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Populist Constitutionalism or New Constitutionalism²

Abstract

This text aims to prove the thesis that we are currently witnessing a birth of new constitutional solutions. The populist movements across the world, and especially in Central and Eastern Europe, are effectively redesigning liberal-democratic constitutionalism. There is a clear correlation between populism, constitutionalism, and democracy, and so the process of redesign of the Central and Eastern European constitutionalism has an underlying democratic potential. Perhaps it is a sort of necessary adjustment of the system implanted in this part of the world after 1989.

Keywords: populism, constitutionalism, democracy, constitutional crisis, Central and Eastern Europe

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Introduction – a few words on populism and its characteristics

There have been two notions dominating the global discourse for some time now; these are: populism and constitutionalism. These notions stand in contrast to each other. All anti-system movements are depicted by the dominating political and intellectual establishment as populist movements, and constitutionalism – as a value that needs to be protected and defended. The problem is that the defenders of constitutionalism understand it only and exclusively unidimensionally, i.e. as liberal-democratic constitutionalism. After a review of the presented standpoints it is hard to resist the impression that liberals have a problem with populism and constitutionalists have a problem with populist criticism and constitutional reforms.

In general, the criticism launched on the liberal side is very shallow and comes down to “labelling”. Not to any in-depth analysis of causes, processes, and effects. It is particularly visible in the political discourse taking place in Poland, where it is hard to come across any arguments more sophisticated than those based on anti-populist (so-called anti-PiS orientation, involving expressing a strong disapproval of the Law and Justice government’s policy) reactions.

The situation of the discourse on changes of the law and the constitution is no better. The language is more refined but in cognitive terms, the statements made by prominent critics of the current government are limited to jurisprudential arguments dating back to the turn of the 19th and the 20th centuries. But this matter shall be analysed separately.

In this text I intend to prove the thesis that we are currently witnessing the birth of new constitutional solutions. The populist movements across the world, especially in Central and Eastern Europe, are effectively redesigning liberal-democratic constitutionalism. Moreover, there is a clear correlation between populism, constitutionalism, and democracy, and so the process of redesign of Central Eastern European constitutionalism has an underlying democratic potential. Perhaps it is a sort of necessary adjustment of the system implanted in this part of the world after 1989.

My line of argument is based on the assumption that there is a pluralism of various forms of constitutionalism, and the liberal-democratic form thereof is only one of the many possible options. A claim that a liberal-democratic constitutiona-

lism is the only practicable solution³ gives too much symbolic capital to just one constitutional option.

According to a report by the Institute for Global Change,⁴ in the period from 2000 to 2017 the number of populist parties in Europe almost doubled, increasing from 33 to 63. The number of European countries with populist participation in government grew from 7 in 2000 to 14 in 2017. This trend of growth is especially noticeable in Central and Eastern Europe, where populist parties are involved in governance in 7 countries: Poland, the Czech Republic, Slovakia, Bulgaria, Bosnia, Serbia, and Hungary.

The deep crisis of liberal constitutionalism of today is not a coincidence. As argued by Frank Furedi, there are two processes that have long been contributing to the erosion of legitimacy of liberal democracy. These processes are: political disengagement of citizens combined with technocratic governance.⁵ The disappointment with the system of liberal democracy is, to a significant degree, an effect of activity of 'detached' liberal elites, which Jan Zielonka claims to be the case of all of Europe.⁶ It is exactly the system of liberal democracy that has implemented the rule of only legitimate oligarchs procedurally. It is this very system where anti-democratic governance practices of experts and "neutral" judges have been acknowledged. It is in the Polish version of the liberal-democratic system frequent instances of contempt for ordinary citizens occurred, just to recall cases of pigeon-holing people based on their social background or age and sympathies for a socially conservative radio station, or the case of the commoners having no right to rule on account of being the commoners.

