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Constitutional Politics and Populist Conservatism: The Contrasting Cases of Poland and Romania

Paul Blokker¹

Abstract

The constitution-making processes and trajectories of the East-Central European democracies have been more challenging than often supposed. Consolidation allegedly rests on the ‘liberal consensus’ that emerged after communism. This consensus has been much less robust and widespread than often believed and has increasingly been confronted with illiberal counter-forces. The article contributes to a critical discussion of constitution-making and constitutional politics in the context of the forceful (re-)emergence of conservative, populist forces in the region. The aim is to demonstrate that, first, constitutional politics in post-communist societies has involved significant, ‘post-consolidation’ forms of contestation throughout the post-1989 period. Second, the article shows that anti-liberal, conservative-populist positions have played substantial but rather variegated roles in different societies. In the most frequently discussed cases, conservative populist forces have mobilized to start an illiberal counter-revolution. In others, largely understudied, such a ‘revolution’ seems hardly in the making, even if political conflict is evident..

Keywords: Conservatism - Constitutional Politics – East-Central Europe - Poland- Polity - Populism – Romania.

Introduction

This article will discuss the relevance of anti-liberal ideas on the level of the polity. As the introduction to this special issue points out, anti-liberal ideas in post-communist societies play a role on the levels of polity, policy, and politics. I intend to show in this article that the polity level – that is, regarding the constitution-making processes and constitutional trajectories of the democratizing societies in East-Central Europe -has been more problematic than generally supposed (cf. Schmitter and Schneider 2004; Merkel 2011).² Constitutional politics has not necessarily supported strong democratic ‘consolidation’ (Elgie and Zielonka 2001; Gonenc 2002). The recent constitutional ‘coups’ in two countries that were understood to be the most robust democracies in the region – Hungary and Poland – indicate that the very nature of constitutional democracy has remained contestable. Consolidation has often been assumed to rest on a ‘liberal consensus’ that emerged after communism, which related to a diffused acceptance of liberal

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² In 2004, Schmitter and Schneider still confirmed ‘the relative success of the Central and Eastern European countries in both liberalization and consolidation. Not only did they achieve the same or an even higher level as earlier cases from Southern Europe and Latin America, but they also did so in a much shorter time... This suggests that the predictions that dominated the literature on these post-communist countries when they began their respective transitions in 1989–91 were excessively pessimistic...’ (Schmitter and Schneider 2004: 87).

norms of constitutionalism and the rule of law. This liberal consensus appears now much less robust and widespread than often believed (cf. Dawson and Hanley 2016) and has in particular in recent years been increasingly confronted with illiberal counter-forces.

The paper contributes to a critical discussion of constitution-making and constitutional politics in the context of the forceful (re-)emergence of conservative, populist forces in the region. The aim is to demonstrate that, first, conflict over the polity or constitutional dimension has been an intrinsic part of democratization processes, also in consolidated contexts.³ Second, the paper will show that conservative-populist positions have played significant roles in post-communist transformations, but in diverse ways. In some cases, conservative populist forces mobilize to start a veritable illiberal counterrevolution, in others, in contrast, such a ‘revolution’ seems not in the making, even if structural political conflict on the basis of anti-liberal positions is evident.

The paper discusses two – contrasting – cases of constitution-making and constitutional politics, Poland and Romania, moderately following a comparative logic of ‘most diverse’ cases. Both Poland and Romania are post-communist societies and in a broad sense followed similar trajectories of democratization and European integration. Within the ‘universe’ of post-communist countries, nevertheless, they have been in many ways opposites. As argued by Alina Mungiu-Pippidi, ‘two different patterns emerged in post-1989 Poland and Romania in terms of freedoms and rights’ (Mungiu-Pippidi 2004: 384). Poland has been from the early 1990s a frontrunner in terms of both democratic and economic success (Gwiazda 2015). Poland was further a pioneer in its development of dissidence and civil society forces, hosting the most sizeable dissident movement in East-Central Europe (and hence showing significant democratic potential before 1989). Post-1989 constitutional politics in Poland followed a gradual approach in that the changes were of a negotiated kind, which also led to a spun-out and slow process of adopting a new constitution. The Polish case displayed a ‘liberal consensus’ in the 1990s, leading to the adoption of the 1997 Constitution (Pakulski 2016). Since 2015, however, it faces a strong and open backlash in the direction of illiberalism if not authoritarianism (cf. Sadurksi 2019; Skąpska 2019; Wigura and Kuisz 2020). Poland is currently experiencing a formidable ‘counter-constitutional revolution’, executed by the conservative-populist regime of the Law and Justice (PiS) party (Bill and Stanley 2020), equally importantly sustained by conservative civil society (Piotrowski 2020).

³ In the definition of Linz and Stepan, ‘*Constitutionally*, a democratic regime is consolidated when governmental and nongovernmental forces alike become subject to, and habituated to, the resolution of conflict within the bounds of the specific laws, procedures, and institutions sanctioned by the new democratic process’ (Linz and Stepan 1996: 16; emphasis in original). Linz and Stepan admit that a breakdown is possible, but argue that this may happen due to *new* factors or a new dynamic. My argument is that the illiberal, conservative thrust is a new phenomenon neither in Poland nor in Hungary, but has been part and parcel of the democratization process.

