

SYMPOSIUM ARTICLE

Is There a ‘Constitutional Moment’ in Israel and Hungary?

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Abstract

This article addresses the concept of ‘constitutional moment’ in contemporary Israel, where an illiberal constitutionalisation process is in progress, and in Hungary, where the illiberal constitutional system has been in place since 2010. After discussing the judicial overhaul of the current Israeli government and the widespread protest movement against it, the article raises the question of whether the moment to adopt a written constitution has arrived. In Hungary, where a semi-electoral autocratic constitutional regime has been entrenched, the question is what are the perspectives on a return to a liberal democratic constitution.

Keywords: Israel; Hungary; constitutional moment; authoritarianism; judicial independence

1. Introduction

The article raises the issue of whether a ‘constitutional moment’ has arisen amidst attempts at illiberal constitutionalisation and an existing illiberal constitutional system. Israel is used as a case study for the first scenario, and Hungary for the second. In Israel, in early 2023, the new government of Benjamin Netanyahu, supported by far-right nationalist and ultra-Orthodox parties, initiated judicial reform with the aim of dismantling the separation of powers and establishing an unbound executive. This raises the question of whether, 75 years after its establishment, the moment has finally arrived to enact a written constitution in the State of Israel. The current political and constitutional system in Hungary was introduced with the adoption of the

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Fundamental Law, the new constitution of Viktor Orbán's illiberal regime, and there are hardly any signs of the return of liberal democratic constitutionalism by either amending or replacing the current constitution.

'Constitutional moments' are points in history when constitutional changes are fostered by a particular mobilisation and engagement of the *demos*, representing a transformative expression of popular sovereignty in a conscious consent of the majority of ordinary citizens.¹ Constitutional crisis or a failure in the constitution-making process sometimes stands behind the constitutional change triggered by the constitutional moment.²

The question I wish to answer here is whether the current constitutional situations in Israel and Hungary can be considered to be a constitutional moment, which necessitates popular mobilisation led by the political and professional elite, such as constitutional scholars.

2. Israel: Towards authoritarianism?

The State of Israel came into being on 14 May 1948, by way of the 1948 Declaration of the Establishment of the State of Israel. It is primarily a political document, which aimed to distinguish between legislative and constitutive powers by creating a Provisional State Council and a Constituent Assembly. There were then, and still are several arguments against the enactment of a written constitution.³ One of the fiercest opponents of the project of drafting a constitution was David Ben-Gurion, Israel's first Prime Minister. A major obstruction in adopting a constitution comes from orthodox and secularist circles taking a decisive position on the unresolved questions of the relationship between religion and state, and the national and cultural or religious nature of the declared Jewishness of the state. In other words, the main cause of uncertainty was the profound ideological rift in Israeli society between the secular and the religious vision of the state. There were other reasons: (i) Ben-Gurion wanted the least restrictions on his power; (ii) the majority of Jews were living abroad and it seemed unfair to entrench a constitution by a minority; (iii) the British experience was also an argument against adopting a constitution; and (iv) the religious population objected because for them there was already a constitution – the Bible. As both the secular and religious parties opposed the constitution for different reasons, and despite the large majority of the secular camp (only 16 out of the 120 members represented the religious

¹ The concept is conceived and developed by Bruce Ackerman in his trilogy on the evolution of the United States Constitution: Bruce Ackerman, *We the People, Vol I* (Harvard University Press 1991); Bruce Ackerman, *We the People, Vol II* (Harvard University Press 1998); Bruce Ackerman, *We the People, Vol III* (Harvard University Press 2014).

² This theory extends Ackerman's concept beyond American constitutional history; see Sujit Choudhry, 'Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?' (2008) 6 *International Journal of Constitutional Law* 193, 198.

³ See, eg, Amos Shapira, 'Why Israel Has No Constitution, but Should, and Likely Will, Have One' (1993) 37 *Saint Louis University Law Journal* 283.

parties), in June 1950 the Knesset decided not to draft a constitution in a single document. Following a heated debate on the religious and secular vision of Israel as a Jewish state, a compromise resolution was passed, named after its sponsor, Haim Harrari, Chair of the Knesset Committee: the Basic Laws, together, would form the state constitution.⁴

In contrast to the relative ease with which the first nine Basic Laws were passed after 1958 – which related mainly to institutional considerations, and were in essence the legal formalisation of the existing structure of government – the religious parties objected to the draft of the Basic Law on Human and Civil Rights, proposed in 1989, because they claimed it would undermine the religious status quo. The religious laws are one of the reasons why the Basic Law on Human Dignity contains an explicit provision (Article 10) which protects the validity of laws enacted before its coming into force. Indeed, the new Basic Laws of the early 1990s, which changed the previous constitutional culture of legislative sovereignty following the British constitutional tradition,⁵ made it possible to challenge in court some basic tenets of the status quo expressed in post-1992 legislation or administrative regulation. It also allowed a reinterpretation of pre-existing legislation, including that relating to the religious status quo in a manner compatible with the Basic Laws. The activist stand of the Supreme Court of Israel made maintaining the status quo in many religious-related issues impossible; however, the growing involvement of the Supreme Court in such issues should be assessed within the context of the intensifying activities of the Likud-led legislature and government in shifting the balance of the status quo in responding to demands of the religious parties.⁶ According to the perception of influential commentators such as Menachem Mautner, the highly activist doctrine of the Israeli Supreme Court adopted in the 1980s was a consequence of (i) the decline of the political, social and cultural hegemony of the Labour movement and the renewal of religious fundamentalism in the second half of the 1970s, and (ii) the Likud victory in the 1977 elections, which brought about a radical change in the collective identity of the state.⁷ Michael Walzer calls this development the ‘paradox’ of secular liberation movements being taken over by religious forces.⁸ The crisis of Jewish secularity, modernity and liberalism of the previous three decades caused the rise of religious fundamentalism within religious Zionist groups, and especially within ultra-Orthodoxy.