This system has given precedence to "discretionary policy", which I understand as the anti-discrimination of minorities (e.g. LGBT) at the expense of excluding larger social groups by eliminating the "distribution policy", e.g. transport exclusion of 1/3 of the country's population,⁷ the education – and technology-related exclusion

³ M. Avbelj, *High time for popular constitutionalism!*, „Verfassungsblog on Matters Constitutional“ 11.9.2016, <https://verfassungsblog.de/high-time-for-popular-constitutionalism>

⁴ See: M. Eiermann, Y. Mounk, L. Gultchin, *European Populism: Trends, Threats and Future Prospects*, Report by the Institute for Global Change, 29 December 2017, <https://institute.global/insight/renewing-centre/european-populism-trends-threats-and-future-prospects>

⁵ F. Furedi, *Populism and the European Culture Wars: The Conflict of Values between Hungary and the EU*, Routledge 2017.

⁶ J. Zielonka, *Counter-Revolution. Liberal Europe in Retreat*, Oxford 2018; see also: R. Eatwell, M. Goodwin, *National populism: The revolt against liberal Democracy*, Penguin Books 2018.

⁷ See: a report by Klub Jagielloński on public transportation, April 2018: <https://klubjagiellonski.pl/2018/04/17/publiczny-transport-zbiorowy-w-polsce-studium-upadku/>

of residents of smaller towns and villages.⁸ It is the liberal-democratic system which has promoted egoism instead of the common good. In the so often quoted anti-immigrant phobia, the media of the liberal-democratic system have often disregarded the fate of the excluded local communities while fostering compassion for “others”.

In Poland, a voice that stands out in a very positive way is a perspective offered by the “Kultura Liberalna” [“Liberal Culture”] environment online weekly – in the form of Tomasz Sawczuk’s book entitled “*Nowy liberalizm*” [“*New Liberalism*”], where the author argues that Polish liberals have not understood four key changes occurring in the Polish society, which have been identified and used politically by the currently ruling party. According to Sawczuk, these changes are:

- ❑ departing from the 1989 euphoria and moving to an actual analysis of the existing instances of social injustice, accompanied by a related claim for a greater involvement of the state,
- ❑ a change related to the previous one – concerning the distribution policy, i.e. a return to antagonistic politics and a departure from post-politics,
- ❑ in the field of economics, this is a departure from neo-liberal dogmatism and a shift to economic pragmatism, related to drawing from many currents of political economics focusing on searching for solutions to the problems of the modern economy and defending Poland’s economic interest in and outside the European Union,
- ❑ exhaustion of the post-communist discourse of catching up with the West and disappearance of the complex related thereto.⁹

Two countries of Central and Eastern Europe are considered states governed by populists. These countries are Hungary and Poland. There are many definitions of populism, but populist movements are social phenomena difficult to categorise. In general, they are characterised by anti-elitism and anti-pluralism. A third quality is the specific approach in moral discourse. As argued by Jan-Werner Müller, a researcher of contemporary populism, representatives of populists consider themselves a moral representation of society.¹⁰

⁸ *Wykluczenie cyfrowe w Polsce*, a 2015 study by the Polish Senate’s Bureau of Research https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/133/plik/ot-637_internet.pdf and 2016 data concerning education exclusion, see: zob. J. Włodarczyk, N. Gańko, *Wykluczenie edukacyjne*, http://fdds.pl/wp-content/uploads/2016/05/Wlodarczyk_J_Ganko_N_2011_Wykluczenie_educacyjne.pdf

⁹ T. Sawczuk, *Nowy liberalizm. Jak zrozumieć i wykorzystać kryzys III RP*, Warszawa 2018.

¹⁰ Jan-Werner Müller wrote “The claim to *exclusive* moral representation of the real or authentic people is at the core of populism”, J.-W. Müller, *Populism and Constitutionalism*, [in:] C. Rovira Kaltwasser, P. Taggart, P. Ochoa-Espejo, P. Ostiguy (eds.), *The Oxford Handbook of Populism*, Oxford 2017, p. 593. See also: C. Mudde, in C. Rovira Kaltwasser, *Populism: A Very Short Introduction*, Oxford

So much for the three main qualities of the ideology of populist movements. We should distinguish populism aspiring to power, i.e. a movement trying to stimulate a society politically, from effective populism, i.e. populism in power. In the latter case, populists in power are attributed with corrupting citizens by certain social policies making citizens economically dependent on the authority.

