

## THOUGHTS ON CONSTITUTIONALISM

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This essay aims to present different aspects of examining constitutionalism today. It provides a definition of the relation between constitutionalism and democracy, and observes their effects on each other. It gives examples of the interaction between these two notions, and provides the possibility of a solution for the problems that constitutionalism faces.

*Keywords:* constitutionalism, democracy, freedom of speech, freedom of assembly, human rights, populism

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At Central European University in Budapest, a panel discussion was held on April 27, 2012 to honor Professor Emeritus *Gerhard Casper* from Stanford University, who has also been a CEU trustee for 12 years. His role as a professor in constitutional law provided the theme for the panel. The topic of all four lectures was the issue of constitutionalism today. That is, the way *John Shattuck* (CEU President and Rector) put it in his welcoming speech: how democratic society should be organized<sup>1</sup> and what challenges it faces in Hungary and elsewhere around the world. The discussion was chaired by *Renata Uitz* (Professor, CEU Department of Legal Studies), and the panelists were János Kis (CEU University Professor), Michael Hamilton (Associate Professor, CEU), Daniel Smilov (Visiting Professor), and Gedion Timothewos Hessebon (SJD Candidate).

*János Kis* outlined the two competing views on the relationship between constitutionalism and democracy. One is the compromising view, and the other is the integrity view. According to those who believe in the former view, the relationship between constitutionalism and democracy is based on conflicting values, which can only be reconciled through compromise. This opinion suggests that democracy is constrained by constitutional rules.<sup>2</sup> On the other hand, those who represent the integrity view say that even though constitutionalism imposes constraints on democracy, the outcome in the long run is the opposite of restraint: the enabling of democracy.<sup>3</sup> The truth of this statement can be demonstrated on the example of the case of the freedom of speech. In a two-party system, the party currently governing would always try to restrain the freedom of speech in order to prevent the opposition from speaking against them. However, constitution disables the restraint of freedom of speech, so neither party is able to violate it without destroying the constitution. The decision of restraining freedom of expression is only regulated by trust: the two parties have to share a common trust that the other will not act against the constitution. According to the integrity view, constitutionalism enables its balance with democracy, but the cost is that certain consequences of the existence of constitutionally insulated bodies are not taken care of. Challenges are on the side of ordinary democratic politics, and the solutions are not to be found in the constitutional sphere. The disadvantages of constitutional democracy are not related to the balance, but to complex phenomena due to insufficient regulation of independent bodies and the lack of trust between the active participants of ordinary politics.

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<sup>1</sup> “Constitutionalism is the idea [...] that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.” <http://plato.stanford.edu/entries/constitutionalism/>

<sup>2</sup> Constitutionalism imposes limits on all three branches of government (legislative, executive and judicial powers) in the form of individual or group rights against government (freedom of expression and association, equality, due process of law, etc.), scope of authority, procedural requirements and civil rights. (<http://plato.stanford.edu/entries/constitutionalism/>) However, this does not necessarily mean that constitutionalism imposes limits on *democracy*.

<sup>3</sup> „There is no moral right to constitutionally unconstrained majoritarianism, even if majoritarianism unconstrained by rules of order and franchise were conceptually possible.” Alexander, Larry, Constitutionalism and Democracy: Understanding the Relationship. The Idea of Constitutionalism, Steven Kautz, Arthur Melzer, Jerry Weinberger and M. Richard Zinman, eds., University of Pennsylvania Press, Forthcoming; *San Diego Legal Studies Paper* No. 07-121. Available at SSRN: <http://ssrn.com/abstract=1019631>

*Michael Hamilton* examined the functioning of constitutional democracy through the state's response to political demonstrations, in other words, the state's respect for the freedom of assembly.<sup>4</sup> According to Hamilton, the institution of the police represents the paradox of constitutionalism, which both enables and restrains. The dialogues between the police and the protestors should be examined in order to determine the nature of their relationship, and the police should work on defining their core identities in order to become a well-functioning institution.

*Daniel Smilov* spoke about the phenomenon of superconstitutionalization, and the rise of populism in answer to it. He stated that despite the challenges it faces, constitutionalism is essentially a success. It has to be pointed out that constitutionalism became widespread very quickly, and nowadays its importance and scope of effect seem to be expanding. There are written constitutions and even supernatural ones (like that of the European Union). There are extensions of the constitution in new areas which were not traditional in the post-war era. Many countries have even introduced financial rules in their constitutions. Going beyond what is traditional in constitutionalism can be called superconstitutionalization. Parallel to this tendency is the rise of populism. Populist parties tend to be nationalistic, they follow the will of the people and work at dismantling the constraints of constitutionalism.<sup>5</sup> The main question today is how the two opposite approaches, superconstitutionalization and populism can work together.

*Gedion Timotheos Hessebon* gave a speech about the problems of the introduction of Western constitutionalism in the African political context.<sup>6</sup> First he defined the two terms. Western constitutionalism refers to certain ideas and principles developed in Western Europe and North America in the 18<sup>th</sup> century, producing several variations over time. The concept of the African political context comprises several different countries with common features such as ethnic diversity and a legacy of – often violent – colonial and post-colonial history. The question is whether the introduction of Western constitutionalism is a reasonable idea in such a political context. The answer to this may be that it could be reasonable if Western constitutionalism was revised and the cultural and historical traits of African nations were considered. The contextualization of constitutionalism must also address the economic situation of the region. Three measures would have to be taken to successfully adopt constitutionalism, these being the reduction of ethnic rivalry, the restraining of executive powers by strict rules and the introduction of regulations in the use of violence for political purposes.

Finally, *Gerhard Casper* himself said a few words to conclude the panel. In his opinion, constitutionalism needs to be much more concerned with the organization of the government, but in the meanwhile maintain everything that has been achieved in the human rights area. If issues like which electoral system was best for a certain country were dealt with, constitutionalism could be more successful than ever.

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<sup>4</sup> The freedom of assembly is only granted as long as the members of the group remain non-violent and do not engage in illegal activity. [http://www.law.cornell.edu/wex/First\\_amendment](http://www.law.cornell.edu/wex/First_amendment)

<sup>5</sup> "History teaches us that populism has recurring pathologies; it is especially important to recognize and counteract them. These dangers [...] include fascism, nativism, anti-intellectualism, persecution of unpopular minorities, exaltation of the mediocre, and romantic exaggeration of the wisdom and virtue of the masses." Balkin, Jack M., "Populism and Progressivism as Constitutional Categories" (1995). Faculty Scholarship Series. Paper 268. [http://digitalcommons.law.yale.edu/fss\\_papers/268](http://digitalcommons.law.yale.edu/fss_papers/268)

<sup>6</sup> "[...]the discourse of the 1960s and 1970s had a distinct character and this is where one notices a curious disjuncture between it and the current constitutionalist discourse. The earlier discourse sought to understand our social order analytically and did not shy away from theory and theorising [...]. It prided in asking larger questions about our societies and social order: how did it get to be where it is, what does it do to those who live under it and in what direction is it moving? [...] The constitutionalist and democracy discourse of the current period is fundamentally different. [...] It is descriptive, prescriptive, eclectic, both in theory and practice, and politically hegemonic [...]." Issa G. Shivji: Democracy and Constitutionalism in East Africa: Taking Critical Stock. [http://www.kituoachakatiba.org/index2.php?option=com\\_docman&task=doc\\_view&gid=387&Itemid=27](http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=387&Itemid=27)