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Towards a Truly Democratic Constitutionalism**

Abstract

As constitutional scholars, we can fall into the error of treating constitutionalism as though it were primarily about limiting government. This article emphasises that the primary aim of constitutionalism ought to be to *enable* democratic governance, not constrain it. It treats democratic self-determination as having two components: 1) a commitment to building mechanisms by which the people are enabled to participate materially in their own governance on a basis of rough equality; and 2) a commitment to ensuring that the people see themselves as being governed by processes that they consider legitimate. Democratic self-government can take different forms in different societies, but there must be effective mechanisms for citizens – actual citizens, not notional citizens – to govern themselves collectively. The paper sketches some characteristics of a constitutionalism that meets those requirements. It also affirms that, for the people to govern themselves, a constitution must, in a real sense, take the people as it finds them, not impose a partial and caricatured definition upon them. This paper is a prolegomenon to such a constitutionalism, not a description of its totality. The latter is, of course, the work of we as citizens, and as constitutional scholars, through time.

Keywords: constitutionalism, democracy, democratic governance, populism, the people

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** This is a modestly revised text of Professor Webber's lecture presented to the ELTE Faculty of Law on 9 May 2024.

I Introduction

I begin by expressing my gratitude, my delight, at the honour that this university – Eötvös Loránd University – will be conferring on me tomorrow. It is a very great honour, one I will treasure.

And I am especially pleased that tomorrow I will become (in a sense) your colleague as 'Doctor et professor honoris causa'. I greatly admire the work of your faculty, especially those members with whom I am especially familiar: your public lawyers. It was the leadership of Eszter Bodnár, Zoltán Pozsár-Szentmiklósy and other members of your faculty in developing a new network of constitutional lawyers – the Central and Eastern European regional cluster of the International Society for Public Law – that formed the foundation of my connection to ELTE in the first place.

In fact, I have the distinct sense that I should be honouring you, not the reverse. I have learned so much from my engagement with Hungary over the years. The early part of my academic career coincided with your great constitutional transformation in 1989. I first came to Hungary in 1995 for a series of seminars organised by the Hungarian Academy of Sciences and the Royal Society of Canada.[1] I was then an Associate Professor on the Faculty of Law of McGill University and, after the seminar, we at McGill recruited a young legal and political theorist from the Hungarian Academy of Sciences (Péter Béndek) to occupy the Boulton Fellowship at McGill for a year.

The transition from communism in Hungary posed important questions to all of us interested in legal theory and constitutional law: How does one re-establish the rule of law in a country from which it was lacking for so long? How does one create a viable democratic order? How does one manage the tensions that exist in any democratic order, including tensions over who constitutes the very people in whose name a democratic state is governed? Those are perennial questions in all democratic nations. They are profoundly important, at the heart of our discipline. It was therefore a great privilege, a great opportunity, to learn from your efforts to answer them – practically, effectively and insightfully – in Hungarian society.[2]

And of course those questions have not gone away, not in Hungary, not in any society. Imagine my delight in 2017, just as my term as Dean at the University of Victoria was

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1 The papers from those seminars were published in Kálmán Kulcsár and Denis Szabó (eds), *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Royal Society of Canada and Hungarian Academy of Sciences 1996, Budapest). My contribution was 'The Rule of Law Reconceived' at pages 197–207.

2 In 2000, I participated in a second project that engaged with the post-communist legal transition in Hungary, although that project addressed Central and Eastern Europe as a whole and its symposium was held at the European University Institute. See Webber, 'Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002, The Hague) 61–99.

approaching its end, to be invited to re-engage in such conversations with you[3] – indeed with a network of dedicated scholars from across Central and Eastern Europe – a re-engagement which has led to many things: to the continuing relationship between your Faculty and ours at the University of Victoria, to the courses and lectures that Eszter Bodnár, Réka Somssich, Zoltán Pozsár-Szentmiklósy, János Mécs, Sára Hungler, Bernadette Somody and Krisztina Rozsnyai have delivered at the University of Victoria, to a graduate course on Democratic Constitutionalism that I taught here at ELTE with Eszter in 2019, and to a major international conference on 'Constitutionalism in a Populist Age', which our two faculties organised at Victoria in March 2020 just as international exchange was shutting down as a result of COVID-19. It seemed as though that conference was the last international conference in the world. Indeed, three of your scholars – Dean Pál Sonnevend, former Dean Attila Menyhárd and Professor Fruzsina Gárdos-Orosz – were unable, at the last minute, to travel to the conference because of the start of the pandemic. That conference has now given rise to three special issues in international journals.[4]

