



## Introduction

... commencing demagogues and ending tyrants.

Alexander Hamilton<sup>1</sup>

In the last twenty years populist movements have given birth to a growing number of illiberal democracies, including Hungary, Poland, Turkey, and Venezuela, and so-called “mature democracies” are increasingly tempted by these examples. Antiliberal popular sentiment is challenging the hegemony of the liberal institutions that saw themselves as the only legitimate and possible political organization of modernity. When democratic regimes reject concerns about liberalism, what is the impact on constitutional discourse? What lies beneath these developments? Have power-hungry demagogues hijacked democracy? Have desperate citizens simply been manipulated?

Scholarly opinion in the United States and Western Europe too often believed that illiberal darkness reigns only in faraway forests: “it can’t happen here.”<sup>2</sup> The history of fascism shows otherwise. Overly confident democracies have paid an immense price for their careless shortsightedness. The prevailing understanding of illiberal regimes,<sup>3</sup> particularly those that emerge from populist movements, is that we are facing a *general* “democratic backlash.”<sup>4</sup> Increasingly, contemporary political

<sup>1</sup> A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers. No. 1* (Mentor Book, 1961), p. 35.

<sup>2</sup> See, for example, E. Posner and A. Vermeule, *The Executive Unbound* (Oxford University Press, 2010), p. 176.

<sup>3</sup> “Regime” refers to a political arrangement where the probability that the ruling force will lose power in the foreseeable future is very low. However, because of the democratic nature of the illiberal regime, the leader and his party, aspiring to have continuous popular support forever, may lose (see the fate of Evo Morales).

<sup>4</sup> The allegory of a backlash is intuitively attractive as it presupposes a pre-existing state of affairs that is related to a self-perfecting democracy. See J. M. Balkin and S. V. Levinson “The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,” *Fordham Law Review*, 75:2 (2006), pp. 489–535. General democratic

science (and, to a lesser degree, constitutional theory) agrees that the phenomena that undermine democracy are not limited to so-called “new democracies,” where democracy is not historically and culturally rooted.

Today, the international community considers democracy as the only form of legitimate government. Populist leaders understand its continuing pull, and all emerging illiberal democracies are eager to present themselves as democratic: more democratic than the predecessor system, which betrayed democracy and the people. In the struggle between the people and the elite, the people’s will, as molded by the political orientation of the populist leader, must win at any cost. At the same time, with pride and anti-elitist arrogance, these regimes declare themselves to be illiberal in line with the dreams of their “authentic” people. With illiberalism unleashed, populism in power turns its actions against constitutionalism. Democracy here takes the shape of a plebiscitarian leader democracy (PLD), a concept used by Max Weber, who proposed it for Germany after the collapse of the German Empire in 1918. “PLD . . . is an authority and regime type with authoritarian traits, like charismatic leadership, generated by the internal logic of modern mass democracy per se.”<sup>5</sup>

PLD, née *Führer-Demokratie*, has an understandably bad reputation within academia, which excommunicates contemporary plebiscitarian regimes from the temple of democracy and labels illiberal democracies as kinds of authoritarian regime.<sup>6</sup> However, one should not confuse the “inherent tendency to authoritarian rule,” which originates from “[t]he irresistible presidentialization of democracy,”<sup>7</sup> with actual authoritarian

backlash is defined as a large-scale democratic change in institutional arrangements that lead to democratic erosion. When presidents can appoint enough judges and justices, constitutional doctrines start to change, and democracies turn into illiberal surveillance states.

Undeniably, populism-generated changes rely on erosion techniques, but in a concentrated way. The ongoing erosion and related value shifts in dominant democracies facilitate illiberal institution building. See, for example, the “liberating” impact of the global human rights erosion on Eastern European rights restrictions, in Chapter 6.

<sup>5</sup> A. Körösenyi, “The Theory and Practice of Plebiscitary Leadership: Weber and the Orbán regime,” *East European Politics and Societies and Cultures*, 33:2 (2019), p. 283. Contrary to Max Weber, Körösenyi claims that “PLD, unlike competitive authoritarianism, is not a combination of democratic and authoritarian elements, but it is democratic (formally) and authoritarian (substantively) simultaneously.”

