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Constitutional Capture Revisited

More than a decade ago, I suggested that a concept of constitutional capture might be helpful in understanding political and legal developments in a number of Central European countries. I argued that “constitutional capture is different from pervasive corruption (...) but it is also different from individual rights violations, grave as the latter might be. Constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult.”¹

In short, constitutional capture is part of a strategy of taking a country in an authoritarian direction; more particularly, the concept was meant to make us comprehend changes that render a government less constrained and that make a government less likely to lose power in the future. The prime example I had in mind then was Viktor Orbán’s Hungary. In Hungary, the governing party Fidesz had replaced the post-1989 constitution with a “Basic Law” which no other party had endorsed and which was never put to a referendum. It was a prime example of what Dieter Grimm has called “exclusive constitutionalism:” the constitution as exclusively the design of one group of political actors, as opposed to a process with wide, pluralistic support.²

Now, there has been a debate as to whether a constitution of this kind really should be called a constitution at all, when it might not fulfil core functions of constitutionalism for a democracy, that is to say: constrain office-holders and structure political competition in a fair manner.³ But my purpose here is not to rehash arguments about the existence and possible characteristics of “authoritarian constitutionalism;”⁴ rather, I wish to develop the idea of constitutional capture further by suggesting a typology, specifying different kinds of capture. Complete replacement of an existing document, as in Hungary, is only one, and a relatively rare, possibility. There is also

¹ J.-W. Müller, “Rising to the Challenge of Constitutional Capture,” *Eurozine*, 21 March 2014, <https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture> [accessed: 17.05.2026].

² D. Grimm, “Types of Constitutions” [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 98–132.

³ Note that political life can still be free of politically motivated violence in the absence of functioning constitutionalism.

⁴ M. Tushnet, “Authoritarian Constitutionalism,” *Cornell Law Review* 2015, vol. 100, issue 2, pp. 391–461.

what one might call constitutional vandalism, or partial demolition, with Poland between 2015 and 2023 as a prime example. And there is now what one might call constitutional bypassing or indifference, for which the early period of Trump 2.0 can serve as an illustration: here the constitution is simply ignored in crucial respects: the president takes actions that violate the constitution, without altering the composition of courts and without changes to the constitutional text (at the time of writing one has to add: all with impunity).

These three cases – or ideal types, if you prefer – have the following characteristics in common: first, a conscious effort is made by partisan actors to render an executive as unconstrained as possible. In other words, the aim is to undermine a central tenet of constitutionalism, namely the effective limiting of powerholders' conduct. It is important to note that we are dealing with conscious and purposeful action here: the language now commonly associated with autocratization – terms like “sliding,” “erosion” or “rot” – can be deeply misleading because they tend to obscure agency. Constitutional orders do not just “erode,” as if we were dealing with a natural process (as in: the sea slowly erodes the shore); rather, political actors strategically set out to take possession of a political and legal system as a whole (which is not to say that every part of a strategy always succeeds, that no mistakes are made, or that leaders cannot blunder). The fact that they do not always fully succeed – as in the case of “mere” vandalism, which, I contend, is still a form of capture, albeit a highly insecure and contested one – does not change the fact that they are acting purposefully.

Second, in none of these cases is constitutionalism – or, for that matter, democracy – officially disavowed. In fact, it is a noticeable pattern that those planning capture try to hide their intentions: in 2010, Orbán did not campaign on creating a new constitution; in 2015, Kaczyński vowed not to touch the judiciary (even if he had long been complaining about “legal impossibilism”); in 2024, Trump certainly made no secret of his desire for revenge, and he threatened to dismantle the administrative state (while also, disingenuously, distancing himself from Project 2025), but he gave little hint that his administration would seek to ignore both the proper role of Congress, in particular the power of the purse, and decisions by courts.

Constitutional capture does not have to be accompanied by violence, nor by a sense that a major challenge, such as war or a natural disaster, can no longer be met within the framework of the existing constitution (one does not need to invoke exceptions to justify capture). I stress this point because leading jurists have seen violence or breakdown in the face of substantial challenges as major features of constitutional crises.⁵ My point is that capture is in fact equivalent to a crisis (which, in line with the original Greek meaning of *krinein*, designates a moment of life-or-death)⁶: the old

⁵ S. Levinson, J. Balkin, “Constitutional Crises,” *Pennsylvania Law Review* 2009, vol. 157, no. 3, pp. 707–753.

⁶ As Reinhart Koselleck observes: “(...) in Greek antiquity crisis had clearly distinguishable meanings in legal, theological, and medical areas. The concept demanded hard alternatives: legal or illegal, salvation or damnation, life or death.” See “Krise” in: *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, eds. O. Brunner et al., Stuttgart 1982, p. 617.

order is being killed and replaced with something else, and yet the symptoms of crisis highlighted most prominently by Jack Balkin and Sandy Levinson are not necessarily to be found.

