



# Illiberal Constitutionalization and Scholarly Resistance: The Cases of Israel and Hungary

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## Abstract

*This paper explores the role of constitutional scholars in resisting illiberal constitutionalization attempts or combating existing illiberal constitutional systems. I use Israel as a case study for the former and Hungary for the latter scenario. In Israel, following the initiation of a judicial reform by the new government of Benjamin Netanyahu in early 2023, supported by far-right nationalist and ultra-Orthodox parties with the aim of dismantling the separation of powers and establishing an unbound executive, constitutional scholars, alongside street protesters, voiced their opposition to illiberalism. Since the start of the war in Gaza, triggered by Hamas' attack on Israel in October 2023, it became evident that the Palestinian issue also calls for a constitutional solution. In stark contrast, Hungary has seen minimal resistance after the enactment of the Fundamental Law in April 2011, Viktor Orbán's new constitution for an illiberal regime. The paper investigates the role of constitutional scholars in both countries in seizing or missing the constitutional moment.*

Keywords: illiberal constitutions, resistance, Israel, Hungary

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## Constitutional Moments and the Role of Intellectuals and Scholars

“Constitutional moments” are points in history when constitutional changes are fostered by a particular mobilization and engagement of the people, representing a transformative expression of popular sovereignty through the self-conscious consent of a majority of ordinary citizens.<sup>1</sup> The concept was coined and developed by American legal scholar Bruce Ackerman in his trilogy on the evolution of the US Constitution. Usually, constitutional moments occur when a state is about to alter its constitutional system, but sometimes, a constitutional crisis or failure leads to constitutional change.<sup>2</sup>

The question I seek to address here is whether the current situations in Israel and Hungary can be considered constitutional moments, necessitating popular mobilization led by the political and professional elite, such as constitutional scholars. Israel is used as a case study since it is currently undergoing an attempt at illiberal constitutional change, while Hungary represents an already existing illiberal constitutional system. In Israel, in early 2023, the new government of Benjamin Netanyahu, supported by far-right nationalist and ultra-Orthodox religious parties, initiated a judicial reform aiming to dismantle the separation of powers and establish an unbound executive. Ever since the onset of the war in Gaza, which was reignited after Hamas’ attack on Israel on October 7, 2023, it has become clear that the Palestinian issue also calls for a constitutional solution. This raises the question whether, after more than 75 years since the establishment of the modern State of Israel, the moment has finally arrived to enact a written constitution for it. The various attempts to draft such a formal document since 1948 have so far fallen short. In Hungary, meanwhile, the current political and constitutional system was introduced with the adoption of the Fundamental Law in April 2011, the new constitution of Viktor Orbán’s illiberal regime. There have been limited attempts to call for a return to liberal-democratic constitutionalism, either by amending or replacing the current constitution.

In both cases of illiberal attempts to change the constitution, I investigate the role that constitutional scholars play, either seizing or missing the constitutional moment to protect liberal-democratic constitutionalism. The focus is on constitutional scholars because throughout the history of constitutionalism, beginning with *The Federalist Papers* promoting the ratification of the Constitution for the United States, “scholactivism” (a blurring of the line between scholarship and activism) has been consistently instrumental in triggering changes. The participation of scholars in political action, in itself, is a contested issue, and the debate on whether intellectuals bear the responsibility to resist autocratization has a long history. Already in 1927, the French philosopher Julien Benda published his much-debated short book, *La Trahison des Clercs* (published in English as *The Treason of Intellectuals*), denouncing as moral traitors those who refuse to defend truth due to political considerations.<sup>3</sup>

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<sup>1</sup> See Bruce Ackerman, *We the People*, 3 vols. (Cambridge, Mass.: Harvard University Press, 1991–2014).

<sup>2</sup> 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?”, *International Journal of Constitutional Law*, Volume 6, Issue 2, April 2008, Pages 193–230, <https://doi.org/10.1093/icon/mon002>.

<sup>3</sup> 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. See Babits Mihály, *Az írástudók árulása* (Magvető: Budapest, 1986).

The activist role of constitutional scholars has also been the subject of recent debates within legal academia. One side of the debate posits that truth-seeking and knowledge dissemination are constitutive of the role of a scholar, and the research driven by “scholactivism” is distinguished by a motivation to directly pursue specific concrete outcomes (that is, outcomes that are more than merely discursive) through one’s scholarship.<sup>4</sup> Critics of this perspective emphasize that scholarship in general, and constitutional scholarship in particular, cannot be apolitical, value-neutral, disengaged, insular, confined to the ivory-tower, a part of the status-quo, elitist, and dispassionate, motivated by reason alone.<sup>5</sup> The debate is particularly relevant for scholars dealing with illiberal constitutional regimes that contradict the value system of global constitutionalism.<sup>6</sup> And especially in the context of a historically important constitutional moment, scholars may need to reflect on their place in society when proponents of constitutional democracy need the professional help of constitutional scholars.

