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Abuse of the Constitution as a Means of Political Change: Sociological Reflections on the Crisis of Constitutionalism in Poland

Abstract: This article aims to analyze abuse of a country's constitution as a unique means by which fundamental changes can be introduced to the country's political system. The term "abusive constitutionalism" is used to discuss the shift of the political system toward decreased democracy by means of changes to the constitution, as in the case of Hungary. In contemporary Poland, abuse of the constitution has entailed the creation of a parallel system via ordinary legislation passed rapidly by a simple parliamentary majority.

The thesis of this paper is that "abusive constitutionalism" and an "abused constitutionalism" stem from a crisis in liberal democratic constitutionalism as a motivating force and moral signpost in the public sphere. In the place of democratic constitutionalism, there has been a return to emotion-laden conceptualizations of the political community. Primordial bonds, unquestioned traditional values, and founding myths are perceived as more meaningful than the law and the constitution. This sort of return to the past has its historical validation, but it is also a reaction to the growing complexities of the contemporary world and its risks. Another important empirical context for abusive constitutionalism is the negative constitutional consensus of a passive electorate. One indicator of a negative constitutional consensus is the population's lack of interest in the democratic functioning of the public sphere.

Keywords: abused constitutionalism, constitutional nihilism, negative constitutional consensus, positive constitutional consensus, binding capital

The fundamental systemic transformations at the end of the twentieth century were not the result of bloody revolutions, the actions of charismatic leaders, or the realization of philosophical ideals. These revolutions were the consequence of social movements, civic initiatives, and, especially in the case of East Central Europe, the actual use of the law—both international as well as national. For instance, in Poland, the Committee for the Defense of Workers [KOR—Komitet Obrony Robotników] took advantage of existing legal rights for the protection of workers and the defense of persons accused by the communist party. The peaceful revolutions in this region of Europe took the form of "legal revolutions": the main agents of change applied the laws in force in order to produce essentially ground-breaking changes to the system (Kis 1998, Skąpska 2011).

As has become evident, however, this did not lead to a "fairytale ending." Currently, we are witnessing the restriction of liberal democracy or its transformation into new, more or less authoritarian forms under the names of electoral autocracy, steered democracy, or illiberal democracy. Michael Ignatieff, a keen observer of political developments around the world, argues that "a new authoritarian wave has gathered momentum in Eastern and Central Europe

in the past years. The same can be said of Western Europe” (Ignatieff 2014). A characteristic trait is that just as before, fundamental systemic shifts are not manifesting themselves as bloody revolutions, civil wars, or military coups d’état. The key role in these transformations is played, on the one hand, by a significant part of the electorate, and on the other, by the law—and thus the departure from liberal democracy has representative legitimacy.

Paradoxically, just as the cornerstones for post-communist liberal democratic constitutionalism appeared to be provided by “legal” revolutions, so the essential tools for reshaping liberal democracies into some form of autocracy are precisely the institutions that underpin those democracies. Above all, these include democratic electoral rules and procedures, the law, and the constitution. It has thus become clear that liberal democratic constitutionalism in the so-called new democracies has been insufficient to form an operative blockade against authoritarian regimes. As a consequence, the constitution is sometimes exploited for the execution of goals contrary to the fundamental values that such a document should protect, and is openly disregarded in the process of creating and/or applying the law. In other words, a legal revolution is replaced by a counterrevolution whose goals are diametrically opposed to even a rudimentary understanding of the principle of the rule of law. However, such a counterrevolution is conducted by means of the law and in the shadow of the constitution, which is either understood purely instrumentally, as a means of political power, or as a means of ethnic or religious unity. Societies in which constitutions are used as instruments for ad hoc political gains or are completely ignored obviously cease to be communities bound by the norms and values expressed in a liberal democratic constitution. Yet political community can be formed in other ways—ways that compete with liberal constitutionalism: for instance, on the basis of ethnic and religious purity.

The purpose of this paper is to consider the practices and discourses that signify an abuse of liberal democratic constitutionalism in new democracies. After a few words on the subject of the terms “constitution” and “constitutionalism,” I will present a brief description of both abusive constitutionalism and an abused constitutionalism as specific sociopolitical practices. Against this background, I will present an overview of ideas and discourses reflecting core values that stray from those associated with liberal democratic constitutionalism. Among these contrasting discursive practices are the ideas of a nation as an ethnos bound by certain primordial values, and the approach to individual rights and liberties as subordinated to those of the community. However, as empirical data will illustrate, the context in which abusive constitutionalism and an abused constitutionalism occur includes a lack of interest in the functioning of the public sphere, and a negative constitutional consensus, which are characteristic of post-communist societies. These elements will be illustrated by data on participation in parliamentary elections in Hungary and Poland.