Third, capture is different from what Balkin has termed “constitutional rot,” even if the conduct of actors engaged in vandalism and bypassing can look similar to the behavior that Balkin deems characteristic of “rot.”⁷ In particular, one will find instances of “constitutional hardball.”⁸ But hardball can usually still be contained within an existing constitutional order, and while it might have damaging effects, it will not necessarily result in systemic change. Rot might make capture more likely, as a system is weakened over time, but it is still important to see rot and capture as distinct phenomena.

Fourth, it would be wrong to suggest that capture is necessarily conclusive, or that it is part of an unilinear development. Capture does mean that aspiring autocrats have a hold over the political and legal systems, but that hold might turn out to be partial and shaky. In other words, processes of capture might also be reversed, though such reversals are more likely in the cases of vandalism and bypassing, and less likely in the case of replacement. The outcome may well be a kind of careening between, on the one hand, constitutionalism that at least half-way works in constraining power-holders and ensuring real political competition and, on the other, clearly authoritarian moments when the political and legal systems are mostly, or even completely, captured.⁹

In the remainder of this essay, I shall briefly flesh out the typology of capture before, in the final part, briefly suggesting some counter-strategies.

1. Three types of capture

It remains rare that one party can single-handedly create a new constitution entirely to its own taste. Not only do the political and legal conditions have to be just right; the party also needs to make a conscious decision that an obvious lack of broad social legitimacy will not necessarily backfire. What Grimm has called an “exclusive constitution” is certainly more than a theoretical possibility: as is well-known, Viktor Orbán’s Fidesz party won an absolute majority in the April 2010 legislative elections, which translated into a two-thirds majority of seats in parliament. Fidesz deployed its super-majority not only to pass the “Basic Law;” it also kept amending the new constitution as it saw fit whenever the constitutional court – despite already being packed – handed down judgements not to the government’s liking. In short, through official replacement, in conjunction with tweaks to the judicial systems and its personnel, the entire constitutional landscape ended up being controlled by one party. Of course, this kind of capture made it easy also to fiddle with the political system

⁷ J. Balkin, “Constitutional Rot,” *Maryland Law Review* 2017, vol. 77, issue 1, pp. 147–160.

⁸ M. Tushnet, “Constitutional Hardball,” *Marshall Law Review* 2004, vol. 37, no. 2, pp. 523–553.

⁹ L. Cianetti, S. Hanley, “The End of the Backsliding Paradigm,” *Journal of Democracy* 2021, vol. 32, issue 1, pp. 66–80.

more directly (think of gerrymandering) and to reshape media in line with Fidesz's preferences. Eventually, constitutional capture can lead to capturing a whole country's political way of life – the more existential meaning of *Verfassung* which Carl Schmitt highlighted in some of his writings.

Vandalism or partial demolition, by contrast, is a strategy available for those who do not enjoy a legislative majority large enough to replace (or even just to change) the constitution. Here a government will try to capture individual institutions through changes in personnel or manipulating specific rules governing institutions. PiS's conduct vis-à-vis the Constitutional Tribunal and, eventually, the Polish Supreme Court are examples of such as second-best strategy for aspiring autocrats. As in the case of replacement, political conditions need to be right (it was crucial that president Duda enabled PiS's strategy), and a party needs to have the will to not only play hardball, but systematically to take possession of as many institutions, specifically, courts and commissions, as possible (as PiS infamously did with the installation of "doubles"). But, absent complete replacement, it will be more much difficult to tilt the political playing field decisively in favor of the incumbents, comprehensively reshape the media landscape, etc.

Finally, there is what I would tentatively call bypassing or indifference, a strategy for which the early months of Trump 2.0 serve as an example (an example that is presented here with due caution: after all, what can be grouped under the label Trumpism is a heterogeneous set of strategies and actors, a picture further complicated by the sheer chaos that has characterized the weeks after Trump's second inauguration). As in the case of vandalism, no effort is made officially to replace or even just to amend the constitution, as the governing party cannot muster the necessary majorities. As in the case of vandalism, there will be attempts to capture individual institutions be it through massive investment in electing particular judges or possibly impeaching judges who issue verdicts not to the Trumpists' liking (the official line is that judges are "abusing" their power). Meanwhile, other parts, those already controlled by the GOP, are left more or less untouched, and everyone other than the governing party is expected to follow the established rules of the game.

Unlike in the cases of replacement and vandalism, then, there is not much of a systematic attempt officially to alter the constitutional set-up. Rather, elements of the constitution are simply ignored, and courts attempting to enforce constitutional provisions are just bypassed in the name of vague appeals to a "mandate from the people." This strategy is somewhat, but only somewhat, akin to what Schmitt theorized as *Verfassungsdurchbrechung* and what was rejected comprehensively in post-war German constitutionalism – a kind of crashing through the constitution by individual laws, without any effort to alter the text.¹⁰ In this case, executive orders are used as if they were laws, and as if they were sufficient to circumvent crucial constraints on power.

