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# LIBERAL DEMOCRACY'S HUNGARIAN CANARY?

Gregory A. Mark\*

*The attacks on the legal and constitutional structures of Hungary are, András Pap, a Hungarian scholar, argues, political maneuvers designed to cement control in one political party, and one leader. Characterizing the appeal of Viktor Orbán's Fidesz's party's self-proclaimed illiberal ideology as a "U-turn" in Hungarian politics, a deliberate turn away from liberal democratic institutions, Pap suggests that Orbán's success is rooted mainly in the failure of post-1989, that is, post-communist, politics. Admittedly limiting his focus to 2010 to 2012, Pap nonetheless seeks to derive a larger meaning from the Hungarian example for populism's appeal elsewhere. While true as far as it goes, Pap's explanation does not explain the deeper political appeal of Orbán's politics, much less the Hungarian acquiescence, perhaps celebration, of illiberal ascendancy. In particular, he does not invest the two years of the U-turn with a sufficiently rich explanation of the role of Hungarian history or its economy. If Hungary is an example of a larger illiberal phenomenon, then understanding its appeal depends on more than knowing that, and how, Orbán subverted democratic machinery. It depends on knowing what such subversion has appeal, which in turn requires a rich knowledge of historical and economic factors.*

## INTRODUCTION

András Pap sets himself a much-needed and terrifically difficult task, explaining how, and when, Hungarians loosed the embrace of the foreseen future and deliberately took up illiberalism, in politics, society, and economy.<sup>1</sup> He adopts an old, seemingly lost technique of political analysts, the quick survey—think Tocqueville on America.<sup>2</sup> His work is a snapshot, or as he puts it, a “diary of a constitutional

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1. See generally ANDRÁS L. PAP, *DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY* (2018).

2. See generally ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (2002) (Henry Reeve trans.).

scholar on select recent political and constitutional developments in Hungary.”<sup>3</sup> Covering a vital period, 2010–2012, it purports neither to be comprehensive in scope nor exhaustive in depth. Rather, it seeks to provide insight about a “new form of populism” in which Hungary is but a leading example.<sup>4</sup>

Liberal democratic institutions are like the miner’s canary. In the presence of a noxious atmosphere, they will expire when poisoned. Their death indicates that political conflicts will be resolved less by debate, give and take, and compromise, than by the authoritarian acts, or worse, of those holding political power. Thus, the seeming unraveling of the institutions, even the values, of democratic politics is, twenty years into the twenty-first century, much in the headlines. Not a moment goes by, one notes in wonder, as the recorders of the events of the day, and their constant companions, the commentators and pundits, discuss and bemoan—in media as old as newspapers and as modern as podcasts and blogs—that declension, to adopt an archaism. After a premature triumphalism following the collapse of the Soviet Union, in which some saw the end of history in the ascendance of various emanations of democratic and market-friendly states,<sup>5</sup> optimism has faded. Promising beginnings in China, the efflorescence in Latin America, and transformations in Africa, among others, all reportedly portended the decline of authoritarianism and the opening of opportunity. Nowhere was this future considered more certain than in the countries once contained in the Soviet bloc. Poland, where the heroes of Gdansk exposed Soviet weakness and weariness, Czechoslovakia, where the spring of 1968 remained a vivid memory, and even Yugoslavia and Romania, always irritant burrs under the Soviet saddle, all seemed to embrace the inevitable future. Nowhere, however, did the embrace feel so keen as in Hungary.

Why should events in a land-locked, small, linguistically unique state with few resources—a country with a small economy and few claims to strategic significance—matter much to those interested in the future of democracy and liberalism? Important things come in small packages, Hungary teaches. Its politicians, Viktor Orbán in particular, have said what many others will not say in public. How what has been said translates into consequences, political, social, and economic, is as sharply drawn in those two years in that small country as anywhere. What a population expects of democratic governance and liberalism, how law and constitutionalism respond when under stress,

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3. PAP, *supra* note 1, at 1.

4. *Id.*

5. See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 277–78 (1992).

have in Hungary a test case. It need not be a harbinger to be important. Thus, Hungary matters.

### I. HUNGARY AND HOPE

Countries, like individuals, have histories. Those histories create cultures, both of hope and resentment. To sketch recent Hungarian history is to know a distillation of many of the powerful forces that have shaped the modern world. The background does more than set the scene. It is the stage itself on which law and politics is performed. To know what Hungary left behind at the end of the Cold War is to know a past both feared and longed for, sometimes for the same reasons.