Liberal critics speak also of other typical features of populism in power, which are xenophobia – manifested in opposing open immigration – and anti-globalist attitudes and rhetoric, stressing the country's economic independence. Next on the list is purging the state-controlled domains from old elites, endorsing the change of elites, or forming new elites in the domain of the economy. The sphere of the media, used to propagate the specific cultural revolution as opposed to political correctness, is of great importance.

Another typical feature of the populism in question is also “institutional impatience” involving rejecting formalism and eliminating the restrictions of constitutional democracy. In Poland, this took the form of changes based on a rejection of “legal impossibilism” defined as an approach where certain decisions or solutions to particular problems were blocked by procedures.¹¹

Populism and constitutionalism

One of the most fundamental qualities of contemporary populism is its specific approach to law. While the populisms of the 1950s and 1960s were about a sort of legal nihilism, the neo-populism of the 21st century, in most cases, treats law seriously, viewing it as both a source of legitimate power and an institution coordinating community life. The populism of today also appreciates the communicative function

2017, pp. 17–18. See also: C. Rivira Kaltwasser, *Populism and the Question of How to Respond to It*, [in:] C. Rovira Kaltwasser, P. Taggart, P. Ochoa-Espejo, P. Ostiguy (eds.), op. cit., pp. 409–492.

¹¹ The notion is used often by the most prominent leaders of the Law and Justice party. The former president of the Constitutional Tribunal, Marek Safjan, claimed that legal impossibilism is an essential element of constitutional judiciary. “I consider it in positive terms, not in negative terms. And this is the difference between my opinion and the opinion of those who claim it to be otherwise. I’m convinced that the function of constitutional courts is designed exactly to pose obstacles to parliamentary majorities wishing to do as they please, ignoring the restrictions that need to be abided by in a democratic state respecting fundamental rights. Such obstacles are there for such majorities to show them the limits of their aspirations” in: <https://www.tygodnikprzeglad.pl/prawo-wedlug-pis/>. This is a classical liberal-constitutional approach. I think that the notion of “legal impossibilism” refers to the excess of formalism, not to “checks and balances”. A critical review of the notion in question from the point of view of the theory of law: J. Zajadło, Pojęcie „imposybilizm prawny” a polityczność prawa i prawoznawstwa, *“Państwo i Prawo”* 2017, 72(3), pp. 17–30.

of law. An example can be the implementation of historical policies through legislations and legal institutions – e.g. institutes of national remembrance.

The accusations raised by (mainly liberal) critics against neo-populist movements in the context of constitutionalism are interesting.

Among these, the oldest, probably the most popular, idea, coined by Fareed Zakaria, is “illiberal democracy”¹² – which is to mean not so much anti-liberal as not materialising liberal concepts, i.e. not placing the individual in the spotlight and rejecting the “sacred nature” of human rights and the separation of powers. Larry Diamond speaks of “hybrid regimes”,¹³ which is not far from an illiberal democracy. Kim Lane Scheppele, a researcher from Princeton University and a radical critic of Orbán’s Hungary, uses the notion of a “constitutional coup d’état”, which carries a clearly pejorative meaning.¹⁴ Bojan Bugarič, a researcher from Slovenia, having put forward the notion of “semi-authoritarian regimes”, seems to be more neutral in his criticism. The dominant model is still a liberal-constitutional democracy, but the regimes operating within its framework are authoritarian, only taking a soft – not tough – form.¹⁵

It only gets worse further on. Tom Ginsburg refers to “authoritarian regression”,¹⁶ Aziz Huq uses the notion of “constitutional retrogression”,¹⁷ Wojciech Sadurski speaks of a “constitutional slump”, J.M. Balkin describes Trump’s America as “constitutional rot”,¹⁸ and David Landau has coined the popular notion of “abusive constitutionalism”.¹⁹

It is not hard to see that the only positive reference model is the liberal-democratic constitutionalism. What is more, it seems that the said acknowledged constitutional researchers have adopted one universal, all-embracing model. The majority of these critics deal with “comparative constitutionalism” in their research

¹² F. Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York–London 2007.