Constitutions and Constitutionalism¹

In one of the most widely known interpretations, a constitution is described as the dynamic foundation for becoming a politically organized, modern nation (Pitkin 1987: 168). In the

¹ The concepts regarding constitutions and constitutionalism presented here are based upon my book, *From Civil Society to Europe: A Sociological Study on Constitutionalism after Communism* (Skąpska 2011).

formation of a modern nation the culminating moment is precisely the moment of adopting a constitution, which becomes a sort of birth certificate for the politically organized community, lending it an identity by reflecting its self-image and its ideas about itself (Skapska 2005, 2011).

In turn, constitutionalism—in the most elementary and procedural sense—is understood as simply the organization of a society based on the rule of law. It effectively guarantees the subordination of political power to law, which is applied by independent courts through their jurisdiction (Grimm 2004: 145). Authors who refer to the contemporary meaning of democracy as deliberative democracy describe constitutionalism as rooted in the moral discourse of the rule of law (Nino 1996: 5). Those authors who analyze constitutionalism from the standpoint of its actual functioning and anchoring in social consciousness and culture describe it as a state of affairs where rules and values found in the constitution infuse public discourse and political practice (Sadurski 2006).

From the perspective of this last approach, constitutionalism is more than a system of institutions. It is more than just a constitution ratified in the form of a document or functioning in the form of constitutional customs and court verdicts; it is also more than the basic norms and principles structuring a normative constitutionalism (including, above all, a tripartite division of political power). The major components of constitutionalism as an integrative concept unifying a community are (1) concrete political practices, (2) the relevant ideas, concepts, imagined utopias or ideologies which are decisive in the content of a constitution and in the interpretation of its rules, and (3) political discourses which reflect the core values enshrined in the constitution. Constitutionalism is—from a dynamic and procedural perspective—the final stage in the creation of a politically organized community. Constitutionalism functions, in both practice and discourse, as part of a bilateral relationship. Such relations shape public discourses thanks to constitutional semantics which influence the meaning of relevant concepts used by members of a constitutional community (e.g., the state, citizenship, the rule of law, human dignity, judicial independence, civil/individual/collective rights and liberties, etc.). The constitution reflects and illustrates both the state of affairs to which a society aspires as well as how it envisages itself (Sunstein 1996: 66).

Equally important factors underpinning social consciousness, but also setting social action in motion in the public sphere, are utopias and ideologies, “the key normative fictions” (Blokker 2017), sentiments and passions (see Holmes 1995), and strong emotions (e.g., fear of a return of the totalitarian past, shame for crimes committed in the past, etc.), which are important components of post-totalitarian constitutionalism (Sajo 2011).

Intense feelings and impassioned emotions manifest themselves especially when a crisis affects the functioning model of constitutionalism and/or the model of the political community as articulated in the constitution. The contemporary crisis in liberal democratic constitutionalism points to a dissonance between the models verbalized in constitutions and rival concepts competing with that model. This crisis is illustrated by (1) the political practices which (ab)use a constitution in order to enact systemic shifts contradictory to liberal democratic values and principles, and (2) the arguments formulated in political discourse. The crisis of constitutionalism can also take another form: the above-mentioned lack of public interest in the constitution and constitutionalism, that is, a negative constitutional consensus.

Political Practices: Abusive Constitutionalism and an Abused Constitutionalism as Fundamental Tools of Political Change

Abusive Constitutionalism

As David Landau emphasizes in his paper entitled “Abusive Constitutionalism” (2013), there has been a retreat from liberal democracy, as has been exemplified by the democratic, constitutionally legitimized establishment of more or less authoritarian governments. This retreat is currently observable the world over: from Latin America (e.g., Venezuela),² through Asia (e.g., Japan),³ the Middle East (e.g., Egypt),⁴ and Central Eastern Europe (e.g., Hungary). After the presidential and then parliamentary elections in 2015, the same trend is manifest in Poland as well. In Poland however, abusive constitutionalism takes the extreme form of abused constitutionalism.

Abusive constitutionalism is thus a new way of introducing authoritarianism; it is the reverse of the lawful revolutions thanks to which totalitarianism was overthrown in Central and Eastern Europe at the end of the twentieth century. In the twenty-first century, instead of military takeovers, coups d’état, or other violent overthrows, democratically legitimized changes are made in the existing constitutional and legal order. In contrast to the former changes, the goal is to undermine the liberal democratic order functioning on the basis of principles such as the rule of law, separation of powers, an independent and autonomous judiciary, checks on executive power, and the protection of civil rights and liberties. In other words, abusive constitutionalism entails the making of constitutional changes rendering a state less democratic.