In stark contrast to Poland, Romania was regarded as a ‘laggard’ in the 1990s (Shafir 2008; Smrčková 2012; Petrescu 2019) and started the transition process with in an economically and politically destitute situation. The changes were of the most radical, even revolutionary kind in the region, but resulted paradoxically in the domination of a new party, with deep roots in the old regime, which managed to dominate a swift constitution-making process. Romania did not experience a significant, collective dissident movement prior to 1989, even if mass protests in December 1989 were at the basis of the revolutionary changes, and its democratic regime has remained problematic ever since. In contrast to Poland, and despite its cumbersome democratic development, Romania has until now not experienced a dramatic counter-constitutional revolution along conservative-populist lines. An extensive liberal consensus arguably never developed and Romania’s transition and process of constitution-making were dominated by a widespread conservatism, in particular a form of ‘leftwing conservatism’ of the ruling Partidul Democrației Sociale în România (Social Democratic Party of Romania, (PDSR). As Mihaela Miroiu argues, ‘[i]n Romania after the fall of communism, left-wing conservatism has become the ideology with the largest mass support’ (2004: 217). Where in Poland conservative populism emerged as threatening, external factor to the formal institutions of liberal democracy, in Romania conservative populism played a dominant role in instituting democracy from the start. In the populist democratic context of Romania, constitutional conflict in Romania has been largely the result of inter-institutional frictions between the President and government, but now comprehensive counterproject has emerged so far.

The article’s main objective is twofold. First, the article discusses the complex relation between the idea of consolidated democracy, on one hand, and the role of constitutional politics and conflict, on the other. In this, the notion of a ‘liberal consensus’ is critically discussed, in particular in relation to contestation over the fundamental rules of the polity. Second, the article investigates the role of anti-liberalism and conservatism in constitutional politics, prominent in both Poland and Romania, but in very different ways.

2. Consolidation, liberal consensus, and constitutional politics

In the period of accession of the post-communist countries to the EU, a general viewpoint was that the stage of consolidated democracy, which includes a constitutional framework and judicial independence (Schmitter and Schneider 2004; Linz and Stepan 1996; Morlino and Sadurski 2010; Merkel 2011), was reached. A problematic dimension of the notion of consolidation is that it assumes that conflict over the rules of the game (or constitutional framework) become marginal once a democracy is consolidated.⁵ The paper draws attention to a

⁵ Linz and Stepan argue that ‘[c]onstitutionally, democracy becomes the only game in town when all the actors in the polity become habituated to the fact that political conflict will be resolved according to the established norms and that violations of these norms are likely to be both ineffective and costly’ (1996: 5).

potential bias in the consolidation and democratization literature, that is, an excessive focus on institutional dimensions (such as the adoption of a constitution or the creation of a constitutional court), with strong assumptions in terms of institutional effects on political and legal culture, without, however, taking into adequate account what one could refer to as the ‘circumstances of politics’, that is, continuing (deep) disagreement about fundamental norms and the key rules of politics, and the fragile nature of democratic systems (cf. Eisenstadt 1998).

The questioning of the legitimacy of constitutional democracy and its origins has, in fact, not disappeared in all post-communist societies. Significant conflict over the transition as well as over the imagination of the political community and form of polity have persevered in some societies in the region. Some countries have in recent years importantly changed their constitutional arrangements (Hungary) or violated existing arrangements (Poland), while others, even while experiencing constitutional conflict, have not done so (e.g. Romania). An important part of our focus ought hence to be on the polity level, analyzed here in the role of constitutional politics and conflict (De Raadt 2009), and on how so-called backsliding might be related to longer-standing conflict over the processes of transformation, democratization, and constitutionalization. The question of the legitimacy of the constitution and its ability to mobilize, coordinate, and direct power is central (cf. Klug 2017: 67).

In order to analyze conflict on the polity level, the paper argues that four dimensions – derived from prominent literature in the field (Arato 2000; 2016; Brier 2006; De Raadt 2009; Hein 2011; Patberg 2020; Přibáň 2007) - are of particular importance. First, constitutions and processes of constitution-making are in a complex manner endorsing (or lacking in) different forms of legitimacy. The analysis of the latter may reveal forms of strength and fragility in democratic orders. Second, conflict over fundamental rules of the polity remains a possibility in democratic regimes. Such conflict is, however, expressed in different manners, including in more institutionally or instrumentally focussed forms or by means of more substantive, identity or value-based manifestations. Third, contestation of fundamental rules and polity dimensions includes both constituent and destituent forms of power, which are also relevant in conservative counterprojects. Fourth, while the narrative of a ‘liberal consensus’ presupposes a singular, liberal form of constitutionalism, a more critical analysis ought to take the role of ‘competing constitutionalisms’, that is, qualitatively different understandings of constitutionalism, into account.

The first dimension, *legitimacy*, is a core dimension of constitution-making processes (cf. Arato 2000; De Raadt 2009). Legitimacy comes however in different forms, and constitutional politics involve different types, not least depending on the way in which constitution-making processes unfold. One particularly significant form is that of *revolutionary legitimacy*, that is, when an unjust, authoritarian regime is replaced by a new legal order. Such legitimacy has been relatively less available in the post-communist trajectories, as many of the processes did not involve a clear rupture with the past, but rather involved negotiated transitions and

important forms of legal continuity. Such ‘legal revolutions’ also tend to portray a lack of *political* or *democratic legitimacy*, due to the largely elitist nature of negotiations, involving actors with few democratic credentials (cf. Arato 2000), and remaining hence vulnerable to a critique of elitism, lack of representativeness and intransparent political deal-making. A further dimension is *procedural* or *process legitimacy*, that is, the legitimacy derived from the manner in which the process of constitution-making is designed and the extent to which the process follows pre-established rules. A final dimension regards *sociological legitimacy*, that is, to what extent constitutions coincide with prevalent views held in society.