The modern Hungarian state was created during the dismemberment of empire following the First World War. The Austro-Hungarian Empire, an empire on the war's losing side, did not survive the war's ending. The post-imperial government, the one which had shaken off empire, while home-grown, was quickly overthrown by only the second communist government in the world, somewhat home-grown. That government, lasting less than one year, was, in turn, supplanted by the regime of Admiral Horthy, an officer in the old Austro-Hungarian Navy who styled himself regent of the Hungarian kingdom. His government lasted well into the Second World War. None of these governments, save the unelected and not even six month long post-war government, pretended to liberal democracy.

Hungary's post-war borders were similarly determined not by imperial legacy but by cease-fire and subsequent diplomatic imposition. The modern nation-state of Hungary was born of the "self-determination of peoples." In an effort to avoid conflict among empires and to build states containing relatively homogenous populations, self-determination was a Wilsonian ideal.<sup>6</sup> As envisioned, it was plebiscitary, allowing populations to decide upon nation-state formation. In practice, it was a hallmark of a more traditional form of post-war European political rebuilding. To wit, votes were not taken. Borders were set in France, largely by the winning imperial powers at the expense of losing ones. They were delineated in the documents that formally ended the conflict, in Hungary's case specifically the Treaty of Trianon. Named after the French palace where it was signed, the treaty created, roughly, modern Hungary's borders. Within those borders lived a seemingly homogenous country of Hungarians. Nonetheless, thirty percent or more of those who claimed to be Hungarian lay outside its

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6. A. SCOTT BERG, *WILSON* 469–73 (2014).

borders. Newly created Hungary wanted them, and the space they occupied, back.<sup>7</sup> They became members, minority members, of other states, further belying the principals—perhaps the fantasy—of national self-determination at the heart of Wilson's view of the European future.

Within a generation, what remained of that view, embodied in Versailles and Trianon, collapsed on itself. Across Europe, the newly formed borders contained states of varying degrees of instability. Hungary was no exception. Resenting its loss of territory, status, and population, Hungary's relations with its neighbors were, to understate the case, tense.<sup>8</sup> Tumult, not peace, followed Trianon. Following Hitler's ascendance in Germany, Hungary sought, albeit loosely at first, an alliance that would assist in its irredentist hopes. In those hopes, it was, partially, successful, regaining some territory after Germany's initial successes in rearranging eastern European borders.<sup>9</sup> Germany, however, was unsatisfied with Hungary's affection for German ambitions. Especially dissatisfied with the level of animosity expressed by the Horthy regime towards its Jewish population, Germany took matters into its own hands. In 1944, it took over, unleashing both its own forces and Hungary's own rabid Arrow Cross on resident Jews. The resulting slaughter was likely the most rapid depopulations of any society's Jewish members visited upon any country by the Nazis.<sup>10</sup> Liberalism was hardly then the dominant animating political spirit of the inter-war regimes, nor of Hungary's populace.

Better known in the United States than any of this post-imperial history is, of course, Hungary's fate after World War II. The Red Army liberated Hungary from the Nazis as the war ended, and the Soviets occupied the land. After a brief interregnum of domestic democratic aspiration, Hungary's second communist government took

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7. See PAUL LENDVAI, *HUNGARY: BETWEEN DEMOCRACY AND AUTHORITARIANISM* (Keith Chester trans., 2012) (2010).

8. *Id.* at 57 ("More than three million Hungarians now lived under foreign suzerainty, half of these in self-contained areas of settlements along the borders of successor states (Czechoslovakia, Romania and Yugoslavia). To this day, the word Trianon symbolizes for all Hungarians the greatest tragedy in their history. Approximately 350,00 to 400,000 civil servants, officers and members of the middle class quit the ceded territories between 1918 and 1920. These politically alert people, who had been degraded from the ruling class to the homeless, formed a fertile recruiting ground for extremists of all kinds . . . . The idea of the restoration of the lost territories was kept alive in the inter-war years in kindergartens and schools, at church services and in the press.").

9. *Id.* at 59.

