

# Radicalised Conservatism in the Hungarian Constitution: An Analysis of Justifications for Rule of Law Backsliding

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Introduction: the Scruton-Fidesz connection – Literature: Hungary's rule of law backsliding and the Hungarian constitution – Methods: analysing ideological justifications and contemporary conservatism – Findings: the traditional family as the base for the existence of the nation – Individual rights' dependency on communal obligations – Constitutional originalism and limitations on judicial review – History as a moral guide and historical revisionism – An exclusionary Hungarian constitutional identity – Analysis: traditionalist conservative values in the Hungarian Constitution and their manipulation – The radicalisation of conservatism – The struggle over the centre-right, and its implications on the future of democracy

## INTRODUCTION

In the final days of 2019, the state of Hungary presented a medal of honour to British philosopher Roger Scruton, who was involved in fighting off the Communist regime in Central and Eastern Europe in the late 1980s. However, longstanding Prime Minister Viktor Orban, who knew Professor Scruton from his time as an Oxford student and presided over the ceremony himself, had emphasised Scruton's normative writing, praising him for showing how conservatism is 'the antidote for ideology'.<sup>1</sup>

<sup>1</sup>'Orbán Lauds Sir Roger Scruton', *Hungary Today*, 4 December 2019, <https://web.archive.org/web/20191205060929/https://hungarytoday.hu/orban-lauds-sir-roger-scruton-loyal-friend-of-freedom-loving-hungarians/>, visited 9 October 2024.

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Irony might have died then and there, as Scruton is perhaps the most prominent advocate for conservative ideology in the 21<sup>st</sup> century. A prolific writer, he built his reputation and received acclaim for reviving conservatism as an ideology. A couple of months before his induction into Hungary's highest order of merit, Scruton recalled meeting Orbán and the founders of Fidesz in 1987. He advised them on their future party's identity: 'I told them at the time that you . . . should make [Fidesz] into a constitutional conservative party of the old school, then you've got a real tradition to build on, and that's what they did.'<sup>2</sup>

In 2019, that so-called 'constitutional conservative party' had been in power for a decade, and widely accused of architecting a gradual regime change in Hungary. Under Fidesz, with Orbán at its helm, many described Hungary as undergoing a 'constitutional revolution', a 'constitutional coup', and an 'autocratic revolution', seeing it as the prime example of democratic decay and rule of law backsliding in the 21<sup>st</sup> century.<sup>3</sup>

Hungary's change is well documented. Comparative projects register Hungary as the most democratic country that has fallen the farthest away from democratic grace.<sup>4</sup> Comparative scholars see Hungary as the precursor for such developments, later copied in other decaying democracies in Europe and beyond.<sup>5</sup> Case-specific studies pointed to the enactment of a new constitution (The Fundamental Law) in 2011 as one of the major steps the Fidesz-KDNP government took to produce its new constitutional order, enacting the Constitution in a partisan procedure and treating it as a political tool, amending it heavily and regularly.<sup>6</sup>

<sup>2</sup>'The Roger Scruton Interview: The Full Transcript', *New Statesman*, 26 April 2019.

<sup>3</sup>R.D. Kelemen, 'Europe's Other Democratic Deficit National Authoritarianism in Europe's Democratic Union', 52 *Government and Opposition* (2017) p. 220; K.L. Scheppele, 'Autocratic Legalism', 85 *The University of Chicago Law Review* (2018) p. 549-550; M. Bogaards, 'De-Democratization in Hungary: Diffusely Defective Democracy', 25 *Democratization* (2018) p. 1481; L. Pech and K.L. Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 10-11. Pech and Scheppele noted that 'rule of law backsliding' is substantively similar to 'democratic decay'. While the former focuses on legal changes that make the executive branch gradually above the law, the latter describes the overall incremental decline of democratic quality leading to the same situation. These concepts are, therefore, used in this article interchangeably.

<sup>4</sup>Freedom House, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule* (Rowman & Littlefield 2022) p. 16; Varieties of Democracy, *Autocratization Turns Viral* (University of Gothenburg 2021) p. 19.

<sup>5</sup>Kelemen, *supra* n. 3, p. 227; Scheppele, *supra* n. 3, p. 553; A. Huq and T. Ginsburg, 'How To Lose a Constitutional Democracy', 65 *UCLA Law Review* (2018) p. 117.

<sup>6</sup>M. Bánkuti et al., 'Disabling the Constitution', 23 *Journal of Democracy* (2012) p. 141-142; J. Kornai, 'Hungary's U-turn: Retreating from Democracy', 26 *Journal of Democracy* (2015) p. 35; Bogaards, *supra* n. 3, p. 1488.

This article sets out to place conservative values within these dramatic developments by analysing Hungary's 2011 Constitution and its amendments up to 2023. Conservatism is notoriously hard to define, but is understood in various fields, including constitutional law, as an influential right-wing ideology that is used to provide normative reasons for political policies.<sup>7</sup> It has been linked to both moderate and radical right-wing agendas, and noted to be plausibly linked to Hungary's regime change.<sup>8</sup> Applying ideological concepts does not mean the Hungarian regime is ideologically motivated. Conservatism can be an effective tool for the political elite to advance personal interests and accumulate power. However, conservatism has not yet been utilised as an analytical framework, falling behind 'thin ideologies' such as 'populism' and 'illiberalism'.<sup>9</sup>

The article asks what values are being used to justify rule of law backsliding. The purpose is not to find objective justifications but to analyse the normative assumptions used in the Hungarian case, normativity being the suggestion of what is considered good or proper. Scrutinising the Hungarian Constitution and interpreting its content and narrative, this article will argue that its normative justifications match conservative values. The article will further reflect on the possibility that conservatism is vulnerable to being manipulated as a cover for reactionary policies, prone to right-wing contagion, indispensable to understand its rationale but, when sanitised of radicalisation, ultimately vital to fending it off.

After this introduction, the first section reviews the literature on how the Constitution functions as the cornerstone for a gradual regime change in Hungary, presenting a challenge to rule of law standards and democratic institutions. European organisations have critically compared the Constitution's content with EU values, while other studies reviewed its language in particular issues of nationalism, religion, and culture. However, much has been left uncovered with regard to the normative language of the document.

In the second section, this article asks about the values used to justify the policies found in the Constitution and are linked to democratic decay. It suggests

<sup>7</sup>N. Bobbio, *Left and Right* (University of Chicago Press 1997) p. 79; R.H. Fallon Jr., 'The "Conservative" Paths of the Rehnquist Court's Federalism Decisions', 69 *The University of Chicago Law Review* (2002) p. 434; E. Fawcett, *Conservatism: The Fight For a Tradition* (Princeton University Press 2022) p. xi-xiii.

<sup>8</sup>M.F. Plattner, 'Illiberal Democracy and the Struggle on the Right', 30 *Journal of Democracy* (2019) p. 17; L. Cianetti and S. Hanley, 'The End of the Backsliding Paradigm', 32 *Journal of Democracy* (2021), p. 69; P. Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism', 15 *EuConst* (2019) p. 525.

<sup>9</sup>Bogaards, *supra* n. 3, p. 1487; B. Majtényi et al., 'Constitutional Othering, Ambiguity and Subjective Risks of Mobilization in Hungary: Examples from the Migration Crisis', 26 *Democratization* (2019) p. 174; G. Halmai, 'Populism, Authoritarianism and Constitutionalism', 20 *German Law Journal* (2019) p. 306-307; P. Wilkin, 'The Rise of "Illiberal" Democracy: The Orbánization of Hungarian Political Culture', 24 *Journal of World-Systems Research* (2018) p. 27-28.

the plausibility of traditionalist conservative values as a preferable conceptual framework over 'thin ideologies'. This section also presents the methods used in this article. It defines conservative ideology as situated between the moderate and radical right and delineates some of its most cited values. It also introduces argument analysis and its interpretive tools to uncover the normative justifications of the Constitution.

The third section presents the article's main findings. A textual analysis of the Constitution's content reveals both previously understudied aspects of foundational and rights-related constitutional provisions and the justificatory relationship between the different sections of the document. The presentation of findings is divided into five themes: the traditional family; rights and obligations; originalist constitutionalism; historical narrative; and national identity. In each of these areas, the Constitution expresses conservative values that are unwarranted by other ideologies.