The second dimension of *constitutional conflict* diversifies between to two different manifestations of constitutional conflict, one relating to inter-institutional relations (between, e.g., presidents and governments, or between courts and political institutions) (cf. Hein 2011), the other regarding the constitutional identity, values, and substance of the constitutional order. Whereas the former largely touches upon the relation between, and distinction of, law and politics, and hence involves instrumental and regulatory dimensions of constitutions (cf. Blokker 2012; Přibáň2005), the latter relates to the polity, and regards fundamental principles, value-based or symbolic, substantial, and ideational dimensions of constitutions.

The third dimension relates to the central idea of modern constitutionalism, that is, *constituent power*. In its most radical understanding, a revolutionary one, constituent power is understood as a founding act of the people, engaging in founding the polity anew. But also in constituted and allegedly ‘consolidated’ systems, constituent power remains relevant. It is clearly part of processes of revision of the constitution, but can also express itself in more comprehensive fashion (when the old constitutional order is replaced, as in Hungary). In addition, constituent power may manifest itself predominantly in its negative, critical form. In such negative, destituent forms, constituent power regards the contestation and even the destitution of already existing constituted powers (Möller 2018: 18). Destituent power expresses a strong critique of existing constitutional institutions, without formally replacing such institutions. The latter might be related to the events in Poland since 2015. In this case, destituent power is manifest in a strong critique of the existing liberal-constitutional institutions, and in the reform of such institutions on the ground (for instance, by means of court-packing), without formally changing the constitutional rules as such. In this specific context, destituent power is related to what Richard Albert has called ‘constitutional dismemberment’ (Albert 2018), that is, the usage of legal and constitutional instruments to significantly change the liberal-constitutional order. Albert defines constitutional dismemberment as ‘self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations (Albert 2018: 2-3).

A fourth aspect regards competing understandings of constitutionalism or *competing constitutionalisms*. A significant dimension of constitutional politics in post-communist societies consists in a meta-conflict over the nature and substance

of constitutions. Indeed, one could depict the democratization trajectories as struggles over interpretations of constitutionalism, as does Emilia Kowalewska in her concept of ‘competing constitutionalisms’ (Kowalewska 2020; cf. Blokker 2010). The meta-conflict regards distinctive procedural, regulatory, and institutional dimensions (not least with regard to core institutions of liberal democracy, such as the Constitutional Tribunal and the Supreme Court), but equally regards the symbolic and value-based dimensions of definitions of the political community, commonality, and identity. In this regard, contestation is about the constitution as a symbol (which in itself comprises instrumental and value-based dimensions and their specific relations and interactions).

3. Constitutional politics and conflict in Poland and Romania

The two cases discussed below – Poland and Romania - are of great significance and relevance for a discussion of constitutional conflict and the emergence of conservative, illiberal forces in post-communist societies. I will discuss both cases with the help of the four analytical dimensions introduced in section 2. The post-communist trajectories of the two countries are highly different. As Arato has argued in more general terms, ‘Bulgaria and Romania have been commonly seen as representing almost the *diametrical opposite* of constitutional development in Poland and Hungary with their evolutionary, piecemeal, flexible patterns of development’ (Arato 2000: 159; emphasis added; Mungiu-Pippidi 2004). Comparing Romania and Poland helps us to identify significantly different patterns. In the case of Poland, this involves a major backlash against the original liberal-constitutional development, whereas in Romania, the liberal-constitutional pattern has been never dramatically strong, but in current times no polity-threatening backlash can be detected either.

3.1 Poland

Poland, just as Hungary, was widely considered a front-runner in the process of democratization, not least due to prominent manifestations of dissidence before 1989, but also due to a relatively rapid democratic consolidation after 1989. Even if Poland was considered a consolidated liberal democracy early on, the contested nature of the liberal-democratic system has remained a prominent factor. A problematic legitimacy can be even traced back to the negotiated transition and Roundtable approach. The Polish Roundtable agreements (1989) suffered from a lack of *political legitimacy*, due to the presence of non-democratic forces, but also due to the participation of societal (dissident) forces that could claim only limited representativeness and hence democratic legitimacy (Arato 2000). Significant legitimacy demands were hence placed upon the subsequent constitution-making process, which evolved between 1994-97.

3.1.1 Constitutional politics

The constitution-making process in Poland evolved slowly, initially consisting in the usage of the existing amendment rule, but, due to the lack of the democratic

legitimacy of the Roundtable agreement as well as the Sejm (the parliament was still containing a majority of communist members), the need for a new constitution became evident immediately (Arato 2000: 155-6). Various competing proposals were put forward, pitting the Sejm against the Senate. In particular growing rivalries within (the rapidly fragmenting) *Solidarność* camp prevented the quick adoption of a new constitution. Instead, a pragmatic and transitional ‘Small Constitution’ was adopted, which provided the political ground rules for the new democracy (Sadurski 2019: 40-1). Only by 1997, the parliamentary forces from the left and centre-left managed to adopt a new constitution. The 1997 Constitution was the outcome of a constitution-making process that had been, however, highly conflictive and contested, involving conflict over meta-political dimensions and the deeper values of the constitution in veritable ‘cultural wars’ (Spiewak 1997; Wyrzykowski 1999).

In the constitution-making process, competing understandings of the constitution clashed. Value-based conflict revealed stark contrasts between liberal and conservative understandings (Brier 2006). The process was formally completed with an adoption of the constitution by parliament and a subsequent confirmatory popular referendum, bestowing further democratic legitimacy on the document. As a matter of fact, however, constitutional conflict is continuing until this day, marking the lack of closure of ‘meta-political’ questions (Bill and Stanley 2020). The Polish constitution-making process in the 1990s was ‘incredibly prolonged and torturous’ (Sanford 2002: 79). The difficulties existed in the lack of consensus between significant political groups about the constitution’s contents (in relation to such matters as religion and human rights) as well as about the overall role and standing of the Constitution (as constituting a deep rupture with the preceding order or as a negotiated compromise).