### **Israel: Towards Autocracy?**

To delve into the constitutional moment in the case of Israel, a brief historical overview is warranted. The State of Israel was established on May 14, 1948, through its Declaration of Independence, ensuring “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”<sup>7</sup> Primarily a political document, it sought to distinguish between legislative and constitutive powers by creating a Provisional State Council and a Constituent Assembly. However, several arguments against the adoption of a written constitution have persisted.<sup>8</sup> A significant impediment to enacting a constitution comes from the divergence between Orthodox and secularist circles regarding the unresolved questions of the relationship between religion and state, as well as the national-cultural or religious nature of the declared Jewishness of the state.<sup>9</sup> In essence, the main reason for uncertainty has been the profound ideological rift in Israeli society between the secular and religious visions of the state.

Some other reasons have also contributed to the hesitation towards adopting a written constitution for the State of Israel: its first Prime Minister, David Ben-Gurion, sought minimal restrictions on his power; a considerable number of Jews resided abroad, raising concerns about entrenching a constitution by those who are residing in Israel; the British, from whose League of Nations mandate the State of Israel declared its

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4 See Tarunabh Khaitan, “On scholactivism in constitutional studies: Skeptical thoughts”, *International Journal of Constitutional Law*, Volume 20, Issue 2, April 2022, Pages 547–556, <https://doi.org/10.1093/icon/moac039>.

5 See the summary of and the rejoinder to the discussion written by its instigator: Tarunabh Khaitan, “Facing Up: Impact-Motivated Research Endangers not only Truth, but also Justice,” *Verfassungsblog: On Matters Constitutional*, September 6, 2022, <https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/>.

6 “Global constitutionalism claims that the principles of the rule of law, a separation of powers, fundamental rights protection, democracy, and solidarity, together with institutions and mechanisms securing and implementing these principles ... should be used as parameters to inspire strategies for the improvement of the legitimacy of an international legal order and institutions without asking for a world state.” See Anne Peters, “Global Constitutionalism,” in *The Encyclopedia of Political Thought*, ed. Michael T. Gibbons (London: Wiley-Blackwell, 2015): 1484–1487, DOI: 10.1002/9781118474396.wbpt0421.

7 Provisional Government of Israel, Declaration of Independence, *Official Gazette*, no. 1; Tel Aviv, 5 Iyar 5708 (May 14, 1948), p. 1, <https://main.knesset.gov.il/en/about/pages/declaration.aspx>.

8 See, for instance, Amos Shapira, “Why Israel Has No Constitution,” *St. Louis U. Law Journal* vol. 37, no. 2 (1993), p. 283.

9 See Declaration of Independence: “We, members of the People’s Council, representatives of the Jewish community of Eretz-Israel and of the Zionist movement ... hereby declare the establishment of the Jewish State in Eretz-Israel, to be known as the State of Israel.”

independence in the first place, have no codified, written constitution of their own either; and religious communities have objected, asserting that there was already a constitution for Israel—the Hebrew Bible. Since both secular and religious parties opposed it, albeit for different reasons, Israel’s unicameral legislature, the Knesset, decided in June 1950 not to draft a singular constitutional document. Following a heated debate on the religious as opposed to the secular vision of Israel as a Jewish state, a compromise resolution was passed. Named after its initiator, Haim Harari, the chair of the Constitutional, Law, and Justice Committee of the Knesset, it outlined that the Basic Laws collectively would form the state constitution.<sup>10</sup>

In contrast to the relatively straightforward process of enacting the first nine Basic Laws after 1958, primarily addressing institutional considerations and essentially formalizing the existing government structure, objections arose from religious parties regarding the draft of two Basic Laws on Human Rights. They contended that these laws would undermine the religious status quo. Justice Aharon Barak, the Court’s Chief Justice for 12 years and the person most closely identified with the Court’s activism, in his opinion in the *Bank Mizrahi* case, characterized the enactment of these two Basic Laws in 1992 as a “constitutional revolution.”<sup>11</sup> As a response to the Supreme Court’s activism, Jewish nationalists consistently made efforts to propose a new Basic Law, defining Israel as the nation-state of the Jewish people and aiming to restore the balance between the country’s Jewish and democratic values, allegedly tilted in favor of the latter. This new law, which was finally enacted in 2018, prevents Israel from becoming a binational state.<sup>12</sup>

The most recent institutional reaction to this “constitutional revolution” has been the judicial reform attempt led by the current far-right governing coalition under Prime Minister Benjamin Netanyahu, aimed at dismantling the judicial independence of the Supreme Court. The proposed amendment to the Basic Law on the Judiciary sought to<sup>13</sup> (a) introduce a government majority in the judicial appointment committee,<sup>14</sup> (b) require a threshold of at least 80% of all Supreme Court justices in order to strike down primary legislation as being unconstitutional, (c) determine that a decision on the judicial review of a statute will not serve as a precedent regarding any other statute, (d) allow for a majority vote in the Knesset to override any ruling by the Court, (e) prohibit the judicial review of Basic Laws, and (f) prohibit the judicial review of administrative actions to be carried out on the basis of the reasonableness doctrine.<sup>15</sup>

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<sup>10</sup> For more on these constitution-making attempts, including the Knesset debates, see Hanna Lerner, “Informal Constitutionalism in Israel,” chap. 3 in *Making Constitutions in Deeply Divided Societies* (Cambridge, UK: Cambridge University Press, 2011): 51–108.