<sup>6</sup> A characteristic term used to indicate that regimes are no longer democratic is “competitive authoritarianism.” S. Levitsky and L. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge University Press, 2010).

<sup>7</sup> P. Rosanvallon, *Good Government: Democracy Beyond Elections* (Harvard University Press, 2018), p. 114.

rule. An illiberal PLD has a destructive potential and can turn into despotism: not the despotism of the multitude (as citizens will be prevented from decision-making), but despotism in the name of the people. The democratic ideal of popular participation in decision-making (popular self-government) is transformed into support for the leader in imperfect elections, where the leader caters only to his people, and where only the “real” people (often construed as an ethnic, tribal community) is relevant. While the government may be formed through imperfect elections, (often sizable) majorities stand behind legislation that does not depart from the preferences of the majority.

In view of this contradiction, the working hypothesis of this book is that illiberal democracies belong to the democratic family in the original Rousseauist understanding of democracy. Democracy, as understood by Rousseau, has a totalitarian *potential*. The totalitarian potential of democracy is not to be confused with the standard meaning of totalitarianism provided by Arendt. Democracy is potentially totalitarian, not in the sense of being all-encompassing but for having the potential to become a single-voice regime. Illiberal democracies unfold the already existing oppressive potential of democracies not by silencing and extirpating opposition but by making opposition completely irrelevant. But illiberal democracies in which the totalitarian potential of democracy unfolds remain concerned of the electorate, or at least its majority, and respond to their private needs and desires, contrary to actual totalitarian regimes, which insist on imposing their single, messianistic world view on all subjects. “The authoritarian traits of PLD are endogenous to democracy, which is quite an unconventional result for democratic theory.”<sup>8</sup> The plebiscitarianism of leader democracy, with its emphasis on the people’s sovereign (i.e. unlimited) power, extracts totalitarianism. Populism in power often enhances democracy with its inclusionary policies; however, this often leads to concentrated power in the executive and growing totalitarianism. This is what happened under Juan Perón and Hugo Chávez; they both used laws instrumentally to repress dissent and “made use of the state apparatus to colonise the public sphere and civil society.”<sup>9</sup>

The regimes that originate in populist movements, and are conceived in populist terms, should be understood “as an internal periphery of

<sup>8</sup> Körösenyi, “The Theory,” p. 283.

<sup>9</sup> C. de la Torre, “Populism and Nationalism in Latin America,” *Javnost – The Public*, 24:4 (2017), p. 375.

democratic politics,” consisting in “a region where the distinction between inside and outside is a matter of dispute and cannot be thought outside a polemic.”<sup>10</sup>

The study of the illiberal order helps to identify the shortcomings of the democratic constitutional system and fight the self-destructive complacency of the “it can’t happen here” attitude. Authoritarianism is not a foreign country. The mirror of illiberalism reflects the weaknesses of the liberal. A resilient democracy must look into this mirror – before it is too late.<sup>11</sup> Populism and illiberal democracy do not just challenge normative theories; they expose the totalitarian and authoritarian in liberal constitutionalism, as well as the technical shortcomings of constitutional democracies. Illiberal democracies rely upon and expose the *inherent contradictions* of democracy and the rule of law (RoL), namely that democracy has an inherently totalitarian potential. Plebiscitarian democracies are the manifestation of this potential, enabled by the illiberal and even authoritarian elements of an intellectually and politically enfeebled constitutionalism and the local imperfections of the constitutional order. The discussion of illiberal PLD within the framework of democracy offers an opportunity to understand democracy and constitutional democracy in their deepest and most troubling contradictions and weaknesses. This applies just as much to building theory as it does to the practical reinforcement of constitutional democracy.