The belated adoption of the 1997 Constitution can therefore hardly be understood as a ‘constitutional moment’ in the sense of the creation of a widely shared and uncontested constitutional framework for Polish democracy. In the mid-1990s, the constitutional draft was heavily contested by conservative forces, who did not participate in its formulation and had put forward an alternative constitutional text (Brier 2006; Kowalewska 2020). The right-wing coalition Electoral Action Solidarity (AWS) mobilized a range of small rightwing parties against the existing left-liberal constitutional coalition and the ‘prospect that Poland’s new constitution would be adopted by a parliament dominated by the SLD [the post-communists]’ (Brier 2006: 9). Robert Brier has argued that the ‘framing process was accompanied by an extraordinarily bitter and aggressive dispute. Especially when this process reached its decisive stage between 1993 and 1997, the constitutional issue polarized Poland’s political scene in an ever more ferocious debate’ (Brier 2006: 7). As Brier recalls, at the time of the finalization of the draft of the formal constitution, a ‘reporter of one of the country’s leading daily newspapers [*Rzeczpospolita*] saw the political scene characterized by “a complete bipolarity” and

one side [the Social-Democrats, SLD] unanimously convinces the citizens that this constitution is the best that could happen to us because otherwise we would be left

with the Stalinist constitution from 1952. The other [the AWS], however, calls the constitutional compromise national treason [*targowica*] and perceives the constitution as a threat to our social life and national identity (Brier 2006: 9).

Many of the arguments made by the current populist government of Law and Justice (PiS) (2015-) were already part of the highly polarized discussions in the 1990s, between post-communists and left-liberals on the one hand, and the centre-right conservatives, gathered in AWS,⁶ on the other. Marian Krzaklewski, leader of AWS, strongly argued against the draft constitution as violating the convictions of larger part of society (Brier 2009: 63, 65). The contested nature was made explicit by the fact that the formal constitution-making procedure, producing a formal parliamentary draft largely promoting a liberal-democratic position, was paralleled by a grass-roots, civil society-created ‘Citizens’ Draft’ (*Obywatelski Projekt Konstytucji Solidarności*), produced by the conservative forces, later gathered in the forementioned AWS. The latter united a range of conservative forces coming from the right wing of the 1980s Solidarność movement.

The conservative constitutional counter-project that resulted in the ‘Citizens’ Draft’ had been formulated in different versions already early on in the transition. The ‘Social Constitutional Commission’ (*Spoleczna Komisja Konstytucyjna*) worked on a draft parallel to the official parliamentary one in the early 1990s (Kowalewska 2020: 916-17; Hałas 2005). A key figure was the forementioned conservative politician and chairman of Solidarność, Krzaklewski⁷, who coordinated the alternative constitutional initiative as president of the Social Constitutional Commission. The Commission devised a separate draft as early as 1993, which was to reflect the ‘values and ideas of the 35 per cent of the population, which was excluded from the official “constitutional coalition” ’ (Herold and Wandan 2014: 273).

A core argument of the conservative forces was that the parliamentary draft lacked in democratic legitimacy and failed to reflect wider societal values. Krzaklewski argued that the constitutional text could not be ‘accidental, it cannot reflect momentary [*bieżących*] political agreements, it has to be the permanent work of the nation. The constitution has to be based on a moral and ethical foundation, on a clear vision of the human person and of society’ (cited in: Brier 2006: 114). 2006: 126). In contrast, the alternative, bottom-up constitutional draft reflected ideas of Christianity, patriotic and national values, as well as social values (Kowalewska 2020: 917-18). The rightwing conservative forces put forward a nationalist and religious ‘master narrative’, which emphasized ‘Catholicism as an indispensable part of the identity of Polish society’, understood the democratic model created by the constitution as a political community grounded in a distinctive culture, and prioritized the idea that the ‘Constitution needs to express national values’ (Brier 2006: 144).

⁶ In 2001, PiS formed out of parts of this conservative political grouping.

⁷ Krzaklewski had been member of Solidarity since 1980 and in 1989 became a member of its National Executive Committee.

Maik Herold and Solongo Wandan have interpreted the successful mobilization around the Citizens' Draft⁸ and its influence on the constitution-making process as revealing the existence of an 'alternative constitutional subject' (Herold and Wandan 2014: 273). They indicate, in this, separate, conflicting or competing visions on the symbolic nature of the constitution, as either a unifying and pacifying force between a plurality of societal groups or rather as the confirmation of a distinctive, historical, conservative and homogeneous understanding of Polish society. Centre-right forces regarded the final as the outcome of a political deal between secularized, civic-liberal forces and socialist forces, rather than as reflecting a society-wide, inclusive compromise. This was somehow corroborated by the confirmatory referendum held in 1997, as the Constitution was only endorsed by 53.5 per cent of the voters, while the overall voter turnout was just 42.9 per cent. This meant de facto that 22.58 per cent of Polish eligible voters voted in favour (cf. Skapska 2019). The 1997 Constitution, in this, is not supported by a broad sociological form of legitimacy.