<sup>11</sup> *United Mizrahi Bank Ltd. vs. Migdal Village*, Supreme Court, CA 6821/93, 49(4)P.D.221 (1995).

<sup>12</sup> See Basic-Law: Israel—The Nation State of the Jewish People (originally adopted in 5778–2018), section 1(c), <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf>.

<sup>13</sup> These elements are discussed in detail in Aeyal Gross, “The Populist Constitutional Revolution in Israel,” *Verfassungsblog: On Matters Constitutional*, January 19, 2023, <https://verfassungsblog.de/populist-const-rev-israel/>.

<sup>14</sup> In accordance with Basic Law: The Judiciary, adopted in 1984, the committee currently has nine members, as follows: the minister of justice (chairman); one cabinet minister, chosen by the cabinet; two Knesset members, chosen by the Knesset (since 1992, they usually appoint one member from the coalition and one from the opposition); and two members of the Bar Association. See: <https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawTheJudiciary.pdf>.

<sup>15</sup> Memo: “Israel’s Recent ‘Unreasonableness Amendment’ and its Implications,” *The Israeli Law Professors’ Forum for Democracy*, July 24, 2023, <https://www.lawprofsforum.org/post/israel-s-recent-unreasonableness-amendment-and-its-implications>. The reasonableness issue passed as the first piece of the legislation package on July 24, 2023, and became the first subject of Supreme Court review.

The reform package also faced massive opposition beyond the Knesset. Starting in mid-January 2023, weekly street demonstrations on Saturday nights took place in cities across the country, organized by a web of nonpartisan civil society organizations, student protesters, LGBT groups, and members of the “Anti-Occupation Bloc” comprised of organizations advocating for Palestinian rights. These protests involved several hundred thousand people in total.<sup>16</sup> Various segments of society expressed their dissent by writing letters, petitions, and memorandums.<sup>17</sup> Three hundred sixty-seven Israeli economists, alongside senior foreign ones, warned about the financial implications of the proposed legislation.<sup>18</sup> Leaders from the highly successful Israeli tech industry signed a letter stating that the proposed changes would discourage international investors and announced intentions to move their funds out of the country subsequent to the bill’s prospective passage.<sup>19</sup> Perhaps the most influential opposition came from the military, with some 10,000 IDF reservists, including over 1,000 Air Force reservists, protesting and declaring their refusal to attend regular training.<sup>20</sup>

Representatives from the legal profession were notably active, with former Israeli attorney generals, state attorneys, and retired judges expressing their opposition to the plan.<sup>21</sup> Legal scholars were among the most organized. The newly-established Israeli Law Professors’ Forum for Democracy issued a public statement<sup>22</sup> and several position papers criticizing various elements of the proposed judicial overhaul.<sup>23</sup> Dozens of constitutional law professors engaged in educating the public about the importance of liberal constitutional democracy.<sup>24</sup> Israeli constitutional law professor Yaniv Roznai expressed his conviction that with such a level of public engagement on constitutional matters, Israel has reached a constitutional moment.<sup>25</sup> Opposition leader Yair Lapid even introduced a plan to enact a new constitution.

16 On March 25, 2023, I had the opportunity to participate at the weekly protest event in Jerusalem; see: <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,” *Verfassungsblog: On Matters Constitutional*, March 31, 2023, <https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel/>.

18 Times of Israel staff, “Hundreds of Top Economists Warn Judicial Overhaul Could ‘Cripple’ Economy,” *Times of Israel*, January 25, 2023, <https://www.timesofisrael.com/hundreds-of-top-economists-warn-judicial-overhaul-could-cripple-economy/>.

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

20 Emanuel Fabian, “‘This Is Where We Draw the Line’: 10,000 More Reservists to Stop Volunteering,” *Times of Israel*, July 22, 2023, <https://www.timesofisrael.com/this-is-where-we-draw-the-line-10000-more-reservists-to-stop-volunteering/>.

21 Times of Israel staff, “78 Retired Judges Warn against Incoming Government’s Judicial Reforms,” *Times of Israel*, December 28, 2022, <https://www.timesofisrael.com/78-retired-judges-warn-against-incoming-governments-judicial-reforms/>.

