Chapter 3

Constitutions: Breaches, Abuses, and Literal Democracy

Populists in power dream of changing their country's constitution and writing into it as many of their pet projects as possible. For populists, this is one of the prizes for winning elections. The alternative of simply *breaching* the constitution inherited from their predecessors is seen as second-best, and much less satisfying, even if it is often useful. This is because populists derive their legitimacy from electoral victory, a victory won on the basis of current constitutional rules in place. For ruling populists to deny the legitimacy of the preexisting constitution by breaching it openly and frequently, would be to saw off the very branch they are sitting on. And it doesn't look good internationally. When you breach the (unavoidably vague) norms of democracy, you can always retort: *which* democracy? But you will not get away as easily if you violate *your own* constitution, rather than some externally imposed standards.

It is no wonder that not only do many populists set about replacing or amending their country's old constitution, but also that they do so in haste, as soon as they obtain the requisite majority. Typically, these populists are not bothered about gaining broad support for their constitutional proposals, including from the political opposition. Actions by President Hugo Chávez in Venezuela (as well as in the Andean region, similar actions by Rafael Correa in Ecuador and Evo Morales in Bolivia) are symptomatic of such quick and unilateral constitutional replacements. Once elected to office in 1998, against the backdrop of a popular rejection of his predecessors as corrupt and elitist, Chávez was able to exploit his victory by quickly delivering a new Constitution, in 1999. As Rosalind Dixon and David Landau explain, "Chávez rejected the 'total reform' [of the Constitution based on existing constitutional procedures] option because it would have required negotiating with an opposition-led legislature that he despised."[1] Rather than relying on the existing institutions and procedures, he called a newly fashioned Constituent Assembly dominated by his followers, which managed to replace an old constitution in the span of several months. This led to the wiping out of many existing state institutions.

The idea of an extraordinary Constitutional Assembly had a good track record in Latin America prior to Chávez's innovative use of it. In several countries in the region (Peru, Nicaragua, Brazil), similar Assemblies were called shortly after the overthrow of authoritarian regimes, as an important step towards democracy. In contrast, Chávez abolished a constitution which *was* democratic and enshrined separation of powers, federalism and social rights in a country which, since 1958, had been a rare case of democracy and stability in the region. It was also based on consensus-oriented processes. As the Statement of Motivations accompanying the old 1961 Constitution declared: "In every moment [the Constitutional Commission] maintained the purpose of drafting a fundamental text that did not represent partial point of views, but those basic guidelines of the national political life in

[1] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press, 2021), p. 125.

which there is and may be convergence of thoughts and opinions of the vast majority, or maybe we could say of the whole Venezuelan people."[2]

No matter how accurate this self-congratulatory description was, the approach by Chávez was the reverse: the constitution-writing he launched was fast and unilateral. His victory was decisive (56 percent of the vote), but he controlled only about one-third of the parliament, and most of state governorships were in the hands of the opposition. So rather than negotiating with the opposition about constitutional replacement (an action probably doomed to failure) and use the path prescribed by the incumbent constitution, he held a referendum on whether to convene a constitutional assembly. The Supreme Court obediently acceded to the terms of referendum, under political pressure. Chávez won the referendum by a wide margin and achieved a spectacular majority of seats in the Assembly (93 percent) – partly due to many oppositional forces boycotting the vote. A result was that the constitution was drafted quickly and with virtually no input from the opposition. We shall return to its contents in a moment.

Frantic

Hungary is another example of populist constitution-making in haste – and not quite according to the rules. To be sure, Viktor Orbán had gained a two-thirds constitutional majority of the unicameral parliament as a result of April 2010 elections. But the earlier Constitution of 1989 (which was, in fact, the very heavily amended old Communist Constitution), required a special majority for the *drafting* of the Constitution (as opposed to the actual adoption.) In order to compel all major parties to reach a consensus immediately after the fall of Communism, constitution makers required the future constitution-making Parliament to adopt "regulatory principles" in the form of a resolution by a *four-fifth majority* of the Parliament. The idea was that, while four-fifths is a clearly unrealistic threshold for the Constitution itself, a near-unanimity condition would force politicians to strive towards an earlier consensus not about specific provisions, but at least about the general principles of a new Constitution. (The technique of proceeding in two steps was very successfully adopted in the course of making of a post-apartheid constitution of South Africa, eventually adopted in 1996.)

But when Orbán came to power again, this time 53 percent of votes translated into a hefty 68 percent of seats. The last thing he wanted was seeking consensus and compromise with the opposition: after all, his popularity flourished on polarization and divisive rhetoric. So first he removed the four-fifths requirement for a "pre-Constitution" by a resolution of the Parliament adopted by, you guessed it, a two-thirds majority. (Such a change of the constitutional rules of constitutional change may be seen to be inconsistent with even the "thinnest" constitutionalism, under which "the constitution can be amended only by adhering to the amendment rules as they happen to be.")[3] Eventually the Constitution was not prepared by a broadly-based body, but by a three-person committee appointed by the government, led by a

[2] Quoted in Miriam Kornblath, "The Politics of Constitution-making: Constitutions and Democracy in Venezuela," *Journal of Latin American Studies,* 23 (1991) 61-89 at 81.
[3] Mark Tushnet and Bojan Bugarič, *Power to the People: Constitutionalism after Populism* (Oxford University Press, 2021), p. 21, footnote removed.

member of the European Parliament (from the ruling party, of course). The Constitution was drafted in secret, inside a close circle of Orbán's friends, and was fast-tracked as a private member's bill, thus eliminating the requirement to consult. As a team of Hungarian legal scholars assessed: "the preparation of the new Fundamental Law has been carried out exclusively by the governing party coalition … and was not preceded by the necessary political, professional, scientific and social debates."[4] The partisan, unilateral nature of the process (the Constitution had been adopted only by the votes of the ruling party coalition) was best symbolized in the rejection by the rulers of a widespread call for a national referendum. Only a majority decision by the parliament would have made the calling of such a referendum possible.

