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The life and death of constitutions

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INTRODUCTION

The Law and Society meetings in 2019 are taking place in Washington DC at a time when many of our international friends are wondering whether they should travel to a place where the national president has made border crossings arbitrary and painful, denied visas to those coming from disfavored countries and in general trampled on the ideals that the United States has long preached. To take a stand against the damage being visibly done to both constitutionalism and the rule of law by the incumbent American administration, we picked "dignity" as the theme for these meetings (Figure 1).

But "dignity" was also *encoded* criticism, designed to ensure that the theme of our conference would not raise red flags on visa applications. We hoped that the Trump Administration would not find dignity as dangerous as we found it inspiring. And so here we are. Not all of our colleagues were able to join us; in particular, we are dismayed that nearly all of our Nigerian colleagues' visa applications were rejected. All the more reason for us to insist on dignity as *our* fundamental organizing principle, even if it is not at the moment honored by the country in which we meet.

Dignity is the heart and soul of many modern constitutions. The German Basic Law holds in Article 1 that "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority" (Germany, Basic Law. 1949). The Colombian Constitution similarly leads with dignity in Article 1: "Colombia is a social state under the rule of law… based on respect for human dignity" (Colombia, Constitution, 1991). And the inspirational South African Constitution proclaims in Article 10 that "everyone has inherent dignity and the right to have their dignity respected and protected (South Africa, Constitution, 1994)." But dignity has never been the organizing principle of the US

LSA Presidential Address, 2019, Washington DC

This presidential address is being published years after it was given, which means that this piece is like a bug in amber, frozen at 2019. That said, our world in 2023 is not as different from the world of 2019 as we sometimes like to think. The threats to constitutional democracy in many countries around the world—including the US—have not ended; temporary respites due to less damaging election results in the meantime do not mean that the problems I identify here have been definitively solved.

I'm grateful that my call to action at the 2019 LSA meetings was heeded by many members of the Association, particularly through the formation of the Project on Autocratic Legalism (PAL) inspired by David Trubek and led by Fabio de Sa e Silva. This collective research project has taken a deep dive into the ways that democracy is being undermined in Brazil, South Africa and India, culminating in many panels at the international meeting in Lisbon in 2022. You can follow developments and publications of the PAL group at https://www.autocratic-legalism.net/.

FIGURE 1 The Logo for the 2019 Washington meeting of the Law and Society Association. Design by LSA member Danielle Rudes at George Mason University.

Constitution, which has taken ideas of liberty—often honored in the breach—as its touchstone instead (Whitman, 2004).

Indeed, it is hard to say that a spirit of dignity characterizes our present moment. Just down the street from the hotel where we are meeting, President Trump occupies the White House, spewing forth daily insults and threats against the people and principles he refuses to honor. But constitutional endangerment is not just happening in the US. The threat to dignity from aspirational autocrats extends far and wide, as Jair Bolsonaro in Brazil, Nicolás Maduro in Venezuela, Narendra Modi in India, Recep Tayyip Erdogan in Turkey and others fan the flames of hatred against their political enemies and legally remove (or ignore) the constitutional constraints on their power. Brexit in the UK was a campaign run and won by English nationalists who rejected the European project and its value constraints—and sent the rickety British constitution into crisis. Viktor Orbán in Hungary and Jaroslaw Kaczynski in Poland are undermining the rule of law and turning once reasonably functioning democracies into autocratic experiments. The threat to democracy, human rights and the rule of law is global. And human dignity is taking a hit.

In its *Freedom in the World* annual report for 2019, the democracy-rating organization Freedom House declared that it had just "recorded the 13th consecutive year of decline in global freedom … Democracy is in retreat" (Freedom House, 2019, p. 1). Other democracy raters agreed. The Varieties of Democracy (V-Dem) project called its annual report in 2019 "Democracy Facing Global Challenges," and noted that in the prior year, "the most dramatic changes occurred in Hungary, with a decline of almost 30% on the LDI [Liberal Democracy Index] scale" (Varieties of Democracy, 2019, p. 22). In 10 short years, Hungary—a country where the Law and Society Association met in 2001—fell from the heights of "liberal democracy" to teetering on the edge of "electoral autocracy" in which it is virtually impossible to change a government through elections. [Hungary in fact was judged to be "no longer a democracy" the year after this presidential address was delivered (Varieties of Democracy Project, 2020, p. 4).] I'll have more to say about Hungary later, as it is the place I study most closely, but for now I'll just note that what happens in Hungary today can happen in a democracy near you tomorrow.

If constitutional democracy is failing and autocracy is on the rise, putting human dignity at risk, what can and should we as scholars do to stall the slide, and perhaps even reverse it?

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THE PUSH AND SHOVE OF THE POLICY AUDIENCE

In the Law and Society world, we have long pondered our relationship to what Austin Sarat and Susan Silbey famously called "pull of the policy audience" (Sarat & Silbey, 1988). Studies of the role of law in the world are persistently interesting to people in power, and Sarat and Silbey cautioned our field against becoming too comfortable with that fact. Not that sociolegal scholars should remain silent on matters of policy. Rather, Sarat and Silbey urged that we be more thoughtful, more explicit about our commitments and more protective of our independence as scholars. They argued that we needed to maintain a distance that would allow us to remain critical both of the repressive uses of power and of instrumental uses of scholarship. They argued against cooptation, against the agendas of our field being set by external standards of relevance and against taking the script of legal liberalism as the only way to think about law.

Since Sarat and Silbey wrote, however, many of us have had the vertiginous sense that our ideas have escaped from academic circles, and are being deliberately used *against* what we value, regardless of whether we have cooperated with power or not. Who has deployed social constructivism better than the defenders of autocracy, who now insist that all truth is relative and perhaps does not exist at all? Who has taken on board the critiques of liberalism better than the aspirational autocrats, who now insist that the liberalism is an old-fashioned and inadequate response to the challenges of today? If ideals of objectivity have been thoroughly unmasked by academic critics, it is the autocrats who have most eager to abandon objectivity altogether as a self-aggrandizing ruse created by those who really pull the strings in this world. The accusation of "political correctness," once a reminder inside critical theory circles to maintain a critical edge, is now regularly deployed to mock those engaged in critique.

Since Sarat and Silbey wrote, an international anti-intellectual autocratic movement has used the ideas generated by reflexive scholars to power their illiberal alternative realities, to mobilize scorn for intellectual life and to troll progressives. What many of us used to see as a strength—which was the sociolegal studies' "insistence that the ability to know what is there is limited" (Sarat & Silbey, 1988, p. 131)—is being deployed by aspirational autocrats who routinely say that up is down and down is up, recalling the then-ironic contribution to a volume on critical legal studies about the decline of the up-down distinction (Shapiro, 1984). If the law and society movement stood for the proposition that legal rules were shot through with "indeterminacy, contingency and contradiction" (Sarat & Silbey, 1988, p. 105), we are now faced with leaders who twist the meanings of rules while we seem to reverse ourselves by insisting that rules are real and should be binding.

In short, while Sarat and Silbey seemed reasonably confident that we scholars could have conversations among ourselves that would not escape into the policy world without our participation, that world no longer exists. Now, whatever we write and whatever we teach have become fair game for immediate political scrutiny and unauthorized political use. Instead of being pulled into the orbit of the policy audience by its irresistible allure, we are being pushed and shoved around by it, often against our will. So how do we relate to that policy audience now, given that it will not just leave us alone to do our academic work?