This type of modification is accomplished by formally valid procedures (e.g., amendments to an existing constitution or the proclamation of a new one) and democratic legitimation (e.g., sufficient support by the electorate, majority representation in parliament, etc.) (Landau 2013: 195–196). Such constitutional changes clear the way for limitations on or even destruction of the liberal democratic order. Consequently, the rule of law, the principle of a division of powers, the system of checks and balances, the authority and autonomy of the courts, the apolitical nature of the civil service, and human rights and liberties are

² Examples of abusive constitutionalism—which takes advantage of an existing document in order to limit democracy—have occurred in South America, including countries in which democratic systems were functioning correctly. Such instances include Venezuela, Columbia, or Bolivia where prevailing procedures were employed in order to change a constitution so as to maintain an authoritarian regime (Coppedge 2003). Perhaps the most infamous is the Venezuelan case (Brewer-Carias 2010: 227–230).

³ Generally accented is that Japan is a stable, liberal democracy. Nonetheless, Prime Minister Shinzo Abe (the leader of the traditionally dominant, liberal party) announced not too long ago the proposal of an amendment to the constitution allowing for changes by a simple parliamentary majority instead of the usual two-thirds constitutional majority. Whereas the liberal party holds a significant majority in the parliament, the amendment did pass. At present there is a low risk of Japan turning into an authoritarian state as a consequence of this change. That noted, however, the amendment could lead to an erosion of democracy, particularly when one considers the weak judicial control found in Japan (Repeta 2013 as cited by Landau 2013: 198).

⁴ A unique example is provided by Egypt where the Muslim Brotherhood made use of its substantial dominance in the parliament and the Constitutional Assembly alongside the fact that it held the presidency. The Brotherhood introduced changes into the constitution which aligned it with the goals, interests, and values (mostly religious) held dear by this movement. Comments have been made that the underlying motive was to turn Egypt into an authoritarian state, albeit with democratic elections (Al-Arian as cited in Landau 2013).

negated. The fundamental tenets and values that a constitution is expected to serve are not only restricted but disrespected.

This process is enabled by amendments or by replacement of an existing constitution. Changes are introduced into the justice system—especially to the highest courts in the land, and where such exist, the constitutional courts and tribunals—in order to deprive this branch of government of its political autonomy and its control over the constitutionality of legislation and executive action. Then, a judicial “reform” is undertaken to limit the independence of judges. The rules and regulations governing public administration are altered too: the civil service becomes politicized, with appointees being chosen among loyal adherents of the new order. Lastly, the public mass media is subjected to government control and the public media are transformed into instruments of political propaganda.

According to Landau’s thesis, abusive constitutionalism ultimately leads to decreased possibilities for the opposition to take power, despite the conduct of democratic elections. The media, which is subordinated to the ruling political majority, impedes all opposition parties in their struggle against the majority and permits unrestrained vilification of the opposition, with government-led smear campaigns against the top opposition leaders. Deprived of their independence, constitutional and other courts face the dissolution of both the separation of powers and the system of checks and balances.⁵ When the judiciary is subject to the executive branch of government, it means there has been a political takeover of the courts, the attorneys general, the civil rights ombudsman, and even electoral commissions (making election fraud more possible). In turn, political corruption in the form of generous social policies ensures the government’s favor among the voting population. As a result, the opposition becomes marginalized and, ultimately, elections may no longer be necessary since the outcome is easily predictable (Landau 2013: 216). Abusive constitutionalism is, therefore, an expression of a unique form of constitutional hypocrisy: systemic transformations are accomplished in accordance with a democratically ratified (or amended) constitution, but the consequence is the further weakening of democracy.

The result of abusive constitutionalism is a limitation of civil rights and liberties. keystones in liberal democratic constitutionalism, such as freedom of speech or assembly, crumble. As Landau concludes, “. . .it is fairly easy to construct a regime that looks democratic, but in actuality is not fully democratic, at least along two important dimensions: vertical and horizontal checks on elected leaders and rights protection for disempowered groups” (2013: 189). Overall, even if democratic elections are held and the government is, essentially, not fully authoritarian, the system is nevertheless significantly less democratic than it was prior to these changes. All things considered, the problem of abusive constitutionalism is, basically, irresolvable. Democratic defense mechanisms (such as the