10. *Id.* at 60–61.

over, helpfully assisted by the Soviets.<sup>11</sup> Longer lived than the first, due at least in part to the presence of Soviet troops, Hungary remained in the Soviet orbit until 1989. Notwithstanding the brief, ill-fated, fall of 1956 attempt to pull out of that orbit, Hungary was solidly a part of the Warsaw Pact and its economic doppelganger, the ComEcon. To be sure, each bloc nation had different experiences and Hungary's, even given 1956, might be said to have been milder than others. Completely toeing the Pact line in foreign affairs, Hungary had a domestic economy tilted towards consumer satisfaction, at least more so than others in the bloc. Even before the New Economic Mechanism of 1968, which opened the country to some market mechanisms—including eventually limited exposure to Western capital markets—the country was nicknamed the land of goulash communism.<sup>12</sup>

All of which is to say, by the time of the bloc's collapse, no soul in Hungary had much more than fleeting experience with anything resembling liberal democratic government, and then only in the immediate shadows of the First and Second World Wars, and in each case in the Soviet shadow, albeit more conclusively after World War II. Similarly, the limited exposure to the market and the West in the economic sphere was not the same as exposure to liberal institutions of the political economy. A social democratic state, Hungary most certainly was not. Indeed, limited exposure to the West may have contributed to a romantic and wrong-headed set of expectations about liberal democracy and markets, and about what might follow communism. Why, then, such optimism about Hungary's democratic potential in 1989 and thereafter?

Pap largely assumes the reader's familiarity with such background (or assumes it is not important to his story) aside from a few passing backwards glances. Describing first the post-1989 optimism and then the sudden "u-turn" from democracy and liberal political culture, borrowing Janos Kornai's locution, he pays most attention to the exercise of power of Viktor Orbán's Fidesz party in the two years, 2010–2012, that most concern him.<sup>13</sup> Making sense of that u-turn, however, depends on knowing something of where the reversal leads. Otherwise, while those two years, 2010–2012, are assuredly an attempt to cement authority in one party, indeed, in one man, the appeal of the direction of the reversal to (at least a large number of) Hungarians seems ut-

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11. WALTER LA FEBER, *AMERICA, RUSSIA, AND THE COLD WAR, 1945-1975*, 19, 71 (3d ed. 1976).

12. PAP, *supra* note 1, at 36.

13. *Id.* at 3.

terly irrational—at least to a reader situated in the liberal democratic tradition. Understanding why the reversal has traction, in other words, depends not simply on the politics of the moment, but upon why those politics have, and had, appeal. Those politics appealed to a romantic history of Hungarian greatness as well as a disillusion with the incapacity of post-imperial, especially post-communist, Hungary to recapture that past.<sup>14</sup>

The post-1989 optimism was a product not simply of the euphoria of liberation. Soviet troops remained in Hungary for some months after the Communist party officially opened the doors to oppositional politics, so the shadow also remained. The presence of Soviet troops and the monolithic politics of the bloc had, before 1989, suppressed historical tensions within the nation-states of the bloc. The borders were effectively sealed. Voice was limited, exit nearly impossible. Religion had been suppressed, so religious tensions were muted. Monopoly of political expression channeled political actions into narrow streams; the ambitious climbed the party ladder or never climbed at all. Only in the economic sphere had authoritarian control been loosened, and then only incompletely. In the 1970s the economy expanded, most notably in the provision of consumer goods.<sup>15</sup> For the first three-quarters of the 1980s the influx of foreign capital sustained the economy.<sup>16</sup> Only in the very last couple of years of Communist rule did stagnation set in. This was Hungary in 1989. A greater proportion of its people had knowledge of the west from travel, Radio Free Europe, and contact with tourists than in the rest of the bloc. Most of the population, cynical where the party's (overblown) critiques of the market economies of the West were concerned, saw only the upside to the elimination of the command economy of the communist state. The suppression of religion generally, and opposition politics particularly, meant that the first order of business for the religious and for those of different politics was to overthrow communism. In that ambition the historical—and natural—opposition, indeed antipathy in some cases, of one religion to another, of one political persuasion to another, took the proverbial back seat. Absent the powerful other, and with the inevitable dissipation of euphoria, normal centrifugal social and political tensions returned, and sometimes with a vengeance.

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14. *Id.* at 36, 90–91.

15. See generally Gregory Mark, *Hungarian Consumers and the New Economic Mechanism*, 16 EAST EUROPEAN QUARTERLY 87 (1982).

16. LENDVAI, *supra* note 7.

## II. HUNGARY AND DISILLUSION

Why had the Hungarians not seen that return coming? Why had they not acted decisively to create structures to mediate such inevitable tensions? They had. They did. They just were not successful, for reasons both practical and theoretical.