It was constitution-making by stealth: Orbán had not foreshadowed constitutional change in his election campaign so voters were not aware that their vote for Orbán would be a vote for fundamental constitutional transformation. Nothing in the election campaign promised radical regime change, which then occurred with unusual speed. Consider the timeline. Viktor Orbán won his constitutional majority in April 2010 (in two rounds, on April 11 and 25). On March 7, 2011, the Parliament adopted a resolution on the rules and procedures for adopting a new Constitution. And on April 18, 2011, Hungarians had a brand-new Fundamental Law.

The speed of adoption affected its quality as measured even by the standards of the ruling party. In the year and a half after its adoption, the Fundamental Law had already been amended five times. János Kis, a legendary ex-dissident, could not have put it better: "It is (and it is meant by its authors to be) a constitution of one half of the nation imposed on the other half against their will."[5]

On 2 January 2012, in the beautiful Budapest opera house, the government held a special gala to celebrate the entry into force of the constitution it had adopted, sidelining the opposition parties and large segments of public opinion. While members of the new Hungarian elite engaged in self-congratulatory talk and enjoyed a glass or two of Tokaji Aszú (or was it Egri Bikavér?), tens of thousands of protesters gathered in front of the venerable building, to show their anger at this unashamedly partisan exercise. The guests at the gala had to leave by the back door.[6]

Constituting A New Beginning

Hastily prepared populist constitutions carry certain common characteristics: the symbolism of a fresh start, centralization of power, erosion of individual rights, appeals to traditional moral and religious standards of the majority, and often the tendency to set various policy preferences in stone, thus making them capable of surviving the demise of populist rule. In presidential systems, the trend is towards increased presidential powers, while in

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[4] Andrew Arato, Gabor Halmai and Janos Kis, "Opinion on the Fundamental Law of Hungary (Amicus Brief)" in Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Budapest: CEU Press, 2012), pp. 455-489 at 459.
[5] János Kis, "Introduction: From the 1989 Constitution to the 2011 Fundamental Law" in Gábor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press: Budapest-New York 2012), pp. 1-21 at 20-21.
[6] This is described by Kis, ibid., p. 1.

parliamentary or mixed systems, it is toward increased parliamentary or executive power. In both cases, limits upon the political branches are eroded. As the Venice Commission remarked, acerbically, after one of its peregrinations to Hungary to discuss a constitutional amendment with Orbán's regime, "During the visit in Budapest and in the documentation provided, the Hungarian Government referred to parliamentary sovereignty as if it were the ultimate instance of legitimacy and no further checks applied."[7] This may be a good summary of populist constitutionalism in general, only with "parliamentary sovereignty" replaced by "constituent power" or "presidential supremacy," as the case may be.

In the new Hungarian Fundamental Law, limits on state power have been greatly reduced, and the powers of central government, greatly enhanced. The government has competencies to do everything that is not specifically assigned to another body – which is *a lot*. The judiciary has been subjected to the executive through the huge powers of the president of the newly established National Judicial Office – a person elected by a two-thirds majority of the parliament, hence by the Fidesz ruling coalition. (I write more about the subjection of the Hungarian judiciary in Chapter 4). The structure of the ombudsman's office has been weakened. In the place of the former three ombudspersons plus a general commissioner for human rights, the Constitution established one "general" commissioner, with many functions of former "specific" commissioners (such as data protection) transferred to the government, thus eroding them of any protected status.

There are other aspects of hyper-centralization. A newly established three-person Budget Council now has the right to veto the annual budget adopted by the parliament at its discretion: its members are appointed by the parliamentary majority (hence, by Fidesz loyalists) for six years (two members) and twelve years (1 member). This is unusual: normally it is parliaments that have the power to express their political preferences through budgets, but here a non-parliamentary Budget Council has been given a power of veto over the parliament's crucial decisions. (In addition, the quorum for the Council's decision is set at two: two people can veto the adoption of the country's budget, which may lead to the dissolution of the Parliament and early elections). The powers of the President (elected by the parliament, hence a completely compliant politician) have grown in importance from a purely ritualistic office. The President now has the right to dissolve the parliament if the budget is not approved by 31 March. The dissolution may even take place shortly after the elections. The powers of municipal governments have been drastically reduced, their property rights in particular. This "de facto ends municipal autonomy."[8] In addition, the parliament has been given competence to dissolve local elected authorities if it finds them in violation of the Constitution. Giving the majority party constitutional control over elected bodies, a power which normally should rest with a constitutional court, is a flagrant symptom of hyper-centralization.

The primary method of straitjacketing a future majority is by introducing a category of "cardinal laws" which may only be adopted or changed by a two-thirds majority. In this way, Orbán has exploited his Party's temporary super-majority to bind future (simple) majorities.

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[7] European Commission for Democracy Through Law, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted June 14-15, 2013, VC CDL-AD(2013) 012 para 137.
[8] Bálint Magyar, *Post-Communist Mafia State: The Case of Hungary* (Budapest: CEU Press, 2016), p. 115.

Currently there are thirty-three such cardinal laws, and they cover issues ranging from local self-government and organization of courts to pensions and taxes. As Imre Vörös, a Hungarian law professor and ex-judge of the Constitutional Court, lucidly suggests: "The intention … is clear: to reduce the room for manoeuvre of future governments, and to secure at any given moment a tool for paralysing the government for the respective opposition."[9] The same is the case with entrenching the power of specific officials appointed at the time of the Fundamental Law. Positions in almost all independent institutions of checks and balances that were occupied by Orbán loyalists at the time of the entry into force of Fundamental Law have been extended far beyond the current election cycle of four years. With terms of office of 6, 9 or 12 years, the Constitution assures that they would hold office well into future election cycles.