Even the most symbolic expression of the state’s new identity – the two Basic Laws of 1992 on Human Dignity and Liberty and on Freedom of

⁴ On the attempts to formulate a constitution, including the Knesset debates, see Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011) Ch 3.

⁵ See Daphne Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective’ (1995) 26 *Columbia Human Rights Law Review* 309.

⁶ Concerning the instability of the status quo see Aviezer Ravitzky, ‘Religious and Secular Jews in Israel: A Kulturkampf?’, *The Israel Democracy Institute*, Position Paper, December 2000, 15–16.

⁷ Menachem Mautner, *Law and Culture of Israel* (Oxford University Press 2011) Ch 5.

⁸ See Michael Walzer, *The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions* (Yale University Press 2015) 19 (comparing what happened to Ben-Gurion’s vision with what befell Nehru’s India and Ben Bella’s Algeria).

Occupation, respectively declaring the State of Israel as a 'Jewish and democratic state' – has received alternative interpretations. Courts and scholars are divided over whether the term 'Jewish' should be read as referring to Judaism as a religion, to Jewish nationality, or to Jewish culture. The majority of views are that this 'constitutional' provision does not mandate the state to become a theocracy because it is certainly excluded by the democratic character, but rather mandates it to 'integrate' or 'harmonise' the two poles. This phrase leaves ample room for competing interpretations.⁹

During these radical changes in party politics, the Supreme Court of Israel embarked on a very activist jurisprudence in order to defend the secular liberal values of the pre-1977 period. While the Likud, on the one hand, has indeed eroded the religious status quo, on the other hand, the party defined itself as national-liberal; for instance, PM Begin was a strong supporter of constitutional basic rights. The Basic Laws of 1992 were in fact supported by the Likud government of the time and by most Likud MKs. As a result of Supreme Court activism – especially in its capacity as the High Court of Israel handling citizens' petitions without concrete personal interest against administrative authorities – Justice Aharon Barak, Chief Justice of the Court for 12 years and the person most closely identified with its judicial activism, represented the view that any court of law should have competence to legally review any legal norm that regulates human conduct. Although, in theory, the courts could review any law, institutional considerations on some issues – for instance, whether to go to war or build settlements in the Occupied Territories – led them to refrain from doing so. Barak, who referred to the enactment of the two Basic Laws on human rights as a 'constitutional revolution', provided the following interpretation of section 2 of the Basic Law on Freedom of Occupation on 'Israel as a Jewish and Democratic State': 'The meaning of the Jewish nature of the state is not in the religious-Halachic sense, ... and hence the values of the State of Israel as a Jewish State should not be identified with the Jewish Law'.¹⁰ Barak proposed two concepts as defining the 'Jewish state': (i) a 'national concept' of the State of Israel as a 'national home to the Jewish people', and (ii) as values derived from the Halakha (which, in Barak's interpretation, intends to prevent the direct application of the Halakha as part of Israeli law). In other words, Barak suggested that a national secular concept should dominate a strictly religious one. In Barak's view the 'Jewish state' and 'democratic state' concept should be

⁹ See Ruth Gavison, 'Jewish and Democratic? A Rejoinder to the "Ethnic Democracy" Debate' (1999) 4(1) *Israel Studies* 44; Ruth Gavison, 'Can Israel Be Both Jewish and Democratic?' (2000) 25(6) *Moment* 70; Hanna Lerner, 'Democracy, Constitutionalism, and Identity: The Anomaly of the Israel Case' (2004) 11 *Constellations* 237; Nadim N Rouhana, 'Jewish and Democratic? The Price of National Self-Deception' (2006) 35(2) *Journal of Palestine Studies* 64; Aviezer Ravitzky and Yedidia Z Stern (eds), *The Jewishness of Israel* (Israel Democracy Institute 2007); Amnon Rubinstein, 'Can Israel Be Both Democratic and Jewish?', 2009, <http://dx.doi.org/10.2139/ssrn.1409291>.

¹⁰ Aharon Barak, 'The Constitutional Revolution: Protected Human Rights' (1992) 1 *Mishpat Umimshal [Law and Government in Israel]* 9, 30–31 (author's translation).

approached on equal terms at peace with each other, without raising any contradictions:¹¹

An appropriate analysis does not have to intensify these contradictions. On the contrary, a purposeful analysis, based on constitutional unity and normative harmony, aspires to find that which is unifying and common, while preventing contradictions and reducing points of friction. We must strive to find the common denominator and synthesis between the values of Israel as a Jewish state and the values of Israel as a democratic state.

