and status of public and constitutional law throughout society and prioritisation of informal local norms, traditions and conventions, rather than formal legal norms.

In Poland, some affinity with this the idea of legal fundamentalism might be found in the expression of ‘*imposybilizm prawny*’ or legal impossibilism. This notion, introduced by PiS politicians, refers to the constraints faced by the executive in bringing about extensive reform, and rejects excessive legal formalism. Legal impossibilism is a ‘synonym of the embarrassing and irrational legal formalism, which allegedly prevents the adoption of certain and socially desirable regulations and constitutes a brake on progress’. In contrast, the counter-constitutional revolution promotes the ‘legislative omnipotence’ of the legislator.<sup>75</sup>

A primary facet of the populist critique on ‘legal fundamentalism’ is the observation that *legal constraints obstruct governing in the name of the people*. Kaczyński, claiming to be inspired by his mentor Stanislaw Ehrlich during communist times, has frequently referred to ‘legalism’ as a great obstacle to change in Poland. In a 2010 speech entitled ‘Is Poland a state of the rule of law?’,<sup>76</sup> Kaczyński argued that the 1997 Constitution jumped the gun when it stipulated that ‘The Republic of Poland is a democratic state with the rule of law’ (in Article 2) since old, communist structures still remained in place. Furthermore, the Constitution created a legal system with distinctive rules of amendment that made a change towards a different political system more difficult. In addition, Kaczyński argued, the interpretation of constitutional norms by judicial institutions entailed the protection of acquired rights, de facto protecting members of the old system.<sup>77</sup> In his 2016 autobiography, Kaczyński identified the actual transition starting in 1989 as the root of the problem:

<sup>73</sup>Cf. M. Mautner, *Law and the Culture of Israel* (Oxford University Press 2011).

<sup>74</sup>G. Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Vol. 6) (Walter de Gruyter 1987).

<sup>75</sup>J. Zajadło, ‘Pojęcie “imposybilizm prawny” a polityczność prawa i prawoznawstwa’, 72(3) *Państwo i Prawo* (2017). See also ([www.prawo.pl/prawnicy-sady/prof-zajadlo-nie-ulegajmy-propagandzie-imposybilizmu-prawnego,70164.html](http://www.prawo.pl/prawnicy-sady/prof-zajadlo-nie-ulegajmy-propagandzie-imposybilizmu-prawnego,70164.html)), visited 17 September 2019.

<sup>76</sup>J. Kaczyński, ‘Czy Polska jest państwem prawa? Wykład na Uniwersytecie Jagiellońskim (2011), ([pressje.pl/media/pressje\\_shop/article/article\\_\\_issue\\_7.pdf](http://pressje.pl/media/pressje_shop/article/article__issue_7.pdf)), visited 5 September 2019.

<sup>77</sup>See K. Mazur, ‘Jarosław Kaczyński – ostatni rewolucjonista III RP’ [Jarosław Kaczyński – The last revolutionary of the Third Polish Republic] (2016), ([klubjagiellonski.pl/2016/01/18/jaroslaw-kaczynski-ostatni-rewolucjonista-iii-rp/](http://klubjagiellonski.pl/2016/01/18/jaroslaw-kaczynski-ostatni-rewolucjonista-iii-rp/)), visited 17 September 2019.

After the fall of communism, should we limit ourselves, firstly, to the return of democratic laws and civic freedoms along with the building of fundamental democratic institutions, such as the holding of elections; and secondly, to the reconstruction of fundamental economic categories, including money as the measure of value and the market with its institutions? Both of these operations have already been conducted in a very imperfect manner. Or is it also necessary to build a new state apparatus together with a new legitimization, and, even more difficult, to create a new social hierarchy? One must strongly emphasize that these operations, which have basically been neglected, make those that have already been completed less real. For without them there is simply no chance of a properly functioning democracy and a properly functioning market.<sup>78</sup>

For Kaczyński – seemingly echoing views of Ehrlich – a key dimension of the impossibility of deep social and political change is the existing, complex of rules and balance of power that make up the liberal-democratic state and which obstructs decisive majority rule and the promotion of a ‘citizen-friendly state’. Legal impossibilism is, however, not an observation that can be made only with regard to the post-1989 liberal-democratic state; it has earlier origins in the observations on the creeping process of juridification under communism as shown, not least, by the creation of a Constitutional Tribunal in the early 1980s and the increasing attention for and expansion of human rights:

There are no conditions in Poland for a state of law and a law-governed state to exist in Poland. Let us now reflect on the consequences brought about by the application of rules derived from the concept of ‘state of law’ in our country. In Poland, during the last twenty years, some elements of a state of law have been built. These elements, however, lead to some rather specific consequences, which can be connected to the consequences of the absence of law. By the 1980s the process of ‘juridification’ of the communist system had already begun. Many things were regulated which had not been regulated before. Certain institutions were established, including the Constitutional Tribunal, the ombudsman, the administrative courts. This process was very far-reaching. A situation came about, in which no decision could be taken without a legal basis. This limited the rational freedom of decision-making by the persons who hold various public offices.<sup>79</sup>

Legutko’s assumption of elective affinity between liberalism and communism becomes relevant here. It is, according to the populists, the internal drive towards

<sup>78</sup>Cited in B. Stanley, ‘Populism in central and Eastern Europe’, in *The Oxford Handbook of Populism* (Oxford University Press 2017) p. 140.

<sup>79</sup>Kaczyński, *supra* n. 76, p. 227, cited in M. Bucholc, ‘The Polish Constitutional Crisis 2015–16: A Figurational Perspective’, 5(2) *Human Figurations* (2016).

political and societal control common to both ideologies that renders them suspect. Formalistic law becomes, in their view, a key mechanism to extend the control of the minority and its distinctive liberal ideology.<sup>80</sup>

A second dimension of the critique of the liberal model is that *judicial institutions engage in illegitimate lawmaking*. In particular, the Constitutional Tribunal is accused of unduly creating law: 'By means of interpretative judgments, the Tribunal creates constantly new rules or modifies the content of existing rules'.<sup>81</sup> As argued by Mazur, PiS has put the 'Constitutional Tribunal on the bench of the accused', as it is identified as a key player in the construction of the so-called Third Republic, the democratic political system that emerged from 1989 onwards.<sup>82</sup> According to PiS, the Tribunal took on the role of 'co-legislator', thereby importantly shaping the political system. The Tribunal (in its set-up up until 2016) is accused of promoting one-sided, ideological views, setting limits on the state that were not merely legal in nature, but also entered the terrain of axiological and ideological matters.<sup>83</sup> A key thrust of the judicial reforms undertaken by PiS has been to bring the Constitutional Tribunal into line, and thus make it a 'government enabler'.<sup>84</sup>

A third dimension of the critique of legal fundamentalism is its *excessive penetration of liberal norms and rights into society*. Liberal legal norms and human rights, in particular, are viewed with suspicion by the populist project which is based on the 'rejection of liberal emancipatory politics – both in the narrow policy sense and as a symbol of a progressive vision of the future'.<sup>85</sup> The thrust in populist, conservative projects is against the wide expansion of individual human rights protections, understood as vehicles for the promotion of equality in, for instance,

<sup>80</sup>Too many contemporary commentators on the 'backlash' or 'illiberal turn' in East-Central Europe seem largely unaware of (or simply ignore) the historical origins, and continuous presence in post-1989 times, of various counter-constitutional projects. As, for instance, clearly shown by Robert Brier's discussion of the 1996-97 constitutional debates in Poland, many of the current arguments were already part of the highly polarised discussions between post-communists and left-liberals on the one hand, and the centre-right conservatives, gathered in Solidarity Electoral Action (AWS) (PiS formed later, in 2001, out of parts of this conservative political grouping), on the other. For instance, Krzaklewski, leader of AWS, strongly argued against the draft constitution as violating the convictions of a larger part of society (see R. Brier, 'The Roots of the "Fourth Republic" Solidarity's Cultural Legacy to Polish Politics', 23(1) *East European Politics and Societies* (2009) p. 63 at p. 65; see also Jasiński, *supra* n. 13), while others denounced the particularist, interest-based nature of the document and its reflection of a singular ideological orientation (p. 66).

<sup>81</sup>Morawski, *supra* n. 68, p. 6.