Hungarians endeavored to create institutions that would not anger the Soviets, for the U.S.S.R. would outlast by about two years the Hungarian transition. The history of a fearful Soviet Union was not a history of pacific reaction to threats. Only in hindsight do we know that Gorbachev, the Soviet Party Secretary, did not have much appetite for military suppression. Hungarians, therefore, only very gradually dismantled and altered the legal institutions of the communist era. While it is true that the old communists transmogrified themselves into a political party that did not govern, the party was itself not an insignificant player in the landscape. It was not insignificant because many political parties formed after 1989. The center-left parties, commanding the largest minority blocs succeeded for a while in holding power,<sup>17</sup> but ultimately squandered their hold on power because they were tempted to deception. And to that temptation they, or at least their most prominent leader, succumbed, crashing the government.<sup>18</sup> The left, apart from the old communists, was also not the biggest threat to national political peace. The extreme right, playing on anti-Semitic, revanchist, and extremely ethno-nationalist tropes, embodied in the Jobbik party, was (and is).<sup>19</sup>

As for the economy, the relative market openness of the last years of communism did not serve the country as well as might have been hoped. Nor did the post-communist government inculcate institutions of market liberalism. Both before and after the transition, Hungary had been a borrower in the global capital markets. It borrowed to avoid economic instability and volatility, both of which threatened the legitimacy of the ruling regimes.<sup>20</sup> A population unused to real economic cycles, indeed which had been educated to understand economic cycles as inhumane, was little open to economic destruction, even, perhaps especially,<sup>21</sup> generative Schumpeterian creative destruction.<sup>22</sup> Despite the borrowing, the real income of Hungarians actually,

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17. *Id.* at 68.

18. *See generally id.* at 131–45.

19. *Id.* at 9.

20. PAP, *supra* note 1, at 39, 41.

21. LENDVAI, *supra* note 7, at 42–43.

22. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL (2012); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83, 90 (2d ed. 1942).

albeit gradually, had been declining for about a decade from the mid-1980s on. And the institutions of the Soviet-style political economy also remained. Despite openness to a market in consumer goods, Hungary had few sectors of the economy characterized by open competition among domestic firms. Moreover, in some cases, the dominating enterprises of the collectivized economy were purchased by foreign businesses when they came up for sale following the collapse of communism. No longer directed in large measure by government planning, they became instruments of extra-national enterprise and domestic resentment.

### III. HUNGARY AND ILLIBERALISM

Against this background came 2010. Orbán, seemingly a once promising democratic and cosmopolitan politician, failed in his political career in 2002. He learned his lesson. Reformulating himself as a nationalist—but European enough to take advantage of what the European Union might offer—and a unifier, who, despite a clear identity with the Magyar population, nonetheless muted some of the negative aspects of cultural identity.<sup>23</sup> A populist who would spread wealth while controlling and thus growing but not commanding and thus stifling the economy, he and his party won big. Capitalizing on a shattered center-left, a politics generally characterized by splintering rather than coalition, and co-opting part of the Jobbik agenda, he took over. Adroitly bringing into coalition the Christian Democratic Party, the only other self-identified, non-extreme conservative party, he received an absolute majority of votes cast.<sup>24</sup> That majority gave him a super-majority in Parliament.<sup>25</sup> With that super-majority he began the task of transforming the legal and economic institutions of Hungary. Using formerly illegitimate tactics, such as having “private member bills” embody substantive policies, he was able to change laws with next to no discussion in Parliament, no give and take with the splintered opposition parties, and little to no accommodation and attendant compromise.<sup>26</sup> The super-majoritarian power to alter fundamental law, the constitutional structure, also allowed him to dismember the institutions where resistance to the changes might form.<sup>27</sup> The judi-

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23. Identitarian politics are, of course, neither a new nor solely a Hungarian phenomenon. For two compelling understandings of identitarian politics, see generally KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* (2018); MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* (2017).

24. PAP, *supra* note 1, at 11.

25. *Id.*

26. *Id.* at 16.