¹³ L. Diamond, *Thinking about Hybrid Regimes*, “Journal of Democracy” 2002, 13(2), pp. 21–35.

¹⁴ K.L. Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, “Transnational Law & Contemporary Problems” 2014, 23, pp. 51–117 and eadem, *Constitutional Coups in EU Law*, [in:] M. Adams, A. Meuwese, E.H. Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge 2017.

¹⁵ B. Bugarič, T. Ginsburg, *The Assault on Postcommunist Courts*, „Journal of Democracy” 2016, 27(3), pp. 69–82; see also: B. Bugarič, *Central Europe’s Descent into Autocracy: On Authoritarianism on Postcommunist Courts*, Oxford 2019.

¹⁶ K.L. Scheppele, *Autocratic Legalism*, „The University of Chicago Law Review” 2018, 85, s. 545–583.

¹⁷ A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, “UCLA Law Review” 2018, 65, p. 118.

¹⁸ J.M. Balkin, *Constitutional Rot*, [in:] C. Sunstein (ed.), *Can It Happen Here? Authoritarianism in America*, New York 2018, pp. 26–27.

¹⁹ D. Landau, *Abusive Constitutionalism*, “UC Davis Law Review” 2013, 47, pp. 189–260.

activity. This kind of constitutionalism considers the global context, comparing constitutional systems of states very distant from each other, like Venezuela and Hungary or the Philippines and Poland. It is not an approach grounded in social sciences. Rather, it is an approach based on a certain normative pattern providing an appropriate point of reference. It is time, as called for by Theunis Roux in his recent book, for comparative constitutionalism research to become more methodologically formalised and to take advantage of methods typical of social sciences to make it possible to take the universal and the particular into consideration at the same time.²⁰

Abusive constitutionalism – a case study

None of the abovementioned notions bring us closer to the essence of populist constitutionalism. They do not offer any characteristic, distinct features, serving the mere purpose of labelling. It is a standard in social sciences to use certain categories of analytical potential. A common practice is to use metaphors – but their aim is to free our cognition, to provide new heuristic possibilities. In the light of the above, the said notions do not serve this purpose. They are just expressions without any analytical potential.

In an article entitled “Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej” [“Abusive Constitutionalism and Abused Constitutionalism. A Sociological Reflection on the Crisis of the Liberal-Democratic Constitutionalism in Post-Communist Europe”], Grażyna Skąpska, a sociologist of law, uses the notion of “*abusive constitutionalism*”, proposed first by David Landau. Let us take a closer look at the content the author of the article feeds this expression with.

“The aim of this article is to answer the question about the factors justifying the disregard for constitutionalism in new democracies” (p. 278), she writes.²¹ G. Skąpska reconstructs Landau’s concept in a creative manner and offers a division into two types of constitutionalism from the point of view of the way in which constitutional changes are implemented. Landau speaks originally only of “abusive constitutionalism”. In G. Skąpska’s typology, the first type is abusive constitutiona-

²⁰ T. Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*, Cambridge 2018.

²¹ G. Skąpska, *Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej*, “Filozofia Publiczna i Edukacja Demokratyczna” 2018, 7(1), pp. 276–301.

lism – when amending a constitution in a way that restricts democracy (and, most likely, civil liberties) is democratically legitimate. In other words, this is a situation in which a political party wins the required constitutional majority and amends the constitution. The abuse then involves making changes, the nature of which is against the nature of liberal-democratic constitutionalism.

A big merit of G. Skąpska's publication is its naming of society as the originator of such changes. It is not the military or some elites who force the change through. Constitutional changes stem from changes taking place in society itself, but this will be discussed further.