The final section provides a preliminary analysis of the main findings. It reveals that the narrative of the Constitution manipulates conservative values to promote and justify a non-conservative agenda. Conservatism provides a normative rationale for constitutional changes that are part of a radical counter-reaction to Hungary's previous democratic system. Because conservatism has a pragmatic, moderate side, conservative values provide an attire of legitimacy that makes them an effective backsliding tool compared to explicitly anti-democratic ideologies that are much easier to recognise and combat. The article concludes by reflecting on the consequences of conservative values' manipulation as mainstream right-wing parties in Europe and beyond are placed between growing reactionary forces and the foundations of liberal democracy.

## THE STUDY OF THE HUNGARIAN CONSTITUTION

The Hungarian case has a special place within the discussion of autocratisation as perhaps the only formerly consolidated democracy that has completely transitioned into a hybrid regime.<sup>10</sup> In 2021, *Varieties of Democracy* highlighted that over a decade, Hungary had dropped by 32% in its Liberal Democracy Index and had therefore been reclassified as an 'electoral autocracy'.<sup>11</sup> Freedom House withdrew Hungary's 'free country' status, pointing at the government's attack on

<sup>10</sup>S.E. Skaaning, 'Waves of Autocratization and Democratization: A Critical Note on Conceptualization and Measurement', 27 *Democratization* (2020) p. 1539; L. Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes', 28 *Democratization* (2021) p. 29.

<sup>11</sup>*Varieties of Democracy*, *supra* n. 4, p. 19.

democratic institutions, specifically the opposition, the media, academia, NGOs, the courts, and the private sector.<sup>12</sup>

The Hungarian case has been analysed as directly influencing other countries that have experienced a slower but still evident process of rule of law backsliding, such as Poland, Israel, and the US.<sup>13</sup> During their periods of decay, they all were governed by establishment right-wing parties, which can be referred to as 'conservative', indicating that there might be some ideational common ground that lures them away from democratic norms.

Hungary's regime change started following the 2010 general election when the Fidesz-KDNP alliance received a 52.7% majority vote that had bloated into a 68% parliamentary supermajority. It quickly moved to create a new constitutional order in a partisan fashion, using only the ideas and votes of its members.<sup>14</sup> Commentators have pointed at the new Hungarian Constitution as a central action the Fidesz-KDNP government took to produce its regime change.<sup>15</sup> The document explicitly asserts its superiority as the eternal cornerstone of Hungary's structure of law.<sup>16</sup>

The constitutional order established in Hungary through the prism of the Fundamental Law has been analysed by legal and comparative scholars, professional organisations, and EU institutions. An analysis of all such secondary analyses may be worthy of its own article. However, some main findings will receive immediate attention, illustrating that there is still much to uncover in the single document most responsible for making a stable consolidated democracy be considered an autocracy.

The current Hungarian constitutional order has been interpreted as entrenching the political class with direct control over all branches of government, rigging the electoral system in its favour, and blocking checks to its power.<sup>17</sup> Freedom House details specific constitutional provisions that made Hungary's Freedom in the World score decrease from 93 in 2009 to 66 in 2023, mostly for reshaping the judiciary, reducing independent oversight of the government, and

<sup>12</sup>Freedom House, *Freedom in the World 2019* (Rowman & Littlefield 2019) p. 10.

<sup>13</sup>Kelemen, *supra* n. 3, p. 227; Scheppele, *supra* n. 3, p. 553; Huq and Ginsburg, *supra* n. 5, p. 117.

<sup>14</sup>G. Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary', *European Yearbook of Human Rights* (2012) p. 374; Bánkuti et al., *supra* n. 6, p. 139.

<sup>15</sup>A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', 94 *Public Administration* (2016) p. 691; Bogaards, *supra* n. 3, p. 1488; Scheppele, *supra* n. 3, p. 581.

<sup>16</sup>The Fundamental Law of Hungary (Hungarian Ministry of Justice 2023) p. 3.

<sup>17</sup>Pech and Scheppele, *supra* n. 3, p. 25; Kelemen, *supra* n. 3, p. 220-222; Bánkuti et al., *supra* n. 6, p. 142.

attacking civil rights and freedoms.<sup>18</sup> Varieties of Democracy's annual reports also mentioned constitutional amendments when analysing Hungary's drop in freedom of expression and civil society indicators.<sup>19</sup>

As the Fundamental Law and its amendments chiselled away at Hungary's separation of powers and limited fundamental freedoms, it created multiple friction points with the values of the EU. However, the European Parliament started the process of sanctioning Hungary only in 2018, and commentators have speculated that the government was not held accountable earlier because of its party affiliation with the centre-right European People's Party, the largest party in the European Parliament and the most influential in the European Commission.<sup>20</sup> When the European Parliament finally found that Hungary had breached the values of the Union, the first concern was the functioning of its constitutional system, with specific attention on the Fundamental Law, indicating the centrality of the Constitution in producing Hungary's regime change.<sup>21</sup>

The European Parliament's review leaned heavily on the opinions of the Council of Europe's Commission for Democracy through Law (hereafter the Venice Commission), that has been following the constitutional order in Hungary long before the 2011 Fundamental Law. The Venice Commission's efforts to scrutinise the new constitutional order are the most in-depth analysis available, mainly its three primary opinions concerning the 2011 original document and its 4<sup>th</sup> and 9<sup>th</sup> amendments.<sup>22</sup> However, even these opinions do not comment on every provision and the Venice Commission largely ignored the 7<sup>th</sup> and 8<sup>th</sup> amendments enacted in 2018-2019.

Moreover, the Venice Commission's opinions focus mainly on the legality of the Constitution, rarely reacting to an underlying justification of a specific provision. Such efforts were conducted by previous studies that focused on unearthing a certain theme within the Fundamental Law, such as the ethnic elements of the preamble, the Constitution's adherence to Christianity, or specific

<sup>18</sup>Freedom House, *Freedom in the World 2012* (Rowman & Littlefield 2012) p. 299-302; Freedom House, *supra* n. 13, p. 480; Freedom House, 'Democracy under Siege' (2021) p. 10.

<sup>19</sup>Varieties of Democracy, *Democracy at Dusk?* (University of Gothenburg 2017) p. 27; Varieties of Democracy, *Autocratization Changing Nature?* (University of Gothenburg 2022) p. 33.

<sup>20</sup>Keleman, *supra* n. 3, p. 225; Pech and Scheppele, *supra* n. 3, p. 26.

<sup>21</sup>European Parliament, 'European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (2017/2131(INL)) P8\_TA(2018)0340, [Sargentini Report], p. 5.

<sup>22</sup>Venice Commission Opinion on the New Constitution of Hungary, CDL-AD(2011)016, 20 June 2011; Venice Commission Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 17 June 2013; Venice Commission Opinion on the Constitutional Amendments Adopted by the Hungarian Parliament in December 2020, CDL-AD(2021)029, 2 July 2021.

provisions that may restrict fundamental human rights.<sup>23</sup> While they have covered substantial portions of the Fundamental Law, key provisions remained understudied, and their structural function as a justification for later directives is yet to be comprehensively analysed. With the ideas found throughout the document still concealed, the overall narrative of the Constitution is waiting to be fully revealed.

## RESEARCH QUESTION AND METHODS

This article seeks to build upon the existing literature by asking what interests, aspirations, and values are used to justify those political outcomes we now know amount to rule of law backsliding and democratic decay. The aim is not to seek an objective justification. Contrarily, by comprehensively analysing the normative narrative found in the Hungarian Constitution, the article aims to explain the rationale behind the constitutional changes that eroded the rule of law in Hungary. ‘Justifications’ are, therefore, seen as the underlying reasons given within the Constitution by the political agents to explain its political outcomes.

The article attempts to contribute to the discussion of the Hungarian case in three ways. First, by scrutinising less-mentioned constitutional provisions. For example, the communitarian language found in multiple articles (I, VI, XI-XIII) in the Rights and Responsibilities chapter. Second, by examining the structure of the entire Constitution. Communitarianism, for example, is installed in the preamble and the Foundations chapter to justify operative provisions in later parts of the document. Looking at the document as whole allows for an inductive observation of the normative themes found in the document. Making sense of each such theme builds towards the article’s main aim, which is to ascertain the ideology used in Hungary’s Fundamental Law to legitimise the political shift from democracy to a hybrid regime. The overarching argument is that the Fundamental Law’s normative assumptions are rooted in conservative values. They are manipulated for illiberal outcomes that cannot be appreciated without them.