3.1.2 Post-2015 constitutional politics

The cultural wars in Poland have intensified since the coming to power of PiS in 2015 and continue to be defined by a clash between liberal, Europeanist forces and conservative-populist forces. The conservative right - in recent years often defined as rightwing populists - has radicalized since the early 2000s, and in particular since PiS' first government in 2005-7, which strengthened resentment against the left-liberals and against specific institutions, such as the Constitutional Tribunal (Buzogany and Varga 2018; 2020). The conflict between liberal and conservative forces remains connected to the struggle over competing understandings of the constitutional-political order and has in important ways deepened. During the 2000s, PiS countered the post-1989, liberal-democratic 'Third Republic' by the competing project of a 'Fourth Republic' (Brier 2009), which included at least two draft proposals for a conservative constitution (of 2005 and 2010).

PiS does not have, however, sufficiently large majority in parliament to adopt a fully new, conservative constitution (which requires a two-third majority in the Sejm and an absolute majority in the Senate, art. 235 of the Polish Constitution). Instead, the PiS party engages in a form of destituent politics, deliberately undermining the liberal-constitutional institutions and engaging in unconstitutional actions (Sadurski 2019) and forms of constitutional dismemberment (Albert 2018). What is crucial in this approach is that the formalistic, liberal, and pragmatic symbolism of the 1997 Constitution, grounded in the rule of law and in liberal legalism, is swept away by a moralistic approach that denies the symbolic standing of the Third Republic. The political project of PiS, pursued through executive decisionism based on unlimited majority rule, effectively undermines the

⁸ In May 1994, ca. 900.000 signatures had been gathered for the citizens' draft. See Herold and Wandan 2014: 275.

liberalism, formalism and proceduralism of the Third Republic, by violating constitutional norms, packing the Constitutional Tribunal with loyalists, extensively reducing the separation of powers (in particular, by reducing the independence of the judiciary), reducing media plurality, and limiting the freedom of action of left-liberal civil society organizations (Sadurski 2019; cf. Skąpska 2019).

3.2 Romania

The Romanian case has in recent years often been cited as a major concern in the EU, next to Hungary and Poland, in terms of democratic backsliding and populist politics undermining the rule of law (Iancu 2017; 2019: 201; Naumescu 2014). Parallels have been drawn between the Hungarian and Romanian situations, partially unjustly so. The Romanian case does warrant, however, specific attention.

The Romanian case of post-communist transformation is dramatically different from that of Poland. The regime change was not one of negotiated change or a ‘self-limiting revolution’ (Arato 2000) as in the Polish or Hungarian cases. Rather, it consisted in both a radical rupture (a ‘coup d’etat’ according to some, see Danisor 2018) and significant continuity. A radical rupture occurred due to a revolutionary break with the preceding communist regime, which involved massive protests and significant violence, and resulted in a new constitutional order (Danisor 2018). Continuity with the communist system result from the take over of power by former communist forces (a second layer of the ruling elites) around Ion Iliescu, benefitting from the widespread popular uprising in December 1989. The revolutionary break necessitated a rapid adoption of a new constitution, as the communist system and any ‘Ceaușescu-ism’ were fully discredited.

The Romanian transformation in the early 1990s was dominated by national-populist forces (Smrčková 2012: 199; Taranu and Nicolescu 2017: 61). It is noteworthy that the liberal consensus that emerged elsewhere did not significantly materialize in Romania before 1996.¹⁰ One could rather speak of an initial ‘*illiberal* consensus’. In the first half of the 1990s, conservative populism was hegemonic in widespread references of the early post-communist government to a unitary people, an anti-pluralist idea of ‘original democracy’ (see below), and a strong distinction between the ‘true people’ and its enemies (the latter were initially predominantly identified as loyalists to Nicolae Ceaușescu, cf. Adamson and Florean 2015).¹¹ As Smrčková argues,

Populism is therefore not new in Romanian politics. Indeed, it is closely connected

¹⁰ Dragoș Petrescu speaks of a ‘fragile liberal consensus’ in the 1990s and the fact that even after NATO and EU accession, the ‘democratic deficit in this country remained significant’ (Petrescu 2019: 240, 229).

¹¹ It has also to be stressed that the specific Romanian experience of ‘national communism’ put strong emphasis on a unitary Romanian people (cf. Blokker 2004; Gutan 2018; Verdery 1991).

with the country's party system, as populist rhetoric has been intertwined with its development since the beginning of the 1990s, even if its character and importance have varied over time (Smrčková 2012: 201).

The post-communist *Frontul Salvării Naționale* (National Salvation Front, FSN) emerged as the main political actor after the December Revolution of 1989, and in later years turned into the *Partidul Democrației Sociale în România* (Social Democratic Party of Romania, PDSR), the predecessor to contemporary the *Partidul Social Democrat* (Social-Democratic Party, PSD), until today one of the major political parties in Romania. The FSN embodied 'leftwing conservatism', endorsing 'the interests of the electorate that wants to conserve some of the features of their familiar world, their lifestyle, including features of a non-competitive (or barely competitive) society' (Miroiu 2004: 2017-8). According to Miroiu, '[the] conservative state is focused more towards needs than freedoms, promotes political patronage and laws to assist, it is supported by populist propaganda, encourages the tyranny of the majority, charity, and clientelism' (Miroiu 2004: 218).

The NSF claimed to be the embodiment of 'national unity' and of the Romanian 'people' (Adamson 2000: 123) and could relatively successfully claim *revolutionary legitimacy* due to its alleged role in overthrowing the Ceaușescu regime. The 'FSN's vision was the organizational vigor of a majoritarian governmental party'; its 'vision was (and mostly still is) of a society devoid of legitimate political cleavages and able to be represented by a dominant political party that successfully administers and integrates its various actors and constituencies' (Marton 2019: 358-9). The leader of the NSF, Ion Iliescu, promoted a particular vision of an 'original democracy', based on the idea of a national consensus and a one-party system, in which the 'increasingly distant image of the revolution was used for the political benefit of the [FSN], but *no rebellious attitudes were tolerated anymore* (Pietraru 1996: 126; emphasis added). The vision of the FSN was that of the 'one-party pluralism of reform communism (rather than the Western-type pluralism)'; the FSN promoted the 'ideology of consensus' (Marton 2019: 366). The FSN defended a vision of the national unitary state, which was informed by a 'discourse of limited change' (Blokker 2004) and built on traditions of Romanian particularism as well as the national communism of the second half of the communist period.

