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## New Book on ‘Constitutionalism’ in an Illiberal State: András L Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2018)

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Over the past eight years, the redrafting of the Hungarian constitutional landscape, the declaration of illiberal constitutionalism and its contagious effect across Central and Eastern Europe have firmly moved into research spotlight. Political analysts, lawyers, economists and other academics within liberal studies are making attempts to observe and assess the U-turn of this once hailed as promising and consolidated Central-European state, which was after its democratic transition of 1989–90 the eminent state for EU accession.

Developments in Hungarian constitutional law after 2010 suggest that the era in Hungarian constitutionalism characterized by a commitment to the rule of law has been replaced by an era where the law is regarded as an instrument available to the government to rule. Under the new constitution, the constraints that follow from the rule of law have been habitually overridden or ignored by the government. The Constitutional Court’s attempts, to continue the legacy of pre-2010 constitutional practice, were reproached by the government who moved to delimit the powers of the Court or overrule its decisions by formal amending the text of the Constitution. Given this, Hungary offers one of the most striking examples of the degree to which an overwhelming political mandate can dismantle and paralyse key democratic institutions designed in the name of liberal constitutionalism yet not deeply rooted in the society.

András L Pap’s monograph<sup>1</sup> is a brand-new set of academic explanations that intend to support better understandings of illiberal constitutionalism in the making. The author – who is professor of constitutional law and doctor at the Hungarian Academy of Sciences; research chair and head of department for the study of constitutionalism and the rule of law at Hungarian Academy of Sciences

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<sup>1</sup> András László Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2018).

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Centre for Social Sciences, Institute for Legal Studies; recurrent visiting professor in nationalism studies program of Central European University, Budapest, Hungary; and a SASPRO-Marie Skłodowska-Curie fellow at Institute of Sociology, Slovak Academy of Sciences, Bratislava, Slovakia – takes a unique approach not just by describing the constitutional law changes within a back-sliding legal system but by considering these changes in their societal and political context. The book was published in Comparative Constitutional Change Series of Routledge in 2018.

This publication follows an unconventional style and format: according to the author it is a kind of ‘diary of a constitutional scholar on select recent political and constitutional developments in Hungary’. Its focus is limited to the constitutional developments of the first two years of the re-transition in 2010–12, which were the most intense years of replacing the old with a new constitutionalism. This was the formative era for building the new constitutional construction and during the ensuing years, the key actors became well settled in the new ‘house’. The author, however, does not restrict himself to explaining changes in the constitutional structure alone, but he also assesses the wider environment, ie the constitutional policy and rhetoric of the Orbán government. His aim is to capture the substance behind this shift and identify key attributes of Hungarian illiberal constitutionalism, and after reading the book one will certainly be convinced that this mission is accomplished.

The book is divided into two parts: the first sets the scene by outlining and explaining the most important and systemic constitutional developments in Hungary, the second part gives an insight into the ‘microfabric’ (ie handicraft), as the author terms it, of an illiberal democracy.

In the first chapter, the author gives a detailed and critical analysis of how legal guarantees and the system of checks and balances related to the rule of law were dismantled by listing fundamental developments including: changes to the competence and composition of the Constitutional Court; attacks on judiciary via coercive early retirement and the centralisation of administration; narrowing the tasks, duties and autonomy of local government; centralisation of the ombudsperson functions; re-positioning the Central Bank; controversial powers bestowed upon the Budget Council; unjustified dismissals of civil servants; and capturing mass media etc. All revoke the many disheartening stories within the Hungarian public space from 2010–12.<sup>2</sup>

The reviewer can reaffirm that these first two years of the government’s term were definitive, though they were neither the starting nor finishing point of the Hungarian constitutional crisis. As regards the circumstances that preceded this

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<sup>2</sup> Pap (n 1) 15–28.