In my view, we do not have the option of doing nothing. Even if we try to hide from this politicization, it is coming after us. Universities are being attacked and their once-secure academic walls have been breached in all democracies in trouble. Central European University, which hosted the Law and Society meeting in 2001, has been pushed out of Budapest and has had to take up residence in Vienna. The Turkish government has engaged in mass firings of academics after the attempted coup in 2016. The Indian government has attacked universities, first in Kashmir and then across the country, demonizing its academic critics and urging a restriction of controversial content on reading lists. In the United States, academic freedom is being undermined by a misguided merger with "free speech" in which outrageous views with no evidence to sustain them are treated as identical to careful research with professionally approved methodologies. Across democracies in trouble, it has become difficult to defend academic

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knowledge against the pretenders and to defend the independence of universities against those who seek political control.

Whether we like it or not, our ideas are weaponized against us by those who turn facts into opinions and insist on having their own fact-free opinions stand on equal ground. And that's true regardless of whether we openly advocate a political perspective or whether we think of ourselves as neutral scientists devoted to pushing back the frontiers of ignorance, as my dissertation advisor Art Stinchcombe used to say. When all ideas are politicized and the independence of universities is under threat in all places where democracy is endangered, the very idea that we can stand outside the political fray becomes naïve at best, dangerous at worst.

As autocracy is on the march, we must think through our responsibilities as scholars in general and sociolegal scholars in particular—or else our fate will be decided for us. If we once had the luxury of researching topics for the sheer intellectual joy of it without worrying about our findings' political implications, we should now realize that the academy has been ripped open to public view and that we will almost surely lose control of the ideas that we generate. Like dissidents in surveillance states, we should be aware that our internal discussions are being monitored by those in power to provide potential fuel for the bonfire of what we care about most deeply. But like dissidents in surveillance states, this realization should make us more and not less committed to "living in truth," as the Czech dissident writer Vaclav Havel once said without the slightest trace of irony. Living in truth "meant, first of all, telling the truth in answer to official propaganda, but also behaving as if fundamental rights … could be taken for granted" (Washington Post, 2011).

Cue the cringes! Who among us has not cringed at the assertion of a monolithic and certain truth or at the invocation of liberal rights as an "unqualified human good" (as E.P. Thompson once said about the rule of law to surprised gasps [Thompson, 1975, pp. 258–269])? One of sociolegal studies' proud legacies is its long and honorable tradition of criticizing liberal legalism! But it's one thing to critique liberal legalism when it is ascendant and potentially open to improvement—and another thing to attack it when it is being replaced by something far worse so that we lend support to the autocrats' deconstruction of it by tearing liberal legalism down (Scheppele, 2019). Cringes always occur in context.

While aspirational autocrats are eager to steal some of our ideas—about political correctness, constructivism and the false promises of rights—they are also eager to obliterate the contributions of sociolegal studies to the advancement of equality, taking particular umbrage at "genderology" (Verseck, 2018) and critical race theory (Harris, 2020). Some might think that the high-level attention paid to these vital ideas is flattering. Who knew that our theories could become so important in setting the agenda of political debate? But others know that the movement of an academic culture of critique into non-academic political settings risks self-destruction when ideas travel without context, academic vocabularies are mocked, and the assumption of equal dignity is stood on its head. These days, political leaders use ideas familiar to us to argue that equality-seeking measures constitute unjust discrimination against those with privilege. In academia, being inconsistent in the positions that one takes counts against us, but such devotion to consistency does not extend beyond our seminar rooms. Sometimes, the aspirational autocrats are eager to use academic ideas that support their positions, but they just as readily seek to mock the academic ideas that threaten them. The point is, however, we do not get to choose the terms on which our ideas enter the public debate.

What's a sociolegal scholar to do? What I will suggest in the rest of this presidential address is that we should stop cringing in corners hoping that aspirational autocrats will ignore us as we talk among ourselves and as they steal many of our ideas for purposes we find abhorrent. Instead, we should take our insights into fight for dignity and unsettle the autocrats on their own home turf. In short, we need more than clever defense, especially when it is becoming increasingly difficult to wall ourselves off from politics. We need to own what we value and what we know—and bring crucial public audiences onside.

Before providing one example of how I have tried to go on the offense against aspirational autocrats as they destroy liberal legal constitutions, I will first provide some background for how we

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might think about law in this process. Given that the new autocrats are attacking constitutional law in particular as they entrench themselves in power, we should understand as sociolegal scholars how constitutions work. And then we can weaponize these ideas against the autocrats.

ON "PASSIVE" CONSTITUTIONAL LAW AND COUNTER-CONSTITUTIONS

Most people do not go around thinking about constitutions very much. Generally, this is a very good thing. If constitutions work as they should, then much of what constitutions "constitute" will be taken for granted. The Westminster Parliament or the Colombian Constitutional Court or the French *Conseil d'État* or the South African Human Rights Commission or the Indian *Lok Sabha* have a certain institutional solidity. There may be pitched political campaigns over who gets to occupy the key posts within those institutions. The decisions these institutions make may generate praise or criticism. But the *existence* of the institutions, their basic rules of operation and the methods for filling their vacancies should simply seem obvious in any constitutional system that works.

Of course, even functioning constitutional systems will have controversies that force attention onto specific topics at specific moments. Does the US Second Amendment really include a personal right to own guns? Does the threat of terrorism justify surveillance of all electronic communications? Does the law right to asylum guaranteed by international law override more restrictive domestic immigration law? How long can the president—or prime minister—rule by executive decree during a state of emergency before the legislature must be consulted? How far does any European constitution permit delegation of key decisions to the European Union? Many of these controversies will culminate in judicial decisions that resolve the issue, at least legally and at least for now. Every constitutional system will have close questions, contested areas, blank spots to be filled in with constitutional interpretation as well as points of genuine disagreement that may not be easily resolved. Such is the stuff of what is typically taught as "constitutional law" in most countries.

Law professors focus primarily on these legal controversies and their legal resolution rather than on the background assumptions of the constitutional order. This is not surprising: resolving legal disputes is what lawyers and judges do, and therefore what legal academics tend to study. But, as sociolegal scholars, we should not equate the functioning of constitutions merely with the legal resolution of specific constitutional questions. No matter how fierce debates over those questions are, they do not capture the most crucial question about constitutionalism: Is a constitution considered real enough by those governed by it so that they can take large elements of it for granted?

Before constitutional controversies over specific constitutional provisions are settled as a matter of active constitutional law, "passive constitutional law" consists of those uncontested parts of a constitutional order that go without saying. Like passive knowledge more generally, passive constitutional law operates in the background, only becoming visible when overly challenged. Getting a constitution to the point where it operates passively in the world is by no means a simple or singular process. There is variation in whether broad features of constitutions have passed into passive knowledge and can therefore simply be assumed to exist, across countries and across history within a country.

On one end of the spectrum, some constitutions never become real. "Sham constitutions" (Law & Versteeg, 2013) exist on paper but have no corresponding existence in practice. Think of the Chinese constitution today or the Soviet one from years ago. They might reveal the state's ideology the way that mannequins in store windows may reflect ideals of beauty. Window-dressing may not reveal much about real life outside the window, though it may be revealing of certain aspirations. In the comparative constitutional law field, we explain sham constitutions away by saying that the governments with window-dressing constitutions are simply not constitutional governments.

But there is a large range across which constitutions can succeed in constituting institutions and being taken for granted. These effects can be wide-ranging and deep, as when a constitution creates a constitutional culture, separation of powers, and firm guarantees for rights that become widely believed

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in the population. Constitutional effects can also be more modest, for example, only establishing the order of succession of power among the elite but little more (Brown, 2002). Constitutional effects can also be intermittent, or visible only in some communities and not others, or real only on some topics and not others. Constitutions vary a great deal in the nature and scope of the effects they create. But their reality hinges on passing into passive knowledge and being taken for granted at least in some places, some of the time. Empirical investigation is necessary to determine when, where and how passive constitutional law rules.