Barak also emphasises the fact that most of the population of Israel is secular and that some of its citizens are not Jewish. With regard to the democratic character of the state, Barak indicates that it establishes provisions for both majority rule and the preservation of human rights:¹²

The values of the state of Israel are the same values that are being reflected on a given time the premise of modern democracy. This democracy is based mainly on two foundations: the first is the government of the people. A democratic regime is one where the people determine their destiny. The people choose their representatives and the latter determine the result on a majority vote. The second foundation is human rights. A democratic regime is one that holds and develops human rights. Only the combination of both tiers can lead to a true democracy.

Once one of these tiers is removed from the equation, it is analogous to losing its essence.¹³

By way of reaction to the Supreme Court's activism, there were constant efforts by Jewish nationalists to propose a new Basic Law, which defines Israel as the nation-state of the Jewish people to restore the balance between the country's Jewish and democratic values, allegedly upset in favour of the latter. This law, which was finally enacted in 2018,¹⁴ prevents Israel from becoming a binational state. The most recent institutional reaction to the 'constitutional revolution' is the judicial reform attempt of the current far-right governing coalition led by Benjamin Netanyahu to dismantle the independence of the Supreme Court. The amendment to the Basic Law on the Judiciary has the following main objectives:

¹¹ Aharon Barak, 'The Values of the State of Israel as a Jewish and Democratic State', *Jewish Virtual Library Publications*, August 2009, <https://www.jewishvirtuallibrary.org/israel-studies-anthology-israel-as-jewish-and-democratic-state>.

¹² Aharon Barak, 'The State of Israel as a Jewish and Democratic State (2000) 24(1) *Tel Aviv University Law Review* 9, 9.

¹³ Aharon Barak, *Interpretation in Law: Vol 3 Constitutional Interpretation* (Nevo 1994) 336.

¹⁴ Basic-Law: Israel – The Nation State of the Jewish People, <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf>.

- (a) to introduce a government majority in the judicial appointments committee;
- (b) to require 80 per cent or more of all Supreme Court justices to strike down unconstitutional primary legislation;
- (c) to determine that a decision regarding the judicial review of a statute will not serve as a precedent regarding any other statute;
- (d) to override the Court's rulings by a majority decision of the parliament;
- (e) to prohibit judicial review of Basic Laws;
- (f) to prohibit the review of administrative action based on the reasonableness doctrine.¹⁵

The reform package met huge opposition also beyond the Knesset. Weekly street demonstrations on Saturday nights, involving hundreds of thousands of people, took place from mid-January 2023 in cities throughout the country. They were coordinated by a web of non-partisan civil society organisations, student protesters, LGBT groups, members of the 'Anti-Occupation Bloc' made up of organisations supporting Palestinian rights.¹⁶ Different parts of society opposed the legislation by writing letters, petitions and memorandums.¹⁷ Hundreds of Israeli, as well as senior foreign economists warned of the financial implications of the planned legislation.¹⁸ Leaders of the very successful Israeli tech industry signed a letter stating that the changes would distance international investors from Israel,¹⁹ and Israeli companies announced that they will move their money out of the country.²⁰ Maybe the most influential opposition came from the military: more than a thousand Air Force officers protested and announced that they would not attend regular training sessions.²¹

Representatives of the legal profession have been particularly active: former Israeli attorney generals and state attorneys, as well as retired judges, have protested against the plan.²² Legal scholars have been among the most

¹⁵ For a discussion of these elements see Aeyal Gross, 'The Populist Constitutional Revolution in Israel: Towards a Constitutional Crisis', *Verfassungsblog*, 19 January 2023, <https://verfassungsblog.de/populist-const-rev-israel>.

¹⁶ On 25 March 2023 I had the opportunity to participate in the weekly protest event in Jerusalem, <https://www.facebook.com/photo/?fbid=10233535329470898&set=a.10231006106801912>.

¹⁷ For an overview of such action see Aeyal Gross, 'The Battle over the Populist Constitutional Coup in Israel: Spring of Hope or Winter of Despair?', *Verfassungsblog*, 31 March 2023, <https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel>.

¹⁸ TOI Staff, 'Hundreds of Top Economists Warn Judicial Overhaul Could "Cripple" Economy', *The Times of Israel*, 25 January 2023, <https://www.timesofisrael.com/hundreds-of-top-economists-warn-judicial-overhaul-could-cripple-economy>.

¹⁹ David Segal, 'Tech Leaders in Israel Wonder if It's Time to Leave', *The New York Times*, 28 February 2023, <https://www.nytimes.com/2023/02/23/business/tech-startups-israel.html>.

²⁰ Assaf Gilead, 'Papaya Global Moving All Money Out of Israel', *Globes*, 26 January 2023, <https://en.globes.co.il/en/article-papaya-global-moving-all-money-out-of-israel-1001436560>.