This book discusses the constitutional (public law) order of illiberal democracy as a regime<sup>12</sup> that continues to take the twisted form of democracy while pursuing its leader’s decisive interest in holding on to power. It does not aim to reconstruct a constitutional theory out of the fragments of populist illiberal constitutional rhetoric and action,

<sup>10</sup> B. Ardit, *Politics on the Edges of Liberalism* (Edinburgh University Press, 2007), p. 2. See also P.-A. Taguieff, *L’illusion populiste* (Flammarion, 2007); E. Laclau, *On Populist Reason* (Verso, 2005); and C. Pinelli, “The Rise of Populism in Europe and the Malaise of Constitutional Democracies,” in S. Garben, I. Govaere, and P. Nemitz (eds.), *Critical Reflections on Constitutional Democracy in the European Union* (Hart, 2019). Pinelli argues that constitutional democracies have a built-in flexibility that has absorbed de-structuring tensions, but that now face challenges through their own institutions.

<sup>11</sup> K. L. Scheppele, “The Opportunism of Populists and the Defense of Constitutional Liberalism,” *German Law Journal*, 20:3 (2019), p. 315. “Populists expose the vulnerabilities in the theories that our profession has taken for granted . . . [and] are also a challenge to . . . the normative defensibility of liberal constitutionalism.” See in a similar sense D. Landau, “Populist Constitutions,” *University of Chicago Law Review*, 85 (2018), pp. 521–43.

<sup>12</sup> This book uses the terms illiberal democracy, illiberal regime, plebiscitarianism and regime interchangeably.

although a “theory of cheating” (including lies, deceit, fraud, spin, tricks, etc.) in constitutional law will inevitably emerge. The plebiscitarian leader democracies that emerge from populism are ruled by all efforts to conceal the truth in order to mislead. “Cheating” is pretending to observe a rule in order to depart from it, often reaping undeserved benefits from those cheated; “in violating a rule that others follow, and thereby breaching an obligation to restrict his liberty in a manner agreed, the cheater gains an unfair advantage.”<sup>13</sup> In the act of cheating, the cheater – the plebiscitarian leader – (mis)represents himself as norm-observant.<sup>14</sup> The illiberal regimes relying on systemic cheating pretend to satisfy the requirements of the RoL by following specific rules that seem applicable, but they do so in disregard of the relevant standards or principles of the RoL. A regime that cheats in its use of the law breaches a promise of “truth” or authenticity that the underlying norms of the game will be observed.

To conceive PLD as a member of the democracy family is troubling, or even an offensive sacrilege, to many constitutional scholars (and committed democrats). It compromises the impeccability of the democratic ideal and the noble character of the people, a cornerstone of Jacobin thinking: “Any institution which does not suppose the people good, and the magistrate corruptible, is evil.”<sup>15</sup> Most scholars of populism and illiberal democracy nurture strong emotions and have intellectual or moral reservations regarding the subject of their study. This is a problem: passionate analysis is self-blinding. Feeling sympathy or antipathy toward the source of their livelihood would seem unprofessional to forensic scientists interpreting the results of an autopsy. Academia’s common and well-deserved contempt toward illiberal democracy and populism only helps populism. Populists thrive on scorn by

<sup>13</sup> S. P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2007), p. 55. See further M. S. Quinn, “Practice-Defining Rules,” *Ethics*, 86:1 (1975), pp. 76–86.

<sup>14</sup> I will refer to the “leader,” “cheater,” and “ruler” throughout this book using male pronouns since there have been no women PLD leaders to date (Isabel Perón and Cristina Kirchner come close but they both inherited their position from their late husbands). The leaders this book focuses on (of Hungary, Poland, Turkey, and Venezuela) are all men. Male dominance is part and parcel of macho populist leadership: illiberal policies regarding the family emphasize traditional female roles and the leaders’ rhetoric is quite macho.

<sup>15</sup> M. Robespierre, *Déclaration des droits de l’homme et du citoyen, présentée par Maximilien Robespierre* [in French] (de l’Impr. Patriotique et Républicaine, 1793), art. xxx, p. 10, [www.gallica.bnf.fr/ark:/12148/bpt6k62625013/f14.image](http://www.gallica.bnf.fr/ark:/12148/bpt6k62625013/f14.image). English translation listed in *The Concise Dictionary of Foreign Quotations* (Fitzroy Dearborn Publishers, 2001), p. 117.