The Constitution is permeated with nationalistic and religious tones, merged together in its invocation: "God Bless the Hungarians." Symbolic too was the change in the very name of the state: Hungary, rather than "the Republic of Hungary" as had been the case up to then. These symbols are meant to mark a fresh start, a new beginning, and to distance the new constitution from the old, referred to disparagingly as "the communist constitution" which was "the basis of a tyrannical rule" and therefore is "proclaimed to be invalid." It was as if the massive 1989 and post-1989 amendments had not existed, and clearly disregards the contradiction between the declared invalidity of the prior constitution and the fact that the new one was being adopted on the basis of the old constitutional framework. I have already mentioned in this book the quasi-religious and exclusionary language of the Constitution (in Chapter 1), and in particular its Preamble, which stresses the Christian tradition and contains grotesquely anachronistic references to the medieval doctrine of the Holy Crown. There is a distinct nationalistic air to the references to the unity of the Hungarian nation ("We, members of the Hungarian nation" – starts the Preamble pompously called "National Avowal", not the "people" or "citizens,") understood in an ethnic manner, and to Hungary's "responsibility for the fate of Hungarians living beyond its borders." At the same time, "the [other] nationalities living with us" are symbolically othered, the formula chosen intimating, as the widely respected Venice Commission observed, that members of those nationalities "are not part of the people behind the enactment of the Constitution."[10] After all, if they live *with us*, then they are not *us*.

The Constitution is also strong on citizens' *duties*, with a puzzling statement that every person has an obligation "to contribute to the performance of state and community tasks to the best of his or her abilities and potential." What on Earth can it mean? Likewise, what can the statement that "every person shall be responsible for him or herself" mean? Probably nothing, but the insertion of such meaningless provisions in a constitution is dangerous because they may always be (ab)used by an enthusiastic legislator or a constitutional judge to restrict citizens' rights by extending their duties. In contrast, the Constitution is singularly meek on individual rights, basically relegating any duty to specify them to "special Acts."

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[9] Imre Vörös, "Hungary's Constitutional Evolution During the Last 25 Years," *Südeuropa,* 63 (2015), 173-200 at 184, footnote omitted.

[10] European Commission for Democracy Through Law, Opinion on the New Constitution of Hungary, adopted June 17-18, 2011, VC CDL-AD (2011) 016 para 40.

The Venice Commission perceptively sees a possibility that "the constitutional provisions on freedom and responsibility might be *eroded* by special Acts."[11]

There are also a myriad other illiberal provisions. To entrench a traditional definition of family and marriage against possible future legislation of same-sex marriages, the Constitution explicitly defines marriage as "the union of a man and a woman." The Constitution admits life imprisonment without parole, in contravention of international standards. Freedom of the press is not formulated as an individual right but only as an obligation of the state – thus reducing the possibility of recourse to courts against breaches of that freedom. Again, how prescient the Venice Commission was in 2013 to suggest that under the Fundamental Law "this freedom appears to be dependent on the will of the state and its willingness to deal with its obligation in the spirit of freedom."[12] Indeed Orbán controls nearly all media in Hungary. Independent media have been pushed far into the margin, and are now financially non-viable.[13] Further, the recognition of religious communities has now been granted to the parliament (by an amendment of 11 March 2013), thus making this a political decision, expressing the views of the political majority about which religion deserves the distinction of recognition and the privileges related to it. Soon after, the parliament adopted a "Bill of Recognition" containing thirty-two "recognized" churches. Of course, any change in the composition of parliament may result in the recognition of new churches or the de-recognition of previously recognized churches. As Vörös observed, "the recognition of churches depends upon the outcome of parliamentary elections, a result that is incompatible with the state's obligation to remain neutral in matters of belief."[14]

The Venezuelan approach to the substance of a new Constitution went further than the Hungarian approach because the Constituent Assembly, as we have seen, did not limit itself to writing a new constitution (which it did in 1999) but also effectively wiped out the main existing institutions of checking and controlling executive power. (It is rather as if a sub-committee that was set up to rewrite the rules of your club established a new statute, and added: and by the way, all existing committees of the club are now suspended or extinguished). The new constitutionalism in Venezuela was therefore more radical than the Hungarian act which in fact remained at least notionally within the framework of the old constitutional rules of changing the constitution. In Venezuela, the change proceeded outside the existing institutional framework.

There, too, was a special symbolism aimed at capturing the authentic emotions of the people, though not by referring to religion as in Hungary, but (in the first sentence of the Preamble) by referring to Simon Bolivar, Venezuela's national hero, and even naming the state the "Bolivarian Republic of Venezuela." This was to symbolize a fresh start, after decades of the despised elite rule, a sign of the Constitution restoring power to the People.

The constitution replaced the earlier presidential term limit (four years term, non-renewable) by two terms of six years, thus effectively giving Chávez twelve years in power. It greatly increased the competences of the President. According to one calculation, presidential power

[11] Ibid., para 59, emphasis added.
[12] Ibid., para 74.
[13] Fábián Tamás, "Orbán's influence on the media is without rival in Hungary," *Euractiv* March 30, 2021.
[14] Vörös, "Hungary's Constitutional Evolution," 192.

was increased by 121 percent.[15] He then used his powers to push through constitutional amendments that even further enhanced his powers, for instance by removing term limits altogether in 2009. Venezuela's bicameral Congress was reduced to a unicameral body, thus reducing its role as a veto point. But most importantly, Chávez used the Constituent Assembly to suspend the Congress, create a Council charged with purging the judiciary, and remove many state-level officials. With the "original constituent power," he gave himself a blank cheque to wipe out preexisting institutions limiting the executive. In one particularly theatrical event, he even resigned from his position to the new Assembly (only to be immediately reappointed), thus highlighting the paramount, unitary power of the Assembly reflecting the "true" will of the people directly.