22 Israeli Law Professors’ Forum, “Preliminary Response of the Israeli Law Professors [sic] Forum for Democracy to the President’s Proposal,” *Israeli Law Professors’ Forum*, February 13, 2023, <https://lawprofforum.wixsite.com/home/post/ preliminary-response-of-the-israeli-law-professors-forum-for-democracy-to-the-president-s-proposal>.

23 Israeli Law Professors’ Forum, “The Government’s Plan Is a Revolutionary Regime Transformation. Period.” *Israeli Law Professors’ Forum* (blog), n.d. (list of related articles from a range of publication dates in 2023, <https://www.lawprofforum.org/en>).

24 See Maximilian Steinbeis’ interview with Tamar Hostovsky Brandes (in German), *Verfassungsblog: On Matters Constitutional*, February 23, 2023, <https://verfassungsblog.de/verfassungsschutz/>. At a conference organized by the Israel Democracy Institute in Jerusalem on March 26, 2023, constitutional law professors from other countries also warned about the threats to democracy posed by judicial capture; see Jeremy Sharon, “Legal Scholars from Poland, Hungary Warn of Judicial Overhaul’s Dangers to Democracy,” *Times of Israel*, March 27, 2023, [https://www.timesofisrael.com/legal-scholars-from-poland-hungary-warn-of-judicial-overhauls-dangers-to-democracy/?fbclid=IwARol6IXRmPEO\\_DfKubaoHYnlEgikJc4-XmaJBWfAedr88jyIhw5Auc5](https://www.timesofisrael.com/legal-scholars-from-poland-hungary-warn-of-judicial-overhauls-dangers-to-democracy/?fbclid=IwARol6IXRmPEO_DfKubaoHYnlEgikJc4-XmaJBWfAedr88jyIhw5Auc5).

25 Doreen Lustig and Ronit Levine-Schnur, “Brwkym hb’ym lrg’ hhwqty,” *Telem Online*, March 28, 2023, <https://telem.berl.org.il/7542/>.

This exceptional constitutional moment, when two-thirds of the population opposed the judicial overhaul and believed the Supreme Court would annul the unconstitutional reform<sup>26</sup>, was abruptly interrupted by Hamas' genocidal attack on October 7, 2023. The war in Gaza, however, also put on hold any talk of judicial reform.<sup>27</sup> On January 1, 2024, the Supreme Court struck down the highly disputed law passed by the Netanyahu-led coalition government.<sup>28</sup> Following the decision, constitutional scholars started to talk about a second and permanent constitutional revolution, which could lead even to the adoption of a written constitution.<sup>29</sup> At the same time, Israeli society still faces serious problems exacerbated by the war in Gaza—which the overwhelming majority of the society, including scholars, seem to support<sup>30</sup>—putting the possibility of a two-state solution and a new constitution for Israel based on the equal rights of all its citizens, further away.

### Hungary: Semi-Electoral Autocracy

After the democratic transitions of 1989–90 in Eastern and Central Europe, Bruce Ackerman extended his theory of the constitutional moment to encompass the constitutional transformations in the region. Ackerman cautioned that the time window for the adoption of a new liberal-democratic constitution does not stay open indefinitely: “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.”<sup>31</sup> According to him, there would have been an opportunity, and indeed a necessity, for the adoption of a new constitution in Hungary at the onset of the political transition. This would have addressed the legitimacy deficit of the systemic change, similar to what was accomplished with the German Basic Law (*Grundgesetz*) of 1949. In an interview given more than a decade after the dissolution of the USSR, he regretfully observed that Hungary had missed the opportunity of its constitutional moment.<sup>32</sup> Contrary to Ackerman's view, András Sajó argues that there has been no constitutional moment in Hungary—neither in 1989, nor during the 1990s—as there was no “constitutional enthusiasm” among the people.<sup>33</sup>

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

27 Noam Kozlov, “How the War in Gaza May Upend Israel's Constitutional Limbo,” *Verfassungsblog: On Matters Constitutional*, November 9, 2023, <https://verfassungsblog.de/how-the-war-in-gaza-may-upend-israels-constitutional-limbo/>.

28 Jeremy Sharon, “In Historic Ruling, High Court Strikes Down Key Judicial Overhaul Legislation,” *Times of Israel*, January 1, 2024, <https://www.timesofisrael.com/in-historic-ruling-high-court-strikes-down-key-judicial-overhaul-legislation/>.

29 Jeremy Sharon, “Will the High Court Rulings against the Judicial Overhaul Become a Permanent Revolution?” *Times of Israel*, January 8, 2024, Analysis, <https://www.timesofisrael.com/will-the-high-court-rulings-against-the-judicial-overhaul-become-a-permanent-revolution/>.