²¹ TOI Staff, 'Several Reserve Pilots Tell Air Force Chief They Won't Train over Judicial Overhaul', *The Times of Israel*, 14 July 2023, <https://www.timesofisrael.com/several-reserve-pilots-tell-air-force-chief-they-wont-train-over-judicial-overhaul>.

²² TOI Staff, '78 Retired Judges Warn Against Incoming Government's Judicial Reforms', *The Times of Israel*, 28 December 2022, <https://www.timesofisrael.com/78-retired-judges-warn-against-incoming-governments-judicial-reforms>.

organised. The newly established Israeli Law Professors' Forum for Democracy issued a public statement²³ and several position papers criticising various elements of the proposed judicial overhaul.²⁴ Several dozens of constitutional law professors engaged in popular education about the importance of liberal constitutional democracy.²⁵ Israeli constitutional law professor Yaniv Roznai expressed his conviction that with the public engagement in constitutional matters, Israel has reached a constitutional moment.²⁶

3. Hungary: Semi-electoral autocracy

After the democratic transitions of 1989–90 in Eastern and Central Europe, Bruce Ackerman extended his theory of constitutional moment to the constitutional transformations in the region. Ackerman also warned that the time window for the adoption of a new liberal democratic constitution is not open forever: 'the constitutional guarantees of a liberal rule of law state can be established only if a new constitution is adopted, and the possibility to adopt a new basic law fades as the time passes'.²⁷ According to Ackerman, there would have been a possibility, and indeed a need, for the adoption of a new constitution in Hungary at the beginning of the political transition, which would have resolved the legitimacy deficit of the 'system change', similar to what was done with respect to the German Basic Law (Grundgesetz) of 1949. In an interview given a decade later he observes regrettably that Hungary missed the opportunity for its constitutional moment.²⁸ Contrary to Ackerman's view, András Sajó argues that there has been no constitutional moment in Hungary, either in 1989 or later during the 1990s, because there was no 'constitutional enthusiasm' by the people.²⁹

²³ 'Preliminary Response of the Israeli Law Professors Forum for Democracy to the President's Proposal', 13 February 2023, <https://lawprofsforum.wixsite.com/home/post/preliminary-response-of-the-israeli-law-professors-forum-for-democracy-to-the-president-s-proposal>.

²⁴ <https://www.lawprofsforum.org/en>.

²⁵ See Maximilian Steinbeis' interview with Tamar Hostovsky Brandes: Maximilian Steinbeis, 'Defence of Constitution', *Verfassungsblog*, 3 February 2023, <https://verfassungsblog.de/verfassungsschutz>. At a conference organised by the Israel Democracy Institute in Jerusalem on 26 March 2023, constitutional law professors from other countries warned of the dangers to democracy of the capture of an independent judiciary: Jeremy Sharon, 'Legal Scholars from Poland, Hungary Warn of Judicial Overhaul's Dangers to Democracy', *The Times of Israel*, 27 March 2023, https://www.timesofisrael.com/legal-scholars-from-poland-hungary-warn-of-judicial-overhauls-dangers-to-democracy/?fbclid=IwAR0l6iXRmPEO_DfKuba0HYnLEgJKje4-XmajBWFwAedr88j1Ylh5wAucq5.

²⁶ Lazar Berman, 'Why the Deepening Judicial Crisis Could Be Israel's Constitutional Moment', *The Times of Israel*, 10 July 2023, <https://www.timesofisrael.com/why-the-deepening-judicial-crisis-could-be-israels-constitutional-moment/amp>; <https://www.facebook.com/photo/?fbid=10162355607437542&set=a.10150302192697542>. See also Manal Totry-Jubran, 'Constitutionalising Israel's Constitutional System' (2023) 56 *Israel Law Review* 355.

²⁷ See Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992) 113.

²⁸ Gábor Halmai, "'A magyar alkotmányos vívmányok túlságosan sérülékenyek": Interjú Bruce A. Ackermanal ["The Hungarian Constitutional Achievements Are Fragile": Interview with Bruce A. Ackerman]' (2003) 2 *Fundamentum* 51, 52.

²⁹ András Sajó, 'Constitution Without the Constitutional Moment: A View from the New Member States' (2005) 3 *International Journal of Constitutional Law* 243.

Indeed, the Hungarian democratic transition process was rather an elitist project. In October 1989, the undemocratically elected, illegitimate legislature formally enacted the comprehensive modifications of the 1949 Constitution, after peaceful negotiations between representatives of the Communist regime and its democratic opposition. This process in the literature is referred to as ‘post-sovereign’ or ‘pacted constitution-making’.³⁰ The public engagement for the adoption of a new constitution was also lacking in the summer of 1996, when a draft constitution prepared by the then governing parties, together with the support of some opposition parties, did not obtain the necessary two-thirds majority of the votes in the parliament, because part of the main governing party (MSZP) did not support it.