3.2.1 Constitution-making in the early 1990s

The constitution-making bodies were dominated by the FSN, while the FSN further limited future constitutional dialogue by constraining choices regarding democratic institutions in the Electoral Law of 1990, issued by decree (Decree-Law 92) (Selejan-Gutan 2018). This law established some key principles of Romanian constitutional democracy, before any open constitutional debate could take place (Pietraru 1997: 139-40). A second phase of constitutional politics began with the election of the Constituent Assembly (*Adunarea Constituantă*) in May 1990. The constituent assembly was dominated by members of the FSN, i.e., of the 515

members of the assembly, 355 were part of the FSN. The Constitutional Commission that was responsible for the writing up of the draft text consisted of 26 members, of which 13 belonged to the FSN, while Antonie Iorgovan, the head of the drafting team, was formally independent but had a communist past and considered close to the FSN. In general, the constitutional debate can be seen as having involved the affirmation of the majority's constitutional view, rather than a genuine pluralist dialogue (Lungu 2002; Preda 2002: 399-400).¹²

The Constituent Assembly was to produce a new constitution in 18 months. The actual constitutional text was drafted by a Constitution Drafting Committee, which consisted of a 26-member elite group, headed by Antonie Iorgovan. In the view of one prominent constitutional scholar, Jon Elster, the constitutional draft was

in many respects an unprofessional document: eclectic, verbose, rhetorical, and excessively detailed. It is also *one of the most illiberal* constitutional drafts presented so far in any Eastern European country, confirming the general impression that Romania forms the rear guard in the transition to democracy and that a "second transition" may be needed (Elster 1991: 463; emphasis added).

The Drafting Commission became the most powerful actor in the constitution-making process, as it was able to steer the process and marginalize significant attempts at revision of its constitutional draft through setting the regulations regarding the working procedures of the Constituent Assembly (Pietraru 1997: 235). The constitution-making process did not generate extensive *democratic legitimacy*. It was the popular, confirmatory referendum, held on 8 December 1991, which produced *sociological legitimacy* instead (79% voted in favour).

In the view of Arato, the 'Romanian constitution-making process [was] one dominated by a sovereign constituent assembly, appealing to revolutionary legitimacy'. This 'claim of representing the constitutional will of the people could not be challenged; there was no rival group to raise an alternative claim' (Arato 2000: 162). The distinctive constitutional view – which can also be labelled 'constitutional nationalism' (Lungu 2002; Suteu 2017) – endorsed a strongly nationalist, majoritarian, unitary view of the Romanian political community and contained important elements of illiberalism (anti-pluralism, one-partyism). In the view of Manuel Gutan, the final constitutional draft, even 'after its liberal facelift, [...] has remained profoundly *illiberal* with regard to the relationships between the Romanian ethnic majority and the national ethnic minorities, recovering the nationalistic pre-communist constitutional discourse' (Gutan 2018: 111; emphasis added).

The constitution-making process in Romania was hence both radical and conservative at the same time. On the one hand, it was the result of the only revolutionary (and violent) process of breaking with communism in the region, radically disrupting the old political order and adopting a new, formally democratic,

¹² For the full records of the debate, see Regia Autonomă 1998.

constitution. On the other, however, the change in power showed significant continuity and involved limited forms of political change. The subsequently unfolding constitution-making process could rely on revolutionary and sociological legitimacy, but was lacking in democratic legitimacy. Despite major defects, the Romanian Constitution ultimately acquired ‘general authority’ and emerged as a general framework for politics (Arato 2000). In De Raadt’s study on constitutional conflict in the region, he even finds that ‘Romania’s constitution should carry most legitimacy’, comparing 8 constitutions, while Poland and Hungary have the ‘lowest levels of constitutional acceptance’ (De Raadt 2009: 327). This general authority, in combination with a highly rigid amendment rule, meant that the 1991 Constitution has been hardly changed.

In fact, the Constitution remained unaltered until 2003, when a series of reforms was adopted (Suteu 2017: 421). The larger part of these reforms was of an instrumental kind, touching upon EU membership and inter-institutional relations. It is significant that in these reforms the core – that is, article 1 (1) – was considered beyond any form of negotiation. The core political cleavage in Romanian politics – between a unitary, nationalist view and a multi-national one - remained intact (Suteu 2017). As reported by Silvia Suteu, Antonie Iorgovan, social-democrat and senator, and widely considered the ‘father of the constitution’, pre-empted any debate in 2002 by considering the definition of the Romanian state as unitary and indivisible as not open to any form of negotiation (Suteu 2017: 421).

From 2003 onwards, the conflictuality around the constitution however increased prominently, frequently leading to critical observations by international observers. Conflict was predominantly about instrumental-procedural aspects, that is, *inter-institutional* tensions, including the President, the government, parliament and the Constitutional Court. It was President Traian Băsescu (2004-2012) who put constitutional reform most prominently on the political agenda. First, by organizing a consultative referendum on ‘unicameralism’ in 2009, which remained, however, without institutional effects. Subsequently, Băsescu initiated a draft law for constitutional reform (*Proiect de lege privind revizuirea Constituției României*) with 61 proposals for modification (Göllner 2014: 185). Core propositions in the draft concerned a strengthening of the Presidential position and a reduction of parliamentarians in a unicameral system. In one observer’s view, many of the changes ‘were merely codification of political gains the President had made in past political battles with the prime minister or Parliament’ (Tanasescu 2014: 51). Băsescu had shown in his presidency a form of ‘hyper-presidentialism’, an activism according to many in tension with the formal presidential position in a semi-presidential system.