⁵ Especially emphasized here is the role of the constitutional tribunal in today’s diversified societies which are pluralistic, complex, multicultural, and connected in numerous ways with the external political surroundings (Grimm 2005). A constitutional court is a crucial institution for the realization of the rule of law, control over lawmaking (constitutionality), and protection of civil rights. Additionally, it is thanks to such judicial branch institutions that a rationalization of the system of government is made possible in the contemporary world—a world in which various values, beliefs, and discourses come into contact with one another. In Central Eastern European countries the role of such a court of law is even more significant: just as it was with the establishment of West Germany’s Constitutional Court after the Second World War, constitutional courts in the postcommunist countries were to act as a cordon against the chance of a return to dictatorship. These courts and tribunals were seen as crucial for the self-defense of democracy.

principles of a self-defensive, militant democracy enshrined in German constitutionalism) become ineffective because the (altered) constitution itself continues to be democratically legitimate.

Another, additional factor should be considered with respect to East Central Europe. Wherever a key part of the economy is state-owned and/or controlled (or is moving in this direction via a re-nationalization process), lucrative positions in the state-controlled sector are reserved for adherents and clients of the political power-holders. The creation of a crony capitalist state is the effect of far-reaching measures having been undertaken in the domain of the economy (Magyar 2016). In Hungary, Victor Orbán used state laws and procurement contracts to create a wealthy Fidesz-affiliated business constituency which can finance political campaigns, reward party supporters, and operate friendly media outlets. Unsurprisingly, it also becomes possible to “buy” the electorate by offering broad social welfare policies. Aside from the political corruption and nepotism, “new elites” are shaped, which are politically subservient to the government. There will also be politically amenable civil servants, judges, or prosecutors.

In East Central Europe, Hungary is (as mentioned earlier) a clear case of abusive constitutionalism. There, a new constitution was enacted in January 2011. According to its critics, this constitution leads to serious limitations on liberal democracy. With an electoral system designed by the ruling party, significant support in each subsequent parliamentary election means democratic legitimization of the political leader’s mandate. Furthermore, this constitution puts limitations on the power of the Constitutional Court and removes its right to strike out any law that has already been enshrined in the constitution. It lowers the retirement age for judges and limits civil liberties. Electoral victory assured Fidesz of a constitutional majority in parliament, and thus the party is assured of victory in all coming elections as well (with significant voter turnout). The latest elections, in 2018, gave the Fidesz coalition 133 of the possible 199 seats. Earlier, immediately after the 2010 elections, Fidesz introduced 10 amendments to the existing constitution, including amendments which noticeably weakened institutions checking and balancing power. The Constitutional Court was particularly affected: the bench was enlarged from 11 to 15 members to permit the appointment of politically loyal judges. An attempt was also made to lower the obligatory retirement age of all judges from 70 to 62 years (in order to permit new appointments to all courts). In this matter, however, the Constitutional Court opposed the amendment, albeit in a manner which precluded allowing judges who had already been “retired” from returning to their positions. Yet another method was to reform the institutions which nominated new judges, subjecting nominations and appointments to political control. Finally, with minimal debate or input by the opposition parties, the country’s parliament passed a completely new constitution. Subsequent, significant changes affected the process by which judges are appointed, and the formation and membership of the Election Commission, the Budget Commission, and the Media Council. Another set of controversial amendments to the Hungarian Constitution was proposed and accepted in 2018.⁶

⁶ Abusive constitutionalism in Hungary has been the subject of many analyses. Typical of the current transformations in that country is that all of this is in accord with the new constitution, passed by the Hungarian parliament after the 2010 rise to power of FIDESZ with its coalition partners.

In summary, the major steps undertaken in order to change Hungarian constitutionalism were the following:

- the constitutional Court was overhauled so that Fidesz appointees became a majority and the Court’s jurisdiction was narrowed;
- the government eliminated the independent fiscal council responsible for overseeing budgetary policy, then replaced it with a new council under Fidesz control;
- a new election law was created that gerrymandered electoral districts that were favorable to Fidesz;
- Orbán gave voting rights to ethnic Hungarians in neighboring countries, who were likely to support Fidesz;
- the government created a new press authority whose chair and members are Fidesz loyalists. The authority was given wide-ranging powers to fine media outlets.⁷