30 One sign of this support is that PM Netanyahu appointed former Supreme Court President Aharon Barak to the Judicial Panel of the International Court of Justice to represent Israel in the genocide case brought before ICJ by South Africa. See Chen Maanit and Jonathan Lis, “Israel Appoints Former Supreme Court Justice President Aharon Barak to Judicial Panel in ICJ Genocide Case,” *Haaretz*, January 7, 2024, Israel News, <https://www.haaretz.com/israel-news/2024-01-07/ty-article/.premium/israel-appoints-ex-top-court-president-aharon-barak-to-judge-panel-in-icj-hearing/000018c-e4f0-db55-a39e-f7f4a4a60000>.

31 Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992), p. 47.

32 Gábor Halmai, “A magyar alkotmányos vívmányok túlságosan sérülékenyek,” interview with Bruce A. Ackerman, *Fundamentum*, 2003, no. 2, p. 52.

33 András Sajó, “Constitution without the Constitutional Moment: A View from the New Member States,” *ICON: International Journal of Constitutional Law*, 2005 vol. 3, no. 2–3, p. 243, <https://doi.org/10.1093/icon/moio18>.

Indeed, the Hungarian democratic transition process was primarily an elitist project marked by significant contributions by the intellectuals involved in scholactivism. In October 1989, the formally undemocratic (that is, not democratically-elected), illegitimate legislature enacted comprehensive modifications to the 1949 Constitution after peaceful negotiations between the representatives of the Communist regime and the democratic opposition. This process is often referred to in the literature as “post-sovereign” or “pacted” constitution-making.<sup>34</sup> Public engagement for the adoption of a new constitution was also lacking in the summer of 1996: a draft constitution prepared by the governing parties, with some opposition support, failed to secure the necessary two-thirds majority of votes in Parliament due to a lack of support from a faction of the main governing party.<sup>35</sup>

A new constitution, called the Fundamental Law, was ultimately adopted in 2011 after the electoral victory of the Fidesz party in 2010. The adoption took place exclusively with the votes of Fidesz, without any public, professional, or even parliamentary consultation. Prime Minister Viktor Orbán’s intention with this constitution for his “illiberal state” was to eliminate checks and balances, parliamentary rotation of governing parties, as well as institutional guarantees of fundamental rights by dismantling the independence of the Constitutional Court and the ordinary judiciary.<sup>36</sup> Hungary has since transformed into an autocracy. Freedom House has traced the country’s transition from a “consolidated” democracy as of 2010,<sup>37</sup> to one that was only “semi-consolidated” by 2015.<sup>38</sup> The Varieties of Democracy Institute classified Hungary as an “electoral autocracy” in 2020,<sup>39</sup> in which year Freedom House categorized the country as a “hybrid regime.”<sup>40</sup> In a country no longer functioning as a constitutional democracy capable of ensuring a peaceful rotation of power; lacking free media, academic freedom, and independent civil society; the possibilities for resistance, both in general and scholarly contexts, are severely limited.

The only exception to the lack of serious professional discussion about a liberal-democratic constitution over the last 14 years was a scholarly debate preceding the 2022 parliamentary elections, following the unification of all opposition parties in a joint list against Fidesz. The subject of this scholarly discussion was how to escape

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34 See, respectively, Andrew Arato, *Post Sovereign Constitutional Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016), p. 123; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London: Routledge, 2009), p. 245, <https://doi.org/10.3167/004058105780929273>.

35 See Gábor Halmi, “The Evolution and Gestalt of the Hungarian Constitution,” in *The Max Planck Handbooks in European Public Law, Volume II: Constitutional Foundations*, eds. Armin von Bogdandy, Peter M. Huber, and Sabrina Ragone (Oxford: Oxford University Press, 2023), p. 217, <https://doi.org/10.1093/oso/9780198726425.003.0005>.

36 In his infamous speech a year later, Orbán proclaimed his intention to turn Hungary into an illiberal state: “Full Text of Viktor Orbán’s Speech at Băile Tușnad (Tusnádfürdő) of 26 July, 2014,” Budapest Beacon (former news site), July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orban-s-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

37 Lisa Mootz, ed., *Nations in Transit 2010: Democratization from Central Europe to Eurasia*, (Washington, DC: Freedom House, 2010), <https://www.freedomhouse.org/sites/default/files/NIT%202010%20Ratings%20Tables.pdf>, p. 45.

38 Sylvana Habdank-Kolaczowska and Zselyke Csaky, eds., *Nations in Transit 2015: Democracy on the Defensive in Europe and Eurasia* (Washington, DC: Freedom House, 2015), <https://freedomhouse.org/country/hungary/nations-transit/2015>.