In placing conservatism at the centre of analysis, the article attempts to challenge the conventional wisdom about the Hungarian case and invigorate the literature on contemporary right-wing politics. Much attention has been given to populism, authoritarianism, and illiberalism to ascertain democratic decay and rule of law backsliding. There are a couple of reasons to suggest an alternative. First, the Fundamental Law is expected to include multiple normative values that

<sup>23</sup>Halmi, *supra* n. 14, p. 375; Z. Körtvélyesi, ‘From “We the People” to “We the Nation”’, in G.A. Tóth (ed.), *Constitution For a Disunited Nation* (Central European University Press 2012) p. 136; R. Uitz, ‘Freedom of Religion and Churches: Archeology in a Constitutional Assembly’, in Tóth (ed.), *ibid.*, p. 201.



cannot be warranted by inherently radical, pejorative analytical concepts. Second, as ideological concepts the above are known to be ‘thin ideologies’ with limited conceptual tools to comprehend a complex document such as the Hungarian Constitution. Thin ideologies lack the depth and breadth of a full ideology, failing to connect abstract premises to a concrete agenda and cover multiple aspects of politics. Finally, thin ideologies also miss an independent historical lineage to propel ideas across time and space, requiring a host ideology to enhance their analytical use.<sup>24</sup>

This article echoes the possibility that thin ideologies merely present a subset of values already found in full ideologies – first and foremost conservatism, as had been suggested about illiberalism and populism.<sup>25</sup> Indeed, a recent attempt to find populist constitutionalism in Hungary concluded that it is a myth and suggested that the Hungarian Constitution is full of conservative values.<sup>26</sup> While populism has an implicit negative core of anti-elitism and anti-pluralism, illiberalism is explicitly and entirely negative, making its independent ideological substance extremely thin. However, illiberalism’s analytical use is in denoting the formation of a hybrid regime that challenges liberal aspects of contemporary democracy. The presence of illiberal outcomes thus merely accentuates the question about the ideological values used to justify them.

The expectation is that traditionalist conservative values are used to defend and promote the regime change found in the Fundamental Law. Conservatism is notoriously hard to define, as some see it as a mere tendency to preserve any given status quo or even a faulty ‘ism’ that does not amount to much.<sup>27</sup> However, political theorists and constitutional scholars laboured to show conservatism as a full ideology.<sup>28</sup> As such, conservative values are understood in various fields to provide normative reasons for right-wing policies.<sup>29</sup>

<sup>24</sup>M. Freeden, ‘Is Nationalism a Distinct Ideology?’, 46 *Political Studies* (1998) p. 749-751.

<sup>25</sup>R. Smilova, ‘The Ideational Core of Democratic Illiberalism’, in A. Sajó et al. (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021) p. 178; M. Freeden, ‘After the Brexit Referendum: Revisiting Populism as an Ideology’, 22 *Journal of Political Ideologies* (2017) p. 3.

<sup>26</sup>Z. Szente, ‘The Myth of Populist Constitutionalism in Hungary and Poland: Populist or Authoritarian Constitutionalism?’, 21 *International Journal of Constitutional Law* (2023) p. 150-151.

<sup>27</sup>M. Beckstein, ‘What Does It Take to Be a True Conservative?’, 5 *Global Discourse* (2015) p. 8; R. Bourke, ‘What Is Conservatism? History, Ideology and Party’, 17 *European Journal of Political Theory* (2018) p. 455.

<sup>28</sup>S.P. Huntington, ‘Conservatism as an Ideology’, 51 *The American Political Science Review* (1957) p. 457; E. Young, ‘Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation’, 72 *North Carolina Law Review* (1993) p. 625; M. Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford University Press 1996) p. 317; N. O’Sullivan, ‘Conservatism’, in M. Freeden et al. (eds.), *The Oxford Handbook of Political Ideologies* (Oxford University Press 2013) p. 308.

<sup>29</sup>Bobbio, *supra* n. 7, p. 79; Fallon Jr., *supra* n. 7, p. 434; Fawcett, *supra* n. 7, p. xi-xiii.



In this article, the possible association of an argument, a constitutional provision, and the entire Fundamental Law to conservative values is done based on a textual argument analysis of the Constitution's language.<sup>30</sup> The argumentative resemblance between the Constitution's content and conservative values is the rationale for the association. However, even without knowing anything about conservative values, there are multiple reasons to suspect the Hungarian case will present an affinity with conservatism.

Long before Roger Scruton and Viktor Orban hailed each other as conservatives, Fidesz had been described by that label.<sup>31</sup> It is a member of the International Democratic Union, the biggest international organisation of conservative parties. It was a member of the centre-right European People's Party until 2021. In the literature, Cianetti and Hanley suggested that Fidesz built its anti-democratic policies primarily on deeply rooted traditions of national and social conservatism.<sup>32</sup> Blokker argued it is impossible to understand Fidesz's project without analysing conservatism.<sup>33</sup> Plattner specifically compared Viktor Orban's political vision to contemporary defiers of modern democracy in the name of conservatism.<sup>34</sup> It is part of a broader interdisciplinary discussion on the place of conservatism between the political centre-right and the far-right.<sup>35</sup>

The complete development of conservatism as an analytical framework is beyond the scope of this article, which also does not pretend to prove conservatism's content beyond doubt. Any conceptualisation of any ideology is bound to raise objections or, better yet, a sensible debate about its *actual* content. The purpose is merely to use a plausible well-grounded conceptualisation of conservatism, based on adequate literature, and show it to be useful for the purpose of analysing the Hungarian Constitution. To do so, this article adopts Roger Scruton's writings and those of other prominent conservative writers

<sup>30</sup>The research relied on the official English translation that the Hungarian Justice Ministry uploaded to its website in January 2023, which was used by Hungary in communications with official organisations like the Council of Europe. Leading Hungarian experts who analysed the language of official documents had previously relied on similar official translations. *See*, for example, A.L. Pap, 'Illiberalism as Constitutional Identity – the Case of Hungary', 59 *Hungarian Journal of Legal Studies* (2018) p. 383. I, therefore, assume the content of the translated Constitution is sufficient to be used as a primary source for the purposes of the article.

<sup>31</sup>E. Bakke, 'Central and East European Party Systems', in S.P. Ramet (ed.), *Central and Southeast European Politics Since 1989* (Cambridge University Press 2010) p. 78-79.

<sup>32</sup>Cianetti and Hanley, *supra* n. 8, p. 69-70.

<sup>33</sup>Blokker, *supra* n. 8, p. 525.

<sup>34</sup>Plattner, *supra* n. 8, p. 17.

<sup>35</sup>Fawcett, *supra* n. 7, p. 415-417; A.H. Kydd, 'Decline, Radicalization and the Attack on the US Capitol', 2 *Violence: An International Journal* (2021) p. 16-17; M.I. Cohen, 'Neither Civic nor Ethnic: Analyzing Right-Wing Politics Using a Theoretical Expansion of Kohn's Dichotomy of Nationalism', 16 *Journal of Nationalism, Memory & Language Politics* (2022) p. 14-16.

alongside scholars of conservatism and its scholarly critics. The values detailed below represent a substantive conservative minimum that covers various aspects of social, national, and constitutional conservative ideology. The controversy around the exact essence of conservatism will remain, with reasonable objections encouraging more robust theories that would only improve our understanding of empirical reality.

### *Contemporary conservatism and argument analysis*

Conservatism is one of the three longstanding ideologies that, alongside liberalism and socialism, has been providing a base for an agenda on socio-economic, foreign policy, constitutional, and identity-related topics since the 19<sup>th</sup> century.<sup>36</sup> Contemporary conservatism, the focus of this article, is the only one of the three to encompass both moderate and radical right-wing ideas.