A functioning constitution specifies how constitutional crises are resolved, establishes principles that govern the operation of the state, and creates political ground rules that permeate the society. It makes the *field* of political play relatively predictable and comprehensible (elections every four years, only one prime minister at a time) even while the specific moves within that field may be surprising, contested and controversial. A "real" constitution allows the inevitable conflicts of politics to generate robust electoral competition, to include citizens actively in political argument and to find ways to keep the inevitable losers engaged in democratic participation without bringing down the state. When a constitution is working, it manages to separate the rules of the game from the game in ways that simply go without saying.

Unfortunately, the reality of any specific constitution does not necessarily speak to its relationship to broader questions of justice and equality; all actually existing constitutions are imperfect, have outrageous blind spots and show evidence of political wear and tear. The sociolegal studies movement has long recognized this and has been a fertile source of critique because many of us have hoped to make constitutional reality better, knowing full well that the reality of a constitution does not settle the question of its goodness. But the existence of a passive constitution matters even when it is flawed because it can serve as a curb on political arbitrariness (Krygier, 2019). Even if a constitution brings imperfect justice, living without a constitution can be far worse, as anyone who has lived in a failed or failing state can attest.

Tracking the reality of constitutions is complicated because constitutions are not necessarily real in the same way to all of their addressees. As Meir Dan-Cohen once observed about the criminal law, there can be a kind of "acoustic separation" in the messages that law conveys (Dan-Cohen, 1983). In criminal law, the prohibition of robbery is simultaneously both a warning to those who might be contemplating an illegal act and also an instruction to certain state officials to respond in a particular way once they have evidence that a particular person is likely to have committed the offense. Similarly, constitutions also deploy different messages to different addressees. State officials are told how their institutions are set up and how they as officers in these structures must behave; those seeking office run within the rules set by the constitutional system with regard to elections, parties, financing and so on; citizens learn about their rights and how to assert them through constitutional provisions. All audiences—including domestic objectors—are told what principles the constitutional government is committed to defending and how far dissent is permitted. But given these different messages that are sent to and heard by different audiences, the sort of reality created in each audience of addressees may vary.

For those who occupy the constitutionally constituted offices, a constitution that has passed into passive knowledge will instruct officials to act *as if* the institutions exist outside them and constrain them, even once they themselves have become the public face of those institutions by virtue of occupying official offices. The Brazilian Constitution functions, for example, when the President of Brazil sees himself and is seen by others as just one occupant of an office called "the presidency," an office that exceeds that particular president's own person, tenure, actions and interpretation of the job. The office, if real, will continue to exist after he leaves it—and the rules of the game will tell him when he must leave. If the constitution works, he will in fact leave when the time comes. If the South African Constitutional Court is real, a judge on that Court will speak for the institution and not just for herself, knowing that these are meaningfully different things. Even when virtually all politicians support a particular law, the Court must nonetheless strike it down when it violates the constitution. And the politicians must accept the Court decision even if they disagree with it, though of course, some debate

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over constitutional meaning is not only acceptable but may make a constitutional order more robust (Meuwese & Snel, 2013). If the French Constitution is real, the French Minister of Justice will see herself as one in a long line of occupants of an office that has traditions, responsibilities and a constitution to uphold. In fact, her highest and best testament to the fact that the office exceeds her may require that she resign it to defend constitutional principles (Chrisafis, 2016). When the occupants of offices confuse their own personal biography with the biography of the office or—worse yet—when the general public does, then constitutionalism is in trouble. Constitutionally constituted offices must seem real both to their occupants and to those who are governed by them, and the individuals who pass through and occupy official posts must not be confused with the structure as such.

Once a constitution is up and running, new actors and new generations must be educated into a constitutional order which—if things go well—they can then take for granted. National constitutions, once established, can be taught as honorable, stable and obvious or as necessarily contingent, evolving and contested. In short, constitutional education creates the reality it teaches. The collective memory of constitutional life becomes a crucial resource for holding constitutional regimes together even when history is taught as a constant struggle. How constitutional memory is generated and passed on therefore becomes a crucial part of understanding what holds constitutional regimes in place.

When constitutions are functioning to create reality in the world, the inhabitants of this constitutional world act *as if* the constitution creates a functioning political space with enforceable legal rules (Vaihinger, 1924). Sociologists know this sort of effect as the Thomas Theorem: "If men [sic] define situations as real, they are real in their consequences" (Merton, 1995). The same holds true for the passive constitution: If people believe a constitution is real, then constitutional ideas have real effects.

Passive constitutional knowledge becomes a part of people's mental maps as they navigate the social world and find that others respond as if their mental maps match those of the subject in question. Intersubjective validation occurs when I act *as if* something is real and others reinforce my actions by also acting *as if* that very same something is real in the same way. So, for example, if I show my US passport when I return to the US from a trip abroad and the immigration official at the desk recognizes the document, checks it in her system and stamps me into the country, my status as a citizen in good standing is reaffirmed. If this breaks down—my passport is not taken as real the border even if I believed it was real in showing it to the immigration official in the first place—then the reality of the underlying system of certification through which I am recognized by my country starts to crumble. The reality of my citizenship will not necessarily be obliterated in a single failure of recognition—systems make mistakes—but a persistent pattern of such de-recognition will undermine my citizenship. If this happens to many people at once, particularly if those targeted for non-recognition form a recognizable pattern, the solidity of the citizenship regime itself will come under question. Acting as if constitutions are real, in the presence of others acting similarly, is one way to make them so. But if disconfirming events persistently occur, or the reality claims are persistently challenged, then the appearance of constitutional reality is exposed as constitutional sham.

Whether constitutions are real can be also assessed with respect to the individuals who are governed by a constitution. Citizens—important addressees of constitutions—have at least some part of their public and civic lives constituted by the constitution. For example, citizenship itself is a legally constituted status (Munshi, 2015). Constitutional rights of citizens protect conscience, private life and public participation in politics. A constitution will specify what the state must do *for* its citizens, and what it cannot do *to* them. And if state behavior roughly corresponds to its legal obligations, the reality of those obligations is affirmed.

One can therefore see how very easy it would be to find oneself in the middle of a constitutional order whose center did not hold. As Karl Marx famously wrote in a year in which constitutional revolutions erupted all over Europe: "All that is solid melts into air" (Marx, 2014 [1848]). He was speaking about the rapacious effects of the relentless expansion of capitalism on the stable order of the old world, but the same can be said about the disintegration of constitutionalism in the face

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of new political forces, something that was also happening at the time he wrote. Nothing destroys an old order like new people acting as if that old order no longer exists.

Understanding constitutionalism therefore requires understanding how constitutions come to be treated as real and taken for granted, under what circumstances and by whom. To get at this, we need to ask: *How* do constitutions come to have an existence in everyday life? How do they come to be *obvious*?

Questioning the obvious always looks a bit suspicious, as if academics have nothing better to do with their time than poke at things that were perfectly fine before the poke. But the fact that a constitution is obvious in one time and place does not guarantee either that that particular constitution will remain obvious or that other constitutions will easily be able to achieve that "obvious" status either. Obviousness is a crucial element of successful constitutions and we need to understand how obviousness is generated to know how to create and fix constitutional polities. But studying what is taken for granted is not easy. So, how can we examine the reality of a passive constitution?