It must be stressed that, measured by participation in elections in Hungary, the changes introduced to its Constitution, to the system of justice in general, and to the media have strong democratic legitimacy. Participation in the 2010 elections was 64.4% and in 2018 it reached a record 73%. As a result of the elections, the ruling Fidesz party and its allies were able to win an unquestionable majority in the parliament. Therefore, in Hungary the ruling party has a democratic mandate to change the constitution and to introduce other changes that have led to the transformation of Hungarian constitutionalism, without breaking the constitution itself. The transformation of democratic liberal constitutionalism to something else—what Victor Orbán, in his famous speech, called an “illiberal democracy”—has then important democratic, procedural support.⁸ The measures introduced gave strong powers to the executive branch of government, limited judicial Control, violated the principle of checks and balances, violated the principle of an independent judiciary, and put serious limits on individual rights and freedoms. Further changes to Hungarian constitutionalism were introduced in 2018. These changes put further limits on both individual and collective civic and human rights.⁹

An Abused Constitutionalism: Poland en Route to Authoritarianism

Quite a different matter from abusive constitutionalism is the violation of an existing and binding constitution by its very guardians, especially by the president and constitutional court, in order to bring about fundamental changes to the political system. Here the constitution is treated as a non-binding document which can be interpreted at will and referred to and applied only when it is politically opportune to do so.

This is an abused constitutionalism; it reflects a constitutional nihilism which completely ignores the binding constitution or, at best, refers to it only selectively and expediently. In this case, fundamental systemic transformations are executed via ordinary laws

⁷ This succinct summary was made by Arch Puddington, in his Freedom House Report published in 2018 (Puddington 2018).

⁸ These shifts have meant that the model of government has changed into a form which Victor Orbán, the prime minister and FIDESZ leader, has dubbed an “illiberal democracy” (Orbán 2014).

⁹ The aim in this instance is to defend (among other things) Christian culture and (above all) to block the relocation of refugees within Europe. This is what Hungary has passed in June of 2018 as the 7th amendment to the current constitution.

passed by a parliament in which the ruling party controls a numerical but not constitutional majority.

Changes in the case of abusive constitutionalism are introduced in accordance with a valid constitution and recognized procedures for amending it. Such a change is legitimate and legal, anchored, albeit hypocritically, in the rule of law. An abused constitutionalism treats the constitution in force as a meaningless document, a mere “piece of paper”—in fact, new laws often degrade it. The constitutional nihilism underlying this practice leads to constitutional anarchy and legal chaos: legislative acts passed to subvert the system are subordinate neither to the provisions nor the principles of the constitution. The legislation serves the ad hoc interests of the ruling majority. Political power is not controlled or restrained by anything—with the possible exception of opinion polls—and that lack of control is made especially potent when constitutional and other courts are politically subordinated. Eventually the accountability of the judiciary is affected, as well as its oversight of the electoral process.

Serving here as an example of an abused constitutionalism, with its potential for anarchy, is Poland after the 2015 presidential and parliamentary elections when the Law and Justice Party [PiS—Prawo i Sprawiedliwość] and its partners gained a simple parliamentary majority in both houses of the legislature—as they did again in 2019—though not a constitutional majority. Nevertheless, that majority sufficed to pass any and all statutes necessary to shift the political system. These included similar alterations as in Hungary: political subordination of the Constitutional Tribunal, the state prosecutors, and courts, the public (now truly state) media, and the civil service. Additional issues are limitations on the freedom of assembly, the diminished competencies of local governments, and attempts to control NGOs politically. After a rapid-fire and brutal “reform” of the Constitutional Tribunal, far-reaching changes were made to the whole of the justice system despite their evident unconstitutionality: the retirement age of justices on the Supreme Court was lowered; the term of the Supreme Court’s Chief Justice was abruptly dissolved; the Minister of Justice and Attorney General in one was given the power to appoint chief judges of courts, and the membership of the National Council of the Judiciary was revamped so as to politicize future appointments of judges. Additionally, new disciplinary procedures were enacted; further, a new chamber was established in the Supreme Court.

A notable decrease or deprivation of constitutional control over the process of lawmaking very clearly exposes a society to the potential dangers of a law that is of poor quality and badly written, inconsistent, or even contradictory, as well as frequently altered or amended. Laws are also voluminously generated due to the political majority’s multiplying number of goals and interests. Constitutional nihilism, which accompanies an abused constitutionalism, thus leads to the passage or amendment of laws which are internally immoral in the classic sense of legal morality (see Fuller 1978: 68 ff.). It must also be stressed that in Poland, along with the many laws that give great prerogatives to the executive branch of government and violate the principle of checks and balances, those that seriously limit individual rights, freedoms, and liberties are also important. Among them, the law that in the name of counterterrorism gives the security services sweeping powers over telecommunications and personal information is deeply concerning. With this legislation, Poland, it is argued, became one of the first countries in the democratic world to embrace the use

of telecommunications shutdowns in a particular area—a measure that smacks of digital repression (Rydzak 2016).