Conservatism is the ideology of communal traditions.<sup>37</sup> In terms of ideals, contemporary conservatism came to accept liberal democracy and the rule of law as a set of institutions that had developed for centuries and helped maintain social stability. In that regard, conservatism is contemporarily perceived to be an old-fashioned form of classic liberalism, manifested in moderate arguments that balance between traditions but favour separation of powers, checks and balances, and limited government.<sup>38</sup>

However, conservative ideology had always been uniquely rooted in preserving historical, even archaic, traditions, as well as rejecting progressive initiatives. These two foundational aspects of conservatism have been criticised as an opening for radicalisation.<sup>39</sup> For example, Norberto Bobbio theorised that both the conservative and extreme right support inequality, and once the conservative adherence to political and legal equality is gone, conservatives are left with reactionary arguments.<sup>40</sup> Reactionary conservatism is not *explicitly* opposed to democracy or even liberalism, but effectively undermines them.

There are multiple argumentative paths by which conservatives radicalise, from moderate protection of democratic institutions to reactionary arguments that

<sup>36</sup>M. Freedon, *Ideologies and Political Theory: A Conceptual Approach* (Oxford University Press 1996) p. 7-8.

<sup>37</sup>R. Scruton, *How To Be a Conservative* (Bloomsbury 2014) p. 1-4; J. Alexander, 'The Contradictions of Conservatism', 48 *Government and Opposition* (2013) p. 608.

<sup>38</sup>Freedon, *supra* n. 28, p. 408; C. Rossiter, *Conservatism in America*, 2<sup>nd</sup> edn. (Vintage Books 1962) p. 43-47; S.P. Huntington, 'Robust Nationalism', 58 *The National Interest* (1999) p. 33; Y. Levin, *The Great Debate* (Basic Books 2014) p. xvi.

<sup>39</sup>Alexander, *supra* n. 37, p. 608; C. Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin* (Oxford University Press 2018) p. 25.

<sup>40</sup>Bobbio, *supra* n. 7, p. 79.

attack them. For once, conservative arguments stem from a uniquely sceptic set of abstract views on human nature, politics, and the world that are based on various philosophical, psychological, and religious sources, grounded in the history of struggles and strife among men.<sup>41</sup> History is the conservative guide to morality, giving the past priority in shaping individual rights and binding them by communal obligations.<sup>42</sup> History is the source of social conservatism's protection of the traditional family and the social role of religion.<sup>43</sup> Such socially conservative arguments are criticised for protecting old hierarchies that are inconsistent with the function of modern democratic institutions.<sup>44</sup>

As mentioned above, contemporary conservatism is required to balance between traditions. The perception of democratic institutions – for instance, an independent judiciary – as endangering the family, religion, or community may amount to the radicalisation of conservative ideology. Failing to protect more recent traditions can turn conservatism into a reactionary force against the status quo. Ideally, conservatives wish to maintain the status quo. However, they will not preserve *every* aspect of *any* given status quo. Conservatism is, and always has been, right-wing. Conservatives argue against socialism and progressives, hold a strong national pride, and view the nation-state as a central communal institution.<sup>45</sup> Conservatism's fierce objection to left-wing ideologies led critics to define it by the values it rejects, a stance that can also be manipulated by radical reactionaries.<sup>46</sup>

These core features of conservatism eventually lead to specific policy proposals. For example, the conservative 'law and order' translates into tough punitive measures against criminals and enhancing investments in national security.<sup>47</sup> The conservative nation-state requires a strict vetting process for incomers, protection of the dominant cultural heritage, and promotion of national interests over universal human rights on the world stage.<sup>48</sup> Finally, conservative constitutionalism restricts judicial review and obliges an originalist interpretation of the law to follow closely with the intention of the legislature.<sup>49</sup>

<sup>41</sup>Rossiter, *supra* n. 38, p. 21, 45–47; Huntington, *supra* n. 28, p. 457; Huntington, *supra* n. 38, p. 37; Alexander, *supra* n. 37, p. 600; J.V. Femia, 'Identifying True Conservatives', 5 *Global Discourse* (2015) p. 22.

<sup>42</sup>Rossiter, *supra* n. 38, p. 38; Scruton, *supra* n. 37, p. 40.

<sup>43</sup>B. Susser, *Political Ideology in the Modern World* (Allyn and Bacon 1995) p. 35–37; Scruton, *supra* n. 37, p. 138–145; Levin, *supra* n. 38, p. 117.

<sup>44</sup>Rossiter, *supra* n. 38, p. 61; Bobbio, *supra* n. 7, p. 76.

<sup>45</sup>Huntington, *supra* n. 38, p. 38; Scruton, *supra* n. 37, p. 15; Robin, *supra* n. 39, p. 208.

<sup>46</sup>Huntington, *supra* n. 28, p. 461; Alexander, *supra* n. 37, p. 602.

<sup>47</sup>Robin, *supra* n. 39, p. 206; Cohen, *supra* n. 35, p. 14–16.

<sup>48</sup>Huntington, *supra* n. 38, p. 39; Scruton, *supra* n. 37, p. 16.

<sup>49</sup>R. West, 'Progressive and Conservative Constitutionalism', 88 *Michigan Law Review* (1989) p. 648; R.E. Barnett, 'The Wages of Crying Judicial Restraint', 36 *Harvard Journal of Law and Public Policy* (2013) p. 930.

One expectation here is that many of the above-mentioned conservative values will be interwoven throughout the Hungarian Constitution, providing an indication of conservative statements and provisions. A second expectation is that the document will present a tendency to use traditionalist conservative values to justify operations that erode democratic quality and the rule of law. The interpretive tools of argument analysis will assist in determining the existence and function of conservative values within the Constitution's language.

In the language of argument analysis, conservative values are expected to warrant the content of the Fundamental Law.<sup>50</sup> When analysing specific arguments, conservative values are expected to justify and provide reasons for legal directives known to be part of Hungary's rule of law backsliding.<sup>51</sup> In that respect, a textual analysis of the entire Constitution is expected to expose an argumentative link in which conservative premises provide reasons for illiberal conclusions.

## FINDINGS

The first finding to note about the Fundamental Law is its complexity. Within its 40 pages, provisions that challenge democratic procedures lay in proximity to paragraphs about the importance of equality, non-discrimination, and the rule of law.<sup>52</sup> The mere mentioning of such principles led early assessments to reject the possibility that the document would lead to a regime change or change the constitutional structure of post-Communist Hungary.<sup>53</sup> In the Venice Commission's opinions, there is a mix of concern and appreciation, which diluted its overall critique of the Fundamental Law.<sup>54</sup>

This complexity is the first textual indication that the illiberal political outcomes of the Hungarian Constitution cannot be comprehended by ideological 'illiberalism'. The Fundamental Law is not explicitly illiberal. That may be a sign of a Machiavellian attempt to throw the reader off the *real* purpose of the Constitution. However, it also fits a sophisticated ideology that has moderate and radical elements, such as conservatism.

<sup>50</sup>T. Govier, *Problems in Argument Analysis and Evaluation*, 6<sup>th</sup> edn. (Windsor Studies in Argumentation 2018) p. 24.

<sup>51</sup>*Ibid.*, p. 26, 35.

<sup>52</sup>See, for example, Fundamental Law, Art. XV, p. 12.

<sup>53</sup>A. Jakab and P. Sonnevend, 'Continuity with Deficiencies: The New Basic Law of Hungary', 9 *EuConst* (2013) p. 103.

<sup>54</sup>Venice Commission, 2011, *supra* n. 22, p. 28; Venice Commission, 2013, *supra* n. 22, p. 26; Venice Commission, 2021, *supra* n. 22, p. 13.

The Constitution's pro-rule of law language is sparse and undetailed, allowing gradual backsliding while providing an attire of moderation for the Hungarian government to welcome 'a constructive dialogue' with EU institutions. Its complexity has been the main reason it has been efficient in reshaping Hungary's regime, numbing critics from holding it accountable for eroding democracy.<sup>55</sup>

Structurally, the document can be roughly divided in half. The organs of Hungary's new constitutional order are detailed in its second half, under the title 'The State', which establishes Hungary's new political power structure with multiple provisions giving a two-thirds parliamentary majority unchecked authority.<sup>56</sup> Those provisions were widely condemned for crippling future majorities and undermining future elections to be able to change the government in Hungary in a free and fair process.<sup>57</sup> 'The State' chapter can be considered the political conclusion of the Constitution.