Less spectacularly but more significantly, the new Constituent Assembly helped Chávez to sideline and politically eliminate many of his political opponents, including those in state assemblies which were closed, by eroding the Congress, closing down the Supreme Court, and replacing many local leaders and trade union heads. "The result was a radically changed political landscape."[16]All countervailing powers were basically extinguished. Similar strategies of bringing about a new constitution to remove limits on the presidential powers were later applied in the region by presidents Rafael Correa in Ecuador (a new constitution of 2008) and Evo Morales in Bolivia (2009).

Constitutionalism by Stealth

But not all populist rulers have the luxury of bringing about a brand new, populist constitution. Rodrigo Duterte has made a constitutional change a core plank since he assumed the Presidency; it became known as "cha-cha" (for "charter change" – the Filipinos have a taste for fun abbreviations). Duterte, himself hailing from the southern island of Mindanao, and resentful of "Manila imperialism," has pushed for a shift from a central government to federalism, for relaxing constitutional provisions restricting foreign ownership in control in economy (which would pave the way for increased Chinese investment) and, not surprisingly, for changes to the term limits (Presidents have a six-year non-renewable term of office). Despite his repeated attempts, he failed to amend the 1987 post-Marcos constitution. Perhaps the main reason was a strong skepticism on the part of the electorate about any constitutional changes: this distrust has its roots in the Marcos era when the dictator used constitutional change to duck term limits.

So rather than changing the constitutional text, Duterte has relied on a friendly Supreme Court which engaged in creative constitutional interpretation to the benefit of the President, for instance by removing its Chief Justice Maria Lourdes Sereno in 2018, thus sidestepping the constitutional procedure of impeachment.[17] (More about it, in Chapter 4). Further, the President engaged in various acts of executive aggrandizement by introducing policies and

[15] See David Landau, "Abusive Constitutionalism," *University of California, Davis Law Review* 47 (2013), 189-260 at 206 n. 59

[16] Dixon and Landau, *Abusive Constitutional Borrowing,* p. 126.

[17] See Edcel John A. Ibarra, "The Philippine Supreme Court under Duterte: Reshaped, Unwilling to Annul, and Unable to Restrain," Social Science Research Council Democracy Papers (November 10, 2020), www.items.ssrc.org/democracy-papers/democratic-erosion/the-philippine-supreme-court-under-duterte-reshaped-unwilling-to-annul-and-unable-to-restrain.

laws which have been scandalous from a constitutional point of view, such as imposing an indefinite in time and open-ended in substance martial law across Mindanao (the southern-most island in the Philippines, with a predominantly Muslim population) in 2017, and unilaterally withdrawing from the International Criminal Court in 2019, without seeking the Senate's consent. The latter move he defended on the basis of the need to protect national sovereignty.[18]

In India, BJP nationalist populists inherited a strongly liberal-democratic, egalitarian, secular, even if almost impossibly lengthy Constitution. The Constitution entrenched a catalogue of judicially enforceable rights, a system of separation of powers with a strong and independent judiciary, and a quasi-federal structure for the territorial division of power, as well as various devices for accommodation for minorities. In many respects it was – and is – a formidable document. As constitutional scholar Gautam Bathia said, "the Constitution's underlying theme of liberal constitutionalism intended to limit state powers and alter the colonial culture of authority into a culture of justification."[19]

Prime Minister Narendra Modi has not felt at ease within this framework, and has done much to undo it, without making any formal constitutional amendment. As leading India scholar Tarunabh Khaitan says of Modi's actions which have been aimed at undermining executive branch accountability, "Many of these acts were not so much unconstitutional (although some clearly were), but constitutionally shameless."[20] "Constitutional shamelessness" is a nice, if disheartening, formula capturing approaches by populist authoritarians who lack power to formally replace a liberal-democratic Constitution.

In the case of Modi, constitutional transgressions have had two main forms. The first has consisted of assaults upon the Constitution's secularism and equal religious rights. A constant Hindu-Muslim tension had been contained, less or more effectively, by strong constitutional guarantees of religious tolerance and non-discrimination. This has been the traditional, post-independence constitutional model of Indian secularism: to inhibit religious conflict and violence, but also to reform and contain Hinduism as the dominant religion, in order to protect fundamental rights and advance equality.[21] The model has not prevented multiple riots (including those following the provocative destruction by Hindu nationalists of the Babri Masjid in Ayodhya in 1992) and a large number of victims (mainly Muslims), but nevertheless the quasi-constant attitude of all ruling parties prior to the BJP has been to calm communal tempers and fall back on secularism as a constitutionally mandated response, with no clear privileges for the Hindu majority (four-fifths of the population). This model of secularism has permeated different state institutions and procedures, including not only the Supreme Court, but also the electoral process which contained prohibitions on appeals to

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[18] See Richard Javad Heydarian, "Subaltern Populism: Dutertismo and the War on Constitutional Democracy", in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds.), *Anti-Constitutional Populism* (in press). *[Part 4].

[19] Sandeep Suresh, "Gautam Bhatia. The Transformative Constitution: A Radical Biography in Nine Acts," *International Journal of Constitutional Law* 18/2 (2020), 668-672 at 668.

[20] Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India," *Law and Ethics of Human Rights,* 14 (2020), 49-95 at 93.

[21] See Manoj Mate, "Constitutional Erosion and the Challenge to Secular Democracy in India," in Mark Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018), pp. 377-94 at 381.

religion by candidates and parties in elections. But this has all radically changed under Modi's leadership, with his BJP government promoting an anti-secular Hindu nationalist agenda. Islam came to be identified with Pakistan and patriotism with Hinduism.[22] This nationalist approach was implemented through law, including the anti-Muslim citizenship act of December 2019, which offered amnesty to illegal migrants from neighboring countries. The law offered a pathway to Indian citizenship for members of six religious groups, including Hindus, Sikhs, Buddhists etc., but with the conspicuous absence of Islam. It was the first time in independent India that citizenship was granted or denied on religious grounds, and it constituted a case of express religious discrimination. It specifically violates Art. 5 of the Constitution which proclaims *ius soli* (citizenship establishes at birth) as the only criterion for conferring citizenship. As the sociologist, Niraja Gopal Jaya, said, the law holds the "potential of transforming India into a majoritarian polity with gradations of citizenship rights."[23] The Supreme Court failed to uphold a challenge to the law, which many constitutional lawyers and judges of lower courts regard as clearly unconstitutional.