The threat of legal chaos is more likely in countries where the constitution is not treated as juridically binding. Normally the constitution can be used directly by the courts when reaching a decision, in judgments and verdicts. Yet if some courts and judges refer to the constitution while others to contradictory legislation, then havoc is wreaked and it will reach deep into the system. Decisions made by higher courts on the basis of varying reference points will affect those made in lower ones; verdicts will be unpredictable, inconsistent, and arbitrary. Hence a consequence of an abused constitution is anarchy, chaos, and disorder; the most rudimentary values associated with the rule of law—its certainty and predictability—are repudiated.

As has already been stressed, an example of an abused constitutionalism is provided by Poland after the 2015 elections: after these elections, the parliamentary majority in both houses was sufficient to pass any law but not to amend the constitution. It should be noted that electoral thresholds made this possible despite the fact that the now ruling right-wing coalition (PiS and its allies) won only approximately 37.5% of the votes cast (approximately 18% of the voting population, considering the above-mentioned 50.9% participation in elections in 2015). Still, the ruling party—after its brutal “state capture” and violation of the constitution—has attractive resources at its disposal. It has a parliamentary majority, a politically controlled and subordinated public media, a politically controlled judiciary, a politically subordinated public prosecution and public services, and the potential to provide generous social benefits, which it can allot or distribute in order to win over more of the electorate. Consequently, there is growing support for the ruling party, or withdrawal from participation in the public sphere. In the latter case citizens abandon defense of liberal democracy, and law and order, in exchange for tangible rewards, benefits, and goods. This behavior is a form of negative constitutional consensus (Skąpska 2011: 76).

Moreover, it is important to add that in Poland, in contrast to any other contemporary democracy, the real political power rests in the hands of the ruling party’s leader, who held a seat in Parliament (until the 2019 election) but no formal government position, and who has no political accountability nor democratic responsibility. In such a case, the whole political system functions on the basis of informal rules, and above all on the basis of hierarchical, blatantly clientelistic rules of subordination to orders issued by the party leader.

It may be added that both in Hungary and Poland the institutional changes would not be possible if there were no people to conduct them. Hence, in accord with the motto “winner takes all,” the change of institutions is accompanied by a massive exchange of the personnel in the government, the judiciary, the constitutional courts, public prosecution offices, public media, army, foreign service, and publicly owned companies and banks.¹⁰ The replacement of constitutional judges, the judges of the highest courts, and the chief judges of courts, and the nominations of such judges who will follow the line of the political majority,

¹⁰ In Poland, as in Hungary, we are witnessing an exchange of the elites. In practice this means placement of individuals in prominent (and often lucrative) positions in the public administration, media outlets, nationalized or state-controlled banks and companies. This is not a meritocracy, but cronyism as family and political connections are usually the basis for job placement. Especially important are positions on boards of directors and supervisory boards or state-controlled enterprises: these facilitate funding for the social benefits and propaganda efforts which, subsequently, could win over more of the electorate.

means that independently thinking judges have been exchanged for opportunists. However, even considering the above-mentioned motto, it would not be difficult to understand the change of personnel if the newly nominated judges, CEOs, members of supervisory boards or directors of the public media were sufficiently educated and experienced to take on the economic, legal, and public responsibility of the functioning of the judiciary, of important companies, of the media, and of public offices. Unfortunately, this is often not the case. The new nominees demonstrate a singular lack of expertise and experience. Therefore, they do not have the courage to question the party policy, and in order to keep their lucrative positions they will applaud any law proposed by the political majority, even the most damaging and detrimental in terms of democratic values. Among this new personnel, a special role is played by former communist collaborators, such as the former public prosecutor who was active in persecuting the opposition but presently chairs the Parliamentary Justice and Human Rights Commission and played a crucial role in preparing new laws on the Constitutional Tribunal, or the former collaborator of the communist secret service who is now Poland's ambassador to Germany. Persons who once left the leader and now, like prodigal sons, have to prove their loyalty, are another type of acolyte of the political majority.

The crisis in liberal democratic constitutionalism is rooted not only in constitutional nihilism and brutal abuse of the constitution. Such a crisis is structured by an axiological framework, social values and interests, ideas, and narratives. It has a social foundation in discourses regarding the politically organized community and its constitution. Therefore, an important question follows: what are the discourses behind the considerable social acceptance for violation of the binding liberal democratic constitution, and of acceptance for authoritarian leadership?