“dominant elite forces.”<sup>16</sup> After the initial excommunication from the realm of respectable politics, the strategy of quarantine backfires: successful populist leaders have learned how to neutralize the labels of populism and illiberalism by proudly declaring them a badge of honor.<sup>17</sup>

Whatever moral and political assumptions they may have about the people and democracy, scholars must learn to live with ambiguous concepts and phenomena, rather than pursuing politically driven research agendas or counterproductive excommunication strategies. Democracy is ambiguous: “an understanding of democracy cannot be separated from an understanding of its perversions.”<sup>18</sup> Those who imagine democracy (even its ideal) as being without inner contradictions and inherently troubling traits (like the emotionalism of the masses) mimic populist simplifications. Populism, and its victorious version in illiberal democracy, is not simply the plot of another, demagogic elite or a manipulative imposition of a false identity on a victimized population: populism remains democracy, but one that is plagued by an illiberalism that undermines constitutionalism. The conviction that illiberal regimes are not democratic, and that their support is illegitimate because elections are manipulated, results in a methodological error that cannot see the genuine popular embrace of plebiscitarian leaders. Such regimes derive legitimacy from their democratic credentials: the system, manipulative as it is, enables citizens to express their support (and even rejection). Academics cannot underestimate the importance, sincerity, and legitimacy of popular support for the leader and his regime, even if this support is based on xenophobic and authoritarian predispositions, or conservative patriotism in search of recognition. These regimes may or may not be democracies in an ideal sense of the term, but they *operate* democratically: their political organs are the same as those in “respected” democracies and are construed by the same democratic (electoral) processes. This gives legitimacy (power) to the regime, and to disregard it on the basis of an abstract and sterile ideal of democracy only serves the populists. In their propaganda, such positions represent another act of external disrespect of the Nation, based on obvious factual errors, deliberately spread by foreign conspirators.

<sup>16</sup> For an example, see J. Rancière, *Hatred of Democracy* (Verso, 2006).

<sup>17</sup> J. P. Zúquete, “From Left to Right and Beyond,” in C. de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge, 2018), p. 417. Zúquete provides a review of “anti-populist demagoguery” and its dangers.

<sup>18</sup> P. Rosanvallon, “A Reflection on Populism,” Books & Ideas (November 10, 2011), [www.booksandideas.net/A-Reflection-on-Populism.html](http://www.booksandideas.net/A-Reflection-on-Populism.html).

In an oft-quoted self-description of his regime, Hungarian Prime Minister Viktor Orbán (hereinafter the HPM), insisted that Hungary is democratic and respects democracy. Contrary to Chávez, he did not aspire to offer a more authentic democracy, as most populists do, only a more patriotic one, a democracy for the *ethnos*. The specificity of the PLD regime is that constitutional institutions are not called on to limit power, and that substantive liberal values are of no importance. In other words, populism (right and left! – let's be under no political illusions) and its resulting system of governance deny *constitutional* democracy. Plebiscitarian democracy disregards liberal constitutionalism and its institutions in the name of majority rule. It is illiberalism and the leader's lust for power that unleashes democracy's self-destructive tendencies, which in the end turn it into despotism through unconstrained government in the name of the people. "Illiberal" means both a lack of the liberal constitutional instruments that limit power, enabling arbitrary personal rule, and substantive illiberal values, like the imposition of a single world view on society. Illiberal democracies are the democracy of, and for, illiberals.

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How does the illiberalism of the PLD regime affect democracy? In a growing number of countries, democracy first killed liberalism and then, dancing on its corpse, committed suicide.

Illiberal democracies thrive on the inherent shortcomings, uncertainties, and inconsistencies of constitutionalism. These weaknesses were always known or at least sensed in constitutional theory, if not always admitted, and important measures are occasionally taken in constitutions to counter them by setting constitutional limits to the totalitarian and self-destructive tendencies of democracy as self-government. The uncertainties of constitutionalism facilitate raw democracy. Where constitutionalism demands homogeneity,<sup>19</sup> it enables populism and illiberal democracy to represent themselves as a solution to the pluralism and diversity that undermine them. Populism claims that by undoing diversity it offers a more solid constitutional foundation.