One good way to study whether constitutional reality holds is to study counter-constitutional challengers. A counter-constitution is an alternative constitutional reality, forwarded by its advocates as a substitute for an existing constitutional arrangement. It is "counter" in the sense that it opposes an existing constitutional order and "constitutional" in the sense that it offers itself as an alternative constituting framework for the governance of a particular community. Counter-constitutions challenge the previously taken-for-granted status of the official constitution which, precisely because of the challenge, can no longer claim obviousness. What made the prior constitution obvious (until that point)? And why did that obviousness begin to fail when it did? What influences the shape that a counter-constitution takes? These are questions we can examine when counter-constitutionalist challenges arise.

Counter-constitutions, then, are "strategic research sites" (Merton, 1987), sites chosen because they are particularly likely to illuminate the social processes we are trying to understand. Because counter-constitutions occur at moments when what "goes without saying" is actually now being said, they often expose what once made a particular constitutional arrangement obvious and why it is no longer so. Counter-constitutions can also reveal how the prior constitutionalist consensus was built, and where the prior constitution proved weak. If counter-constitutions win and become the new "real" constitutions, studying them allows us to see constitutional creation in action. If counter-constitutions fail, we can see how the prior constitution found its strength to fend off the challenge. In short, moments of fundamental constitutional contestation are moments when the reality claims of constitutions are exposed as the contingent claims that they are. And then, as claims, they are either toppled or reaffirmed. Counter-constitutional moments are, in short, critical moments for constitutions that expose and test what is usually taken for granted.

To understand counter-constitutions, we must be able to assess the conceptual fields within which the established and countering constitutions are contending for dominance. Assessing this context counsels going deep rather than broad, as we must track the meanings that various players bring to the debate and the way that implicit ideas hold sway until the moment when they do not. So let me turn to Hungary for a specific example of how this works—and how to mobilize scholarship for the values we share.

COUNTER-CONSTITUTIONAL REVOLUTIONS

At the end of World War II in Europe, the territories that had been conquered by or that had aligned themselves with Nazi Germany came to be governed by the Allied powers that won the war. The armies and then the civilians of the UK, France and the US occupied the Western parts of that territory; the Soviet Union occupied the lands to the East. Germany was divided among the four Allied powers. While the Western powers supervised the creation of new constitutional governments and then withdrew, the Soviet Union presided over the drafting of new constitutions that mirrored Stalin's 1937 constitution in crucial respects and then remained in control of the territories that it

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had taken during the war. Like the Soviet constitution itself, the constitutions in Eastern Europe disguised rather than illuminated the real source of power. The communist party was not mentioned in those constitutions—or was mentioned only in passing—and yet all major decisions were made through the party hierarchy, ultimately all the way back to Moscow regardless of what the national constitutions said. Rights, elaborated in the texts, were realized primarily in the breach.

Forty years later, succession crises in the Soviet Union brought new leadership to the fore that loosened the Soviet Union's grip on its "satellite states" in Eastern Europe. "Perestroika" brought a tentative opening to pluralism. The dissidents of Eastern Europe agitated for change as soon as change seemed to be on offer. And surprisingly, the Soviet Union permitted a process of political transition to multiparty elections.

Two weeks before the fall of the Berlin Wall in November 9, 1989—which itself was the most visible marker of how far and how fast the political ground had shifted—Hungary enacted its new post-Soviet constitution on October 23. During the Cold War, dissidents had campaigned for rights, called for restraints on the power of governments and insisted that their countries could become, as they put it, "normal" (Shleifer & Treisman, 2014). The National Roundtables of 1989 across the region provided a forum for negotiating the political transfers of power from the outgoing communist party to the incoming democratic opposition. Along the way, almost by accident, the Roundtable process in Hungary generated such a major constitutional reform that it amounted to a wholly new constitution (Scheppele, 2020).

Formally, the 1989 Hungarian constitution started as a giant amendment to the Stalin-era constitution of 1949 (Germany, Basic Law. 1949), but left very little of that original constitution intact. Despite its odd provenance as a super-amendment to a sham constitution enacted by the outgoing illegitimate government, the 1989 constitution nonetheless became accepted very quickly because ideas about human rights, democracy and constitutionalism had grown deep roots during the communist era (Scheppele, 1996). The new Constitutional Court created by Hungary's 1989 constitution started work in January 1990, deciding a flood of constitutional cases even before the first multiparty elections as if the new rights contained in the new constitution were real. The fact that thousands of people petitioned the Court to right wrongs in those early years relying on those rights meant that the public recognized how much things had changed.

By the time I showed up to work as a researcher at the Hungarian Constitutional Court from 1994 to 1998, the commitment to constitutionalism on the part of public institutions, political parties and the public as a whole was so strong that the description of a state of affairs as "*alkotmányellenes*" (unconstitutional) had already become a general expression of condemnation even outside legal settings. For example, I once heard a taxi driver yell this expression out his cab window to object to the unconventional driving behavior of the car ahead of him. In those heady years when the new constitutional republic was being established, I witnessed first-hand how this new constitution generated a democratic republic and a jurisprudence in which dignity was the central organizing principle. The Constitutional Court issued pathbreaking decisions abolishing the death penalty, dismantling the surveillance state, fashioning a "rule of law transition" and protecting freedom of speech, association, religion and more (Scheppele, 2005). The Court's inspirational first president, László Sólyom was the keynote speaker at the Law and Society meetings in Budapest in 2001!

Of course, there are limits to what any new constitution can do. It did not change all of the old habits from the Soviet time of evading state regulation wherever possible. The new constitution presided over the explosion of economic inequality under wild capitalism. That said, Hungary showed that the rule of law could develop in stages, first through establishing a constitutional government and then gradually spreading through other areas of law (Scheppele & Örkény, 1999). Emerging from dictatorship with its sham constitution, Hungary became a relatively well-functioning constitutional republic reaching the status of a "consolidated democracy" quite quickly (Linz & Stephan, 1996).

During the same years that the new constitution was becoming entrenched, however, I also witnessed the rise of Hungary's first post-Soviet counter-constitution, which grew out of a backlash against the rapid-fire changes. The transformations of 1989 and after were pervasive and not always

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positive. A one-party state became a multiparty political free-for-all with political parties shifting their stances between elections so that nothing in the public sphere seemed stable. A rigidly controlled economy was suddenly opened to international competition, to prices established by markets rather than political fiat, and to private ownership of both large businesses and the growing revenue streams that they produced. The absence of flaunted wealth and extreme poverty was replaced by the sudden visibility of both. The average Hungarian experienced a sudden expansion of political freedom and a rapid contraction of economic fortune at the same time.

The post-1989 changes were so fast and so extreme that nostalgia for the pre-Soviet past became especially strong among those who had lost the most in the transition. People who could not make the sudden shift to a capitalist economy either because their education did not prepare them for the new world or because their social vulnerabilities made it impossible to enter a world of cut-throat competition found that they were left behind by a state that, under international tutelage, cut back the social safety net that had protected them. The nostalgia of those who lost out in the transition conjured an image of a world that Hungary could have entered if it had not sold out its economy to neoliberal reform and if it had not abandoned its historic national identity for a cosmopolitan vision of itself as "*valahol Európában*" ("somewhere in Europe," the title of a popular film at the time). By the mid-1990s, pre-Soviet nostalgia had a toehold in politics, voiced primarily through the small and conservative Smallholders' Party which, despite its 20th century interwar bourgeois origins, had become the party of the post-Soviet dispossessed.

In 1995, the Hungarian Parliament, with a socialist-liberal coalition in the majority engaged in a full-throated defense of the "transition," decided that it should put the 1989 constitution on a more legitimate footing by revisiting it again after a full democracy had been established. The effort failed to generate a new constitution because there was not enough political will to change what was working rather well for the victors of transition, who consisted of the newly empowered political classes and the new elites who had embraced the opportunities that capitalism made available. One significant dissenting voice, however, urged a major revision of the 1989 constitution. The Smallholders Party argued for a return of the monarchy and, if that were not possible, they urged at the very least that the Holy Crown of St. Stephen should be recognized as Hungary's historic constitution. The Holy Crown of St. Stephen had been the leading symbol of state in the 20th century interwar period when Hungary had been last independent of foreign domination.