So I have gained much from our many conversations. To be clear, I do not presume to be an expert on Hungary. In relation to Hungary I am merely a student, not a teacher. But those conversations continue to inform my work in legal theory and comparative constitutional law. Today I want to return to the theme of that jointly-sponsored conference of ours: 'Constitutionalism in a Populist Age'. That topic will allow me both to extend our conversation on such questions and to situate that discussion against the backdrop of the career for which you are honouring me (hence the predominance of my work within the footnotes).

Often, the challenge of populism is addressed by constitutional lawyers as a question of limits: Are populist governments complying with the constitutional constraints that apply to them? From that point of view, the problem of populism seems to be one of failing to respect the due constraints on government, failing to stay within the boundaries of democratic action, perhaps even too much democracy. Treating the challenge of populism as being essentially about limits is, I think, a mistake. It acquiesces in seeing constitutionalism as essentially anti-democratic – as a constriction, potentially a frustration, of democratic governance, when in fact constitutionalism developed in lockstep with democracy and continues to be interdependent with it. As a result, the moral high ground of democracy is surrendered to the populists at a time when populist parties – and I should make clear that

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[3] The occasion was an International Symposium on 'What Can Central and Eastern Europe Learn from the Development of Canada's Constitutional System?' to mark with the 150th anniversary of the Canadian federation. My paper was published as 'Canada's Agonistic Constitution: Themes, Variations, Tensions, and Their On-Going Reconciliation' (2017) (2) ELTE Law Journal 13–30.

[4] Webber, Oliver Schmidtke, Eszter Bodnár, 'Special Issue: Democratic Constitutionalism in a Populist Age' (2023) 32 (6) Social and Legal Studies 841–995; Schmidtke, Webber Bodnár, 'The Resurgence of Populism: Tackling the Crisis of Liberal Democracy' (2021) 10 Social Sciences; Bodnár, Webber, Schmidtke, 'Populism, Democracy, and the Rule of Law in Central and Eastern Europe' (2024) 16 (2) Hague Journal on the Rule of Law 219–374.

I am only speaking about those populist parties that deserve our criticism, what might be called 'authoritarian populists', for some populists are simply boisterous democrats – when those populists that deserve our criticism are almost always also bad democrats, not merely disregarders of constitutions and the rule of law. And treating the rule of law as primarily a constraint on democracy is also a mistake professionally, for we neglect the ways in which the constitutional structures that foster democratic participation also tend to sustain healthy, law-respecting political orders. We emphasise the role of institutions that seek to constrain the actions of governments from (as it were) the outside – constitutional courts, for example – and neglect the development of the democratic institutions themselves, institutions that can foster more vibrant, more responsive, democratic orders.[5]

Why this tendency to see constitutionalism primarily in terms of constraint? I suspect that part of the reason is disciplinary specialisation. At least in Canada and the United States, there is a division of labour between legal scholars (who tend to focus on courts and adjudication) and political scientists (who tend to focus on legislatures and the executive). That division of labour is unexceptionable in its own terms, but it is unfortunate if it leads us to neglect the interconnections between the institutions.

But I think that there is also another contributing factor, and that is a growing loss of faith in democracy. I have been surprised by the number of my colleagues that have come to distrust democratic action. Some do so because they recognise, rightly, that our governments now face great challenges – climate change, for example – to which those governments have difficulty responding quickly and effectively. Others in North America seem to be shell-shocked by the rise of Donald Trump and his capture of the Republican Party, and they therefore seek to erect bulwarks against the depredations of another Trump-led government. In any case, there appears to be, among intellectuals, a growing worry that democratic government is unable to respond to the contemporary situation effectively, that the political decisions of our fellow citizens may even be a danger, and that we should therefore place our hopes in the action of constitutional courts, constraining, perhaps even directing, what governments ought to do.