27. *Id.* at 19–20.

ary was dealt successive blows. First, the conditions of holding office were altered, forcing many judges to retire, and allowing the appointment of legal lackeys.<sup>28</sup> Second, the judiciary was dramatically stripped of authority, most especially in the capacity to interpret fundamental law when the authority of the Constitutional Court was limited. Local and regional government was transformed as formerly elective positions were changed into appointive ones, making the organic growth of opposition more difficult.<sup>29</sup> Finally, in what can only be regarded as a brilliant maneuver, he also forced through legislation giving the franchise (albeit limited) in national elections to ethnic non-citizen Hungarians resident outside Hungary. They, in return, voted almost solidly for him.<sup>30</sup>

Appealing to nostalgia and nationalism domestically, Orbán advanced a cultural agenda clothed in legal garments. Claiming a mandate born of his electoral legitimacy he (somewhat) soft-pedaled his appeal to cultural identity through the system styled “National Cooperation.”<sup>31</sup> That system would be based on “popular democratic will”<sup>32</sup> and would emphasize “[w]ork, home, family, health and order.”<sup>33</sup> Ignoring the echoes both of the fascist and communist past contained in that formulation, and not having need to cooperate with a pesky opposition that might unseat him—since it was too fragmented to do much save sputter in rage—he claimed to construct a new social contract that would lift Hungary from its “economic, social, and spiritual crisis.”<sup>34</sup> This contract “calls for cooperation instead of divisiveness” to achieve a “unity” built “on the restoration of balance between rights and obligations.”<sup>35</sup> The undertone is clear. Political disagreement is the cause, not an effect, of economic, social, and spiritual crisis. Thus, political disagreement is illegitimate, save within the narrowest possible political bandwidth. That bandwidth minimalism, moreover, is not itself a projection of the underlying political culture, but rather the precondition for legitimate political culture. That culture is illiberalism.

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28. *Id.* at 20–21.

29. *Id.* at 18.

30. PAP, *supra* note 1, at 25.

31. *Id.* at 47.

32. *Id.* at 51 (quoting HUNGARIAN NAT'L ASSEMBLY, *Political Declaration 1 of 2010 (16 June) on National Cooperation*, <https://hungarynews.files.wordpress.com/2016/06/declaration-22.jpg> [hereinafter *Declaration on Nat'l Cooperation*] (official English translation)).

33. *Id.* at 55 (quoting *Declaration on Nat'l Cooperation*, *supra* note 32).

34. *Id.* at 53 (quoting OFFICE OF THE NAT'L ASSEMBLY, *The Programme of National Cooperation* No. H/47 (May 22, 2010), at 10, [https://www.parlament.hu/irom39/00047/00047\\_e.pdf](https://www.parlament.hu/irom39/00047/00047_e.pdf) [hereinafter *Programme of Nat'l Cooperation*]).

35. *Id.* at 54 (quoting *Programme of Nat'l Cooperation*, *supra* note 34, at 11).

## IV. PAP ON CAUSES

Pap notes that polling data suggest that Hungarians were well-disposed to such an appeal. Not much interested in politics, distrustful of political institutions, and believing that neither market nor democracy was working, they felt the system badly tilted to the few. As he summarized the evidence, "In a comparative analysis, Hungary was ranked the very last of all European countries, including the formerly socialist states, in its level of trust in institutions."<sup>36</sup> Most telling, the relative feeling of prosperity, perhaps superiority, which Hungarians felt during the communist era had evaporated. Channeling post-Trianon resentment, feelings of having been victims in international affairs, successively mauled by the Germans, the Soviets, and then Western capital, Orbán fed on Hungarian's sense of victimhood.<sup>37</sup> An adroit politician, as Pap notes, he managed to claim to be the only legitimate voice to finish the transition from communism while eschewing the natural tensions in a democratic culture, a culture that when linked to the market also necessitated recognition of differing private ambitions and relative economic successes.<sup>38</sup>

Pap also suggests that Orbán has tapped into a special form of "cultural particularism."<sup>39</sup> As he puts it, "Orban's illiberal democracy instrumentalizes a special form of nationalism built on the uniqueness of the Hungarian 'people,' where illiberalism is a form of ethno-symbolism."<sup>40</sup> This he does by appealing not simply to Magyar sentiment, but its manifestation as a special form of European Christian identity. Embodied in that identity is also, in Pap's view, an appeal to the traditional family. Suggesting a backtracking towards orthodoxy, again the "u-turn," he argues that Orbán has advanced the idea of "intimate citizenship" as a method of consolidating political identity, keeping that identity safe from the outside, and not coincidentally continuing Orbán and his party in power as the keepers of that identity.<sup>41</sup> Part of National Cooperation was an explicit, and legally grounded, legitimating of the support of recognized religious communities, both as churches and in the schools the churches maintained.<sup>42</sup> Those religious

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36. PAP, *supra* note 1, at 35.

37. *Id.* at 36.