The author argues that changes in abusive constitutionalism take a path away from the classical canon of liberal constitutionalism, which involves departing from the separation of powers, depriving a constitutional judiciary of its independence, and subordinating the judicial to the executive. As a result, the principle of mutual supervision and balance between powers is violated. Furthermore, political corruption, 'bribing' the electorate through appropriate social policies leads to the marginalisation of the opposition. The consequence is that "abusive constitutionalism is therefore an expression of a certain constitutional hypocrisy, where changes to the system are made in accordance with a democratically enacted (or amended) constitution, but the effects of such changes weaken democracy".²² Abusive constitutionalism, which is clear in the publications of both David Landau and Grażyna Skąpska, is based on the model of liberal-democratic constitutionalism, and the entire process abuses this very model. The same process is described by the notion of "*constitutional backsliding*".

G. Skąpska proposes a notion not found in D. Landau's text. This notion is "abused constitutionalism" – "expressing constitutional nihilism, a complete disregard for the constitution in force or, at best, citing the constitution selectively and to achieve short-term political goals. Abused constitutionalism is about fundamental changes to the existing political system being made by way of ordinary acts by a parliamentary majority – which is not a constitutional majority but an arithmetic one".²³

The difference between abusive and abused constitutionalism concerns a very important matter of legitimisation of and the procedures adopted under each of them.

I find it interesting that the author treats the constitution only as a legislative text subject to stable interpretation. The entire line of presented thought is based on certain assumptions concerning the role of the constitutional judiciary and law-

²² Ibidem, p. 285.

²³ Ibidem, p. 287.

yers in interpreting the constitution. In G. Skąpska's depiction, lawyers are not just guardians but more like owners of the constitution. The public domain does not have any major impact on the constitution, it is a passive audience of the constitution provided in a form and content shaped by lawyers.

It is both the constitution and the also law itself that are a questioned social phenomenon. Different interpretations of law and the constitution exist in a society in which conflict is endemic. Most of these interpretations remain in opposition to each other. What G. Skąpska defends is legal constitutionalism, leaving the political variant of constitutionalism aside. She is right in claiming that what we are witnessing right now is about undermining the dominant position of legal constitutionalism. This is manifested not so much through constitutional nihilism, for no one has abolished the constitution, we do have civil rights, as through challenging lawyers' interpretation of the constitution, which undermines the dominant position of constitutional tribunals, the guardians of legal constitutionalism. It is easy to prove that legal constitutionalism hindered the activity of political forces to a great extent – not to call it anti-democratic. Some restrictions are necessary, but the situation we were dealing with was an excess of legal constitutionalism which was definitely anti-democratic in its nature.

I do not find the argument that if someone is a criminal law expert and a judge of the Constitutional Tribunal, they may speak authoritatively on the matter of the value of political community convincing. Reducing the role of the constitutional judiciary based on the Kelsenian model can be regarded a democratic achievement of what G. Skąpska refers to as abusive constitutionalism.

I do not consider the argument on constitutional nihilism convincing either. If there really was a situation of constitutional nihilism, nobody would bother – like under the Bolshevik rule – to implement statutory changes in a procedural manner. The decisions of the Court of Justice of the European Union would not be respected. It is possible to agree with G. Skąpska's argument that "abusive constitutionalism" in her understanding did involve instances of unconventional interpretation, close to bending the rules of law or, using another term, to "falandisation" of law, an expression coined at the time of Lech Wałęsa's presidency.

The argument of subordination of the judiciary to the executive does not seem convincing either. Reforms of the judiciary were necessary, and it is a pity that there have been no deeper structural changes, only changes involving personal subordination.

The post-1989 judiciary has emancipated itself too much, opting for defending corporate privilege. Legal constitutionalism legitimises itself by the political neutrality of judges. In other words, decisions are made impartially and based on facts. But there is always some interest behind each and every decision.