However, the provisions that established Hungary's illiberal constitutional order are technical and do not justify themselves. The argumentative reasons used to justify the political power grab are in the earlier half of the Constitution, consisting of three chapters: The preamble ('National Avowal'), a chapter describing the 'Foundations' of the Hungarian state, and a chapter about 'Freedoms and Responsibilities' in Hungary.<sup>58</sup> The remainder of this article will be focused primarily on the first half of the Constitution. It will dissect its normative content, ascertaining the values that justify its rule of law backsliding. With dozens of constitutional provisions promoting conservative values, the findings were organised inductively around five prominent themes: the traditional perception of the family; communitarian constraints on individuals; originalist constitutional approach; history's moral role; and cultural nationalism. The presentation of the findings will be followed by an analysis section which will also recap on how conservatism captures the normative content of the Constitution better than thin ideologies.

### *The traditional family*

The Hungarian Fundamental Law has areas where it is unambiguous in promoting certain ideas. A prime example is the place of the nuclear family. The Constitution's preamble proclaims that 'the family and the nation', in that order, 'constitute the principal framework of our existence', asserting the priority of the

<sup>55</sup>Batory, *supra* n. 15, p. 692-693; R. Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making?', 13 *International Journal of Constitutional Law* (2015) p 279 at p. 290-291.

<sup>56</sup>Fundamental Law, *supra* n. 16, p. 16-37.

<sup>57</sup>Venice Commission, 2013, *supra* n. 22, p. 29; Kornai, *supra* n. 6, p. 35; Bogaards, *supra* n. 3, p. 1491.

<sup>58</sup>Fundamental Law, *supra* n. 16, p. 2-16.

community over the individual.<sup>59</sup> In the Foundations chapter, Article L then defines the family as a marriage between one man and one woman with children, adding gender roles of a 'mother' and a 'father'.<sup>60</sup>

These provisions have been analysed as excluding many households in Hungary from state protection.<sup>61</sup> However, to understand how they helped facilitate Hungary's new constitutional order, a central sentence in Article L had been largely overlooked. It asserts the traditional definition of a family as 'the basis of the survival of the nation'.<sup>62</sup> The Constitution has established a dependency between the strength of the community and the traditional understanding of the family as a married heterosexual couple with children. The conservative familial structure thus became the foundation for the sheer survival of the nation.

In an apologetic response to the Venice Commission, the Hungarian government noted other democratic constitutions that protect families or cite their societal importance.<sup>63</sup> By doing so, it had only emphasised that having a specifically traditional definition of a family placed as the foundation of the nation is a novel creation of the 2011 Hungarian Constitution. Its presence both in the preamble and the Foundations chapter shows how deeply entrenched social conservatism is in the language of the Constitution.

Multiple social conservative arguments can be found in the Rights chapter of the Constitution. For example, Article XVI(4) obliges adult children to care for a needy parent.<sup>64</sup> In a modern paraphrase of the biblical Fifth Commandment, the Constitution directs all Hungarians to respect their father and mother *a priori*, regardless of their behaviour or relationship with their children. It is a conservative way to promote social hierarchies, as they are considered to be a structure that maintains order and conformity.

The Ninth Amendment to the Constitution, made in 2020, has also extended Article XVI(1), obliging the state to 'protect the right of children to self-identity corresponding to their sex at birth'.<sup>65</sup> The Venice Commission discussed how such a position directly disqualifies the personal rights of transgender youth.<sup>66</sup> But beyond constitutionalising a rigid gender dichotomy, Article XVI(1) exposes a broader social conservative aspiration. Isolating 'sex at birth' as the only constitutional criterion worth mentioning when protecting a child's identity

<sup>59</sup>Ibid, p. 2.

<sup>60</sup>Ibid, p. 5.

<sup>61</sup>Venice Commission, 2013, *supra* n. 22, p. 11; Halmai, *supra* n. 14, p. 376-377.

<sup>62</sup>Fundamental Law, *supra* n. 16, p. 5.

<sup>63</sup>Uitz, *supra* n. 55, p. 287.

<sup>64</sup>Fundamental Law, *supra* n. 16, p. 12.

<sup>65</sup>Ibid., p. 11.

<sup>66</sup>Venice Commission, 2021, *supra* n. 22, p. 11.

conveys that a person's sex – being a man or a woman – is the most important thing for a young person's development.

The heavily gendered approach of the Hungarian Constitution implies that men and women have designated social roles assigned to them by their sex at birth. Such provisions cannot be warranted by the ideological toolbox of populism, illiberalism, or other incomplete ideologies that do not have salient gender-related arguments to match the language of the Constitution.

Another indication of this socially conservative perception of gender appears in Article XV. Following Article XV(3)'s brief assertion that 'Women and men shall have equal rights' (the single constitutional mention of such equality), Article XV(5) places all women in Hungary among groups whose physical attributes may prevent them from being autonomous and require special state protection: 'Hungary shall protect families, children, women, the elderly and those living with disabilities'.<sup>67</sup> By elimination, 'Hungary' in this provision can be replaced by 'able-bodied adult men' who are assigned to protect families, children, women, the elderly, and those living with disabilities. When not balanced with unequivocal language specifying gender equality, this awkward (and perhaps backward) conservative chivalry may lead to the erosion of women's rights, reflecting a common critique of conservatism's desired social structure. This naturally leads to how rights are perceived in the 2011 Hungarian Constitution.

### *Rights and obligations*

One sentence before the Fundamental Law places the existence of the nation on the shoulders of the traditional family: individual freedoms are stipulated as being cooperative with other freedoms.<sup>68</sup> It could have been a benign sentence if the Constitution had not constructed human rights as completely dependent on the communal responsibilities of the individual. Before even a single specific right is introduced, Article O states that 'Everyone shall be . . . obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities'.<sup>69</sup>

While other constitutions might also mention an interrelation between rights and obligations, the Hungarian Fundamental Law creates a systematic dependency. For example, Articles XI, XII, and XIII bind fundamental rights to private property and freedom of profession to a 'benefit' or 'contribution' to society and 'social responsibility'.<sup>70</sup> In Article XXIX(3), social security for a

<sup>67</sup>Fundamental Law, *supra* n. 16, p. 11.

<sup>68</sup>*Ibid.*, p. 2.

<sup>69</sup>*Ibid.*, p. 5.

<sup>70</sup>*Ibid.*, p. 10-11.



Hungarian resident is determined 'in accordance with the usefulness to the community of the beneficiary's activity'.<sup>71</sup> In one blatant assertion of communitarianism, Article XXX says 'Everyone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy'.<sup>72</sup>

Thin ideologies do not have the conceptual toolkit to analyse such arguments. Populist and illiberal rhetoric do challenge individual rights. However, there is no self-styled illiberal populist that has developed the social premises that underline the challenge. Meanwhile, Roger Scruton wrote in *The Meaning of Conservatism* that 'The condition of mankind requires that individuals... exist and act as autonomous beings, do so only because they can first identify themselves as something greater – as members of a society, group, class, state or nation...'.<sup>73</sup>

Even such staunch communitarianism is not explicitly illiberal and could theoretically fall within the framework of democratic norms. However, the Fundamental Law includes other forms of limitations on rights which are covered by a conservative rationale, starting from the first article in the Rights chapter, Article I. While its first two provisions recognise human and individual rights, they are immediately followed by two provisions that are two and a half times longer and restrict those rights in several ways:

Article I(3) explicitly allows restrictions of fundamental rights 'to protect a constitutional value'. Consequently, to protect the traditional family as the basis for the existence of the nation, as well as other conservative constitutional values to be discussed below, such as 'the historical constitution' or 'Christian culture' of Hungary, the Fundamental Law allows for regulated human rights violations. Article I(4) provides an even larger space for lacunae, as it applies human rights to all 'legal entities established by an Act'. Such extension may allow government agencies to enjoy fundamental human rights, raising questions on the very meaning of 'fundamental rights' throughout the text.<sup>74</sup>

When fundamental rights are both obscured and require communal obligations, it is easier to dilute the protection of specific rights. The literature has detailed specific articles in the Fundamental Law that stretch the 'right to life' to a one-day-old embryo in a way that can endanger women's rights to bodily autonomy, limit the rights of asylum seekers, criminalise unhoused people, discriminate against minority religious communities, and disenfranchise people with a mental disorder.<sup>75</sup> In addition, the Venice Commission criticised the

<sup>71</sup>Ibid., p. 12.