38. Of course, the recognition that markets have losers as well as winners, means that losers must be able to become winners and that competition embodies economic progress. Those views require both an understanding and a patience, and a safety-net, that was absent from his, and Hungarian, politics.

39. PAP, *supra* note 1, at 60.

40. *Id.*

41. *Id.* at 66–68.

42. *Id.* at 71.

communities, one notes without surprise given the history of Hungary, maintained very traditional understandings of the role of marriage and the family, not to mention sexual identity. In this sense, Orbán was also able to create a sense of cultural solidarity not simply against the outside world, but against intra-national changes that upset citizens longing for the romantic ideal of an earlier time.

Hungary, of course, had largely lost one group against whom nationalists traditionally rallied, the Jewish community. Another, however, remained. Though also victims of the Nazis, Hungary's Roma population—known colloquially as gypsies—constituted the largest identifiable non-Magyar population within the borders. Traditionally the victims of discrimination, they were nominally protected by post-communist legislation that provided for minority self-government.<sup>43</sup> Likely as much a fantasy inside Hungary as Wilsonian self-determination proved to be generally, its legal instantiation in Hungarian law served only to cover what the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe characterized as a system “the very design of [which] prevents it from having a significant impact on issues of greatest concern to most.”<sup>44</sup> Notions of cultural identity and group rights aside, in a jujitsu move, the very existence of such identified communities, Pap suggests, further enabled and legitimated Orbán's already refined system of gerrymandering to solidify his political ascendancy.<sup>45</sup>

Unfortunately under-emphasized in Pap's treatment of Hungary under Orbán, and by implication in the post-communist Hungary generally, is the role of economic institutions and market understanding. The absence of a discussion as detailed and interesting as the one Pap provides where politics and culture are at play, is troubling. Admittedly, Pap does make an occasional references to what he terms “neoliberal policies,”<sup>46</sup> or Hungarian disenchantment with the “free market,”<sup>47</sup> which presumably includes economic policies and institutions. In the main, however, his story, and explanation, concern, and lessons are cultural and social.

The provision of the stuff of daily life is not, however, simply a matter of consumption. It is also a matter of the organization of produc-

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43. *Id.* at 96–97.

44. *Id.* (quoting NAT'L DEMOCRATIC INST. (NDI) & ORG. FOR SEC. & CO-OPERATION IN EUROPE, OFFICE FOR DEMOCRATIC INST. & HUMAN RIGHTS (OSCE/ODIHR), *The Hungarian Minority Self-Government System as a Means of Increasing Romani Political Participation* (2006), at 6, <https://www.osce.org/odihr/25974?download=true>).

45. PAP, *supra* note 1, at 109–113.

46. *Id.* at 61.

47. *Id.* at 37.

tion, something the communists well-knew. Part of the difficulty of post-1989 Hungary was the failure to develop indigenous economic institutions—firms—which might supplant the state firms and quasi-state firms of the communist era. Of course, in so doing, Hungary was hardly alone. The story of oligarchical capitalism is also a Russian story; the continuing tension between the Ossi and the Wessi in Germany stems in major part from the complete domination of the economy of the reunited Germany by the firms of the old Federal Republic of Germany, the West; to this day China has not been able to liberate itself from the drag that is the residuum of state enterprise—the capital draining, sclerotic, businesses created by the communist government, which seem neither to turn a profit nor wither away. Not to acknowledge that failing, and to explain how the economy was also part of Orbán's populist appeal however, is to understate at least some of his political appeal.

As important as the substance is the education, both tacit and explicit, about market economy and politics necessary for the polity not to overreact to market cycles and competitive injury. Notwithstanding the relative freedom of Hungarians to travel to the West, to pick up some western broadcasts and sources of news and information, the citizens of Hungary had not been exposed to the real ups and downs of markets in decades. Perversely, the combination of the allure of the West and the constant critique by the Communist Party of the West's economic failures, the claimed attendant immiseration and exploitation of its population, and, of course, its pending and inevitable collapse, which was largely seen by Hungarians as false propaganda, may have left most of the citizenry unprepared for the sometimes quite harsh realities of market life. As the economic protections of the communist state withered away, the remnant safety nets were completely inadequate. No wonder disenchantment set in and, notwithstanding the factual falsehood of the belief, by 2010 over two thirds of the population believed they were worse off economically than in 1989.<sup>48</sup>