The second departure from the Constitution has been through aggrandizement of the executive powers and weakening of most devices that disperse powers. It is true that assaults on India's Constitution have been facilitated by various flaws in the constitutional text itself.[24] The Constitution imported a British-style Westminster system into India, but without certain customary restrictions on the power of the parliamentary majority, for instance without adequately protecting opposition rights. Modi has exploited these flaws by moving in the direction of granting full supremacy to the executive branch, for instance by using the procedure for "money bills" (which do not require scrutiny by the upper chamber) to pass all sorts of legislation, contrary to the original purpose of such acts which is only to clear government expenses. Matters such as the reform of existing tribunals, and more specifically, a 2017 law which shifted the authority to appoint the heads of the tribunals to the central government, have been decided in a shortcut way as "money bills." In addition, the "vertical" separation of powers, which takes the form of a quasi-federal system of government, has been decisively deformed to the detriment of states. This has been achieved through tax law – by reducing tax powers of state governments – as well as by revoking the autonomy of Jammu and Kashmir (a matter further discussed in Chapter 4). This last step basically showed that the central government can make "an Indian state extinct without consulting the elected representatives of its people."[25]

This all vindicates Khaitan's assessment that the BJP government has been "constitutionally shameless." Partly by violating the constitution outright, partly by departing from its spirit and the established precedents, and by ruthlessly exploiting its flaws, Modi has moved Indian constitutionalism in a Hindu-oriented, centralized direction, eroding the efficacy of veto points at the central level as well as federalism. This is evidenced by the "Kashmir lex" and

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[22] Swaminathan S. Anklesaria Aiyar, "Despite Modi, India Has Not Yet Become a Hindu Authoritarian State," Policy Analysis No. 903, The Cato Institute (Washington DC, November 24, 2020), www.jstor.org/stable/resrep28731, p. 8.
[23] BBC, "Citizenship Amendment Bill: India's new 'anti-Muslim' law explained", BBC (11 December 2019), www.bbc.com/news/world-asia-india-50670393.
[24] See Khaitan, "Killing a Constitution with a Thousand Cuts," 93.
[25] Madhav Khosla and Milan Vaishnav, "The Three Faces of the Indian State," *Journal of Democracy,* 32/ 1 (2021), 111-125 at 118.

strong fiscal centralization.[26] In the process, it has undermined the many rights guarantees for which the Indian constitution was deservedly praised.

Similarly to India, Polish ruling populists have not had the luxury that Hungarian and Venezuelan rulers had, and have been unable to change the Constitution. When they came to power in 2015 – with a bare legislative majority, insufficient for a constitutional change – the populists did not have any constitutional drafts in their drawers. An older one, from 2010, had been all but forgotten, but if one were to retrieve it, one would be shocked how centralizing, pro-religious and reticent on individual rights it was.

During the post-2015 populist rule, President Andrzej Duda at a certain stage tried to initiate a debate about constitutional referendum. It was his desperate attempt to find a role for himself, having otherwise been relegated to a hapless rubber-stamp of his party's (PiS) initiatives. But the presidential initiative was a spectacular non-starter. Not only was it ignored by his own party (a deliberate snub by party leader Jarosław Kaczyński), but more importantly, in a polarized Polish society it was obvious to everyone that no draft generated by PiS would be endorsed by PiS opponents and thus win the required constitutional support of a supermajority. Duda's proposals ranged from symbolic-sycophantic (highlighting the role of Christianity), redundant (the protection of labor and of pregnant women), silly (the supremacy of Polish law over that of EU) to harmful (the constitutional entrenchment of current levels of welfare payments). Mercifully, public opinion forgot about this ill-considered initiative as soon as the ruling party confined it to the dustbin. So all in all, the populist regime in Poland has operated in a formally unchanged constitutional context. The 1997 Constitution – by and large liberal, pro-human rights, consensus-based – has been in force throughout the populist rule.

Rather than governing under a new "abusive constitution," Polish rulers abused the existing one. The 1997 Constitution has acquired its value based on an old joke from the Communist times: "Why is our Constitution so valuable? Because it has not been used." While they could not change the (capital-C) Constitution, they have changed the (lower-case) constitution – understood as the rules that govern the political game.

As I have evidenced elsewhere at length, the Polish Constitution has been routinely violated in a number of ways since 2015.[27] The takeover of the Constitutional Tribunal through a complex process of court-packing is one arena in which breaches of the Constitution have been committed, as I shall describe in some detail in Chapter 4. The parliamentary resolution undoing the formal election of judges, the President's refusal to take an oath of office from those judges, the government's refusal to publish Tribunal judgments it did not like – these are just a few steps that led to the dismantling of the Tribunal through utterly unconstitutional means, and that have importantly changed the constitutional structure. Further, the regime has "amended" the Constitution through simple statutes adopted quickly by a simple majority: it has fundamentally altered the method of selection to the National Council of the Judiciary (KRS), established a new Media Board by statute which overshadows the constitutional body, the Council for Radio and TV, and has adopted a statute lowering the retirement age for Chief Justice, despite her constitutional term of office.