That loss of faith is tragic and distressing. It is distressing because it risks abandoning what I take to be a central ideal of contemporary constitutionalism, namely the great merit, the dignity (to adopt Jeremy Waldron's term[6]), of collective, participatory self-government: the sense that the people ought to be able to govern themselves.[7] I have been

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5 See Webber, 'A Democracy-Friendly Theory of the Rule of Law' (2024) 16 (2) Hague Journal on the Rule of Law 339–374. On populism generally, see Webber, 'Understanding Populism' (2023) 32 (6) Social and Legal Studies 849–876.

6 Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999, Cambridge). On the general importance of taking disagreement seriously in legal theory, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999, New York).

7 See Webber, 'Democratic Decision Making as the First Principle of Contemporary Constitutionalism' in Richard W Bauman, Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006, New York) 411–430.

blessed, throughout my career, by being able to work on Indigenous rights. There the central goal has been the freeing and rebuilding of Indigenous societies, re-empowered to govern themselves according to their own norms and procedures.[8] But have we, non-Indigenous scholars, championed Indigenous self-government only to lose faith in it for ourselves?

Moreover, the loss of faith in democracy is also distressing to the extent that it signals a loss of trust in our fellow citizens, a breakdown in our national conversations. Democracy is hard. It is hard precisely because democratic societies are diverse, democratic citizens disagree, and yet they also need to find ways to live and make decisions together. Democracy therefore requires work. It may not produce the decisions that we ourselves would make were we able to govern our societies alone. In fact, it is pretty much guaranteed not to produce those decisions precisely because, in a democracy, we do need to work together with people with whom we disagree. Yet that is also democracy's glory. Democracy allows us to maintain and express our own opinions. It allows us to disagree. And yet it also acknowledges that we are fated to live together, that we have to find some way to get along, and that we all are entitled to a say in how we do so. It recognises both our autonomy and our interdependence.

That does mean that democracy – that we – can fail. But even if we do fail, there is nevertheless a dignity in our entitlement to do so on our own responsibility and not have someone else do our failing for us. To be clear, I personally am hopeful of our capacity to succeed. Democracies, for all their frustrations, have proven remarkably resilient. Democracies won the Second World War, and they did so for reasons related to their democratic character.[9] The apparent solidity of the Communist-era autocracies proved

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[8] See Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (McGill-Queen's University Press 1994, Montreal), especially 66–74, 111–115, 122–125, 170–172, 219–222; Webber, 'Individuality, Equality, and Difference: Justifications for a Parallel System of Aboriginal Justice' in Royal Commission on Aboriginal Peoples (ed), *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Minister of Supply and Services 1993, Ottawa) 133–160; Webber, 'Beyond Regret: *Mabo*'s Implications for Australian Constitutionalism' in Duncan Ivison, Paul Patton and Will Sanders, (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press 2000, Cambridge) 60–88; Webber, 'The Public-Law Dimension of Indigenous Property Rights' in Nigel Bankes, Timo Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart 2013, Oxford) 79–102; Webber, 'We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press 2016, Toronto) 63–99; Webber, *Las gramáticas de la ley: Derecho, pluralismo y justicia* (Anthropos 2017, Barcelona, trans Francisco Beltrán Adell and Álvaro R. Córdova Flores); Webber, 'Governing Ourselves: Reflections on Reinvigorating Democracy Stimulated by Gitxsan Governance' in James Tully et al. (eds), *Democratic Multiplicity: Perceiving, Enacting and Integrating Democratic Diversity* (Cambridge University Press 2022, Cambridge) 281–303; Webber, *The Constitution of Canada: A Contextual Analysis* (2nd edn, Hart Publishing 2021, Oxford) at 209–247.