Băsescu’s presidency had seen deep, structural conflict between political institutions. This conflict became particularly outspoken in a (first) presidential crisis in 2007, which evolved around an attempt at impeachment, while a second such crisis unfolded in the summer of 2012. The 2012 crisis triggered an (unsuccessful) attempt by the then government of Victor Ponta (USL, an alliance

between Liberals and Social-Democrats, which won an extensive majority in the December 2012 elections) to revise the Constitution in 2013-14, not least in order to deal with the question of relations between president, parliament, and government. The governmental supermajority made the prospective of significant constitutional revision possible, as the Romanian amendment rule stipulates two-third majorities for approval in both the Chambers of Parliament (art. 151(1)). The 2013 reform attempt was again a reaction to the structural tensions between institutions (Göllner 2014). In general, it followed a majoritarian, governmentally driven process; the initiative ‘emerged in the circle of political elites’ (Gherghina and Miscoiu 2016: 27).

3.2.2 *Conservative constitutional politics*

It is surprising that political conservatism has (re-)emerged in particular from below since 2015. Even if the ‘leftwing conservatism’ of the PSD had been present in the political sphere all along, and the PSD has seen a nationalist and anti-European turn since 2016 (Petrescu 2019), in recent years it was most prominently from the grass-roots level that political conservatism has become visible and organized. In 2015, a citizens’ initiative was launched to amend the Constitution (as allowed for by article 150 of the Romanian Constitution). The so-called *Coaliția pentru Familie* (Coalition for the family), a grass-roots organization, gathered the necessary signatures for a constitutional initiative (500,000 is the minimum, the organization gathered almost 3 million signatures). The initiative proposed to change Article 48 of the Romanian Constitution, which refers to marriage between ‘spouses’, into marriage between a ‘man’ and a ‘woman’. The aim was to ‘prevent the legislation of same-sex marriages in Romania and to ensure that “gender stereotypes are constitutionally enshrined” ‘ (Brodeala and Suteu 2017: 127). In Gutan’s words, these ‘recent developments with regard to the constitutional definition of the family show a strong national Christian (Orthodox) identity which demands to be constitutionally expressed’ (Gutan 2018: 111). The initiative managed to pass required review by the Constitutional Court and was endorsed by large majorities in both Chambers of Parliament, resulting in the first successful citizens’ initiative to change the Romanian Constitution (Brodeala and Suteu 2017: 126-7).

The debates in the Romanian Parliament on the constitutional revision largely endorsed the conservative agenda of the grassroots forces promoting the initiative. In the debate in the Lower House in March 2017, one parliamentarian of the Liberal and Democratic Alliance (ALDE) claimed that the reinvigoration of the Romanian nation depends on the ‘family which reproduces and educates its children in the spirit of traditional values and aspirations’. On his view, the traditional family guarantees the continuity of the nation. A female parliamentarian of PSD observed, in the final debate in the Lower House in May 2017, that ‘[a]s Romanians, we define ourselves by our Romanian roots and national identity. We define ourselves by Christian belonging and family’. In the debate in the Senate of 11 September 2018, an exponent of the National-Liberal Party claimed that the traditional family is part of the Romanian nation and its traditions. In his view, Romania needs ‘strong

families’, rooted in tradition. A prominent senator of the PSD invoked natural law and the ‘ancestral meaning of people’, the Christian nature of the Romanian nation, and suggested the constitutional revision would not touch upon the rights of any Romanian.

Despite the coincidence between a conservative, traditionalist position of the organizers of the initiative, the Coalition for the Family (itself strongly backed up by religious organizations, including North-American ones, and the Orthodox Church) and the position of the mainstream Romanian political parties, the referendum that followed did not reach the turnout quorum of 30 percent and hence remained invalid (Brodeala and Suteu 2017: 129). While the impact of the societal-political conservative movement on the Romanian constitutional order has been modest so far, this might be challenged by a recent ‘conservative resurgence’ (Margarit 2019), represented most clearly in the discussed constitutional referendum on marriage, which questioned substantive, symbolic dimensions of the 1991 Constitution. In the elections of 2020, an additional challenge is posed by the electoral success of *Alianța pentru Unirea Românilor* (Alliance of Unity of Romanians) (gaining 9 percent of the votes), a radical-right party, which invokes symbols of the interwar fascist, legionary movement.

The success of more radical-conservative endeavours remains however also limited due to both institutional and societal resistance. In December 2020, the Romanian Constitutional Court decided against a legislative proposal banning gender studies, declaring it as unconstitutional.¹³ In addition, conservative populism is contrasted by comprehensive bottom-up mobilization and widespread protest against corruption, and in favour of legality, human rights, and Europeanization, as witnessed since 2012 (Mungiu-Pippidi 2018; Petrescu 2019). Various pro-legality and rule of law protests culminated in a consultative referendum on issues of corruption and the relaxation of anti-corruption legislation (as put forward by the PSD government), initiated by President Klaus Iohannis in May 2019.