The Holy Crown? An object as constitution? In Hungary, this was a familiar claim. As school textbook history would have it and as every Hungarian knows, Hungary's first Christian king, Stephen, received a Crown from Pope Sylvester II in the year 1000 C.E., thus creating the medieval Kingdom of Hungary. From that establishment of the Hungarian state through the middle of the 20th century, the physical, literal Holy Crown of St. Stephen (*Szent Korona*) had played an important role in the formation and legitimation of governments and the doctrine of the Holy Crown—the *Szent Korona-tan* —contained the principles of Hungary's historic constitution. Not surprisingly, the Crown's leading role in Hungarian public law had ended once the Soviet Union occupied Hungary after World War II. And in the new democratic transformation after 1989, the Crown—like many Hungarians—had been left behind. The Smallholders wanted to pick up where the interwar history left off by restoring the Crown as Hungary's constitution. As they argued, such recognition would begin by acknowledging that no law was valid unless passed in the physical presence of the Crown. This recognition would be accompanied by recovering the constitutional principles grounding Crown's award of legitimacy to nearly a millennium of kings. The socialist-liberal government of the time thought that restoring the Crown and its associated ideas was crazy. The Crown, they said, belonged in a museum.

The 1998 election brought a coalition of conservative parties to power, led by Prime Minister Viktor Orbán, then a 35-year-old firebrand whose political party Fidesz had already crossed the political spectrum from libertarianism to nationalism looking for a place to park. The Smallholders joined Orbán's coalition government. Seizing on the popularity of the Crown in far-right circles, Orbán celebrated the Millennium by moving the physical Crown with great pomp and fanfare from the National Museum to the Parliament. Enclosed in a glass case and watched over by a revitalized Crown Guard in the giant rotunda of the

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Parliament building where it has remained ever since, the Crown now symbolizes state sovereignty in the symbolic heart of democracy. The Smallholders and other nationalist Hungarians were delighted.

After only one term in office, Orbán was defeated in 2002 and again in 2006. But when the global financial crisis tipped Hungary over into bankruptcy on the watch of the socialist-liberal government, Orbán's fortunes changed and he was reelected overwhelmingly in 2010 with 53% of the vote. Hungary's disproportionate election law converted this Fidesz victory into a supermajority bloc in the Parliament with 67% of the mandates. Because the 1989 constitution could be amended with a single two-thirds vote of the unicameral Parliament (one of those rules that had not been changed from the Soviet time), Orbán could elevate himself above the law and even rewrite the constitution without the approval of any party save his own.

Soon after taking office, Orbán commissioned a new constitution. As in 1989, the new constitution that raced through the Parliament was adopted by the same rule that governed amendments. As in 1989, the new 2011 constitution was an ideological counter to the prior constitution, now replacing both political and economic liberalism with intolerant nationalism much as liberalism had replaced state socialism in 1989. To signal the new nationalist bent of the new constitution, Orbán drew heavily on Crown symbolism. While the liberals of 1989 had mobilized widespread disaffection with Soviet rule to bolster their vision of government (and to launch themselves into power), Orbán's counter-constitution told Hungarian nationalists that they had won the battle for Hungary's future based on Hungary's past.

On April 25, 2011, the President of Hungary signed Hungary's new constitution, the product of a secret, hurried, one-party process and an even shorter public debate (Hungary, Fundamental Law. 2012). Within one year of its election to office with a constitution-making supermajority in the Parliament, Orbán's government changed the very constitutional ground on which it stood. Orbán's new constitution took effect on January 1, 2012, and his Parliament obediently passed thousands of pages of new laws to go along with it. The overall effect of this sweeping legal reform was to lodge all political power in a single pair of hands for the long haul. The 2010 democratic election had launched what became a quickly consolidated autocracy. Every step in this process was legal, a pure example of *autocratic legalism* (Scheppele, 2018).

To disguise the power grab implicit in the 2012 constitution, Orbán topped his new powers with the Holy Crown, signaling to his conservative base that he was restoring Hungary's pre-communist constitutional tradition. As the new constitutional preamble states, "We honor the achievements of our historic constitution and we honor the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation." And then, as Article R of the new constitution commands, "The provisions of the Fundamental Law shall be interpreted in accordance with …the achievements of our historic constitution." Lest anyone miss the symbolism, a coffee-table-book version of the new constitution was printed by the thousands, with the Holy Crown emblazoned on its cover.

If the Crown symbolizes Hungary's historic constitutional order, why would it appeal now only to those on the right wing—and particularly the far-right—of the political spectrum?

Post-communist nostalgia created a fond image of 20th century interwar Hungary, when Hungary had last been an independent nation. Politically, it urged Hungary to pick up where the interwar period left off and continue the same form of government. But this proposal sharply divides the current left and right in Hungary for reasons having to do with what that interwar regime stood for.

At the end of World War I, the Austro-Hungarian Empire—whose leader had the dual title of Emperor of Austria and King of Hungary and which after 1867 was formally co-ruled by both states—was cut into pieces with the aim of giving each major ethnic group within the empire its own national state. The Treaty of Trianon created the new independent state of Hungary, but the new borders established under that treaty meant that the country lost 60% of the territory and 70% of the peoples that had historically been under its jurisdiction. Hungary was perhaps the biggest loser in the post-World-War-I division of empire.

Though monarchy disappeared in 1918, the Crown that had for 900 years been associated with the Hungarian monarchy ironically became more important. Miklós Horthy, who governed the new

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Hungarian state within its diminished borders from 1920 to 1944, vowed to address the "Trianon trauma" by fighting to recover the lost lands and peoples of "Greater Hungary." To symbolize his irredentist commitments, Horthy took the title of Regent and claimed to govern the country in the name of the Crown which then symbolically stood for Hungary's proper place in Europe as a major kingdom and a major power.

During Horthy's reign, the Crown symbolically united Hungary with its glorious past by being displayed everywhere. The Crown appeared on currency, on stamps, on shrines across Greater Hungary and even on tour around the country as a specially created train brought the Crown to giant cheering crowds in 1938, the 900th anniversary of King Stephen's death. The centrality of the Crown to Horthy's nationalist government put the Crown in bad company because the government had more than a passing flirtation with fascism and a troubled relationship to democracy.

At the start of Horthy's reign, Hungary passed the first *numerus clausus* laws in Europe, limiting the number of Jews in the professions (Kovács, 1994). Throughout his tenure in office, Horthy encouraged intolerant nationalism. When the time came, Hungary entered World War II on the side of Nazi Germany in part out of ideological affinity and in part because Hitler had promised Horthy that a victorious Hungary would get its former territories back. By the war's end, about 565,000 Hungarian Jews were murdered, some by forced labor but most at Auschwitz, deported by the Hungarian Arrow Cross (Nazi) government that took power near the end of the war. Another half million non-Jewish Hungarians—both soldiers and civilians—died during the war as well. And, at the end of the war, Hungary was occupied by the Soviet Army, not to see independence again for nearly another half century.

Horthy's reign may have ended in disgrace and defeat, but even now, Hungary's far-right parties support Horthy's dream of restoring Greater Hungary. At far-right rallies, and even at government functions under Orbán, flags, bumper stickers and banners feature maps of "Greater Hungary" instead of the current state borders. Orbán has signed onto the cause, perhaps most visibly doing so when he first held the rotating presidency of the Council of the European Union in 2011. In decorating the Council building in Brussels with symbols of the Hungarian presidency, he proudly displayed a carpet featuring a map of Greater Hungary obliterating the established international borders of the neighboring countries, to great alarm (Pop, 2011).