¹⁰ H. Ehmke, "Verfassungsänderung und Verfassungsdurchbrechung," *Archiv des öffentlichen Rechts* 1953/1954, Bd. 79, H. 4, pp. 385–418.

What is happening here, it is worth adding, goes far beyond well-known conservative strategies for establishing a unitary executive: the aim is not merely to make the administrative state uniformly accountable to the president, but to engage in conduct that would appear to be blatantly illegal, but that, so Trumpists seem to think, could still be justified with vague appeals to the executive pursuing “the common good.”

To be sure, it is early days, and this kind of indifference to the constitution might not in the end turn out to be the main characteristic of the Trump 2.0 period. But even an attempt at such a strategy should be shocking for American jurists, not least because it comes close to fulfilling one of the more traditional criteria for declaring a constitutional crisis which Balkin and Levinson had suggested. While the President and his acolytes are not quite declaring officially that they are just ignoring the constitution, they certainly are ready to announce their unwillingness to implement courts’ decisions.

2. A quick word on counter-strategies

As I have been emphasizing throughout this brief essay, capture depends on particular political conditions. Determined opposition forces might be able at least to slow down attempts at capture through playing hardball; they can try to mobilize civil society actors; and they can bolster the general legitimacy and concrete political support of institutions, in particular courts (the mobilization to protect courts in Poland being a particularly notable example). As always, resistance is a collective action problem, rendered more difficult still if a government clearly signals its willingness to punish opposition forces (think of the attacks by the Trump administration on law firms and universities).

What also makes such counter-strategies *prima face* more difficult is that those bent on capture, as already mentioned, tend to dissemble; they often do not announce their designs on constitutions well in advance. On the other hand, the very fact that autocratization now often follows a particular playbook also makes the work of a potential opposition at least somewhat easier: when Orbán embarked on capture, there were still plenty of observers who were giving him the benefit of the doubt, or who claimed that autocratization could never happen inside the European Union, or that the situation would necessarily self-correct sooner or later. By the time Benjamin Netanyahu embarked on his so-called “judicial reforms,” protestors could hold up images of Orbán and point people quickly to Kim Lane Scheppele’s article on “autocratic legalism” (which had been swiftly translated into Hebrew), rendering the “this cannot really happen” – stance less and less credible.

3. Conclusions

Constitutions do not just constrain powerholders and structure a political system. Few would deny, though, that these are central functions of constitutions. Those intent on constitutional capture seek to be unconstrained and to control the political system (and the outcome it produces). In other words, they have systemic ambitions. Yet, as I have suggested, they often hide these ambitions. When political conditions are favorable and pushback is insufficient they will ideally seek to replace a constitution entirely; as a second-best (from their point of view), they can try to get hold of particular institutions, taking plainly illegal (and unconstitutional) measures in the process. But they can also try to bypass the constitution by simply ignoring constraints – an example being the early Trump 2.0 administration, which sought to dismantle entire departments, even though only Congress is allowed to create and abolish departments –and also establishing a track record of not following court orders (needless to say, this analysis is very tentative at this point).

These are ideal types, the boundaries between them might be fluid, some of what is tried in one situation might also be tried in another. The hope is that this typology will help us better understand the varieties of capture and means of resisting it.

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Summary

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Constitutional Capture Revisited

The article offers an analysis of the phenomenon of constitutional capture and sketches a typology of different kinds of constitutional capture. Capture means that one party effectively controls the political system as a whole, without officially declaring a form of authoritarianism. One type of capture is the complete replacement of an existing constitution; the second is what the article calls constitutional vandalism, in which a governing party purposefully damages institutions; the third is constitutional bypassing, in which power-holders simply ignore constitutional constraints. The article then also suggests some strategies to counter processes of capture.

Keywords: authoritarianism, constitutional crisis, constitutional capture, constitutional rot, autocratic legalism.

Streszczenie

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O przejęciu konstytucyjnym raz jeszcze

W artykule omówiono zjawisko „przejęcia konstytucyjnego”, a także zarysowano typologię jego różnych form. Przejęcie konstytucyjne oznacza, że jedna partia skutecznie kontroluje cały system polityczny, nie dokonując przy tym formalnego wprowadzenia ustroju autorytarnego. Jednym ze sposobów przejęcia władzy jest całkowita zmiana obowiązującej Konstytucji. Drugim – tzw. wandalizm konstytucyjny, polegający na celowym niszczeniu instytucji państwowych przez partię rządzącą. Trzecia forma obejmuje obchodzenie przepisów konstytucyjnych, czyli sytuację, w której osoby sprawujące władzę ignorują konstytucyjne ograniczenia jej wykonywania. W opracowaniu zaprezentowano również strategie przeciwdziałania procesom przejęcia konstytucyjnego.

Słowa kluczowe: autorytaryzm, kryzys konstytucyjny, przejęcie konstytucyjne, konstytucyjny rozkład, autokratyczny legalizm.