<sup>82</sup>Mazur, *supra* n. 77.

<sup>83</sup>*Ibid.*

<sup>84</sup>Sadurski, *supra* n. 2.

<sup>85</sup>Grzebalska and Petö, *supra* n. 14, p. 165.

gender relations, sexual minority rights, and reproductive rights.<sup>86</sup> According to Kaczyński, the liberal worldview separates liberal elites from wider society as the former is not rooted in the latter.<sup>87</sup> Liberalism and its legal language are understood, furthermore, as destructive to the ‘natural’ communities of the nation and its most important component, the family.

A final dimension of the critique on legal fundamentalism is hence the observation that *abstract law undermines the community mores and traditions*. In the words of Lech Morawski, one of the PiS-appointed Constitutional Tribunal judges,

a term ‘liberal state’ refers to a strictly (pure or orthodox) liberal state [of] which [the] political system is based on the individualistic concept of rights as a trump card against community (R. Dworkin) and the concept of economy entirely based on the Weberian criteria of economic rationality such as profit and economic efficiency (*cf* “famous” L. Balcerowicz’s reforms).<sup>88</sup>

If the law is considered superior to the political community and ‘legitimises the functioning of this community and its public bodies’, it (detrimentally) prioritises abstract law over (the traditions and mores of) a political nation.<sup>89</sup> The liberal idea of the rule of law and liberalism’s drive towards promoting equality through human rights are dismissed or at least portrayed as not befitting of the domestic context and traditions of East-Central European societies. Again, in the words of Morawski,

the government and its supporters argue, and rightly so, that the strictly liberal model is incompatible with the Polish tradition and constitutional identity. It should be strongly emphasized that Polish constitutionalism from the very beginning – starting with the Constitution of the 3rd of May 1791 and ending with the current constitution of 1997 – has not been based on strictly liberal values, but on republican ones. As opposed to the parliament and the vast majority of citizens, the supporters of pure liberalism do not want to accept the republican way of interpreting our Constitution.<sup>90</sup>

East-Central European societies have strong collectivist and religious traditions which, according to the populists, have a universal significance in their own right.

<sup>86</sup>Ibid., p. 165.

<sup>87</sup>Mazur, *supra* n. 77.

<sup>88</sup>Morawski, *supra* n. 68, p. 3.

<sup>89</sup>Majchrowski, *supra* n. 65, p. 3.

<sup>90</sup>Morawski, *supra* n. 68, p. 4.

As Görgy Schöpflin, a member of the European Parliament for the Hungarian Fidesz party, stated a few years ago, the liberal paradigm suffers from ‘universalist pretensions and overweening self-confidence’. According to Schöpflin, Hungary ‘rejects liberal universalism and insists that Christian values are as valid as secular liberal norms’.<sup>91</sup>

If, however, the populists reject the diffusion of liberal, individualist human rights in Polish society, this does not mean that they merely intend to dismantle the human rights regime. In contrast to their own denunciation of rights as forces for the politicisation and juridification of society, populists extensively seek to redefine human rights and utilise them for their own political aims. Populists ‘hijack’ human rights by using them to promote the (traditional) family, pro-life policies and the protection of the nation (e.g. from immigrants).<sup>92</sup>

#### CONCLUDING REMARKS

A central dimension of the manifestation of populism-in-government in Hungary and Poland is its conservative anti-liberalism. In theoretical terms, conservative anti-liberalism, in particular, has been explored in this paper in relation to Ryszard Legutko’s views which, even if in some ways on the radical side, are clearly shared by a range of significant and politically active intellectuals in the region. In theoretical, ideational terms, liberalism is criticised for its lack of weight and moral substance, lack of authenticity and distance from social communities, and its ultimately ideological nature. Such arguments are clearly part of a wider conservative worldview which prioritises the ethno-national community, historical traditions, and a homogeneous understanding of ‘the people’. While populist political projects are frequently – and with good reason – portrayed as destructive, instrumentalist, opportunist, and abusive of political power, it ought to be equally recognised that there is some type of ‘script’ – intended here as a set of ideational justifications linked to institutional objectives – grounded in conservative, nationalist, and religious ideas behind the experiences in Hungary and Poland.