<sup>72</sup>Ibid., p. 14.

<sup>73</sup>R. Scruton, *The Meaning of Conservatism*, 3<sup>rd</sup> edn. (Palgrave Macmillan 2001) p. 24.

<sup>74</sup>Ibid., p. 8.

<sup>75</sup>Venice Commission, 2011, *supra* n. 22, p. 14; Venice Commission, 2013, *supra* n. 22, p. 15-16; Halmai, *supra* n. 9, p. 307; Uitz, *supra* n. 55, p. 287-288.

elimination of four different ombudspersons responsible for investigating human rights violations, collapsing them into a single, partisan-controlled organ.<sup>76</sup>

The Venice Commission had expressed specific concern for freedom of the press.<sup>77</sup> However, the literature largely ignored how constitutional communitarianism and family values may infringe upon assembly and expression freedoms in Hungary. Before these fundamental rights are even introduced, they are restricted by Article VI(1), which asserts they ‘shall not impair the private, family life or home of others’. This Seventh Amendment (2018) addition extended the list of considerations that take precedence over the basic political freedoms of expression and assembly.<sup>78</sup>

Freedom of assembly and expression are introduced only after these limitations.<sup>79</sup> However, within the article designed to protect freedom of expression, Article XI(5) limits it further using the same communitarian rationale: ‘The right to freedom of expression may not be exercised with the aim of violating the ... dignity of the Hungarian nation or of any national, ethnic, racial or religious community’. It then provides for broad *locus standi* to any member of a community, to legally claim ‘against the expression of an opinion which violates their community, invoking the violation of their human dignity’.<sup>80</sup>

By the language of the Constitution, a community’s right to dignity supersedes the individual’s right to freedom of expression. Any member of any community, which explicitly includes members of the majority, can turn to the courts and claim to be offended by an expression of another. Hypothetically, it may lead to radically autocratic procedures, in which minorities are prosecuted for public practices that the majority deem offensive. While leaning on a socially conservative logic, such provisions move away from creating a balance between individuals and communities to justify the preference of traditional institutions over fundamental human rights.<sup>81</sup> This manipulation of conservative values made its illiberal outcomes harder to detect and harder to challenge.

### *Originalist constitutionalism*

In 2011, when most of these limiting constitutional provisions were written, the Venice Commission wishfully thought that the Hungarian Constitutional Court

<sup>76</sup>Venice Commission, 2011, *supra* n. 22, p. 23. The Venice Commission called the new organ the ‘Commissioner for human rights’, overlooking the absence of the term ‘human rights’ in the relevant Article 30; Fundamental Law, *supra* n. 16, p. 28.

<sup>77</sup>Venice Commission, 2011, *supra* n. 22, p. 16.

<sup>78</sup>Fundamental Law, *supra* n. 16, p. 9.

<sup>79</sup>*Ibid.*, p. 9-10.

<sup>80</sup>*Ibid.*, p. 10.

<sup>81</sup>Majtényi et al., *supra* n. 9, p. 177-178.

would interpret and contextualise them to fit accepted standards of rule of law.<sup>82</sup> In reality, the judicial branch soon fell to executive control through a newly established partisan regulatory body and by forcing hundreds of judges to retire.<sup>83</sup> Some, like Halmai, have criticised the Constitutional Court for failing to utilise the doctrine of unconstitutional constitutional amendments, effectively letting the Fidesz-KDNP government rebuild the country in its image.<sup>84</sup> However, the writers of the Constitution seemed prepared for that, as they embedded it with a specific view of constitutionalism, obliging any future legal interpretation to match the original intent of the legislature. The most explicit direction towards such an originalist view is Article 28:

In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good.<sup>85</sup>

This single-provision article, unchanged between 2011 and 2024, is hardly ever discussed in the context of the constitutional revolution in Hungary. A notable exception is Szente, who has recently mentioned how Article 28 obliged courts to take into account primarily the preambles of the legal norms and their explanatory memoranda.<sup>86</sup> Considering the superiority it ascribes to legislative preambles and the Fundamental Law in particular, Article 28 effectively binds all judicial review to the National Avowal. Together with the fifth Final Provision (that has repealed all case law arguments before 2011),<sup>87</sup> it created a complete constitutional structure, in which ultimately everything must be directly based on the National Avowal, the DNA of Hungary's new regime.

Here is another constitutional area that cannot be explored through thin ideologies that do not have their independent constitutional approach, but rather

<sup>82</sup>Venice Commission, 2011, *supra* n. 22, p. 7, 19.

<sup>83</sup>Scheppele, *supra* n. 3, p. 573; P. Wilkin, *The Road to Derfdom* (Lexington Books 2016) p. 75.

<sup>84</sup>G. Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?', 19 *Constellations* (2012) p. 192-196.

<sup>85</sup>Fundamental Law, *supra* n. 16, p. 27.

<sup>86</sup>Z. Szente, 'Constitutional Changes in Populist Times', 47 *Review of Central and East European Law* (2022) p. 28.

<sup>87</sup>Fundamental Law, *supra* n. 16, p. 37.

draw values from other ideologies, including conservatism.<sup>88</sup> Directing courts to follow the intent of the legislature resembles the American conservative doctrine of ‘originalism’.<sup>89</sup> In public appearances, senior Fidesz members appealed to other constitutional conservative values such as judicial restraint in opposition to viewing the Constitution as ‘a living law’.<sup>90</sup> In a 2011 debate, József Szajer, the principal writer of the Constitution, justified limiting constitutional review as a response to an ‘activist’ Constitutional Court with a ‘living law’.<sup>91</sup> In a 2015 interview, Hungary’s then Justice Minister and former Supreme Court Judge, László Trócsányi, framed the entire regime in Hungary as following ‘a conservative school’ of thought, which emphasises ‘collective rights’ and ‘the interest of the community’.<sup>92</sup>

The Hungarian government’s appeal to conservative constitutionalism may be an example of the Hungarian ‘Frankenstate’.<sup>93</sup> Even in the American version, there is a scholarly debate on the coherence of originalism, as critics found it inconsistent with core conservative values and ultimately a covert way to enable partisan adjudication.<sup>94</sup> Nevertheless, a legitimate scholarly discussion in a 250-year-old constitutional democracy appears rather pathetic in Hungary’s new constitutional order. Advocating judicial restraint and originalism by the government that introduced the Fundamental Law is another way to sanctify the power of its parliamentary supermajority and cement the rule of an unchecked executive branch.<sup>95</sup> Under the cloak of American conservative constitutionalism, the writers of the Fundamental Law basically declared themselves the constitutional ‘founders’ of the Hungarian state. It is another example of a radical outcome that hides behind a manipulation of a respectful moderate conservative stance.

<sup>88</sup>T. Drinóczi and A. Bień-Kacała, ‘Illiberal Constitutionalism: The Case of Hungary and Poland’, 20 *German Law Journal* (2019) p. 1143; D. Landau, ‘The Myth of the Illiberal Democratic Constitution’, in Sajó et al., *supra* n. 25, p. 425.

<sup>89</sup>West, *supra* n. 49, p. 648.

<sup>90</sup>Barnett, *supra* n. 49, p. 930.

<sup>91</sup>European University Institution, ‘Debating the Hungarian Constitution, Roundtable Discussion at the EU’, *YouTube*, 7 March 2012, 132 minutes, at 45:00–52:00, [https://www.youtube.com/watch?v=\\_q3Jxobiv9A](https://www.youtube.com/watch?v=_q3Jxobiv9A), visited 28 September 2024.

<sup>92</sup>G. Gotev, ‘Trócsányi: “There Are Different Interpretations of Democracy”’, *EURACTIVE*, 17 April 2015, para. 7, <https://www.euractiv.com/section/europe-s-east/interview/trocsanyi-there-are-different-interpretations-of-democracy/>, visited 28 September 2024.

<sup>93</sup>K.L. Scheppele, ‘The Rule of Law and the Frankenstate’, 26 *Governance* (2013) p. 560.

<sup>94</sup>Young, *supra* n. 28, p. 664; D.A. Strauss, ‘The Death of Judicial Conservatism’, 4 *Duke Journal of Constitutional Law & Public Policy* (2009) p. 14.