period of Hungarian constitution-making, the political situation was overloaded with both the effects of the economic world crisis<sup>3</sup> and specific domestic tensions – ‘cold civil war’, ‘the prime minister lied 2006’, ‘social’ referendum 2008 (against health system reform and tuition fee), minority government, ‘expert’ government for crisis management. Thus, after an altogether constitutional but unsuccessful governance of the socialist-liberal coalition between 2002–10, society was deeply divided at the time of the 2010 elections. The newly elected government, who came in with a two-thirds majority, blamed the past for all difficulties and the former Constitution became one of the scapegoats, which was deemed no longer worthy of respect.<sup>4</sup> In the course of ‘replacing the old with new’, the development of another constitutional regime and the writing of the new Constitution came about in parallel, with the devastation of the previous constitutional order coupled with permanent amendments to the former Constitution.<sup>5</sup> This policy was enacted against a background characterised by an unequal fight between the Constitutional Court and the governing majority. A contest that might be summarised in the question of ‘who is the final arbiter in constitutional matters’,<sup>6</sup> and ended in the partial incapacitating of the Constitutional Court, wherein it was fundamentally weakened in its role as a counterbalance to executive and legislative powers.<sup>7</sup> After a relatively rapid period of constitution-building, the new ‘Fundamental Law of Hungary’ (this is the official translation of its title) came into force on 1 January 2012,<sup>8</sup> but the constitutional patchwork was not yet finished. Six subsequent amendments, adopted after January 2012, have shaped and shaded the new constitutional architecture; all have influenced the present landscape though, of course, not with equal significance. It is worth noting that most of amendments were

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<sup>3</sup> Zoltán Szente, ‘Breaking and making constitutional rules, The constitutional effects of the world economic and financial crisis in Hungary’ in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Farnham 2013) 245–262.

<sup>4</sup> See also Gábor Halmai, *Perspectives on Global Constitutionalism, The Use of Foreign and International Law* (Eleven 2014) 121–155.

<sup>5</sup> Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989–90, in force until 31 December 2011.

<sup>6</sup> Nóra Chronowski and Márton Varju, ‘Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law’ (2016) 8 Hague J Rule Law 281–282.

<sup>7</sup> See also Zoltán Szente, ‘The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?’ in Zoltán Szente, Fanni Mandák and Zsuzsanna Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L’Harmattan 2015) 192–196.

<sup>8</sup> See Attila Vincze and Márton Varju, ‘Hungary: the New Fundamental Law’ (2012) 18 European Public Law 437–453; Attila Vincze, ‘The New Hungarian Basic Law: Redrafting, Rebranding or Revolution’ (2012) 6 ICL Journal 88–109.

adopted during 2012–14, in the context of a practically unlimited constitution-amending power – a two-thirds majority in the parliament. And this story goes on with overestimating national security claims, taking a hard line against immigration, threatening university autonomy, jeopardising civil society organisations who support the most vulnerable groups in society.<sup>9</sup>

The author seeks explanations for this constitutional U-turn<sup>10</sup> in the second chapter. In doing so, he points to four key features: (i) the Hungarian political culture and social value structure – the Hungarian society tends to being passive, isolated, distrustful, populist with an especially low trust in democracy, a high tolerance for corruption and an attraction to charismatic leaders; (ii) how strategies adopted by the Orbán government made the best use of this aforementioned value-orientation; (iii) the existence of economic hardships; and (iv) weaknesses within constitutional structure and national consciousness, ie he shares the idea that the rule of law state and the Constitution of 1989–90 never belonged to the people since it was an elite project, manifested in constitutional court decisions but, never a social reality.<sup>11</sup> It is worthwhile to add that this is true. But it is no wonder, given that Hungarian public education has never devoted much attention to active citizenship, participation, solidarity or democracy studies. Furthermore, it is no wonder that Hungarian misuse of constitutional comparisons, rule by law governance, legislative cynicism and legal fetishism has a chilling effect on the EU institutions that must balance between keeping the defiant member state integrated for the sake of its people and seeking soft sanctions to moderate government responsibility.

After summing up and commenting on the cornerstones of the Hungarian constitutional turn, the second part of the book sees the author move to the specific issues of Hungarian illiberalism wherein he identifies four problem fields: (i) illiberalism as part of constitutional identity, (ii) intimate citizenship and the value preferences of the Constitution, (iii) illiberal multiculturalism, and (iv) personhood, privacy, dignity and transparency in an illiberal system.

Chapter three is a kind of thought-experiment<sup>12</sup> to grasp how illiberalism operates as constitutional identity-forming feature. It is challenging both in the

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<sup>9</sup> See Renáta Uitz, 'The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe' (*Verfassungsblog* 5 April 2017) <<https://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe>> accessed 5 January 2018.

<sup>10</sup> U-turn is a term borrowed from Harvard Emeritus Professor János Kornai, who introduced it in 'Hungary's U-Turn' (2015) 37 *Society and Economy* 279–329.

<sup>11</sup> Pap (n 1) 35–43.