Two Responses to a Query on the Causes of Abusive Constitutionalism: Mind-Numbness and Cultural Nationalism

The liberal democratic crisis comprises a breakdown of recognition for the values that are the cornerstones of liberal constitutionalism. Those values no longer function as moral signposts for engagement in the public sphere; they are neither a topic of critical reflection, nor a key component of social bonds. In the language of constitutional law, they cease to be constitutional motives. Therefore, the principles communicated in the text of a constitution do not frame public discourse or provide arguments for social actors; they fall on deaf ears. Societal permission to abuse the constitution can mean an escape from the barrage of difficult dilemmas and decisions in today's world—an "escape from freedom," to use Fromm's words. Still, such permission, if not based on a negative constitutional consensus, can indicate a turn toward a vision for a political community other than the liberal democratic kind.

Thus, the question of how to explain a considerable part of society's lack of support for liberal constitutionalism and open disregard for its cornerstones, that is, for such constitutional principles as the rule of law, checks and balances, the accountability of government, the independence of the judiciary—the disregard which in Poland takes the form of an abused constitutionalism—evokes two possible answers. The first is connected with the above-mentioned concept of a negative constitutional consensus. The second refers to the

broader phenomenon of a crisis in liberal democratic constitutionalism and the search for an alternative.

Thus, a civic acquiescence to abusive constitutionalism is conceivable because:

1. Citizens simply do not care because the constitution, the principle of the rule of law, checks and balances, the division of powers, sovereign and autonomous courts, or independent media are not as meaningful to them as the securing of material needs and social welfare; and
2. Citizens have a different concept of the nation as a politically organized community from the concept expressed by liberal democratic constitutionalism. They demand a different political culture—one that appeals to traditional values to counter fears about contemporary challenges such as globalization, migration waves, the cumulative strength of mega-corporations, and the new influence and power divides on a worldwide scale.

Current debates on the growing popularity of authoritarianism in Eastern Europe and elsewhere focus on the rising nationalist and even fascist ideologies that present an important discursive legitimation for illiberal alternatives to liberal constitutionalism. However, considering social reality in Poland—the civic passivity on the one hand, and the visible importance that a considerable part of society attaches to consumerism and social benefits—a negative constitutional consensus can be spoken of, one that supports the destruction of liberal constitutionalism, as is happening today in the form of direct abuse of the binding constitution.

A negative constitutional consensus in a democratic society can take a form similar to the consensus found in communist society. In the latter, the authoritarian leadership treated the country's constitution as a non-binding document and citizens did not question this status quo because of the substantial social benefits made available: free health services, aid for persons with disabilities, winter and summer camps for children, paid vacations, inexpensive housing, free nurseries and preschools, and so forth. The segment of the citizenry advocating a negative constitutional consensus—the new *homo postsovieticus*—is reproducing the old, learned patterns of disregard for the public sphere in general and the constitution in particular; the difference is that their desire for communist-style social safety nets and benefits is currently complemented by their desire for greater consumption of goods in the capitalist market economy. The contemporary version of this negative consensus is marked by a withdrawal from the public sphere and a lack of interest in its functioning, for reasons described by Jürgen Habermas as “the new obscurity.” Habermas (1985). Other authors, in referring to the broad phenomenon of citizens' withdrawal from the public sphere, use the concept of the depoliticization of contemporary societies and the limitation of social interests to private affairs, particularly to family bonds (Agamben 2013), or they use the term “agnotology,” that is, a specific type of contemporary ignorance which is an outcome of political and cultural struggles (Proctor 2008: IV). All of these descriptions signal a sort of mind-numbness: the vanishing of critical reflection about the political system and of the will to engage in public action. Overall, the opportunity to participate in rising consumerism and in the advantages afforded by the market economy takes precedence. The kind of mind-numbness present in contemporary Poland is even more significant, considering the very low participation in the constitutional referendum in 1997. Then, when for

the first time in its history Polish society could actively take part in a political act deciding its most important law, which would indeed be a birth certificate for the newly independent state, only 42.86% of the whole electorate participated. Thus, more than half the electorate showed clear indifference or lack of competence. As noted above, low participation in elections is another indicator of indifference or incompetence.

However, a negative constitutional consensus comprises a factor not always favorable for dictatorships: as long as such a government is capable of meeting the expectations of the voting populace (again, social benefits and free market consumerism), the government can count on the support of society. However, as the historical experiences of pre-1980 Poland demonstrate, if social expectations are insufficiently met, then rebellion is aroused.