<sup>95</sup>Bánkuti et al., *supra* n. 6, p. 141–142; Kornai, *supra* n. 6, p. 35.

*The many roles of history*

Even though the Fidesz-KDNP government received only 52.7% of the votes in the low-turnout 2010 election, the Constitution's writers had the audacity to speak for the Hungarian nation. Using the first-person plural, the National Avowal declares:

Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live.<sup>96</sup>

The substance of the Hungarian nation as a constitutional identity is the clearest, most distinct ideological content within the document. It accompanies the text from the first declaration of the National Avowal, which goes back 1,000 years, asserting Saint Stephen as 'our king', the creator of the Hungarian state, in times of Christian crusade.<sup>97</sup> The reverence of an archaic king is a salute to history as an element of national identity and a reminder of the advantages of an elitist social structure, two cardinal conservative social premises. The second declaration follows suit when the National Avowal takes pride in 'our forebears' and a couple of sentences later undertakes 'responsibility for our descendants', once again romanticising the classic conservative silver-lining between past, present, and future generations of members of the nationality.<sup>98</sup>

As noted, conservatism is the ideology of a dominant historical community, and the historical narrative is evident throughout the National Avowal. Of particular importance is the repeated term 'our historic constitution'. The Venice Commission pointed out the vagueness of the term, mindful that Hungary never had a written constitution before 1949.<sup>99</sup> Trying to rationalise the inconsistency, the Venice Commission assumed any 'historic constitution' must include the democratising 1989 amendments of the 1949 Constitution, further assuming they still hold legal liability.<sup>100</sup> However, this may have been another example of wishful thinking.

The term 'our historic constitution' refers to a much earlier era, alluding to a pre-modern historical community from which the Hungarian nation originated.

<sup>96</sup>Fundamental Law, *supra* n. 16, p. 3. Note that the self-assertion of the Constitution as a 'living framework' enables the parliamentary supermajority to change it at will, rather than directing the judiciary to contextualise the law as required by the 'living law' approach. I thank one of my reviewers for this comment.

<sup>97</sup>*Ibid.*, p. 2.

<sup>98</sup>*Ibid.*

<sup>99</sup>Venice Commission, 2011, *supra* n. 22, p. 3-7.

<sup>100</sup>*Ibid.*, p. 23.

It first appears concerning the Holy Crown of Saint Stephen, which embodies ‘the constitutional continuity of Hungary’s statehood and the unity of the nation’, and immediately followed by how the nation’s identity is ‘rooted in our historic Constitution’.<sup>101</sup> The 1,000-year-old ‘constitutional continuity’ is further warped in a third straight sentence that denounces the 1949 Constitution and excludes the period between 1944 and 1990 from its constitutional continuity.<sup>102</sup> The Venice Commission had overlooked this explicit statement that effectively excludes both the 1949 Constitution and its 1989 amendments from Hungary’s constitutional continuity.

The chronological gap in the unusual historical narrative of the Fundamental Law is bridged with an even more unusually lengthy indictment of the regime that ruled Hungary between 1946 and 1989.<sup>103</sup> This illustration of historical justice and strong reactive proclamation against the revolutionary politics of Communism cannot be warranted by thin ideologies but does characterise contemporary conservatism that proclaims a sense of continuity of sacred heritage and rejects radical changes, especially related to left-wing ideologies, such as socialism.

However, this historical narrative reveals another example of conservative radicalisation, this time into historical revisionism. First, it adulterate the historical record by excluding 1944–1945, during which around 600,000 Hungarian Jews were murdered.<sup>104</sup> Then, it also rejects the unified 1989 document in favour of an envisioned (or imagined) set of historic communal arrangements that developed in Hungary’s proximate geographic area from the start of the second millennium. The writers of the 2011 Constitution see the 1990–2010 period as part of the restoration of their historic Constitution, a continuation of a much more ancient tradition that was suspended in 1944 when the Kingdom of Hungary was demolished. While Hungary remained a republic, such continuation may underscore why the Constitution effectively removed the term ‘Republic’ from Hungary’s official name.<sup>105</sup>

The last mention of ‘Our Historic Constitution’ infuses it with legal meaning that circles back to constitutional conservatism. Following another assertion that the Fundamental Law is the legal foundation of Hungary, Article R(3) directs any interpretation of its provisions to be ‘In accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution’.<sup>106</sup> As the amorphous ‘achievements of our historic Constitution’

<sup>101</sup>Ibid., p. 2.

<sup>102</sup>Ibid., p. 2-3.

<sup>103</sup>Fundamental Law, *supra* n. 16, p. 7-8.

<sup>104</sup>Wilkin, *supra* n. 84, p. 62.

<sup>105</sup>Ibid; Fundamental Law, *supra* n. 16, p. 3.

<sup>106</sup>Ibid., p. 6.

had become integral to any interpretation of the Fundamental Law, the term became charged with legal originalist purpose. History thus has a legal, moral, and cultural role as the embodiment of the Hungarian nation.

### *A constitutional identity*

The identity of the Constitution speaks for the Hungarian nation, a social community relying on the traditional family to continue a 1,000-year-old 'historic constitution'. This constitutional identity provides a moral reason for the suspension of fundamental individual rights that are dependent on social obligations and should stand in the background of every future legal interpretation of Hungarian law. Thus, the Hungarian national identity connects the different conservative themes within the Constitution. It also reflects another radicalisation process, moving towards hereditary ethnic elements of nationalism.

The constitutional identity of the Hungarian nation is found especially in the National Avowal. Its cardinal elements are clustered together in a single sentence that notably also differentiates the first-person plural ('we', 'our') from 'minorities living in Hungary':

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin.<sup>107</sup>

In this sentence, once again the lead is historical ('heritage'). History is the base of the Hungarian nation, with subsequent additional essential elements being language, culture, and geography. These components mark a conservative aspiration to maintain the nation-state. However, previous studies noted that 'assets of the Carpathian Basin' include territories beyond Hungary's current borders.<sup>108</sup> In addition to hinting at an aspirational 'Greater Hungary', the constitutional conception of Hungarian nationalism does not stop at culture and geography, but includes religious and ethnic elements that previous research found to be excluding of Hungarian citizens of minority ethnic descent.<sup>109</sup>

The Constitution ignores ethnic minorities, mentioning only 'national minorities'. The National Avowal proclaims, 'the national minorities living with us form part of the Hungarian political community and are constituent part of the

<sup>107</sup>Ibid., p. 2.

<sup>108</sup>Körtvélyesi, *supra* n. 23, p. 116-117.

<sup>109</sup>Halmi, *supra* n. 14, p. 375-376; Körtvélyesi, *supra* n. 23, p. 113-114.



State'.<sup>110</sup> The Constitution includes these minorities in the civic 'Hungarian political community' while excluding them from the Hungarian Nation, alluding to it being an ethnic concept. Moreover, the National Avowal subjects minorities to the Constitution without considering them as co-writers. 'They' live alongside 'Us', excluded from the 'alliance among Hungarians of the past, present and future' that the Constitution is allegedly written by and for.

Focusing on Article D, Körtvélyesi criticised the constitutional national identity as an aggressive form of ethnic nationalism.<sup>111</sup> It opens with an unusual empirical social claim: 'there is one single Hungarian nation that belongs together'. The Fundamental Law subsequently directs Hungary to develop Hungarian communities beyond its borders, preserve their Hungarian identity, and even support the creation of autonomies within other states.<sup>112</sup> The Venice Commission warned that these directions might affect Hungary's relations with its sovereign neighbours.<sup>113</sup> Halmai added that since the National Avowal limits the possibility of religious minorities being part of the Hungarian nation, the Fundamental Law actively prefers people who live outside Hungary's borders over Hungarian citizens from minority backgrounds.<sup>114</sup>

Previous research indeed described how the Fundamental Law sings praise for Christianity both as a cardinal element of nationalism and as the primary essence of Hungarian culture.<sup>115</sup> The clearest example came in 2018 when the Seventh Amendment revised Article R to not only charge 'our historic constitution' with a legal purpose but direct 'every organ of the state' to protect 'the Constitutional identity and Christian culture of Hungary'.<sup>116</sup> The constitutional identity probably refers to the historical substance of the Hungarian nation found in the National Avowal, now legally concretised by Article R.<sup>117</sup> In 2021, the Venice Commission indicated that the Ninth Amendment had laid a third layer of concretisation in Article XVI(1). Analysing it shows the incremental radicalisation of the preamble's constitutional identity.