39 Anna Lührmann, Seraphine F. Maerz, Sandra Grahn, Nazifa Alizada, Lisa Gastaldi, Sebastian Hellmeier, Garry Hindle, and Staffan I. Lindberg, “Autocratization Surges—Resistance Grows: Democracy Report 2020,” Varieties of Democracy Institute (Gothenburg: University of Gothenburg, 2020), p. 27, [https://www.v-dem.net/static/website/files/dr/dr\\_2020.pdf](https://www.v-dem.net/static/website/files/dr/dr_2020.pdf).

40 Zsuzsanna Végh, “Hungary,” in *Nations in Transit 2020: Dropping the Democratic Facade*, ed. by Zselyke Csaky et al. (Washington, DC: Freedom House, 2020), [https://freedomhouse.org/sites/default/files/2020-04/05062020\\_FH\\_NIT2020\\_vfinal.pdf](https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf)



the trap of the illiberal Fundamental Law if the opposition won the election but did not have the 2/3 majority required to replace some high ranking public officials elected by supermajority, such as Constitutional Court judges, the president of the State Audit Office, or justices of the Supreme Court. It was clear that even if Fidesz lost the national election and a new government was formed, the latter would not be able to function properly in the legal, economic, and cultural domains. The Fundamental Law would continue to grant full power to these incumbent holdovers, hindering the new government's ability to govern effectively. Measures proposed by the new government could be sabotaged by state officials, including constitutional judges who, under the Fundamental Law, cannot be removed or replaced during the parliamentary term. Therefore, if a democratically-elected government aimed to replace the autocratic system institutionalized by the Fidesz government, it would need to free itself from the constraints of the Fundamental Law.<sup>41</sup>

### Constitutional Scholars' Role

German political philosopher Jan-Werner Müller criticizes the convenient but ultimately misleading response to democracy's decline: to blame the people.<sup>42</sup> He argues that ordinary folks, even the well-informed, can be misled by demagogues. In other words, blaming exclusively the people cannot help one to understand the crisis of democracy.<sup>43</sup> The crucial decisions to empower dictators are made by parts of the conservative establishment.<sup>44</sup> Regarding contemporary right-wing populists, Müller claims that none of them has come to power without the collaboration of established conservative elites.<sup>45</sup> Neither Netanyahu nor Orbán are exceptions, and conservative intellectuals and academics, including constitutional law scholars supporting illiberal theories, bear responsibility for their counsel.

In Israel, there has been a relatively weak illiberal legal academic support for the government's judicial overhaul plan. Although in early 2023 about 120 academics (members of the right-wing "Professors for a Strong Israel" association) announced their support for the government's proposed reforms with the reasoning that these were needed against "constitutional revolution led by Aharon Barak, which violated the balance between the branches of government in Israel," but the signatories are non-legal scholars.<sup>46</sup> This does not mean that there has not been serious academic opposition to the "constitutional revolution" ever since the mid 1990s, but those legal scholars opposing it have never supported the autocratic pursuits behind the current judicial reform. The most vocal prestigious conservative law

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41 See the various scholarly suggestions in Viktor Zoltán Kazai, "Restoring the Rule of Law in Hungary: An Overview of the Possible Scenarios," *Fascicoli* no. 3 (2021), <https://www.osservatoriosullefonti.it/archivi/archivio-saggi/fascicoli/3-2021/1675-restoring-the-rule-of-law-in-hungary-an-overview-of-the-possible-scenarios>.

42 Jan-Werner Müller, *Democracy Rules*, (New York: Picador, 2021), ix–xi.

43 See Eric Posner, *The Demagogue's Playbook* (New York: All Points Books, 2020), which mainly blames the American people for Trump's rise. This has been criticized by Yale Law School historian Samuel Moyn, in his review of Posner's book: "The Guardians: Does 'the Resistance' Actually Want More Democracy or Less?" *The Nation*, August 24, 2020, <https://www.thenation.com/article/culture/eric-posner-demagogues-playbook/>. Similarly, Joseph Weiler has blamed the Hungarian people for supporting Orbán: see "Editorial: Orbán and the Self-Asphyxiation of Democracy," *ICON: International Journal of Constitutional Law* vol. 18, no. 2 (July 2020), <https://academic.oup.com/icon/article/18/2/315/5878827>. For a critique of this position, see Viktor Z. Kazai, "Blaming the People is not a Good Starting Point," *Verfassungsblog: On Matters Constitutional*, August 8, 2020.

44 See, for instance, the novel by Éric Vuillard, *Ordre du jour* (Arles: Actes Sud, 2017); see also Müller, *Democracy Rules*, 18.