[9] This conclusion would doubtless be contested in the principal successor state to the USSR, Russia. The arguments to the contrary are convincing. See, for example, Phillips O'Brien, *How the War Was Won: Air-Sea Power and Allied Victory in World War II* (Cambridge University Press 2015, Cambridge). One need not make

temporary, as Hungarians above all demonstrated in 1989. And, despite all their claims, right-wing authoritarian governments have also proven remarkably fragile when viewed through the lens of history. In fact, they themselves confess their fragility, implicitly, through their strenuous attempts to muzzle their people and yet claim democratic authority. Why else would Putin's Russia have pretended to have its recent election?

But whether you share my (qualified) optimism or not, I cannot see a viable alternative but to cast our lot on the side of democracy, on the side of the dignity of collective self-government, and do our best within our scholarly disciplines to make democratic governance work. Legal institutions – even constitutional courts – depend upon their people's general support to sustain themselves. Indeed they depend upon, as I have argued and will argue, the mechanisms of democracy for their own integrity.[10] There is no alternative to engaging with our fellow citizens if we want to sustain healthy institutions. We are fated to live and govern ourselves, together.

We should, then, resist the temptation to adopt a predominantly defensive stance, looking to the courts to constrain what we might take to be excesses of democracy. Instead we should build our constitutionalism squarely upon democratic foundations, seeking to reinforce, not disable, the recursive, dialogic, participatory mechanisms of a vibrant democracy. In the rest of this lecture, I will describe in overview how the continued incorporation of democracy into the premises of our constitutionalism might shape our constitutional vision.

II Democracy

Let me start by saying a little more about what I mean by democracy.

Political and legal theorists often treat democracy as though it were simply about elections, perhaps about contested elections, sometimes about the alternation of governments as a result of elections. But a focus on elections or the alternation of governments misses the target. Putin's Russia has elections, but it is in no sense democratically governed. An election in which there is no real choice; in which opponents are disqualified, jailed, or worse; in which there is no media of communication that is independent of government; in which there is no real ability of citizens to know what their government is doing; and in which citizens have no basis for believing that their votes are being accurately counted –is not democratic. Russia is not an illiberal democracy. It is no democracy. The people are not allowed to rule. A corrupt, self-dealing, elite rules.

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as far-reaching an argument as O'Brien's to establish that, without the productive power of the democracies, the USSR would not have succeeded in driving the Germans back. This is not, of course, to denigrate the fighting ability, fortitude, and sacrifices of the people of the USSR during the war.

[10] Webber, 'A Democracy-Friendly Theory of the Rule of Law' (n 5) at 354–367.

But it is also the case that elections are not absolutely necessary to have a democracy. One of my great privileges as a scholar has been the ability to see, up close, how one particular Indigenous people, the Gitxsan of northwestern British Columbia, govern themselves. I will not describe their subtle and elaborate governance structures at length, but suffice it to say that, in order to accomplish important legal transactions, they require careful consultation and preparation in advance, leading ultimately to the accomplishment of the legal operation itself in a feast, with structured opportunities for the attendees to express or withhold their approbation, in ways that are shaped by the patterns of membership and relationship within Gitxsan society. It does not require elections, but it does require participation, continuity of commitment, the public contribution of resources, and consultation. It is not easy. Indeed it is particularly demanding. But it is seen to be legitimate, tightly tied to the histories of Gitxsan houses (their *wilp*), their language, their principles, their relationships to territory, and their need to sustain themselves on their territory.[11]

Our experience of contemporary state-structured democracies, together with the Gitxsan example, therefore point to two characteristics that I take to be the essence of democracy. The first is the ability of a society's members to participate in their collective governance on a basis of rough equality, either directly or through representatives – and by participation I mean the exercise of some power to make decisions, by flesh-and-blood citizens, with respect to their governance, even if the effective power of any one citizen is diluted by the number of citizens entitled to participate. And lest one consider those requirements to be universal in form, necessarily the same for all societies, it is important to recognise that there is a second required characteristic of democracy, namely that the citizens ought to see themselves as being governed by processes that they themselves recognise as legitimate, institutions that are subject to their collective support, rooted in their societies – institutions that they, in a sense, 'own'.[12] As the legal theorist Nicole Roughan has argued in the context of Aotearoa/New Zealand, especially with respect to the application of New Zealand law to Maori, such recognition is essential. It is that sense of ownership that separates law from simple coercion.[13] It grounds the legal order in the

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[11] Webber, 'Governing Ourselves' (n 8) and the sources cited there, especially Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (UBC Press 2005, Vancouver BC) 57–98; Val Napoleon, 'Living Together: Gitksan Legal Reasoning as a Foundation for Consent' in Jeremy Webber, Colin McLeod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010, Vancouver) 45–76.