A new Constitution, called the Fundamental Law, was finally adopted in 2011.³¹ This occurred after the current governing Fidesz Party’s 2010 electoral victory with the exclusive votes of Fidesz without any public, professional or even parliamentary consultation. Prime Minister Viktor Orbán’s intention with this ‘illiberal’ constitution was to eliminate any notion of checks and balances, and even the parliamentary rotation of governing parties, as well as the institutional guarantees of fundamental rights, by dismantling the independence of the Constitutional Court and the ordinary judiciary.³² By now, Hungary had turned into an autocracy. Both Freedom House and the Varieties of Democracy Project have tracked the country as it passed from a ‘consolidated’ democracy (Freedom House in 2010) through the ‘partially consolidated’ category (Freedom House in 2015), and into the status of ‘electoral autocracy’³³ and ‘hybrid regime’.³⁴ In a country that is no longer a constitutional democracy able to ensure a peaceful rotation of power, and where there is no free media, no academic freedom and no independent civil society, there is very limited possibility and point of resistance, in general, and of a scholarly nature, in particular.

During the last 14 years the only exception was a scholarly debate before the 2022 parliamentary elections, following the unification of all opposition

³⁰ See respectively Andrew Arato, *Post Sovereign Constitutional Making: Learning and Legitimacy* (Oxford University Press 2016); Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) particularly Ch 5.

³¹ See the English translation of the Fundamental Law of Hungary, <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178>.

³² In an interview on Hungarian public radio in 2013, Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution: ‘Interview with PM Viktor Orbán’, *Kossuth Rádió*, 5 July 2013, <http://www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>. In his infamous speech a year later, Orbán proclaimed his intention to turn Hungary into an illiberal state; see ‘Full Text of Viktor Orbán’s speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014’, *The Budapest Beacon*, 29 July 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014>.

³³ V-Dem Institute, ‘Autocratization Surges – Resistance Grows: Democracy Report 2020’, https://www.v-dem.net/static/website/files/dr/dr_2020.pdf.

³⁴ Zselyke Csaky, ‘Nations in Transit 2020: Dropping the Democratic Facade’, *Freedom House*, <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade>.

parties in a joint list against Fidesz. The subject of this scholarly discussion was how to escape from the trap of the ‘illiberal’ Fundamental Law if the opposition wins the election, but without the two-thirds majority that is required to replace it. It was clear that even if Fidesz were to lose the national election and a new government formed, the latter would not be able to function, whether in the legal, economic or cultural domains. On the foundation of the Fundamental Law a great deal of power would remain in the hands of its incumbent holders or those near to them. The new government would not be able to govern in practice; all or most of its measures could be sabotaged by state officials, among them constitutional judges who cannot be removed or replaced under the Fundamental Law during the next parliamentary term. If, therefore, a democratically elected government would wish to replace the autocratic system, institutionalised by the Fidesz government, with a constitutional system, it must free itself from the Fundamental Law.³⁵

Ultimately, at the parliamentary election on 3 April 2022, the Fidesz victory against the united opposition was the largest ever since 2010, gaining again the two-thirds majority of the seats. There can be various explanations for this landslide victory. Kim Scheppele blamed the rigged election rules, the terrible war in Ukraine, which the government also used for its own benefit, and some demonstrated instances of incumbent cheating.³⁶ Andrew Arato, on the other hand, saw two other reasons that decided the election. The first of these is the opposition’s ‘combination of the promise of the restoration of the rule of law at the price of illegality’, meaning circumventing the two-thirds majority requirement in the Fundamental Law. In a contribution to this scholarly discussion, authored together with Arato, I also criticised some of these ideas, such as the immediate change in Fidesz’s Fundamental Law, or even the speedy enactment of a new constitution with a simple, instead of a two-thirds majority in the event of an opposition victory.³⁷ However, following the election, Arato also criticised the publicising of the constitutional change carried out illegally as ‘*rendszerváltás*’ (regime change) ‘rather than replacement of a not very popular government’,³⁸ which allowed Orbán to claim that a coup was being planned. This argument indicates that changing the autocratic regime back to a democratic regime was an unpopular cause for most of the voters – or, at least, that they did not care about liberal democratic constitutionalism. Adopting Bruce Ackerman’s theory, this means that there was no constitutional moment before the election.

³⁵ See the various scholarly suggestions in Viktor Z Kazai, ‘Restoring the Rule of Law in Hungary: An Overview of the Possible Scenarios’ (2021) 3 *Osservatorio Sulle Fonti* 983.

³⁶ See Kim Lane Scheppele, ‘In Hungary, Orban Wins Again – Because He Has Rigged the System’, *The Washington Post*, 4 April 2022, <https://www.washingtonpost.com/politics/2022/04/06/orban-fidesz-autocratic-hungary-illiberal-democracy>.

³⁷ Andrew Arato and Gábor Halmaj, ‘So that the Name Hungarian Regain its Dignity: Strategy for the Making of a New Constitution’, *Verfassungsblog*, 2 July 2021, <https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity>.

³⁸ Andrew Arato, ‘Why We Lost?’, *Verfassungsblog*, 4 April 2022, <https://verfassungsblog.de/why-we-lost>.