Illiberal democracies assert deeply illiberal values, some of them bordering on authoritarian. Populists mobilize communitarianism and/or nationalism: it is therefore not surprising that the illiberal regime prefers

<sup>19</sup> "The nation exists prior to everything; it is the origin of everything. ... It would be ridiculous to suppose that the nation itself was bound by the formalities of the constitution." E. Sieyès, *Political Writings*, ed. M. Sonenscher (Hackett Publishing Company, 2003), p. 136.



collectivist fictions. However, in one of their many acts of pragmatism, such rulers accept a *consumerist* concept of individualism as privacy and personal (bodily) freedom. The ruler knows the secret of the postmaterial world, where the active electorate takes the satisfaction of primary needs for granted: “Wellness is a daily, active pursuit.”<sup>20</sup> The regime does not interfere into private life directly, although it promotes traditional roles for women and family at the symbolic level.<sup>21</sup> It stands for traditional marriage but does not discriminate openly against sexual minorities (which it prefers remain invisible). It favors traditional religions and promotes traditional churches and their values (in countries where right-wing populism is in power), but without the formal oppression of those who fall outside these traditions. In areas like education and culture, it tries diligently to make its illiberal (nationalist, authority-respecting) preferences prevail. It even protects freedom of expression, including harsh criticism of the government, though it conceives of the role of the state in communication in an illiberal way: there is freedom of speech for all, but the means of socially effective speech (what can be heard) are increasingly monopolized by the state. This strange mixture, which falsely claims respect for fundamental rights, renders illiberal democracies a class of their own.

The popular support of illiberal democracy, and its social success, tests the resilience and even legitimacy of liberalism’s constitutional institutions. Particularly troublingly, many people willingly approve of illiberalism: the orgy of irrationality masquerading as common sense challenges – not the first time in history – fundamental assumptions of equal respect for all.

The cunning genius of constitutionalism has invented institutions and beliefs that can contain the totalitarian potential of democracy. But constitutionalism often fails, and these current failures expose the unfinished nature of liberal constitutions. Constitutions, as liberal as they can be, are political creatures and reflect existing social and cultural values, and therefore become containers for the survival of illiberal, authoritarian solutions. Their unfinished nature not only captures historical contingencies, an inevitable inconvenience in constitutional design and constitutional development, but it also embodies the inherent contradictions of the *politically determined* constitutional order.

<sup>20</sup> “Millennials,” Goldman Sachs (website), accessed January 6, 2021, [www.goldmansachs.com/insights/archive/millennials](http://www.goldmansachs.com/insights/archive/millennials).

<sup>21</sup> The plebiscitarian leader accepts popular values and changes them carefully: Jarosław Kaczyński did not push ahead with an absolute ban on abortion when in 2016 he ran into mass demonstrations; according to urban legend, the HPM refused to amend a relatively liberal Hungarian abortion law because he had no intention of losing the next election.



Populist illiberal democracy relies upon and brings to light the authoritarian elements of Western constitutional systems. Many of these elements relate to the dictates of market capitalism or distortions of the market.<sup>22</sup> Other features simply reflect “normal” political power. Political power, including such power in constitutional democracies, relies on the oppressive and discretionary logic of the public bureaucracy. At the level of constitutional law, here too the illiberal regime can rely on the illiberal values that were built into the constitutions of many countries that claim to be liberal.