3.2.3 Brief comparative remarks

As the discussion of the constitutional trajectories of Poland and Romania indicates, significant differences are evident, in terms of legitimacy, dynamics of conflict, prominence of constituent dimensions in later stages of democratization, and the availability of competing (conservative) constitutional narratives. At the same time, in both cases the role of anti-liberal ideas is prominent. The discussion of Poland and Romania may be seen to indicate two contrasting trajectories in East-Central Europe.¹⁴ The first, Polish case, stands for *democratic pioneer-turned-conservative-illiberal pioneer*. This trajectory involves a comprehensive process of democratization followed by a strong conservative counter-movement with

¹³ See <http://www.iconnectblog.com/2021/03/going-against-the-tide-the-romanian-constitutional-court-rejects-a-ban-on-gender-studies/>. Accessed on 26 March, 2021.

¹⁴ This does not mean that there are merely two trajectories. Countries such as the Czech Republic or the Baltic states seem to follow different paths.

significant implications on the constitutional or polity level, in particular in terms of authoritarian tendencies. Other cases of this kind clearly include Hungary, and very recently there are indications that Slovenia might be moving into this direction (Avbelj and Cernic 2020). The second, Romanian case, stands for *populist democracy*, in which early and continuous manifestations of conservative populism became embedded. Following Peter Mair, populist democracy may be understood as a political system in which one party claims to impersonify the state and the ‘national interest’, and claims to represent all citizens directly. Conflict and pluralism are perceived in negative terms, and the people is understood as undifferentiated (cf. Mair 2002). Due to the institutionalized nature of populism, in Romania no comprehensive, polity-threatening radical counter-project has emerged so far. Similar cases may include Slovakia (which has a similar populist history in terms of the rule of Vladimír Mečiar), and to some extent Bulgaria (which, as Romania, acceded to the EU later, in 2007, and displays strong nationalism since the early 1990s).

In the table below, the two cases discussed in the paper are briefly positioned in terms of the four analytical dimensions indicated. Clearly, in the case of Poland, conflict of the level of the polity, and related counterconstitutional narratives, are upfront, whereas in Romania conflict has remained largely inter-institutional while no strong counter-constitutional narratives has developed. The early, top-down settlement of the constitutional question in Romania in favour of a populist-nationalist idea of the polity appears to have pre-empted any constitutional counter-revolution.

Table 1 – The contrasting roles of constitutional politics in Poland and Romania

	Poland	Romania
<i>Legitimacy</i>	Process legitimacy; limited/partial democratic and sociological legitimacy	Revolutionary legitimacy; modest sociological legitimacy
<i>Conflict</i>	Meta-conflict regarding the polity	Inter-institutional conflict
<i>Constituent/destituent power</i>	A prolonged constituent moment (1994-97). Destituent power since 2015	A one-party dominated, brief constituent moment (1990-91)
<i>Competing constitutionalisms</i>	Competing models (liberal vs. conservative, illiberal)	Singular majoritarian, nationalist model

Source: Own elaboration

Conclusions

This paper draws attention to the central importance of constitutional conflict in understanding the emergence of backsliding in East-Central Europe. The notions of consolidated democracy and liberal consensus prove to be unhelpful, because of the assumption that conflict over the fundamental norms of the polity subsides in the course of further democratization. The emergence and manifestation of illiberal, conservative visions and political projects are underestimated and possibilities of

illiberal or non-liberal forms of democratization, which may lead to democratically problematic, but relatively stable political regimes, are downplayed. The paper hence stresses the importance of analyzing conflict on the level of the polity and questions whether the formal adoption of a (liberal) constitution is a sufficient condition for a well-functioning, inclusive, and pluralist democracy. The paper stresses in this the possibility of continuous political conflict on polity matters.

The core argument of the paper is therefore that constitutional conflict has remained part and parcel of politics in many post-communist countries. One dimension that needs reflection is that of the role of broadly inclusive, *consensual constitution-making*. A lack of inclusiveness and representation of significant political forces in the constitution-making process may be a basic factor in undermining democratic constitutional orders, in particular when protracted constitution-making processes have seen the marginalization, and subsequent radicalization, of important political actors (as in Poland) or, in the wake of failure of a consensual constitutional project, have led to political polarization (as in Hungary) (Blokker 2020). In the Romanian case, the domination of one, conservative-populist, party in the constitution-making process has led to the perseverance of a relatively stable, but in significant respects exclusionary, constitution. As indicated, however, in recent years, a polarization between conservative and liberal forces is emerging.

Different lessons with comparative relevance may be drawn from the contrast between the Polish and Romanian cases. First, the concept of consolidated democracy, grounded in a liberal consensus and prominent judicial institutions, such as a liberal constitution and a constitutional guardian in the form of a constitutional court, tends to obfuscate potential forms of dissensus, also in relation to polity dimensions. In the case of Poland (but in a different way also Hungary), a significant and potentially destabilizing dimension of dissensus has been part of constitutional politics since the constitution-making process in the mid-1990s. The institutionalization of liberal democracy has neither ‘pacified’ this conflict nor has it immunized Polish society to ongoing meta-political conflict. In polity terms, more systematic research is needed to understand when and how high levels of (societal) legitimacy emerge to sustain liberal, constitutional democracy. In other words, a purely institutional focus is insufficient. Second, while backsliding is now a major concern in the democratization literature, the term should not necessarily be taken to mean a general *telos* in the East-Central European region. The Romanian case shows that a democracy that has been structurally qualified as problematic may be more resistant to radical conservative overhauls of the polity than (some of) the ‘front runners’, even if it clearly displays significant tensions with regard to corruption, the rule of law, and pluralist politics. These insights may prove important in the analysis of other cases, including those often qualified as ‘laggards’, such as Slovakia and Bulgaria.

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