45 Müller, *Democracy Rules*, 18.

46 Jeremy Sharon, "120 Israeli Academics Express Support for Government's Judicial Overhaul Plan," *Times of Israel*, March 2, 2023, <https://www.timesofisrael.com/120-israeli-academics-express-support-for-governments-judicial-overhaul-plan/>.



professor opposing the activist role of the Supreme Court was the late Ruth Gavison, who despite her harsh criticism, never supported any illiberal ideas.<sup>47</sup>

The ideological foundation of Orbán's illiberalism, however, can be found among scholars: for instance, in the works of his two court ideologues, the sociologist and former liberal MP Gyula Tellér, and the political scientist András Láncki. Orbán's 2014 speech on "illiberal democracy" notably cited one of Tellér's studies, published earlier that year, which Orbán assigned as required reading to all his ministers.<sup>48</sup> Tellér claims that the "system of regime-change" in 1989 failed because the liberal constitution focused on global individual rights and did not obligate the government to protect national interests.<sup>49</sup> Therefore, according to Tellér, the new "national system" must strengthen national sovereignty, granting the government greater freedom.<sup>50</sup> This move is deemed necessary against the moral command of the liberal rule-of-law regime, which, in Tellér's view, asserts that "everything is allowed, which does not harm others' liberty," and fails to prescribe duties for the citizens.<sup>51</sup> Láncki's anti-liberal concept of a state is outlined in his book *Political Realism and Wisdom*, published in English in 2015, as well as in an article from 2018, following Fidesz' third consecutive electoral victory.<sup>52</sup> Láncki's critique rejects liberalism outright as a utopian ideology, claiming that—like Communism—it is incompatible with democracy. This is the basis of Orbán's concept of illiberal democracy.

In particular, Hungarian illiberal constitutional theorists have contributed to attempts to legitimize the new populist constitutional system in Hungary by referring to political constitutionalism.<sup>53</sup> István Stumpf, a Constitutional Court justice and Fidesz loyalist nominated by Fidesz without the its consulting with opposition parties<sup>54</sup> immediately after the new government took over in 2010, and who was then elected exclusively with the governing parties' votes, argued for a strong state in his 2014 book. He claimed that the changes introduced by Fidesz's new constitution, known officially as the Fundamental Law, expanded political constitutionalism.<sup>55</sup> Notably, two other members of the current packed Constitutional

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<sup>47</sup> *Bruckym hb 'ym lrg' hhwqty*, Israel Democracy Institute, 1998. Before her death in 2020, I had the privilege to take part in a conference of the Israel Democracy Institute, Ruth Gavison being one of the commentators of a liberal law professor's work. Here I could witness her true commitment to the values of constitutionalism. And this applied to all conservative legal scholars. In other words, her and most of the conservative law professors' conservatism means true commitment to the ideals of constitutionalism.

<sup>48</sup> See Tellér Gyula, "Született-e Orbán-rendszer 2010 és 2014 között?" *Nagyvilág* (March 2014): 346–367.

<sup>49</sup> Tellér, "Született-e Orbán-rendszer 2010 és 2014 között?" 349.

<sup>50</sup> Tellér, 357.

<sup>51</sup> Tellér, 346.

<sup>52</sup> András Láncki, "The Renewed Social Contract—Hungary's Elections, 2018," *Hungarian Review* vol. IX, no. 3 (May 2018), [http://www.hungarianreview.com/article/20180525\\_the\\_renewed\\_social\\_contract\\_hungary\\_s\\_elections\\_2018](http://www.hungarianreview.com/article/20180525_the_renewed_social_contract_hungary_s_elections_2018). For a detailed analysis of Láncki's arguments, see Kim Lane Scheppelle, "The Opportunism of Populists and the Defense of Constitutional Liberalism," *German Law Journal* 20, no. 3 (April 2019): 314–341, <https://www.cambridge.org/core/journals/german-law-journal/article/opportunism-of-populists-and-the-defense-of-constitutional-liberalism/687EC09BB43AB8AE88FAA42ED4D83DB0>.

<sup>53</sup> As opposed to legal constitutionalism, which focuses on the role of courts to rule on the constitutionality of legislative acts, political constitutionalism makes it to duty of elected bodies to take into account the principles and norms of the constitution. One of the main representatives of political constitutionalism is Richard Bellamy; see his seminal work, *Political Constitutionalism* (Cambridge, UK: Cambridge University Press, 2007).

<sup>54</sup> Ever since in 2010, when Fidesz has changed the election procedure this has ceased to be a legal obligation, but rather a principle of global constitutionalism. Prior to this change, the law on the Constitutional Court required a consensus among parliamentary parties.

<sup>55</sup> See István Stumpf, *Erős Állam—Alkotmányos Korlátok* (Budapest: Századvég Kiadó, 2014), 244–249.