Legal constitutionalism, defended by the author of the said article, involves a glorification of the approach to the “legal revolutions” taking place in Poland and Hungary in 1989. The transfer of power was lawful. But there is no mention that this lawful nature of the political transformation of the time was hermetic, reserved for the elite. It was then that lawyers gained their dominant position in the political system, which was based on social disengagement, on a rapid inclusion of the provision on “the state of law” in the constitution – which was to act as a cover for the former communist elites, on failure to square accounts with the past, on refraining from cleansing the judiciary from disgraced judges, and on a transmission of what a Croatian lawyer would call “a socialist legal tradition”, meaning a set of certain practices involving avoiding accountability, implanted from the earlier system.

Social causes of the critical approach to the constitution

G. Skąpska searches for answers to the question about the social causes of the critical approach to the constitution. She refers to it as “disregarding the values and principles supporting liberal-democratic constitutionalism, disregarding the constitution, restricting fundamental rights, and the ensuing legal chaos and a potential lack of legal security”.²⁴

The first answer is obvious, pointing to the greater care for social security than for constitutional values.

The second reason mentioned is more interesting – G. Skąpska speaks of different concepts of “a nation as a politically organised community than the one expressed by liberal-democratic constitutionalism, in relation to a political culture different from a liberal democracy, which is accompanied by the emotion of fear of the challenges of the modern world: globalisation, mass emigration, an increasing significance of big corporations, a new world order of influence”.²⁵

The phenomenon of the departure from liberal-democratic constitutionalism as described by G. Skąpska is global, not just regional. While her argument of a different vision of political community sounds convincing, the argument of a mental “escape from freedom” fails to make the same effect. Analysing the text, I cannot resist the impression that the author offers us another version of the once popular concept of *Homo Sovieticus*, the product of communism, unable to cope with a new economic and political system. An immature being, turning to the state in search

²⁴ Ibidem, p. 219.

²⁵ Ibidem.

for care and social security. It sounds quite good. The problem is that *Homo Sovieticus* has never existed. Maciej Gdula, in his research on new authoritarianism, conducted in a fabled town of Miastko [existing real town, renamed for research purposes], gives a precise indication of another social source of support of what he calls “authoritarianism”²⁶ and what G. Skąpska names lost and confused masses subject to manipulation of anti-constitutional forces in her text.

I think this is not the cause of the critical approach to liberal-democratic constitutionalism in Central and Eastern Europe. The social and political reasons have been named in the initial part of the text. Here, I would like to focus on several more specific causes.

First, liberal-democratic constitutionalism was imposed by a narrow environment of elites, not adopted with the mass involvement of the people. In her article, Anna Młynarska-Sobaczewska has proven that there was no “constitutional moment” in Poland that would fulfil Bruce Ackerman’s criteria.²⁷ The same tone regarding new constitutions in post-Communist Central and Eastern Europe can be traced in Andras Sajó’s writing.²⁸ It can be added that the 1997 Constitution did – and does – not enjoy such significant recognition and is therefore not as legitimate since it gained so little support in the referendum. The turnout among those with the right to vote was 42.86%. 53.45% of voters voted for the adoption of the Constitution; 46.55% were against. If we couple it with the Constitutional Commission’s rejection of citizens’ initiatives,²⁹ the full picture tells us that the legal constitutionalism in Poland was an expression of a vision of a political community of a very limited part of the society and did not enjoy the support of the majority of the citizens.

The second cause is the political maturity of the society. In 1989 there were not many people with practical knowledge about the mechanisms of the functioning of democracy, constitutionalism, and rules of law, which paved the way for the mindless imitation of the West.³⁰ Professors of law of the time had a major (and disgraceful) part in, blindly copying the solutions they knew from books. At present we have

²⁶ M. Gdula, *Nowy autorytaryzm*, Warszawa 2018.

²⁷ A. Młynarska-Sobaczewska, *Constitutional Moment Theory in Polish Reality – the Consent, Identity, and Change of Constitution*, a paper presented in Lisbon at the RCSL Annual Conference on 21 September 2018.

²⁸ A. Sajó, *Constitution without the Constitutional Moment: A View From the New Member States*, “International Journal of Constitutional Law” 2005, 3(2–3), pp. 252–253.