<sup>12</sup> Pap (n 1) 47.

light of recurrent debates on the content and motivation of constitutional identity<sup>13</sup> arguments and from the perspective of how political notions are translated into constitutional language. Moreover, the author revokes his former advisor, András Sajó, the Hungarian ECtHR judge from 2008 to 2017, who stated: "it is a mistake to put ideas and improvisations of East European politicians up for serious and unreflected scientific scrutiny and comparative analysis."<sup>14</sup> Still, the experiment is successful as it allows readers to get closer to the significance and constitutional meaning of Hungarian illiberalism.

In the author's interpretation, illiberal democracy is a form of constitutional identity, a discursive framework that reframes nationhood, and its characteristics are cultural particularism and historical narrative. The core values of this communitarian concept as enshrined in the Fundamental Law are fidelity, faith and charity rather than the traditional values of liberal constitutionalism, such as equality, human rights and social inclusion. The methodology of illiberalism is negation: in its lack of genuine added values it defies the post-WWII value system and liberal consensus on human rights by questioning their validity and sustainability. The constitutional frame of illiberalism is the new Hungarian social order, the 'system of national cooperation' that fails to recognise individual autonomy and, through its illiberal value preferences, risks authorising future legislation that may restrict autonomy and freedom.

The fourth chapter reveals how the illiberal value system may influence the status of members of the political community. As an analytical tool, intimate citizenship is introduced, which refers to the fact that certain groups – formally equal status citizens – within society face inequality and marginalisation. Vulnerable groups that *de facto* do not share equal respect of human dignity, such as members of LGBT community, homeless people, women, refugees, single parent or patchwork families. The prevalence of Christian values in the Fundamental Law may also serve as referential point for the justification of such inequalities.<sup>15</sup>

The next chapter's focus is the Hungarian model of illiberal 'multiculturalism', which means on one hand illiberal transnationalism and on the other the deceptive nationality (minority) policy of the government. The author argues that diaspora politics, by overemphasising the importance of the unity of the Hungarian ethnic nation even within the Constitution, introducing simplified naturalisation, and opening the door for all ethnic kin serves purely electoral

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<sup>13</sup> For further references, see Pietro Faraguna, 'Constitutional identity in the EU – A Shield or a Sword?' (2017) 18 German Law Journal 1617–40.

<sup>14</sup> Pap (n 1) 48.

<sup>15</sup> Pap (n 1) 66–79.

functions – providing voting rights for government supporting non-residents, and allowing gerrymandering.<sup>16</sup> On the other side of the coin is the hypocritical model of Hungarian nationality policy, which hides the problems and discriminations for the most numerous and segregated ethnic group in Hungary, the Roma. As the author underlines, Hungary's new legal framework is allowing the potential abuse of minority rights and large-scale ethno-corruption.<sup>17</sup>

The final chapter examines relations between the individual and the ethno-cultural majority in the context of personhood and privacy. The challenging issues discussed under this broad concept are the following: first, he considers communities as agents of human dignity, the moving to the use of the liberal privacy concept as an instrument to obstruct public accountability and to protect the dignity of government institutions and officials, for which the best example is case law concerning the recording the images of police officers. The author then turns to examining how ill-conceived and cynical understandings of data-protection can lead to further ethnic discrimination and marginalisation – especially where there are insufficient prosecutions of racially motivated hate crimes and inadequate monitoring of ethnic profiling – which ends up according to the author in penal nationalism: 'where the social construction of Roma criminality evolves and gains power from its mythical nature'.<sup>18</sup>

The case of Hungary – and its contagious influence across Central Europe and the Balkans – continues to trigger academic discourse on populist or illiberal constitutionalism.<sup>19</sup> András L Pap's book is a point of reference and rich documentary to that by providing a unique source to understand the development and morphology of this self-identified illiberal statehood. It goes beyond legal analyses and it applies sociological and political science methods; thus it is eminently readable, riveting and thought provoking even for the wider public. The publication can be recommended to all who are interested in transitology studies, multilevel constitutionalism and the perils threatening liberal constitutionalism.

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<sup>16</sup> Pap (n 1) 92–95.

<sup>17</sup> Pap (n 1) 95–119.

<sup>18</sup> Pap (n 1) 155.

<sup>19</sup> Blokker and Halmai classifies the Hungarian situation as 'populist' constitutionalism. Paul Blokker, 'Populist Constitutionalism' (*Verfassungsblog*, 5 April 2017) <<http://verfassungsblog.de/populist-constitutionalism>> accessed 27 December 2017; Gábor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' (*Verfassungsblog*, 1 October 2017) <<http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity>> accessed 27 December 2017.