Here again Orbán's political skill needs to be acknowledged. He managed to stay in the European Union, playing on member fears that worse could be in store than Fidesz (to wit, Jobbik). With opposition completely splintered, the European Union made the bet that nasty was better than truly bad and did not cut off Hungary. Orbán could thus take advantage of the huge transfer payments to Hungary that subsidized his government almost with impunity. That Hungary never adopted the Euro also gave it flexibility in monetary policy not

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48. *Id.* at 40–41.

allowed to suffering states that had adopted the Euro, such as Greece. Hungary, almost uniquely, could take advantage of European economic wealth without having to answer, indirectly, to the German fiscal conservatism that dominated European Union policy or the constraints associated with economic bailouts. None of this is to say that Hungary was an economic wonderland. Far from it, but it retained a useful autonomy while buffering some of the effects of being tied to European integration. In that, Orbán could bite the hand that fed his government. In other words, it could have been worse.

#### V. ON TEMPTATIONS TO GENERALITY AND CRITIQUE

It could have been worse. Using the very word “worse” invites the question, compared to what? Where I part company from Pap is not in his concern for the anti-democratic, illiberal, and authoritarian nature of Orbán and his party. I share his concern for the fate of minority cultures and identities in modern Hungary. I am one with him in being appalled at a specious ethno-nationalism that, even if today grounded in pride might become grounded in contempt, even hate. Where I part company is analytically, perhaps descriptively.

Liberal democracy had a very short life in Hungary, not a dozen years if one includes even every waking moment from communism’s collapse through the spring of 2010. Perhaps it is possible to establish an enduring political system grounded in pluralism in politics, ecumenism in religion, competition in economy, tolerance and celebration in ethnicity and identity in such a short period, but such examples elude me. Without wanting to embrace a false inevitability that suggests Hungary’s liberal democratic aspirations were destined to die and without accepting a perverse fatalism about the country’s politics, the observation that Hungarian liberal democratic institutions needed time to develop, grow legitimate, and sink roots deeply into its political culture, seems apt. That time was denied Hungary by circumstances and, in part, by the attitudes of Hungarians. That is, lack of time was abetted by naïve understanding of democratic culture. (In this sense, Hungarians are certainly not alone. Indeed, the American state-makers who sought reformation of the various countries whose authoritarian governments were overthrown in the Gulf War and subsequent conflicts have been overwhelmingly disappointed in their ambitions.) Liberalism’s virtues are not always appreciated. Indeed, as Orbán’s victories suggest, if liberalism is oversold, it is weakened. If liberalism is not accompanied by a hope of shared prosperity, it is weakened. If liberalism seems to be unappreciative of traditional cul-

ture, it becomes suspect. In other words, developing liberalism takes some time, certainly it takes time to become strong.

The specific legal institutions of a liberal government are also vulnerable to liberalism's conceits. That is, liberalism has accompanied democracy. The two are not the same. Liberal institutions left vulnerable to democratic moments, as opposed to thoughtful democratic experience, can be, as Pap notes, relatively quickly displaced by majorities that can use power to entrench themselves at the expense of others. Thus, for example, if in one election a party can take power in every branch of government, and if governmental institutions can be easily altered by legislative voting, then democratic liberalism, or at least its institutions, are perpetually vulnerable. With a thin liberal culture, that is one with a very short lifespan, to which outsized expectations are attached, there is not much save populist majoritarianism for government officials, especially members of the judiciary, to rely on. Hungary had no Adenauer and Erhard working to link democracy to prosperity; it had no Washington to step aside voluntarily after wielding power, not even a Callaghan nor a Heath. In short, Hungary was long on aspiration, cultural, social, economic, and political, but short on the politicians and institutions necessary to temper public expectations about how fast those aspirations might be realized.

Does Hungary provide an example, negative or positive, for other countries in times of turmoil? What lessons, if any, does it provide for the legal institutions of other countries? Pap suggests that Hungary's ethno-nationalism, embodied in the System for Cooperation, has perverted liberal and democratic institutions. While true, that claim does not go far enough to explain Hungary's troubles. For example, he develops a very interesting and powerful critique of the government's use of privacy law to undermine societal objectives. His observation is worth quoting at length:

One of the characteristic features of the [System of National Cooperation] is also that public institutions and intolerant and radical parties that engage in the politics of exclusion are also entitled to personal rights protections based on the concept of dignity. The media, the independence of which is not curtailed in this regard, also fails to provide a democratic counterbalance in these cases . . . .<sup>49</sup>

He calls this a paradox, a "liberal construct serv[ing] an illiberal goal: limiting the possibility of monitoring public power."<sup>50</sup> Is it actually a liberal construct that is at fault? Why is the fault not that "public

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49. *Id.* at 155.