But the dream of Greater Hungary, symbolized by the Holy Crown, is not just about borders. It's about a version of history that the far-right has constructed against all scholarly evidence. Hungary's role in the Holocaust is persistently denied, as far-right "historians" attribute the Holocaust to a German "invasion" of Hungary. Orbán's government even constructed a monument on Freedom Square in the heart of Budapest dedicated to the "victims of German occupation" in World War II, a category which includes both the Jewish and Roma victims of the Holocaust alongside their non-Jewish and non-Roma fellow citizens. To hammer home the point about continuity of government between the Horthy regime and his own, Orbán has brought back the uniforms of the Crown Guard from Horthy's day and presided over the dedication of Horthy statues, the reversion of street names and public squares to their interwar identities and the symbolic makeover of the country to trigger at all possible moments the historical memory of Horthy's rule (Walker, 2019). The school history books have been rewritten to glorify those days.

To Hungarians, the Holy Crown symbolizes all that. For Viktor Orbán to restore the Crown to public life again signals that he sympathizes with the politics of that period. Orbán's new constitution, with the Crown emblazoned on the cover and honored in the text, adopts the spirit of the Horthy government, which stayed in power constantly undermining democratic government for a quarter century. In short, Orbán took the Holy Crown, the counter-constitution that had been the object of nostalgia since Hungarian independence in 1989, and made it the symbol of his signature legal reform.

Orbán justified his new constitutional order by claiming to restore Hungarian historical honor against the siren songs of the cosmopolitans, by preaching that Hungary was just for Hungarians, demonizing migrants, celebrating Hungary's Christian founding and eventually cracking down on "gender ideology" and the rights of the LGBTIQ+ community. In attaching this program to his new

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constitution, Orbán inverted the dignitarian values of the 1989 post-Soviet constitution and created a fiercely nationalist and anti-liberal constitution.

By 2013, the Constitutional Court where I had worked for four years as a researcher in the 1990s was packed with Orbán's judges who have since done everything he wanted. A 2013 constitutional amendment, enacted to symbolize the end of the Constitutional Court as we knew it, nullified the entire dignity-based jurisprudence of the Court from 1990 to 2012. By the 2014 election, the rules were too rigged for the opposition to win (something I blogged about at the time and later documented in detail in Scheppele, 2022). Already by his first reelection, Orbán had destroyed democracy by making it impossible for Hungarians to change leaders through elections. Hungary had fallen from democracy into dictatorship under Orbán's nationalist counter-constitution.

A COUNTER-COUNTER-CONSTITUTION: USING SCHOLARSHIP FOR DEMOCRATIC REFORM

As we meet here in Washington, democracies across the world are weakening and some are collapsing. The United States is not immune from these trends. As we know from our own experience, scholars are being pushed and shoved into the policy debate whether they want to be part of this debate or not. Because democracies fail these days not by coup but by law (Bermeo, 2016; Scheppele, 2018), we as law and society scholars are uniquely positioned to call the process out—and even to do something about it. Hungary was the first consolidated democracy in the world to fall into autocracy, so perhaps my experience in countering Orbán's counter-constitution will provide some useful material to think with.

As the radicalness of Orbán's constitutional revolution became clear, I could no longer separate the scholar in me from the outraged defender of democracy, human rights and the rule of law. I had been a journalist before becoming an academic, so I started in 2011 to cover in real time the autocratic legal structures that Orbán was erecting so that the English-speaking world would understand what was happening. My Princeton colleague Paul Krugman gave me space on his highly visible *New York Times* blog to explain the legal revolution in the first several years of Orbán's assault on liberal constitutionalism. At the beginning, I simply called out what Orbán was doing so that the world could not pretend it did not know.

Once entrenched, however, Orbán's illiberal counter-constitution required more concerted resistance. Hungary needed a new counter-counter-constitution. The fact that Orbán was attacking all independent institutions in the country—including the universities—meant that scholars in Hungary faced a choice between cringing in corners hoping not to be noticed and taking a stand on principle while risking reprisals. Even before the site of the Law and Society Association annual meeting in 2001, Central European University, was pushed out of Hungary and even before nearly all public universities were "privatized" to make them dependent on the party faithful, defenders of the 1989 constitution of dignity were under threat.

If my arguments about how constitutions and counter-constitutions work were right, however, it should have been possible to generate yet another counter-constitution, especially given that Orbán's new constitution was divisive and not universally accepted. To create a counter-constitution, as the liberals did during the Soviet time and as the nationalists did during the liberal period, one needs to unsettle the obviousness of the constitution that exists and replace it with another narrative that is compelling to those who would be governed by this new constitution. And so I started the work of counter-constitutional creation.

Since the 1990s, I had been tracking the nationalist counter-constitution of the Holy Crown by hanging out at right-wing bookstores that featured an astonishing number of new Holy Crown books and pamphlets each year, elaborating various fantastical histories of the object to serve as a base for a counter-constitutional revolution to the existing liberal constitution. I had chatted up the patrons and asked them to explain the Crown to me. I had shown up at Crown events and

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interviewed Crown defenders to figure out what made them tick. I had collected Crown artifacts and photographs of Crown tributes to document the pervasiveness of the Crown, particularly in the Hungarian countryside. I visited Crown shrines in multiple countries. By the time that Orbán's constitutional revolution occurred, I was not surprised that he had chosen the Crown to disguise his autocratic ambitions because it was the perfect way to dog-whistle his political sympathies to domestic audiences while leaving foreign audiences clueless.

But what could counter Orbán's new nationalist constitution? Hungary is a conservative country by political inclination; returning to cosmopolitan liberalism was unlikely to win hearts and minds of enough Hungarians to win elections. And yet, Hungary could do better than dictatorship. Being American, I had seen how conservatives could mount a successful counter-constitutional movement, convincing the Supreme Court and most of the constitutional law profession that originalism was the only proper way to understand the US Constitution (Levin, 2004). (Not that I had welcomed the originalist project in the United States since the constitutional vision it was trying to obliterate was one that I had critically defended.) The success of American originalism, however, worked to convince people who already believed that their glory days were in the past to support a different vision of what a constitution meant for the future. Many Hungarians were already inclined to look to history to understand what a constitution could be and they had already fixed on the Holy Crown as the marker of constitutionalism, so maybe a different and more variegated history of the Crown would be a good place to start in creating a new counter-constitution to overcome Orbán's nationalist constitutional reconstruction.

Originalism starts by searching the past. If it's done badly, it mangles the history. But it can be done well, to write honest history in a way that creates a usable "history of the present," to echo Foucault (Foucault, 1977, p. 31). Before I trigger the historians to object to a project like this, let me explain—in the words of David Garland—that this sort of history "aim[s] to reveal something important—but hidden—in our contemporary experience; something about our relation to technologies of power-knowledge that was more clearly visible [in the past] than elsewhere but which was nonetheless a general, constitutive aspect of modern individuals and their experiences" (Garland, 2014, p. 368). In short, it is possible to write a history to scholarly standards that also illuminates something important hiding in the present that we can see anew if we look at the present through the past. And so I set out to tell the history of the Crown *before* Horthy to create a new originalism that would appeal to Hungarian conservatives who wanted to know their roots. I was fortunate to be able to rely on the extraordinary recent work of Hungarian medievalists who had been excavating novel insights about the origins and history of the Crown and its associated ideas.