[12] Webber, *Reimagining Canada* (n 8) especially 183–228; Webber, 'Individuality, Equality, and Difference' (n 8); Webber, 'The Meanings of Consent' in Webber, Macleod (eds), *Between Consenting Peoples* 3–41; Webber, 'Recognition in Its Place' in Daniel Weinstock, Jacob Levy and Jocelyn Maclure (eds), *Interpreting Modernity: Essays on the Work of Charles Taylor* (McGill-Queen's University Press 2020, Montreal) 247–264; Webber, 'A Nationalism Open Towards the World' in Rajeev Bhargava (ed), *Politics, Ethics and the Self: Re-reading Gandhi's Hind Swaraj* (Routledge 2022, New Delhi) 162–189.

[13] Nicole Roughan, 'Interlegality, Interdependence and Independence: Framing Relations of Tikanga and State Law in Aotearoa New Zealand' Appendix 3 to the study paper, He Poutama (NZLC SP24, 2023) (New Zealand:

people's traditions of governance. A true democracy can therefore take somewhat different forms in different societies, expressing the particular normative language of the society concerned.

In emphasising this two-part definition of democracy, in which elections are not essential to the definition, I do not mean to reject the mechanisms of electoral democracy as illegitimate. Some scholars do treat mechanisms as illegitimate, even as inauthentic, because elections substitute voting for the direct participation by citizens and subject even the votes that citizens cast to a complex process of summation and aggregation. I reject that view. For one thing, it is a dramatic oversimplification to reduce state-structured democracies to the casting of votes alone. States can and generally do provide other forms of participation alongside voting. But in addition, one cannot expect, in any real society, that discussion alone will resolve all disagreements. Even after full debate, members will still disagree, even over fundamentals, and those disagreements will need to be resolved by some additional means of decision. In a large-scale society, counting heads is a pretty good way to go. It has the great merit of *a)* actual means of participation for citizens, not merely an imputed or merely notional participation; and *b)* an institutionally-embodied norm of equality. Even in small-scale societies like the Gitxsan, one has mechanisms for sifting reasons and deciding outcomes in contexts of disagreement: one has processes for publicising the holding of feasts, those feasts are open to all comers, they provide for responses from the attendees that the work has been done properly, and in cases of dispute there are processes for weighing positions and fastening upon an outcome.[14] Indeed, some criticisms of mechanism strike me as dangerously romantic in their longing for unity. In attempting to achieve unity, they are likely merely to suppress the disagreements of their citizens.[15]

Moreover, in any large-scale society, even deliberation and decision will have to occur, in large part, through representatives. The only way one could avoid doing so is by restructuring societies so that they were very much smaller. Now, I do support decentralised government precisely to create greater opportunities for participation, but we also require the capacity for large-scale action – the kind of action that alone is capable of producing effective responses to climate change, providing better health care, achieving greater

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Te Aka Matua o te Ture | Law Commission, 2023) <https://www.lawcom.govt.nz/assets/Publications/StudyPapers/NZLC-SP24-Appendix-3.pdf> accessed 15 October 2024.

[14] Webber, 'Democratic Decision Making as the First Principle' (n 7) at 418–422. On Gitxsan governance, see the sources cited (n 11).