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[26] See Chanchal Kumar Sharma and Wilfried Swenden, "Modi-fying Indian federalism? Centre-State Relations under Modi's tenure as Prime Minister," *Indian Politics and Policy,* 1/1 (2018), 51-81 at 55.
[27] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

The process of "amending" the constitution by fiat and simple statutes rather than by constitutional amendments is the main difference between Kaczyński's Poland and Orbán's Hungary. What Kaczyński occasioned by statutes, Orbán brought about by a brand-new Constitution followed by a number of constitutional amendments. One may wonder which of these two situations is worse—worse, that is, from the point of view of the standards of liberal constitutionalism. On the one hand, one may claim that the Hungarian style of illiberalism via constitutional changes is *more* damaging in the long term because illiberal changes are being entrenched well into the future; thus a future non-Fidesz government may lack a constitutional majority and be straitjacketed in its conduct by the illiberal Fundamental Law of Hungary. On the other hand, one may speculate that constitutional amendments via statutes and simple breaches of the constitution, Polish-style, are more destructive of the principles of constitutionalism and the rule of law. In Hungary, the disempowerment of the Constitutional Court was accomplished in accordance with the law; in Poland, it was more a demolition job than the restructuring of an institution, fully disregarding constitutional provisions.

Parchment Barriers

The Polish case is a good starting point for considering how resilient a constitution may be against politicians orchestrating backsliding towards authoritarianism. Suppose you have a reasonably good constitution, which provides for a fair balance between different institutions, good protection of individual rights, safeguards for judicial independence etc. How can you make sure that the constitution will deter authoritarians from dismantling these achievements? Or, more realistically, that the constitution will *slow down* the backsliding? Poland has had a reasonably good, liberal constitution since 1997 and yet it was incapable of preventing populist backsliding. So has India.

The main reason why it is difficult to consider the impact of non-resilient constitutional design on the rise of populism in Poland or in India is that, as already shown, PiS and BJP continued to govern through multiple *breaches* of the constitution. When a constitution is violated with seeming impunity, it is difficult to blame the constitution itself for the capacity of rulers to overcome constitutional checks and balances. Speculation about alternative designs that may arguably be thought to be more capable of withstanding the populist rise is just that, speculation, simply because the constitution itself is breached. For how do we know that a smarter constitutional design would not have been as easily discarded by determined authoritarians? The simple answer is, we do not know. This sort of counterfactual is simply impossible to support with a good argument.

But what we do know is that no constitution is *absolutely* resilient. To what extent constitutional design can make a difference in protecting a system against an authoritarian threat, especially when that threat comes from elected populists who enjoy a sizeable public support, is a matter that is fundamentally context dependent. Much depends on the course of action taken by the elected rulers themselves. If they feel free to break constitutional rules and customs whenever they find them inconvenient, not much can be done by designing checks on the political branches.

As Aziz Huq and Tom Ginsburg say in relation to the United States:

> The decisions of party leaders and activists on both sides to prioritize the continuance of democracy as an ongoing concern, and their willingness to allow transient policy triumphs to offset concerns about antidemocratic behavior, will be of dispositive

> importance… Constitutions are, after all, just pieces of paper that take their force from the intersubjective understandings of elites and citizens.[28]

But the human factor is all the more significant in new, transitional democracies, where there has simply been less time for people to have had the opportunity to become convinced about the advantages of democracy. Democracy is stable when its citizens believe that it is "the only game in town" and that nondemocratic alternatives are illegitimate.[29] The *newness* of institutions works against the resilience of the constitution because there is simply an insufficient reservoir of customs, conventions, established patterns of conduct, and collective memory as to the proper way of acting within these institutions.

This is not to suggest that the shape and design of institutions do not matter: there are ways of promoting and ways of minimizing the need for interparty dialogue and compromise through institutional design. In the United States, various devices of checks and balances – federalism, bicameralism, presidential veto, robust judicial review etc – mean that the leaders in power have to compromise with politicians of persuasions other than their own. These and other factors of institutional design constitute jointly what Samuel Issacharoff calls "the structural dimensions of democratic stability."[30] Rosalind Dixon and David Landau offer important advice to constitutional designers aimed at making constitutions more robust against the possible future capture of constitutional institutions.[31] Three such techniques, the authors suggest, are (1) tiering (some constitutional provisions are less easily amendable, and hence more entrenched), (2) sequencing (amendments of core provisions take longer to carry out, hence "creating speed bumps that can slow authoritarian projects,")[32] and (3) splitting (i.e. the fragmentation of authority over appointments, including to courts).

There is no doubt that smart constitutional design may increase the costs of constitutional breaches by the authoritarian leaders, but it will not eliminate such breaches. For instance, a system of electing/appointing constitutional court judges may make it easier or more difficult to capture the court. The Polish and Hungarian system is bad, from this point of view, because the parliamentary majority can appoint judges to all vacancies that open up during the parliamentary term. In a "winner takes all" system, the compromise-oriented election of judges depends largely on the political culture and goodwill of the ruling party or parties rather than being compelled by an institution. Germany has a very similar model for the election of constitutional judges but a degree of cultural consensus about the process has prevented an outright capture by the ruling party or coalition. In Poland or Hungary, a different system for the election of those judges (for instance, as in many countries, splitting appointments to the court between different top institutions) would have made it more difficult for local authoritarians to quickly pack the court with party loyalists. But it would not prevent it: those other institutions charged with appointing judges (the President, the judiciary council, etc.) could have been captured first. And if they did *not* appoint the "right" judges, their decisions may be struck down, misrepresented or wrongly reported by the executive. It is all a matter of political costs – not of the physical impossibility of a capture.

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[28] Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review,* 65 (2018), 78-169 at 167.
[29] Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies,", *Journal of Democracy,* 7/2 (1996), 14-33.
[30] Samuel Issacharoff, *Fragile Democracies* (Cambridge University Press, 2015), p. 22.
[31] Dixon and Landau, *Abusive Constitutional Borrowing,* p. 179.
[32] Ibid., p. 179.