The increased support for Fidesz by the majority of voters who cast votes on 3 April 2022, despite Orbán's immoral stance towards Putin's war, as well as these voters' 'little appreciation for freedom and almost none for limiting power',³⁹ raises the question of who is to blame for the success of Viktor Orbán and his Fidesz party, besides themselves and the people who voted for them. Kim Scheppele argues that politics has failed 'the people', who were only choosing an option that they were offered, and not the other way around.⁴⁰ In other words, blaming exclusively the people cannot help in understanding the crisis of democracy.⁴¹ Furthermore, Jan-Werner Müller criticises the convenient but ultimately very misleading response to the decline of democracy: blame the people.⁴² He argues that ordinary folk, even those who are well-informed but clearly irrational, are always ready to be misled by demagogues but, at the end of the day, the crucial decisions to empower dictators such as Hitler was made by parts of the conservative establishment of the day.⁴³ With regard to contemporary right-wing populists, he claims that none of them have come to power without the collaboration of established conservative elites.⁴⁴

Müller also asserts that an increasing number of citizens at the lower end of the income spectrum no longer vote or participate in any other form in politics, and political leaders have no reason to care for those 'disadvantaged communities' who do not care to vote.⁴⁵ In Hungary the situation is even worse, in that about 40 per cent of the poorest and less educated part of the society overwhelmingly support Fidesz. Some of these people do not vote, but some vote for the governing party without considering that its policies are against their interests.⁴⁶ The phenomenon is described by Claus Offe as

³⁹ Zoltán Fleck, 'Why They Win?', *Verfassungsblog*, 6 April 2022, <https://verfassungsblog.de/why-they-win>.

⁴⁰ See Kim Lane Scheppele, 'The Party's Over' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 495.

⁴¹ See Eric A Posner, *The Demagogue's Playbook: The Battle for American Democracy from the Founders to Trump* (All Points Books 2020), which mainly blames the American people for Trump's rise, criticised by Yale Law School historian, Samuel Moyn, 'The Guardians: Does "The Resistance" Actually Want More Democracy or Less?', *The Nation*, 24 August 2020, <https://www.thenation.com/article/culture/eric-posner-demagogues-playbook>. Similarly, Joseph Weiler blamed the Hungarian people for supporting Orbán: 'Editorial: Orbán and the Self-Asphyxiation of Democracy' (2020) 18 *International Journal of Constitutional Law* 315. See a critique by Viktor Z Kazai, 'Blaming the People is not a Good Starting Point', *Verfassungsblog*, 8 August 2020, https://verfassungsblog.de/blaming-the-people-is-not-a-good-starting-point/?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKIDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugCnw.

⁴² Jan-Werner Müller, *Democracy Rules* (Penguin 2021) ix–xi.

⁴³ See, eg, Éric Vuillard, *Ordre du Jour* (Actes Sud 2017).

⁴⁴ Müller (n 42) 18.

⁴⁵ Müller (n 42). Müller refers to the term 'two-thirds society', coined by Wolfgang Merkel for the lowest third, which has effectively disappeared from political life completely.

⁴⁶ See the result of the Medián Institute survey, commissioned by the RTL Klub TV station on 30–31 March 2022, on the relationship between votes and incomes before the 3 April 2022 Parliamentary election, with a nationwide survey of 1,531 respondents. The survey has not been published; therefore its only public source is a Facebook post by the director of Median,

‘participatory inequality’, which is especially characteristic in states with high income inequality that use austerity measures.⁴⁷

On the other hand, supporters of Fidesz cannot be released from responsibility either. We should not go as far as Daniel Goldhagen on the responsibility of ordinary Germans in the Holocaust,⁴⁸ or Sándor Márai – who, in 1945, before emigrating from Horthy’s Hungary, wrote in his diary⁴⁹ that the ‘middle class was culpable for the depth to which Nazi doctrines took root in Hungary’ – to observe that many voters for the right-wing authoritarian populist parties, especially those who are educated, are aware of those parties’ exclusionary, nationalistic, homophobic, autocratic ideas and aims, and they still support them. Among those are intellectuals and academics, including constitutional law scholars.⁵⁰

4. The perspectives of a ‘constitutional moment’

Taking into account the current state of constitutionalism in Israel and Hungary, let me try to assess whether the attempts to achieve illiberal constitutionalisation in Israel and the constant state of illiberal constitutionalism in Hungary represent a constitutional moment *à la* Ackerman. In Israel, despite the 64 to 56 majority of the governing coalition parties in the Knesset, according to recent opinion polls almost two-thirds of Israelis oppose the judicial reform and believe that the Supreme Court should have the power to strike down laws that are incompatible with one of the Basic Laws.⁵¹ This means that one of the central tenets of Ackerman’s constitutional moment – ‘the self-conscious consent of a majority of ordinary citizens’ – is present. This commitment to the values of the separation of powers and judicial independence does not necessarily mean that the same majority of citizens would support a constitution that would change the constitutional identity approach of the 2018 Basic Law on Israel as the nation state of the Jewish people, and guarantee equal rights for all citizens of the country, including those of non-Jewish Arabs. One indication against this is that, according to the same survey, only

[https://www.facebook.com/photo/?fbid=10220827131740798&set=a.1030493095277](https://www.facebook.com/photo/?fbid=10220827131740798&set=a.1030493095277;); <https://www.facebook.com/median.hu/photos/a.1378324522412809/3275767579335151>.