[15] This of course is a central characteristic of the constitutional theory of Carl Schmitt and others on the anti-democratic right, although some on the left take comparable positions. See John P McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press 1997, Cambridge); Webber, 'Understanding Populism' (n 5) at 853–857. For my position on Schmitt specifically see Webber, 'National Sovereignty, Migration, and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion?) of Carl Schmitt' in Oliver Schmidtke, Saime Ozcurumez (eds), *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (Palgrave Macmillan 2008, New York) 61–90.

material equality and myriad other objectives. My conception of democracy is therefore federal, with a graduated structure of participation, representation and authority.[16]

We cannot, then, escape the construction of complex mechanisms of democratic governance. But keeping our focus on the two-part definition of democracy that I provided above – first, the ability of a society's members to participate in their collective governance on a basis of equality; second, their ability to 'own' those institutions – furnishes criteria for evaluating and therefore improving the mechanisms. A society's achievements will always be matters of degree. Any structure of participation will do some things well, some not so well. Moreover, there will always be variation in citizens' attachment to their institutions, both amongst elements within the citizenry and over time. The institutions themselves must therefore be open to reflexive redefinition. Democracy ought to operate both within the institutions as they exist from time to time, and control their evolution over time.

One last thing before I leave the question of definitions: When examining large-scale societies, the privileged expression of democratic legitimacy is almost always found in the legislature as opposed to the executive. This is because the legislature is larger and has a more diverse composition than the executive; it therefore serves as a better simulacrum of the people as a whole, capturing more accurately the range and balance of the citizenry. Moreover, the legislature's composition assists the democratic engagement of the citizenry because the openness of the chamber's processes, together with the continual presence of different segments of the population in those processes (especially the presence of the executive's opponents), furnishes a source of information on public affairs, a prominent position for questioning the government and holding it to account, and an effective stimulus to debate. Therefore, when I say that contemporary constitutionalism ought to focus more on enabling democratic governance than on constraining it, I will be referring primarily to how we as constitutional lawyers ought to approach the legislature. This accords with our historical experience. The great battles for advancing the rule of law focused on limiting arbitrary action by the executive, not on limiting democratic legislatures. Indeed historically, demands for strengthening the rule of law were allied with arguments for greater democratisation in the sense intended here. If one focuses, as I am doing, on democratic governance as a process – as the process of engagement of citizens in the decisions that will govern their lives – then the privileged institutional expression of that process will be the legislature.[17]

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[16] Webber, 'Governing Ourselves' (n 8) at 298–302; Webber, 'Federalism's Radical Potential' (2020) 18 (4) International Journal of Constitutional Law 1324–1349.

[17] Webber, 'National Sovereignty, Migration, and the Tenuous Hold of International Legality' (n 15); Webber, 'A Democracy-Friendly Theory of the Rule of Law' (n 5) at 343.

III Features of Democratic Governance

So how, then, would this focus on the dignity of self-government reshape how we would characterise the chief features of a constitutional order?

We would continue to value certain rights as foundational to the existence of democracy. In addition to the expressly political rights – such as the right to vote – we would definitely include within this category freedom of speech and freedom of association, which are crucial to citizens' ability to formulate their opinions, develop evidence to support those opinions, express those opinions, build coalitions, and work to shape government policy. These are rights that are valuable not just within a citizen's private sphere but also as democratic rights – as rights of participation in the exercise of collective self-government.

Indeed, the rights' very importance to democratic engagement suggest their extension in ways that would not be true if their significance were limited to a private sphere. The need for rough equality in democratic participation means that they should be paired both with limitations on electoral spending (so those of great wealth do not control the political sphere) and with restrictions on media concentration (so that citizens have access to a diversity of information). Each of these measures expands the range of democratic engagement. They do not restrict it.

But in order to have effective participation, citizens also need to have access to information. They need to know what their governments are doing, they need to know what options their governments are considering, they need to know at what points they might be able to make representations. This requires openness in government and generous sharing of public-sector information – not merely disclosure upon special application but also the pro-active publication of data of public significance together with especially strong access for parliamentarians. Poorly-designed 'access to information' regimes can work against these goals by subjecting information to expensive and time-consuming applications, or by imposing limits on disclosure in order to protect private interests in a manner that is disproportionate to the public interests involved. The limitation of access to important public-sector contracts, in the supposed interest of commercial confidentiality, is an especially egregious example.[18]