To quote Huq and Ginsburg again, "[C]onstitutional enforcement requires the kind of intersubjective agreement on violations that is difficult to obtain, especially under mutative and precarious political conditions."[33] The test for the resilience of constitutions is whether powerful officials back down when institutions in charge of enforcing a constitution issue decisions those officials dislike or even abhor, as was the case of President Richard Nixon having to hand over audiotapes in connection with the Watergate scandal as ordered by the Supreme Court. So ultimately it is a matter of culture and ethics. When these are missing or uncongenial, even the best-designed constitutional institutions are rendered hollow. By contrast, when they are strongly ingrained in the professionals staffing various institutions – in parliaments, the public service and courts – they are likely to prevail over determined and resolute populists. Consider this hypothetical a US legal scholar posed about a possible attack by President Trump on freedom of speech and the press in order to silence his critics:

> A frontal assault on the [Supreme] Court's First Amendment jurisprudence would fail for the time being. Justices on the left and right are committed to strong protections for political speech; Trump would need to replace at least five of them, securing the Senate's consent in each case, and *it would be hard, perhaps impossible, for him to find even a single qualified, mainstream jurist* who would supply the vote he needs.[34]

The confidence with which Eric Posner makes this assessment seems justified, but a similarly confident judgment could not have been made with respect to Poland or Hungary or the Philippines when the ruling elites went after the top courts. They *did* find a sufficient number of jurists who were willing to occupy high judicial positions. On the positive side, there was a strong sense of opprobrium targeted against those individuals. On the negative side, it was not strong enough to prevent these lawyers from volunteering or accepting these positions and, in the process, actively participating in the dismantlement of the rule of law.

Reading the Constitution between the Lines

Authoritarian populists behave as if all there is to a constitution is the constitutional text. Theirs is literal democracy, not liberal democracy.

When Polish President Andrzej Duda granted in 2017 a pardon to PiS politicians who had been sentenced in a non-final judgment for abuse of office,[35] he may have used his text-based constitutional power of pardon correctly (the text does not expressly qualify this right in any way). However, he breached an unwritten norm which states that a pardon is a means of last resort which can be applied only to those sentenced in *final* judgments. To think otherwise – i.e. to allow presidential pardon at *any* stage of the judicial trial – would bring the chief executive right into the centre of judicial proceedings and make him or her a super-judge, thus fundamentally breaching the very essence of the separation of powers. And, come to think of it, it does not make sense: a person not yet sentenced in a final judgment must be considered innocent, and how can you pardon a legally innocent person?

When the Polish ruling party PiS brought about a law with respect to the body for appointing judges, the National Council of the Judiciary (KRS), which transferred the power to elect

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[33] Huq and Ginsburg, "How to Lose a Constitutional Democracy," 168.
[34] Eric A. Posner, "The Dictator's Handbook, US Edition," in Cass R. Sunstein (ed.), *Can It Happen Here? Authoritarianism in America* (New York: HarpersCollins, 2018), pp. 1-18 at 3, emphasis added.
[35] For an account, see Sadurski *Poland's Constitutional Breakdown,* pp. 80-81 and 253-54.

KRS judicial members from the judges to the parliament, it may have been legally correct – the Constitution does not explicitly say that these members are elected *by* judges, only that they must *be* judges – but the law breached an unwritten norm taken for granted from the beginning of the post-communist history of Poland up to 2015. It had been ordained in a founding constitutive document of post-communist Poland, i.e., in the agreements of the Round Table of 1989.[36] It is also a generally recognised European standard with which Poland, as member of the Council of Europe and of the European Union, has an obligation to comply, whether it is textually stated in its Constitution or not. It also has the advantage of making sense: these judges are meant to be representatives of all judges, and the KRS representatives should be elected by those whom they represent.

When the government of India brings about various non-budget related statutory changes via "money bills," thus avoiding a cumbersome legislative path and eliminating scrutiny by a higher chamber, it strictly speaking may have be seen to remain within the four corners of the constitutional text which does not provide a clear definition of what exactly "money bills" concern. But when the Modi government introduced the controversial "Aadhaar project" in 2016, which sought to create a national, centralized biometric identification system for the whole country, its constitutionality was more than dubious.[37] How can a citizens' identification system be viewed as the proper subject-matter of a "money bill"? But its unconstitutionality was not a matter of text but of interpretation which is based on the *purposes* of having a particular procedure – in this case, a money bill – in the first place. The purpose is unwritten – as they usually are.

This, incidentally, is a trick many authoritarian populists use. In Poland, some of the populist government's most important pet projects after 2015 have been introduced as private members' bills, even though they were very much prepared by the government. (In 2016, the first full year of the PiS majority, over 40 percent of all PiS legislative proposals were presented as private members' bills even though they had been mostly prepared by the relevant ministers; the proportion in the previous years sat around 15 percent. And substantively, those bills applied to some of the most important legal changes, such as the law on common courts and the Supreme Court).[38] The reason is simple: private member bills allow the lawmaker to sidestep various procedural requirements of compulsory audits, public hearings, expert opinions etc. So if the government wants to fast-track its legislative proposal and immunize it from pre-enactment control, it can always use the ruling party's MPs to sign on to it as their bill. Of course, it is disingenuous, dishonest, and contrary to the norm of proper legislation. But where is there a black-letter provision which prohibits such practices?

Each of these norms was unwritten but considered clear and peremptory – until populists took power and breached them, pretending they did not exist. This uses the law against itself: acting within the literal meaning of the rules but disregarding the norms which are necessary in order to accomplish the original purposes for specific legal provisions. And this is characteristic of today's authoritarians' uses of law. As Martin Krygier notes, "Many illiberal regimes have aspired to use law for their purposes, but without submitting themselves to it in any ways that matter to them, at any event at times that matter to them. Here a regime might promote law and even fidelity (of officials and citizens) to law, but there are strict limits."[39]

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[36] On the constitutional significance of 1989 Round Table compromise, see ibid., pp. 36-9.
[37] Khosla and Vaishnav, "The Three Faces of the Indian State," 115.
[38] See Sadurski, *Poland's Constitutional Breakdown*, p. 133.
[39] Martin Krygier "The Spirit of Constitutionalism," in Jakub Urbanik and Adam Bodnar (eds.), *Περιμένοντας τους Βαρβάρους. Law in the Days of Constitutional Crisis. Studies offered to Mirosław Wyrzykowski (*Warsaw: C.H. Beck, 2021), pp. 343-58 at 351.