Article XVI(1) was mentioned above for stipulating the proper upbringing of children solely on their sex-at-birth identification. Its second part promises how such upbringing will be done, not based on a child's needs, abilities, or aspirations but on the constitutional values of the nation, and its Christian culture: 'Hungary

<sup>110</sup>Fundamental Law, *supra* n. 16, p. 2.

<sup>111</sup>Körtvélyesi, *supra* n. 23, p. 136.

<sup>112</sup>Fundamental Law, *supra* n. 16, p. 3.

<sup>113</sup>Venice Commission, 2011, *supra* n. 22, p. 10.

<sup>114</sup>Halmai, *supra* n. 14, p. 375-376.

<sup>115</sup>Uitz, *supra* n. 23, p. 201; Venice Commission, 2021, *supra* n. 22, p. 11.

<sup>116</sup>Fundamental Law, *supra* n. 16, p. 16.

<sup>117</sup>Venice Commission, 2021, *supra* n. 22, p. 12.

shall . . . ensure an upbringing for [children] that is in accordance with the values based on the constitutional identity and Christian culture of our country'.<sup>118</sup>

The Venice Commission produced a thorough analysis of this sentence.<sup>119</sup> The 2011 preamble, gorged with traditional conservative values of family, community, history, and culture, laid the moral foundations for Hungarian national identity, which also includes exclusionary religious and ethnic elements. The 2018 Amendment of Article R(4) ascribed active commitment by all state organs to protect it. The 2020 Amendment of Article XVI(1) made the same national identity the base for children's proper upbringing. How can Hungarian children who were unlucky enough to be born to a minority receive 'protection' and 'care' based on a 'constitutional identity' that excludes them from the nation and a 'Christian culture' to which they do not belong? The Venice Commission thus warned that the new provision may amount to an ideological state indoctrination of children, placing several human rights at stake.

However, even in 2021, upon finding that the concretisation of the Hungarian constitutional identity may violate human rights as it excludes minorities from being considered equal Hungarians, the Venice Commission failed to estimate the actual erosion of the rule of law and democratic standards. Instead, it recalled that the Constitution also includes paragraphs that proclaim the importance of well-known democratic ideas, such as the freedom of education, religion, belief, equality and non-discrimination.<sup>120</sup>

Indeed, without ascertaining the Constitution's conservative normative premises and the attire of legitimacy that some moderate language provides for radical political directives, analysis might as well fall back to point at the Constitution's multiplicity. However, the findings contained within this article are hopefully sufficient to provide an analytical interpretation of the direction of the Hungarian case that would prevent another round of institutional wishful thinking.

#### ANALYSIS AND CONCLUSION: THE MANIPULATION OF CONSERVATIVE IDEAS IN THE HUNGARIAN CONSTITUTION

In Kim Lane Scheppele's foundational discussion of autocratic legalism, Viktor Orbán's ideological credentials in recreating Hungary's constitutional order were downplayed as opportunism, taking advantage of the technical weaknesses of

<sup>118</sup>Fundamental Law, *supra* n. 16, p. 11.

<sup>119</sup>Venice Commission, 2021, *supra* n. 22, p. 12-13.

<sup>120</sup>*Ibid.*

Hungarian democracy.<sup>121</sup> The language of the Constitution questions this assessment.

The Constitution asserts the existence of a rigid national identity that is built around a historical narrative that respects antiquity and religion. It enshrines a traditional understanding of the family and the nation-state and fixates an originalist interpretation of law in Hungary. It nominally protects human rights but places multiple limitations on them, indicating the use of moderate language to justify radical political conclusions. The Constitution challenges EU norms while posing as pro-Europe and twists historical events while claiming to be the natural continuation of Hungary's history. The sophistication of the document attests to the Hungarian regime's attempt to be perceived as mainstream while constructing a new constitutional order infused with a distinct ideational hue.

The findings support the assumption that the content of the Constitution, in particular its ideational narrative, cannot be warranted by inherently radical thin ideologies.<sup>122</sup> Indeed, if the Fundamental Law was explicitly illiberal or right-wing populist, its undemocratic nature would have been much easier to recognise and combat. For backsliding to run smoothly, the agents used a legitimate ideology with a pragmatic moderate side. The findings point to conservatism for that purpose. While the *true* intentions of any political agent are too labyrinthine to be discovered by analysing one document, Hungary's Fundamental Law contains several distinctly conservative themes to justify its political power grab.

A 1,000-year-old Hungarian nation, a preference for communal dignity over freedom of expression, human rights for a one-hour embryo, and an originalist constitutional approach – these conservative values are some of the examples of ideological justifications found for establishing Hungary's new constitutional order. In the words of Hungary's former Justice Minister, the government applies 'a conservative school of thought' willing to preserve historical traditions even at the price of democratic norms and human rights.

More research would be necessary to remark on whether the agents of backsliding *truly* wished to establish an ideologically motivated conservative document as part of a reaction to liberal democracy. Nevertheless, the argumentative connection runs through the entire document. The Constitution arrives at illiberal conclusions by promoting elitist communitarianism, illustrating illiberalism's dependence on conservative ideas.<sup>123</sup> Similarly, the

<sup>121</sup>Scheppele, *supra* n. 3, p. 574.

<sup>122</sup>Freedden, *supra* n. 25, p. 10.

<sup>123</sup>Smilova, *supra* n. 25, p. 178-184.

ultra-nationalist ethno-religious sentiment builds upon promoting social cohesion, history, and culture, demonstrating the proximity between radical and conservative right perceptions of nationalism.<sup>124</sup>

Traditionalist conservative values underline the narrative of the Hungarian Constitution. However, the Hungarian Constitution is more precisely a reactionary outcome of the radicalisation of conservatism. Roger Scruton, who took pride in his connections to Fidesz, also wrote that conservatism maintains distance from ethnic nationalism.<sup>125</sup> He viewed separation between church and state as a pinocle of contemporary conservatism.<sup>126</sup> He also defined extremism as the disregard for human rights.<sup>127</sup> As the writers of the Hungarian Constitution have neglected the more moderate conservative values, their use of traditionalist conservative paternalism, communitarianism, historical nostalgia, and anti-socialism became part of a reactionary backlash against democratic standards and the substance of the rule of law.

Rather than being *explicitly* anti-democratic, reactionary conservatism hollows out liberal democracy, allowing a radical regime of change to gradually take place. Such conservative-radical dynamics support Plattner's depiction of Hungary as a manifestation of a right-wing conservative philosophy that presents a fracture within the European establishment right.<sup>128</sup> The ideological fracture may help explain how parties like Fidesz-KDNP came to advance democratic decay policies as members of the centre-right EPP. They gradually used conservative language that counters progressive ideas and turned them against liberal democracy. That type of reactionary conservatism has allowed the slow boiling of the water until democracy lost much of its substantive content.

The Hungarian Constitution shows that contemporary mainstream right-wing ideologies are vulnerable to undergoing radicalisation. The findings suggest the need to look at centre-right and particularly conservative actors. The conservative premises of the Hungarian Constitution and their illiberal conclusion are consequential for conservatives in Europe and beyond, as they are urged to decide whether to embrace the radical version of their ideology or balance it with the old-fashioned classic liberalism. The ability of conservatives to guard their ideas from radicalisation and maintain a substantive difference from right-wing reactionaries might be a deciding factor in the battle over the rule of law and democracy.

<sup>124</sup>Cohen, *supra* n. 35, p. 14; P. Ignazi, 'The Silent Counter-revolution: Hypotheses on the Emergence of Extreme Right-wing Parties in Europe', 22 *European Journal of Political Research* (1992) p. 22-25.

<sup>125</sup>Scruton, *supra* n. 39, p. 33-34.

<sup>126</sup>*Ibid.*, p. 138-139.

<sup>127</sup>P.R. Neumann, 'The Trouble with Radicalization', 89 *International Affairs* (2013) p. 874-875.

<sup>128</sup>Plattner, *supra* n. 8, p. 18.

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