⁴⁷ Claus Offe, ‘Participatory Inequality in the Austerity State: A Supply-Side Approach’ in Armin Schäfer and Wolfgang Streeck (eds), *Politics in the Age of Austerity* (Cambridge University Press 2013) 196; also quoted by Müller (n 42) 193.

⁴⁸ Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* (Alfred A Knopf 1996).

⁴⁹ Sándor Márai, *Memoir of Hungary 1944–1948* (CEU Press 1996).

⁵⁰ The debate about the responsibility of intellectuals to resist autocratisation or existing autocratic regimes has a long history. In 1927 the French philosopher, Julien Benda, published his much-debated short book, *La Trahison des Clercs* [The Treason of Intellectuals]. In 1928 the Hungarian poet, Mihály Babits, published a comprehensive review of Benda’s book with the same title in the literary monthly, *Nyugat*, also sparking controversy in Hungary: Babits Mihály, *Az írástudók árulása* (*The Treason of Intellectuals*) (Magvető 1986).

⁵¹ Luke Tress, ‘Majority of Israelis Opposes Key Planks of Judicial Overhaul Plan, Survey Finds’, *The Times of Israel*, 21 February 2023, <https://www.timesofisrael.com/majority-of-israelis-opposes-key-planks-of-judicial-overhaul-plan-survey-finds>.

a minority of the respondents feared a negative impact of the overhaul on the rights of Arab Israelis.⁵² The question is if the current majority of Israeli citizens and their representatives in the Knesset were to agree to adopt a new written constitution – which codifies the status quo prior to the judicial overhaul, but without resolving the problem of non-Jewish Israeli citizens and residents,⁵³ and also not promoting a two-state solution⁵⁴ – how would this constitutional system differ from the current regime, characterised by Gila Stopler as ‘semi-liberal constitutionalism’?⁵⁵

The other, related question about the content of a future Israeli constitution is the role of religion, because in addition to the illiberal character of the state there were growing demands for it to be a religious state also. This is especially true over the last four decades, during which there has been a continuous decline in the political power and representation of Israel’s historically hegemonic and largely secular Ashkenazi constituencies. At the same time, political forces representing Orthodox religious Mizrahi residents have grown stronger through their participation in successive Likud governments. As Hanna Lerner was arguing a decade ago, the paradigm of liberal constitutionalism is not a relevant framework for such religiously divided societies, such as Israel. She claims that under conditions of disagreement over the state’s religious character, the drafters of constitutional design in different countries have adopted either a permissive or a restrictive constitutional approach to address their

⁵² *ibid.* My personal experience during the anti-judicial reform demonstration in which I participated on 25 March 2023 in Jerusalem underlines this assumption; those for this cause and against the occupation represented a clear minority of all demonstrators and were segregated from the other demonstrators.

⁵³ The number of Palestinians living in the West Bank is three million and another two million in Gaza, who are now under ‘temporary’ occupation, which the current government aims to make permanent. The GDP per person in the West Bank is 94% lower than in Israel; see ‘Survivor Nation: As Israel Turns 75, Its Biggest Threats now Come from Within’, *The Economist*, 27 April 2023, <https://www.economist.com/leaders/2023/04/27/as-israel-turns-75-its-biggest-threats-now-come-from-within>.

⁵⁴ After Likud won the 17 March 2015 elections, Prime Minister Netanyahu declared that he will never permit a two-state solution between Israelis and Palestinians, adding: ‘Anyone who is going to establish a Palestinian state, anyone who is going to evacuate territories today, is simply giving a base for attacks to the radical Islam against Israel’: Elliott C McLaughlin, ‘Israel’s PM Netanyahu: No Palestinian State on My Watch’, *CNN*, 16 March 2015, <https://edition.cnn.com/2015/03/16/middleeast/israel-netanyahu-palestinian-state>. Even though two days after the election victory Netanyahu tried to backtrack from his declaration by saying that he intended only to argue that the two-state solution was impossible right now, the pre-election statement questions the commitment to his speech in June 2009 at Bar Ilan University, when he said: ‘In this small land of ours, two peoples live freely, side by side, in amity and mutual respect. Each will have its own flag, its own national anthem, its own government. Neither will threaten the security or survival of the other ... We will be ready in a future peace agreement to reach a solution where a demilitarized Palestinian state exists alongside the Jewish state’: Ministry of Foreign Affairs, ‘Address by PM Netanyahu at Bar-Ilan University’, 14 June 2009, <https://www.gov.il/en/departments/news/address-by-pm-netanyahu-at-bar-ilan-university-14-jun-2009>. With regard to the current impossibility of the two-state solution see Michael Barnett and others, ‘Israel’s One-State Reality: It’s Time to Give Up on the Two-State Solution’ (2023) 102(3) *Foreign Affairs* 120.