Those limits arise out of the authoritarian focus on the *letter* and disregard for the *spirit* of constitutions.

Populists manipulate public opinion into believing that if a norm is unwritten then it is not binding, and not really a norm. This means that unwritten norms are usually the first victim of populist actions that often observe the written norms to the letter. But unwritten norms are equally, if not more, important. Consider the catalogue of examples of unwritten norms necessary for a democracy, provided by Anna Grzymala-Busse: "conflict of interest laws, financial transparency, respect for the opposition access and accountability to the media, and preventing party loyalty from becoming the basis for the awarding of tenders, contracts, and government responsibilities."[40] Yascha Mounk adds norms such as: the government does not change electoral rules shortly before the election in order to maximize its chance of winning, the incumbents losing in the elections do not restrict the powers of offices gained by their adversaries in the last moment of their rule, or "[t]he opposition confirms a competent judge whose ideology it dislikes rather than leaving a seat on the highest court in the land vacant."[41] Regardless of whether it is written into a law or not, there is obviously a norm that the top executive does not intervene in individual criminal investigations, especially those that involve him or his family.

The problem is that some of these norms are ascertained only in consequence of their *breach*; they become evident because of specific conduct which strikes us intuitively as highly improper. For often the norms become salient only when broken; as with health or plumbing, we know their importance in their failure. That is why the argument that populists would have been prevented from breaching them by making those rules *explicit* in the text in the first place, is so hypocritical. You cannot put everything into a constitutional text; you must rely on common sense and honesty in the text's interpretation, and in filling the gaps. In different countries the proportions between the written and the unwritten will be different, but there must always be something which remains unwritten, just as in love something remains unsaid. Articulating these unwritten norms may be controversial at times and some proposed meanings may be contested, but in a healthy democracy there is a degree of consensus on unwritten norms. What is required is not just knowledge of the norms, but also knowing that others know them, and that they will abide by them, and if they do not, they will know that they have violated them.

Often, unwritten norms have a suitably *moderating* effect upon written rules, and supplement them in ways that render written rules more constraining upon public officials than what a mere reading of the textual rule would suggest. Mark Tushnet gives an example of the Canadian system for choosing Supreme Court justices. The formal rule gives the Prime Minister complete discretion in making appointments, subject only to the proviso that three out of nine justices come from Quebec. However, Tushnet adds: "That formal system … is supplemented by extremely strong norms of deference to professional judgments about potential appointees' ability. The prime minister would act inappropriately, and suffer politically, by departing from these norms."[42] The same textual rule, adopted in another

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[40] Anna Grzymala-Busse, "Global Populisms and Their Impact," *Slavic Review*, 76 (2017) Suppl. S1, 3-8 at S6.
[41] Yascha Mounk, *The People vs Democracy* (Harvard University Press, 2018), p. 113.
[42] Mark Tushnet, "Comparing Right-Wing and Left-Wing Populism," in Mark Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) pp. 639-650 at 642.

country but without the accompanying unwritten norm, would be disastrous because there is little reason to think that elsewhere such informal norms would effectively constrain the top executive's choices.

In his important book, *America's Unwritten Constitution* (note the title!) Yale Law Professor Akhil Reed Amar urges: "we must read the Constitution as a whole – between the lines, so to speak."[43] This is a nice formula: reading the Constitution "as a whole" and "between the lines" demands that we must not read disparate passages and clauses in isolation from the document as a whole. This is a good passage (redacted, for brevity) in Amar's book, bringing together several conclusions from his case studies (including the composition of impeachment courts, the scope of congressional lawmaking power, the sweep of free-speech rights, etc): "On each topic, clause-bound literalism fails. Sometimes the key clause in isolation is simply indeterminate. … Other times, the most salient clause, in isolation, sends a rather misleading message. … On occasion the Constitution's true meaning is very nearly the opposite of what the applicable clause seems to say quite expressly."[44]

This means that we must inquire into the *reasons* for having a particular constitutional provision in the first place. To go back to the example of Poland's National Council of the Judiciary: the reason for providing a certain number of judges on the Council is to make sure that they *represent* judges. Hence, there is some discretion for a legislator to regulate the mode of appointment but only in a way which renders the representation meaningful. There may be other ways of filling these positions than by having all judges elect them (although I am not sure of better ways) but, by contrast, allowing members of parliament (hence, the majority party) to elect them is not one such way. The Constitution, if read "between the lines," precludes such a legislative choice.

Democratic unwritten norms are often *pre*-constitutional, not discernible even from a "holistic" reading of the Constitution "between the lines," but from the democratic culture underlying the system. Of course, there may be a legitimate disagreement about the exact meaning of such norms, but this is a different disagreement from the one that disputes whether such norms exist and are peremptory. For instance, there is a norm that democratic rulers do not push their legal competences to their limits, i.e., by testing their outer boundaries, or by constantly being on the verge of overreaching. Steven Levitsky and Daniel Ziblatt define this as a norm of "forbearance" which is "the idea that politicians should exercise restraint in deploying their institutional prerogatives."[45] There is also a norm that, no matter how harsh the words said during the electoral campaign, there is a sort of reconciliation after the election, which allows the governing majority and the opposition to work in the parliament towards a public good. But in the countries where populists win, usually the opposite happens. The chasm between the winners and the losers grows larger, and accusations against the opposition become harsher. Public insults devastate the public sphere and contribute to a growing public cynicism about politics – a toxic element in a democracy, as Chapter 5 will show.

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[43] Akhil Reed Amar, *America's Unwritten Constitution* (New York: Basic Books, 2012) p. 47.
[44] Ibid., p. 47.
[45] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing, 2018) pp. 8-9.