Court, consisting of members all loyal to the government, also argue against legal constitutionalism, denouncing it as “judicial dictatorship”<sup>56</sup> or “juristocracy.”<sup>57</sup>

Moreover, the legal scholar Attila Vincze has argued that the Constitutional Court’s decision to declare the Fourth Amendment to the Fundamental Law as constitutional—and thus, among other things, invalidating the Court’s entire body of case law predating the new Constitution—was a sign that political constitutionalism had prevailed over legal constitutionalism.<sup>58</sup> Even those scholars who claim, as do Kálmán Pócza, Gábor Dobos, and Attila Gyulai, that the Court has not acted confrontationally towards the current legislature and government, characterize this government-friendly behavior as a special approach within the system of the separation of powers, best described as a partnership in a constitutional dialogue and not as a denial of any checks and balances on the executive branch.<sup>59</sup>

## Conclusion

After comparing the engagement of constitutional scholars in Israel and Hungary through Ackerman’s concept of a “constitutional moment,” we can establish that there is currently a process of illiberal constitutionalization taking place in Israel, and that a constant state of illiberal constitutionalism exists in present-day Hungary.

In Israel, despite the governing coalition parties’ 64–56 majority in the Knesset, recent opinion polls indicate that almost two-thirds of Israelis oppose the proposed judicial reform. They believe that the Supreme Court should have the power to strike down laws that are incompatible with the Basic Laws.<sup>60</sup> This aligns with one of the central tenets of Ackerman’s “constitutional moment” concept: the self-conscious consent of a majority of ordinary citizens to constitutional values.<sup>61</sup> This commitment to the separation of powers and judicial independence does not necessarily mean that the same majority of citizens would support changing the constitutional identity of Israel as the nation-state of the Jewish people and guaranteeing equal rights for all citizens of the country, including non-Jewish Arabs. Indications against this include the same survey results showing only a minority of the respondents feared a negative impact of the proposed overhaul on the rights of Arab Israelis.<sup>62</sup> And this has most probably worsened with the onset of the war in Gaza. At the same time, the January 1, 2024 decision of the Supreme Court gives some reasons for optimism, as it increased the chances of a return to the ideals of liberal Zionism originally envisaged by Theodor Herzl and codified in the Declaration of Independence. This

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56 András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Dialóg Campus: Budapest, 2019), 16.

57 Béla Pokol, *The Juristocratic State: Its Victory and the Possibility of Taming* (Dialóg Campus: Budapest, 2017).

58 Vincze Attila, “Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról: az alkotmánymódosítás alkotmánybírósági kontrollja,” *Jogesetek Magyarázata* vol. 12, no. 3 (March 2013): 3–21.

59 See Kálmán Pócza, Gábor Dobos, and Attila Gyulai, “The Hungarian Constitutional Court: A Constructive Partner in Constitutional Dialogue,” chap. 5 in *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe*, ed. Kálmán Pócza (London: Routledge, 2018) Chapter 5.

60 Tress, “Majority of Israelis Opposes Key Planks of Judicial Overhaul Plan, Survey Finds.”

61 See the scholarly support of the Supreme Court judgement 5658/231 of January 2024 in *Movement for Quality Government v. Knesset*. This annulled the first piece of judicial overhaul legislation, the amendment of “The Basic Law: The Judiciary,” prohibiting the use “reasonableness” as a reason for declaring a law unconstitutional. Aeyal Gross, “Did the Israeli Supreme Court Kill the Constitutional Coup?” *Verfassungsblog: On Matters Constitutional*, January 9, 2024, <https://verfassungsblog.de/did-the-israeli-supreme-court-kill-the-constitutional-coup/>.

62 In my personal experience during the anti-judicial-reform demonstration on March 25, 2023, in Jerusalem, where those for this cause and against the occupation were representing a clear minority of all demonstrators, and also segregated from the others, underlines this assumption.

hope is supported by some opinion polling results, according to which 72% want Netanyahu to resign, and the far-right Religious Zionist Party would not even enter the Knesset.<sup>63</sup>

In Hungary, by contrast, there is no significant support for any change to the Orbán government's 2011 constitution. And, as the scholarly debate in the country has shown, there are few democratic means left to amend the Fundamental Law. This also means that while in Israel the current constitutional crisis may be a sign of a constitutional moment, in Hungary the overwhelming majority of voters does not consider the illiberal constitutional system to be a failure. These differences in the attitudes of the people, including their respective groups of intellectuals and scholars, which are determined by democratic developments and the salience of constitutional issues, explain the differences in scholarly resistance to illiberal constitutionalization in the two countries. Israel has been a democracy with a strong civil society, and scholarly activism giving weight to the values of constitutionalism despite the lack of a traditional written constitution as a single document ever since its establishment in 1948. On the contrary, in Hungary there had been no democratic tradition, nor vibrant civil society and scholactivism, prior to the 1989 democratic transition, and the priority given to economic development and the speedy increase in living standards failed to increase the importance of constitutional issues in the perception of the people.

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63 Times of Israel staff, "Poll Shows Gantz's Party Soaring as Likud Nosedives, Smotrich out of Knesset," *Times of Israel*, December 19, 2023, <https://www.timesofisrael.com/poll-shows-gantz-s-party-soaring-as-likud-nosedives-smotrich-out-of-knesset/>.