²⁹ E. Kowalewska, *Competing visions of Constitutionalism in Post-Socialist Poland*, a paper presented at a conference entitled “New Constitutionalism? New Forms of Democracy and Rule of Law Beyond Liberalism”, International Institute for the Sociology of Law, Oñati, Spain, 12–13 July 2018.

³⁰ See: I. Krastew, S. Holmes, *Imitation and its discontents*, “Journal of Democracy” 2018, 29(3), pp. 117–128.

a completely different generation, one aware of its rights and identity. A generation of people who are at least critical of the constitutional transplants imported carelessly from the famed West. The current generation of citizens is interested in its own – historically rich – constitutional identity.³¹

Counter-constitutionalism – new constitutionalism as a corrective measure addressing the excess of liberal-democratic constitutionalism

Looking at the constitutional changes taking place in Poland, I do not find them to exemplify any populist movements. These changes do not abolish political pluralism, nor do they appear to be anti-elitist. This trend may be said to be taking advantage of moral superiority and idealising ethnic community in its rhetoric, though. But this still does not make it a populist movement. Institutions function in a certain context and this context sets the limits to their potential. The reforms of the ruling party take place in limited internal and external contexts – there is a significant involvement of its political opposition and there is the supervision of the European Union. This results in the movement and the suggested reforms becoming more moderate.

Frank Furedi has written that “the political outlook of FIDESZ is best described as a synthesis of conservative nationalism and Christian democracy”.³² I think the same can be said about the political outlook of Law and Justice in Poland.

Certainly, there has been a shift from legal constitutionalism towards political constitutionalism since 2015. The implemented changes have upset the separation of powers, and there is a clear increase in the significance of the legislative branch, but not necessarily of the executive branch.

The main point of this new constitutionalism is the rejection of the idea of law as a neutral institutional mechanism to govern politics. The suggested changes promote a participatory democracy instead of a constitutional democracy. In this concept, the sovereign ruler is not a constitution but a political nation. The outcome is pressure exerted on the political constitution and ‘dejuridisation’ of the public domain. It is too early to conclusively evaluate the current trend, but its democratic, emancipatory potential certainly deserves to be emphasised. After 26 years of imposed liberal-democratic discourse the pendulum has swung to the other side.

³¹ Z. Rau, P. Żurawski vel Grajewski, *Magna Carta: A Central European Perspective of our Common Heritage of Freedom*, Routledge 2016.

³² F. Furedi, *op. cit.*, p. 5.

The constitutional courts in Central and Eastern Europe have been criticised by Wojciech Sadurski, known for his criticism of the current Polish government's policy towards the Constitutional Tribunal and common courts. In his pioneering book he emphasised the excessive authority of constitutional courts in the political systems formed after the fall of communism.³³ Hanna Dębska conducted an empirical study of the Polish Constitutional Tribunal from a critical theory point of view. Applying the theory of Pierre Bourdieu, she showed that the Constitutional Tribunal's way to become more legitimate in the society involved accumulating and taking advantage of symbolic authority.³⁴ From a sociological point of view, it is interesting to see that these two former critics tend to forget their very own arguments.

It is a kind of counter-constitutionalism aimed against legal constitutionalism. Its essence is a battle to change the emphasised principles of interpretation of the constitution.

I would like to conclude with a quotation addressed to both parties of the constitutional crisis, taken from a short text by Hanna Fenichel Pitkin, entitled "The Idea of a Constitution": "the constitution we gave depends upon the constitution we make and do and are. Except insofar as we do, what we think we have is powerless and will soon disappear. Except insofar as, in doing, we respect what we are – both our actuality and the genuine potential within us – our doing will be a disaster".³⁵

³³ W. Sadurski, *Rights Before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht 2014.

³⁴ H. Dębska, *Władza, Symbol, Prawo. Społeczne tworzenie Trybunału Konstytucyjnego*, Warszawa 2015.

³⁵ H. Pitkin Fenichel, *The Idea of a Constitution*, "Journal of Legal Education" 1987, 37(2), p. 169.