Every good originalism starts "at the beginning." And in this case, it means starting with the object itself, the Crown given by the Pope to Hungary's first Christian King Stephen in 1000 C.E. While Hungarian nationalists will say that this object in the Parliament is the original Holy Crown of St. Stephen, academic medievalists know that the Holy Crown *could not possibly* have been given to Stephen by the Pope (Bak & Pálffy, 2020; Hilsdale, 2008).

One look at the Crown shows why. Hungary's Crown is a "hoop Crown" (in the shape of circle like a wedding band) topped with what was apparently once a cross, bent down on all four ends to meet up with the hoop at quarterly turns. The Crown is made from two distinct pieces, visible from the underside of the Crown where they are awkwardly joined. Because both pieces are made of gold, decorated with precious stones and graced with enameled portraits of saints, the Crown has a certain aesthetic integrity (Figure 2).

A closer look at the enameled portraits in Figure 2, however, reveals what a complex object this is. The inscriptions on the lower crown are not written in Latin, as one would expect if this Crown were given by the Pope to Stephen. Instead, they are written in Greek. Art historians have tracked down the object with the aid of these inscriptions and concluded that the three portraits on the back of the Crown reveal both the place of origin of the object and its timing. The top middle portrait on the back of the Crown in Figure 2 depicts the Byzantine Emperor Michael VII Doukas who ruled Constantinople and its empire from 1060 to 1078. Below him and to his right (our left) is a portrait

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FIGURE 2 The Hungarian Holy Crown, from Wikimedia https://tinyurl.com/anrvma35.

of Constantine, Michael's brother and co-emperor. Below Michael and to his left (our right) is the Hungarian King Géza I, grandson of Stephen, who ruled Hungary from 1074 to 1077.

As Cecily Hilsdale demonstrates (Hilsdale, 2008), the lower Crown (the *corona Graeca*) was almost surely a Byzantine Crown destined for Géza's bride, who came from a noble Byzantine family. The bottom part of the Crown was therefore a *female* crown, almost surely dating from the 1070s only a few decades after Stephen's death in 1038 C.E. While Holy Crown is therefore not Stephen's Crown, it is still an 11th century object. That said, on a Crown where all of the enameled portraits represent saints or emperors and where all wear halos (the green and gold circles behind their heads), the only figure without a halo is the one Hungarian, Géza. So much for the essential superiority of Hungarians as reflected in the Crown! (In fairness, Géza came from a family with at least six saints even if he wasn't among them.)

Dating the oldest part of the object to the reign of Géza I puts its creation near the time of the Great Schism. Starting in 1054, the Christian churches of Rome and Constantinople battled each other as each church excommunicated the other church's leaders, separating the Catholic and Orthodox Christian churches down to this day. Rather than signifying Hungary's place at the heart of (Roman) Christian Europe, as Viktor Orbán constantly claims now, the Crown itself instead reveals Hungary's precarious location on the border between two warring versions of Christian Europe. At the time, there was immense tension at the border between empires—hence Géza's attempt to patch the split that would have run right through Hungary's neighborhood at the time by remaining loyal to Rome while marrying into Byzantine nobility.

The fact that the upper Crown (the *corona Latina*) (Figure 3) has Latin inscriptions of a very different origin shows that those who fused the two pieces, most probably in the 12th century, may well

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FIGURE 3 The Holy Crown of St. Stephen seen from the top, with the Latin inscriptions visible. From: https://tinyurl.com/4v45wafh.

have been still trying to appeal to both sides. The object itself provides evidence that it straddles two religious and political traditions, a multi-confessional biography that was continued in the mid-17th century, when, as the Habsburg Counter-Reformation attempted to purge Protestantism from its empire in general and Hungary in particular, an agreement was reached to ensure that the Crown Guard would always include both Protestants and Catholics (Bak & Pálffy, 2020, p. 170). At least twice in its history, then, the Crown has bridged religious divides rather than assert one side against another in religious wars.

Even if the Crown is not Stephen's, those who want their constitutional history to highlight the greatness and uniqueness of their country going back to the High Middle Ages will not be disappointed. No other European country has maintained the centrality of an 11th century Crown without replacing it with something more modern along the way, which makes the Hungarian Crown still the oldest crown in continual use in Europe. Perhaps the Crown's longevity is due to the fact that it came to be associated with some quite modern constitutional ideas, ahead of their time.

Ernst Kantorowicz's famous study of *The King's Two Bodies* argues that medieval European kingdoms typically marked the evolving separation of the person of the king from the office of the king (and therefore the beginning of constitutionalism as a constraint on kings) through the elaboration of the king's "two bodies" (Kantorowicz, 1995 [1957]). The corporeal and mortal body of the king could die and yet the "super-body" of the king, representing the body politic, could live on. (Hence the cry, "The king is dead! Long live the king!") But by the late Middle Ages and perhaps even earlier, Hungary achieved the conceptual distinction between particular rulers and the authority of the office by distinguishing the person of the king (who could die) from the physical Crown (which was eternal). Kantorowicz pointed out in a footnote that the Hungarian case clearly did not follow the pattern of the rest of Europe: "Hungary carried the distinction between mystical Crown and a physical king to a great refinement, but the material relic of the Crown of St. Stephen seems to have prevented the king from growing his own super-body" (Kantorowicz,

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1995 [1957]: note 446). In short, Hungary seems to have been the first to invent the modern constitutional idea that political authority resides in the legally established office and not in the body of any specific person.

In medieval and early modern Hungarian constitutional practice, each new king would swear an oath on the Crown to uphold the laws of his predecessor. As a result, the Crown became the functional guarantor of the rule of law as a constraint on the arbitrariness of the ruler. In 1222, the *Aranybulla* (Golden Bull) declared the privileges of the nobility, limiting the powers of the king and establishing the right of resistance if the king violated his oath. The *Aranybulla* has a status in Hungarian constitutional history rather like the Magna Carta in England, trailing it in time by only 7 years. While many of the rights and privileges it identifies are not ones anyone would claim now, the fact that something like a bill of rights constrained the king from the early 13th century on is a constitutional accomplishment. By the early 16th century with the addition of later pacts between king and nobility, the Crown started to grow an associated set of legal doctrines as catalogued in the *Tripartitum*, Hungary's first legal codification by István Werbőczy (1517) who, among other things, asserted that the Crown could not be put on a monarch's head until he had first sworn to honor the laws of his predecessors (Rady, 2014, p. 106).

Even after Hungary's partition at the hands of the Ottomans in the early 16th century and later absorption into the Habsburg empire as the Ottomans were pushed back, Austrian monarchs were separately crowned with the Hungarian Crown, giving rise to their cumbersome double title of Emperor of Austria and King of Hungary, further signaling that Hungary—and the Hungarian Crown—had special status within the empire even before the late 19th century formalization of a Dual Monarchy.

In the early 17th century, a full-fledged "doctrine of the Holy Crown" (*Szent Korona-tan*) was codified by Péter Revay, the Protestant head of the Crown Guard (Revay, 1659). Written at a moment when the Habsburg Empire was engaged in a vicious campaign of Counter-Reformation against Hungary's remaining Protestants, Revay's treatise on the Holy Crown was a plea for religious toleration.