50. *Id.*

institutions . . . engage in the politics of exclusion”?<sup>51</sup> Why is that not the fault of explicitly recognizing ethnic group rights and then allowing the government to decide who is a member of such groups, both decidedly illiberal, not liberal, legal approaches? Not everything that seems at first glance to be progressive turns out that way and a system in which the entire government can be captured in one fell swoop and may thereby be prevented from tempering its own decisions may be democratic in the strictest sense, but is not liberal. The Hungarian canary is not well. The metaphor, especially in 2020, may be trite, but nonetheless apt. Whether the canary proves a telling signal only to Hungarians or to citizens of the larger world of liberal democracies will, of course, only be known in hindsight.<sup>52</sup> At least in

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51. PAP, *supra* note 1, at 155.

52. As this Essay went to press, that is, in April, 2020, the world faced the greatest pandemic since 1918. The coincidence with the end of World War I and the hijacked temptation to remake the world safe for democracy could not be more telling in a certain sense. The public health measures required to limit the viral spread, to insist on vaccination should one be developed, and to revivify economic institutions, require a degree of state intervention rarely seen outside of war, and even more rarely justified in liberal democracies. The authoritarian temptation looms large. If journalistic accounts may be believed, democratic mechanisms are being put in service of Prime Minister Orbán's most illiberal aims. Consider simply the following succession of articles. See Drew Hinshaw & Szabolcs Panyi, *Hungary's Orbán Wins Right to Rule By Decree*, WALL ST. J., Mar. 31, 2020, at A9; Benjamin Novak & Patrick Kingsley, *Orban Using Emergency Powers, but Often Not for the Emergency*, N.Y. TIMES, Apr. 6, 2020, at A7. These powers coincide with extant illiberal policy justifications. See, e.g., Dusan Stojanovic, *Virus used as excuse to quell dissent: Some nations take extreme measures during pandemic*, CHICAGO TRIBUNE, Apr. 3, 2020, at A11 (“Rights groups and officials say the law creates the possibility of an indefinite state of emergency and gives Orbán and his government carte blanche to restrict human rights and crack down on freedom of the press.”); Matina Stevis-Gridneff & Monika Pronczuk, *EU Court Rules 3 Countries Violated Deal on Refugee Quotas*, N.Y. TIMES, Apr. 2, 2020, at A18 (“The nationalist governments of the three countries previously cited national security reasons in refusing to take in any of the refugees and migrants. Prime Minister Viktor Orbán of Hungary, for example, vowed to block the European Union program to resettle migrants from Africa and the Middle East, saying that it was important to secure his nation's borders from the mainly Muslim migrants ‘to keep Europe Christian.’”). National security, once the province of military threat, has greatly expanded its scope, to understate the case, even in the United States. See DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* (1977). That illiberal “national security” tools exist in the United States is a well-known secret. See, e.g., Elizabeth Goitein & Andrew Boyle, *Trump Has Emergency Powers We Aren't Allowed to Know About*, N.Y. TIMES, Apr. 10, 2020, at A23. Some fear the illiberal temptation even other already extant powers present, invoking the Hungarian canary. Paul Krugman, *American Democracy May Be Dying*, N.Y. TIMES, Apr. 9, 2020, at A27 (“The pandemic will eventually end; the economy will eventually recover. But democracy, once lost, may never come back. And we're much closer to losing our democracy than many people realize. To see how a modern democracy can die, look at events in Europe, especially Hungary, over the last decade.”). See also Bret Stephens, *Covid-19: A Look Back From 2025*, N.Y. TIMES, Apr. 4, 2020, at A23. The subtle observation of Camus' character Dr. Rieux, “The only means of fighting a plague is common decency,” risks drowning in the noise of illiberalism. ALBERT CAMUS, *THE PLAGUE* 150 (Stuart Gilbert trans., Random House 1972) (1947). Hungary demonstrates that the machinery of democracy may be co-opted, abandoning democracy's animating spirits.

part, Hungary has been vulnerable because it created democratic institutions, that is, those responsive to voting, but did not, and in some measure through no fault of its own, accompany the creation of those institutions with a fully measured, that is a liberal, sensibility. If there is a lesson, it is that the machinery of democracy is easy, the culture of liberal democracy is hard.