⁵⁵ See Gila Stopler, ‘Constitutional Capture in Israel’, *International Journal of Constitutional Law Blog*, 21 August 2017, <http://www.iconnectblog.com/constitutional-capture-israel>.

intense internal religious conflicts. The permissive constitutional approach of Israel uses strategies of constitutional ambiguity, ambivalence and vagueness to allow the political system greater flexibility in future decision making regarding controversial religious issues. By contrast, a restrictive constitutional approach, such as that chosen in Turkey, uses specific constitutional constraints, designed to limit the range of possibilities available for future decision makers, when addressing religion-state relations. Permissive constitutions, she argues, for the most part allowed for greater freedom of religion than did restrictive constitutions, especially guaranteeing the survival of minority religious groups. By contrast, freedom from religion, namely the right of individuals to opt out of a religious affiliation, is limited under permissive constitutional arrangements such as Israel, compared with the restrictive constitutions of other states.⁵⁶ Religious groups currently enjoy complete autonomy under Israeli law, while in Turkey, for instance, until 2013 respect for religious expression in the public sphere was limited. For example, Muslim women were prohibited from wearing headscarves in public institutions, including universities and public schools. The question is whether this status quo can be retained in a new constitution, amidst the increased percentage of citizens who are ultra-Orthodox, and the growing political role of religious parties, which will shift politics further to the right and strain Israel's liberal democratic character.⁵⁷ Also, religious marriage and divorce are the only options for all citizens, including non-believers and atheists. This means that the right to marry is violated for hundreds of thousands of citizens, including inter-religious couples or the 4 per cent of the population who are not affiliated with any religion. Will this situation be entrenched in the written constitution?

In more general terms, Israel in its constitutional moment – after the repeated failures of the ‘peace process’ and the two-state solution – faces very limited options regarding the identity of its new constitution. It either remains Jewish but ceases to be a democracy, or it could become a genuinely multi-ethnic democracy, but would in that case cease to be ‘Jewish’.⁵⁸

In Hungary, by contrast, there is no significant support for any change in the Orbán government's 2011 Constitution, which questions even the

⁵⁶ Hanna Lerner, ‘Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey’ (2013) 65 *World Politics* 609.

⁵⁷ Also, according to predictions, the share of citizens who are ultra-Orthodox – a group that is less likely to work, perform military service or attend conventional schools – will rise from 13% to 32% by 2065; see ‘Survivor Nation’ (n 53).

⁵⁸ These alternatives were drawn up by Tony Judt first in 2003 and then in a draft paper written in the summer of 2009, published in 2015: Tony Judt, ‘Israel: The Alternative’, *The New York Review of Books*, 25 September 2003; Tony Judt, ‘What Is to Be Done?’ in Jennifer Homans (ed), *When the Facts Change: Essays, 1995–2010* (Penguin 2015) Ch XIII. In the former work Judt also mentions a third outcome, whereby Israel forcibly removes a majority of its Arabs (or makes it intolerable for them to remain); this would indeed ensure the survival of a Jewish democracy, but at a grotesque and ultimately self-destructive price. In his last interview Judt again promotes a binational or federal arrangement as the only viable solution in Israel's current circumstances; see Merav Michaeli, ‘Tony Judt's Final Word on Israel’, *The Atlantic*, 14 September 2011, <https://www.theatlantic.com/international/archive/2011/09/tony-judts-final-word-on-israel/245051>.

democratic legitimacy of suggestions raised during the scholarly debate referred to above regarding the unlawful amendment of the illiberal Fundamental Law. This also means that, while in Israel the current constitutional crisis is a sign of the constitutional moment, in Hungary the overwhelming majority of voters do not consider the autocratic constitutional system to be a failure. The presence of single-party dominance is also a sign of the lack of a constitutional moment in Hungary, as argued in the case of Japan, India, Mexico and South Africa by Rosalind Dixon and Guy Baldwin.⁵⁹ Mass protests, another characteristic of constitutional moment proposed by Juliano Benvindo, are present only in Israel, not in Hungary.⁶⁰

The recent attacks on the separation of powers and guaranteed fundamental rights in Israel carries the danger that the country – which, with the caveat of discrimination against Arab Israelis can be considered at least a ‘semi-liberal democracy’ since its establishment 75 years ago – comes closer to the fully fledged illiberal regime of Hungary. However, if we consider civil resistance against illiberal constitutionalisation, while there is none in Hungary, the Israelis are holding protests many months after the government introduced its plans to dismantle judicial independence. Because of the conscious opposition by the majority of Israeli citizens to the overhaul, there is indeed a ‘constitutional moment’ right now in Israel, which can lead to entrenching basic elements of liberal democracy into new Basic Laws, or maybe even into the first written constitution of the State of Israel. In contrast to this development, in Hungary, since the adoption of the ‘illiberal’ Fundamental Law in 2011, there has been no ‘constitutional enthusiasm’ to reinstitute the liberal democracy introduced in 1989 without serious public involvement in a constitutional moment.

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⁵⁹ Rosalind Dixon and Guy Baldwin, ‘Globalizing Constitutional Moments? A Reflection on the Japanese Art 9 Debate’, 23 October 2017, UNSW Law Research Paper No 17-74, 21-22, <https://ssrn.com/abstract=3057199>.

⁶⁰ See Juliano Zaiden Benvindo, ‘The Seeds of Change: Popular Protests as Constitutional Moments’ (2015) 99 *Marquette Law Review* 363.

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