As the Crown developed an increasingly legal identity, it came to represent the "peoples of the Crown." Nora Berend has demonstrated that Hungary was unusually diverse in the Late Middle Ages, when Jews, Muslims and Pagans (Cumans) shared equal legal status with Hungarians (Berend, 2014, pp. 101–108). Positioned on the frontiers of Christendom, the country welcomed foreigners in large numbers who often stayed, were promoted through the social ranks and sometimes attained noble status. Berend has estimated that of the roughly 50 aristocratic clans in Hungary from the 13th to 15th centuries, nearly one quarter had descended from a foreign knight who had only recently moved into the territory (Berend, 2014, p. 104), thus incorporating immigrants into the highest levels of Hungarian society. When the founding Árpád dynasty had died out at the end of the 13th century, the assemblies of nobles (itself a shifting and diverse group) elected Hungarian kings who were themselves rarely Hungarian. In European countries farther west with more rigidly stratified feudal institutions, the nobility was a fixed, small and relatively clear group and the monarchy was more firmly hereditary. But in Hungary, with a rather more fluid social structure, the nobility elected each new king without the presumption that heredity settled the matter. The nobility was itself a constantly changing group that included not just (or even primarily) what we would now recognize as ethnic Hungarians.

I could go on, but you can see how far the pre-Horthy—and especially medieval and early modern—history of the Crown undermines everything that Horthy—and now Orbán—projected onto the Crown. In the hands of modern intolerant nationalists, the Crown stands for a univocal Christian Hungary, which in turn promotes intolerance of diversity and the exclusion of non-Hungarians. In the medieval sources, however, the Crown was associated with patching over religious differences, welcoming foreigners and integrating them into the political community (Berend, 2014). The physical Crown's mixed origins screams pluralism, while Orbán has used the defense of "constitutional identity" to reject pluralism of all kinds (Halmai, 2018). To modern nationalists, the Crown stands for the unlimited power of the Regent (Horthy) or Prime Minister (Orbán) while in the medieval and early modern sources, the king's powers were limited by a

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religiously and ethnically diverse nobility which possessed proto-rights which the king had to swear to uphold in the name of the Crown, thus stabilizing the rule of law. In nationalists' hands, however, the Crown blesses indefinite rule without legal constraints. In the medieval sources, elective kingships meant that power rotated across a wide swath of both foreign and domestic kings who would only be given the power to govern if they agreed to respect the rights of those over whom they would be given the temporary power to rule. Sovereignty, after all, stayed with the Crown and never passed to the king. The Crown was even gender-fluid as it started its life as female and converted to male only later while Orbán's nationalist constitution emphasizes the rigidity of gender. Orbán's constitution, using the Holy Crown as a symbol, thus relies on fake history to justify itself.

I started taking this new constitutional history on the road, lecturing to Hungarian nationalist groups in the US and in Hungary. By this time, I was well known in Hungary as an opponent of the Orbán government so that nationalists viewed me with suspicion. But as one man—wearing the stereotypical giant mustache and traditional clothing that allows one to spot the nationalists from a long way off—told me after one of my lectures, this deeper history of the Holy Crown provided something for Hungarians to adopt with pride. That gave me some hope that popularizing this new Crown history could undermine Orbán's distorted narrative. I've since talked with some of the new opposition parties about weaving this history into their platforms at election time.

[Update since this lecture was given, one of the youthful new parties expressed an interest in basing its political platform a counter-constitutional Crown proposal and some of their members had participated in a working group elaborating this new history at the Hungarian Academy of Sciences. But the fact that all opposition parties had to unite to defeat Orbán in the 2022 election—an endeavor that ultimately failed—meant that the parties did not develop differentiated political platforms. Since liberals in Hungary are still firmly opposed to any mention of the Holy Crown in contemporary politics, no common opposition platform can include it. So for now, this alternative history has not yet surfaced as a serious counter-constitutional proposal that could ground a new government.]

Constitutional histories of present-day states are complicated and no single narrative captures their richness. But serious constitutional history can often undermine the historical caricatures that autocrats are presently relying on for their own legitimation. Using better histories to underwrite counter-constitutions can thus be one way to unsettle autocrats' claims without sacrificing scholarly integrity. A counter-constitution does not have to lower our academic standards but can instead be an opportunity to make the public appreciate better history.

When I recently gave an academic lecture proposing this new counter-constitution for Hungary, one student asked me how I had made the decision to become an activist. I said that I had not really made such a decision. I just went on saying the same things that I had been saying for decades. Changes in the world have turned what had once been uncontroversial and neutral core ideas in our field into statements of political activism. Most of us studying comparative constitutional law had long been saying that separation of powers, protection of rights and rotation of power were in general good things and that serious history was too. It says something about our times that we look like activists to insist on these once-uncontroversial principles, now that anti-liberal politicians attack the academic values of integrity, evidence and open argument. But the fact that anti-liberal politics has taken an anti-intellectual and intolerant turn is no excuse for giving up on our values and methodologically sound ways of assessing evidence. It is a moment to recognize, however, that our audiences may have changed and new tactics of explanation are needed.

THE ROLE OF SCHOLARS IN DEFENDING DIGNITY

Dignity at these Law and Society Association meetings is not only our theme but also a sign of commitment to what we share as sociolegal scholars. We value the equal dignity of all, and work to make

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the realization of dignity central to the operation of our political, economic, social and academic institutions. At this moment when constitutional governments are being undermined by autocrats who use formal legality to attack the basic principles of constitutionalism, we are particularly well-situated to call out what is happening because it is happening on our watch in our field. The comparative legal analysts among us can show how autocratic tricks travel across borders. The historians among us can write better history than the autocrats. Those who track abuses of power and resistance by counter-power actors can explain what is happening in real time while assessing what is working to undermine autocracy. Those of us who have devoted our academic careers to working toward equal dignity for all can demonstrate empirically how and why autocracy fails to achieve this goal.

In short, those of us in the law and society movement are on the front lines of the battle for dignity in our autocratizing world, whether we like it or not, because autocrats are coming after everything we value and doing so by distorting our fields of expertise. It is not an option not to fight—just as it is also not a time to cease to operate by our academic standards.

Continuing to say what we have always said is not going to be easy when our statements are put under a public spotlight and are mocked by the autocrats. What we do can even attract unwanted legal attention. Shortly after I started my quest to create a new Hungarian originalism of the Holy Crown, the Orbán government quietly amended their new criminal code, which now reads:

> Section 334: Any person who—before the public at large— … dishonor[s] or degrade[s] the … Holy Crown of Hungary … is guilty of a misdemeanor punishable by imprisonment not exceeding one year ….
>
> (Hungarian Criminal Code, 2013).

I take this as a badge of honor.

As scholars, we must defend our independence, our standards and our integrity, even if our work is criminalized. In fact, threatening our work with criminal penalties may be a sign that the autocrats recognize the threat that we pose to their continued and fraudulent rule.

Of course, we know as sociolegal scholars that the *status quo ante* was not adequate before the present autocratic revolution. Inequality and injustice were just two reasons why the autocrats' siren songs were so beguiling to voters who had given up on liberalism. It will not be enough to argue that we should return to some barely adequate past constitutional arrangement. At this moment when it would be easy to be depressed about the state of the world, we are called upon now more than ever to imagine that another world is possible. Creating counter-constitutions will be one way to contribute to that project.

In thinking through how we carry out our work in this difficult moment, we should take note of the fact that anything we say can be used against us in the court of public opinion. We are no longer speaking just among friends who share our academic training. Like it or not, we have become public intellectuals, and as such we should think about how our words and actions and research and conclusions will be understood by others outside our immediate academic circles. Rather than trying to hide behind our specialized vocabularies, ironic failure to commit and self-referential flights of abstraction, we should become more rather than less straightforward in the way we make the case for our evidence-based arguments. We need to approach our scholarship the way we approach our teaching—patiently explaining to those who are new to our fields the bases of our professional knowledge and the reasons why we believe what we do. We need to engage with those who disagree, insist on high standards of evidence and ultimately remain open to counter-evidence and counter-argument. We need to defend our evidence and our arguments in public debate and take the message of dignity beyond these meetings into the fight to preserve constitutional democracy around the world.

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