There also need to be mechanisms that allow for the testing and assessment of this information. The disclosure of information has to include access to raw data so interpretations disseminated by governments can be verified. The existence of independent parliamentary officers, protected against retaliation, who can verify government accounts and institute safeguards against corruption is a further requirement. Moreover, there is good reason for knowledge to be held generally within society: for there to be independent

[18] Indeed, the impairment may be even more far-reaching than this suggests. Kristen Rundle argues convincingly that contracting-out can displace the foundational relationship of mutual responsibility between government and the citizenry: Kristen Rundle, 'Office and Contracting-Out: An Analysis' (2020) 70 (2) University of Toronto Law Journal 183–197.

universities, which can perform their autonomous analyses; for strong educational institutions throughout the country; for equality of access to education. What is more, here again, the existence of a diverse array of media serves democratic empowerment.

There also need to be structural opportunities for the people to know about and participate in the legislative process itself. This means a consistent process for the enactment of legislation, known to the public in advance, which allows for scrutiny, for response and for the making of representations.

An especially good way to encourage participation is to decentralise government – not just decentralising the delivery of services but also the making of public decisions, a decentralisation that might occur through (for example) the greater empowerment of provincial or municipal governments or the creation of specialist institutions (such as local tourism boards). Such initiatives provide accessible opportunities for participation in public decision-making, allow decisions to be adapted to local contexts, and create a ladder of opportunities that can lead to higher office. I began this lecture by noting a loss of faith in democracy. In my homeland, that loss of faith is a consequence, in some measure, of the erosion of forums in which people learn to work together despite their disagreements: non-governmental organisations, trade unions or boards that were once associated with public institutions. It is time that we sought to rebuild those important schools for democracy.

Finally, there need to be effective means for ensuring that the integrity of democratic decision-making is carried through to the moment of implementation. One of the eight components in Lon Fuller's influential statement of the rule of law is that there be congruence between declared rules and official actions.[19] That requirement is crucial to any truly democratic order. What use is democratic decision-making if it has little impact on what governments actually do? This is an additional reason for effective knowledge and scrutiny of government action. It is a good reason for structural mechanisms of oversight and accountability, and punishment when governmental actors behave corruptly. It requires protections for the independence of courts and prosecutors from government pressure. It emphasises the importance of a robust system of administrative law. All these things serve the constitutional objective of democratic government.

The above list is partial, suggesting the kind of reorientation inherent in a truly democratic constitutionalism. Note that the list does not limit or displace democratic decision-making. Instead, it enables it, helping to give it added force. The French political theorist Pierre Rosanvallon has demonstrated that the practice of democracy has always involved practices that go beyond participation in elections but which enable political argument and democratic decision-making to be responsive and informed. He calls these additional features 'contre-démocratie' – 'contre' in the sense of counterpoint, complementing and informing rather than contradicting.[20] Many of the elements in this list have that character.

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[19] Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969, New Haven) at 39 and 81ff.

[20] Pierre Rosanvallon, *La contre-démocratie: La politique à l'âge de la défiance* (Éditions du Seuil, 2006, Paris).

Not everything in the list would fall within the distinctive province of a lawyer, although a great many would do so. Indeed, several of the items would not be 'constitutional' in the sense in which that word is commonly used by legal scholars, yet they certainly serve as valuable foundations for effective democratic engagement – itself an argument for thinking about constitutionalism in ways that go beyond the strictly adjudicative. Moreover, we should never forget that lawyers do more than argue matters before courts. They also serve in constructive roles as legislative drafters, as designers of institutions, as administrators of regulatory regimes, as high officers within institutions, as policy analysts, as politicians themselves. Many perform roles in which this enabling of democratic agency would be acutely relevant. And it is also relevant in the heartland of the adjudicative role itself: in helping to articulate the interpretive frame within which strictly constitutional guarantees ought to be interpreted and applied.[21]

IV The People

Finally, the people, the citizenry – the *demos* in a democracy – has figured prominently throughout this argument. A democracy governs in the name of its people. But who constitutes that people? One characteristic of authoritarian populist movements is that they articulate a narrow and exclusive definition of the people.[22]

That tendency to narrow the political community is itself a problem. It often leads to a political culture prone to continual damaging schisms precisely because it fastens upon a set of characteristics that is much simpler than the lives that people actually live. If the criterion of membership is cultural, what happens when one of the movement's leaders marries someone from a foreign country? Is the marriage itself a sign of weakening loyalty? Are the children of that couple somehow less deserving of membership? Can they be full-fledged party members only if they give up one of their parents' languages? If the definition depends upon the rejection of 'gender ideology', must a true adherent choose between their nationhood and a daughter who enters into a same-sex relationship?