The populist counter-constitutional projects are aimed directly at decades of institutionalisation of liberal, constitutional democracy that unfolded after 1989. The populist projects thus attempt to institutionalise alternative political

<sup>91</sup>See ([www.politico.eu/article/western-liberals-have-misunderstood-hungary-migration-geneva-convention/](http://www.politico.eu/article/western-liberals-have-misunderstood-hungary-migration-geneva-convention/)), visited 5 September 2019.

<sup>92</sup>Grzebalska and Pető, *supra* n. 14.

orders grounded in notions of national and popular sovereignty, political realism, collectivism, the protection of national identity, and welfarist social programmes.<sup>93</sup> Such political projects have been part and parcel of the post-communist transformation projects.<sup>94</sup>

The populist assault on liberal-constitutional democracy and the rule of law in East-Central Europe is not going to disappear any time soon. In the case of Poland, ongoing populist activity on a variety of fronts – including the ongoing saga of the Act on the Supreme Court and the conflict with the European Commission in the context of the rule of law framework – hints at the ambition (in emulation of Hungary<sup>95</sup>) to further undo the achievements of the post-1989 legal-constitutional project and to build an alternative, counter-constitutional order in its stead. While there is abundant literature on the East-Central European threat to the rule of law and constitutional democracy from a formal-legal and institutional perspective, the highly pertinent socio-cultural and symbolic dimensions of the democratic and constitutional transformations<sup>96</sup> still need further investigation. My concern in this paper has been, in particular, the populist critique of liberal or legal constitutionalism as the dominant model for the institutionalisation of post-communist democracy. My argument has been that by dissecting the critique of the liberal rule of law and constitutionalism made by the populist counter-constitutionalists and by weighing the merits (if any) of such critique, an important contribution can be made to engage in a more in-depth and historical understanding of counter-currents against liberalism and ultimately in rethinking/re-imagining constitutional democracy in the contemporary European context. Such engagement with the populist critique is urgent, and may in some ways help to provide significant insight into the failings of the liberal or legal-constitutional model often overlooked by self-indulgent promoters of liberalism and the rule of law.

As a final note, it appears to me that neither a too narrow espousal of a formalistic-legalistic notion of constitutional democracy nor an embrace of the hyper-majoritarian and exclusionary idea of populist constitutional democracy

<sup>93</sup>Cf K. Jasiński, 'The Nature of Capitalism in Poland. Controversy over the Economy Since the End of 2015: The Prospects of Business Elites and Employer Associations', 8 *Corvinus Journal of Sociology and Social Policy* (2017) p. 171.

<sup>94</sup>As, for instance, becomes clear from the constitutional politics and debates in the transformative years in both Poland as well as Hungary, cf Brier, *supra* n. 80; P. Blokker, *Multiple Democracies in Europe. Political Culture in New Member States* (Routledge 2010).

<sup>95</sup>Jasiński, *supra* n. 14.

<sup>96</sup>G. Skąpska, 'The decline of liberal constitutionalism in East Central Europe', in P. Vihalemm et al. (eds), *The Routledge International Handbook of European Social Transformations* (Routledge 2018); Bucholc, *supra* n. 79; Bucholc and Komornik, *supra* n. 64.



ultimately offer a promising and robust way out of the current predicament,<sup>97</sup> the former because it neglects certain shortcomings (e.g. sociological legitimacy, civic participation, societal engagement)<sup>98</sup> and the latter because of its clear authoritarian tendencies and roughshod denial of rights to various minorities while dramatically failing to offer a convincing, more inclusionary and less estranging idea of constitutionalism.



<sup>97</sup>What I find particularly unhelpful is the tendency in current academic debate to ‘internalise’ the populist mindset by dividing academic contributions into ‘friend’ and ‘enemy’ statements, contributing in this way to an atrophy of the intellectual terrain of discussion and, even worse, limiting any intellectual creativity/imagination in formulating insightful answers to the current dire predicament of constitutional democracy.

<sup>98</sup>As I argued some years ago (see P. Blokker, *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2013)). I believe that an important dimension of the current processes of ‘backsliding’ involves the lack of social embeddedness of the post-1989 liberal-constitutional projects.