The liberal institutional order has been further debilitated in the name of popular, republican democracy. Academia and public intellectuals bear a certain responsibility here. Self-proclaimed prophets of popular democracy have promoted the ideas of political constitutionalism and weak courts,<sup>23</sup> while the liberal component of constitutional democracies was shoved in the backroom, a dirty little secret of democracy – as if liberalism were a matter of shame for a progressive democrat or human progress.<sup>24</sup> An influential stream in academia blames liberal democracy for the backlash or crisis of democracy, as if the confrontation with and even partial imposition of liberal values had caused the populist-authoritarian counterrevolution.<sup>25</sup> As the accusation goes: “Populism has essentially become an illiberal democratic response to undemocratic liberalism.”<sup>26</sup> Though liberalism (defined here as individual rights and the separation of powers) had very little to do with the lack of responsiveness by politicians or the corruption among them, “liberal” became a badge of shame (and, perhaps unrelated, an anti-Semitic dog whistle), and not just in Eastern

<sup>22</sup> G. Frankenberg, “Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares,” in H. A. García and G. Frankenberg (eds.), *Authoritarian Constitutionalism* (Edward Elgar, 2019).

<sup>23</sup> For a summary of the position that these republican ideas are not related to populism, see G. Halmai, “Populism, Authoritarianism and Constitutionalism,” *German Law Journal*, 20:3 (2019), pp. 296–313.

<sup>24</sup> On top of this leftist scorn of (classic) liberalism, “liberal” in the United States became confused with social democracy and a strawman for conservatives as well. Yet left-oriented politicians and associated academics and intellectuals considered liberalism a historical malefactor responsible for both past injustice and the present democratic backlash (originating in liberalism’s latest reincarnation, neoliberalism).

<sup>25</sup> See J. C. Isaac, “Is there Illiberal Democracy? A Problem with no Semantic Solution,” *Eurozine* (August 9, 2017). <http://www.eurozine.com/is-there-illiberal-democracy>; I. Krastev, “What’s Wrong with East-Central Europe: Liberalism’s Failure to Deliver,” *Journal of Democracy*, 27:1 (2016), pp. 35–39. It is telling that Farid Zakaria’s emphasis on the centrality of the lack of liberalism was received with indifference.

<sup>26</sup> C. Mudde and C. R. Kaltwasser, *Populism. A Very Short Introduction* (Oxford University Press, 2017), p. 116.

Europe. “Between the pressures of post-modern deconstruction on the one side and pre-modernist fundamentalism on the other, the liberal project is now being squeezed as it has never been squeezed before.”<sup>27</sup> These words were written in 1989 but they remain as accurate as ever.

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This book addresses the constitutional structures and operations of illiberal democracies, and yet it looks odd to center the analysis on (public) law. After all, the success of populism and the domination of PLD depends primarily on nonlegal factors. Indeed, the whole PLD regime is an emotionally manipulated patronage system that maneuvers *around* the law. Illiberal democracy cannot be understood merely as a legal phenomenon or pure governance concern: it is embedded in the ability of a centralized executive to dominate a society of dependent people. Nevertheless, the constitutional system remains central as the actual power of the plebiscitarian leader relies on his control over the state, and this control is achieved through constitutional measures. The state as an administrative apparatus is managed through formal law, which requires the observance of legal formalities. The principal technique to control the state, and to influence society through the state, is a legal one. Illiberal democracies are state centered: the ruler reigns over society through the strict, centralized legal control over administrative and ideological resources. This is not to deny or dismiss the centrality of material factors in the domination and maintenance of legitimacy. Chávez owed his success to the services he provided to his constituency (the “Bolivarian mission” social programs, personally overseen by the President); legalized persecution was secondary.

In most countries where illiberal democracy has been victorious, the society remains fragmented, lacking comprehensive tools for social cohesion. The distorted market is a poor coordinator. In the absence of common bonds<sup>28</sup> or other forms of social coordination, law becomes an important cementer of society. In this system of rule by law, the powerholders cheat through law: both on law and the recipients of law.

Over the last seventy or so years, the concept of a constitution has been increasingly understood in the spirit of *Marbury v. Madison*, as the supreme *legal* norm of the country. Today, most societies imagine their

<sup>27</sup> R. K. Sherwin, “Law, Violence, and Illiberal Belief,” *The Georgetown Law Journal*, 78 (1990), p. 1785.

<sup>28</sup> In Hungary, only family relations are considered trustworthy, while in Poland the Church is added.