Moreover, that narrowing of the definition of people cheapens the nation itself, turning the nation into a caricature of itself.[23] Such definitions generally seek to freeze the nation in time, when any vigorous nation is always evolving, always extending its reach. Look back at definitions advanced by such movements 60 or 80 years ago. They now appear to be blinkered and deeply anachronistic. Moreover, any people is diverse politically and

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[21] Webber, 'Constitutional Reticence' (2000) 25 Australian Journal of Legal Philosophy 125–155; Webber, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Goldsworth, Adrienne Stone (eds), *Human Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006, Aldershot) 263–287.

[22] Webber, 'Understanding Populism' (n 5) at 853–857.

[23] See Webber, *Reimagining Canada* (n 8) at 185–193.

culturally and that very diversity accounts for much of its dynamism. I come from a country in which much of its character is the result of the centuries-long interaction of French- and English-speaking societies. That interaction has created my country. It would not be the country I know had those two segments been separated. But of course I do not need to tell a Hungarian audience that. Hungary has not been well served by an exclusive, exclusionary nationalism. It is precisely that nationalism that is responsible for the fact that borders now separate them from so many of their cultural compatriots. And still today Hungary and those neighbouring societies are culturally diverse. Such diversity is the norm, not the exception.

Above all, a narrowing and exclusionary nationalism forfeits much of the justificatory force of democracy. Such a regime no longer governs in the name of all the people but in the name of a segment, a segment trying to impose its vision on other members of the people, advancing a kind of internal colonialism. A truly democratic constitutionalism treats its actual people, not its pretended people, as the custodians of its future, as the bearers of its political sovereignty.

That does not mean that such a country lacks a cultural character. Such a people still conduct its activities in a particular language or languages. In the case of Canada, that linguistic character is composite, drawing upon French, English, several immigrant cultures (including Hungarian) and increasingly (and belatedly) several Indigenous languages. Those components bring to the public life of the country the cultural resources carried by those languages, not least their distinctive literatures, their distinctive histories. Moreover, even within a single natural language – English for example – there are characteristics that are particular to each regional variant.[24] I am both Canadian and Australian, and even the English-language political cultures of my two countries are substantially different from one another. In Australia – which has refused to adopt a constitutionally entrenched bill of rights and which has a vigorous, one might even say populist political culture (populist mostly in the good democratic sense) – this argument for a democratic constitutionalism would be very easily made, perhaps even treated as old news, hardly worthy of an argument. And just as debates that occur within natural languages change over time, so the debates that occur within our political and legal cultures evolve and adapt and transform their societies through time. Any living people is not static, not a museum piece. Any of my Indigenous colleagues would tell you that.

Earlier in this lecture, my working definition of democracy treated, as one of its requirements, the members' recognition of the political structure as one appropriate for their collective self-government. That element draws our attention to this cultural dimension of nationhood – a dimension that need not be exclusive or reactionary, but that can be confident and inclusive.

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[24] Webber, *Reimagining Canada* (n 8) especially 222–226; Webber, 'A Nationalism Open Towards the World' (n 12).

V Conclusion

I began this lecture by thanking you for giving me the opportunity to renew my engagement with the struggle to establish freedom, democracy, self-government, in a distinctively Hungarian democratic and constitutional order. Each country's trajectory is unique, each is instructive, each holds lessons that are unique to that context but instructive to others.

My thanks to you. My thanks to Eötvös Loránd University. Let us all continue to learn and to grow into a fuller understanding of the requirements of a truly democratic constitutionalism.