In terms of a politically organized community's perseverance and of the imaginable further evolutions of constitutionalism in East Central Europe, this second response is crucial. If society does not accept the values enshrined in liberal democratic constitutionalism, the constitutions can be changed or a wholly new one can be ratified. That constitutionalism would take a contrary form to the liberal democratic version; the new constitutionalism would also be a keystone for a different political community than the liberal democratic one.

The final section of this article will therefore turn toward discourses that give rise to a political community envisioned differently than the liberal democratic one. They pertain to the nation as an ethnic and/or religious community, and to non-liberal models of constitutionalism. Of special significance here are statements made by politicians at the highest levels of their governments: their words carry great weight and are a key instrument of power wielded over the processes shaping social consciousness.

Characteristic Discourses on the Subject of the Political Community

The primary kinds of such statements are those that refer directly to a negative constitutional consensus and support it. For example, according to Poland's prime minister, Mateusz Morawiecki, what counts above all is the material well-being of society, and the social support which is generously provided by the government.¹¹

There are, however, other arguments.

In the above-mentioned address given in Baile Tusnad to ethnic Hungarians living in Romania, Victor Orbán argued that

There is a race underway to find the method of community organization, the state, which is most capable of making a nation and a community internationally competitive...The most popular topic in thinking today is trying to understand how systems that are not Western, not liberal, not liberal democracies, and not perhaps even democracies, can nevertheless make their nation successful (Orban 2014, op. cit).

As has been observed, in his relatively short address Orbán neatly summarized most of the key factors that distinguish a fully democratic "Western" system, based on liberal values of accountability, from what he calls an Eastern system, based on a strong state, weak

¹¹ The generous social benefits as a way of Polish society "Europeisation" (instead of liberal democratic constitutionalism) presents a constant issue in the speeches of the Prime Minister mr. Morawiecki, especially during the electoral campaign in 2019.

opposition, and emaciated checks and balances (Puddington 2017). Among other things, he signaled his support for majoritarianism, his disdain for checks and balances, division-of-powers principles, and civil society, and his opposition to the values of pluralism that are enshrined in liberal democratic practice and liberal constitutionalism. Moreover, he regarded 1989, which was so important for liberal values, the rule of law, individual rights, and civil society, to be the source of an intellectual impediment to his plan for Hungary. Further, he included full-blown dictatorships (Russia and China) in the type of democracies he admires, along with democratic but illiberal states (like Turkey and Singapore). In speeches which followed, Orbán also declared that "...every single immigrant poses a public security and terror risk (...)" Moreover, refugees bring "groups hunting down our women and daughters" (Orbán, *ibidem*).

In Poland, the political leader and the followers of the right-wing party PiS accuse the liberal opposition of being more comfortable with the cosmopolitan liberal values of "Brussels" and (specifically) of Berlin than with the traditional Christian morality of rural Poland. The criticism goes even further and deeper and consists of smearing PiS's political adversaries as traitors to the Polish nation.

Therefore, an important feature of the emerging illiberal constitutionalism could be a retreat to the tried patterns, values, and practices of the past—particularly those that ensured a cohesive collective viewed as an ethnically homogenous nation organized as a state.

Key postulates are for a "closing of the ranks" in the political community and a fortifying of the nation-state's sovereignty. Isolationism, segregation from the outside world, which is seen as foreign and adversarial, and antagonism toward the "West" or the European Union, as well as toward the "bureaucrats" or "elites" who symbolize the EU, ensues. Antipathy toward Others, especially immigrants or representatives of other cultures or religions, that is, anyone perceived as threatening the nation and/or the state, is also rising fast.¹²

Hence one consequence is social discourse that initiates shutting away, escaping, and scapegoating others. Critical or even catastrophic prognoses regarding the assumed liberal democratic crisis foresee contemporary societies transformed into battling tribes; logical reflection upon or communication with "the coming community" (to paraphrase Giorgio Agamben 2008) fade away. The institutionalized embodiments of such social and political reactions are ultraconservative, racist, and/or isolationist political movements, which go hand in hand with fundamentalist, nationalistic, and xenophobic ideologies. Accordingly, there is a call to return to ethnic, cultural, and/or religious roots; conservatism serves to assuage fears of the "new."

In the twenty-first century world of social and other media, such reactions manifest themselves on a mass scale. "Shouting" takes the lead as society becomes deaf to logical arguments, conversations, or deliberations. Strength and might (physical as well as emotional) surpass rational discussions. Public debates acquire an emotional nature which, in

¹² This kind of emotional rhetoric is heard often in speeches uttered by the current President of the Republic of Poland, Andrzej Duda. A specific case was his official speech on the square in front of the Royal Palace for the 3rd of May holiday (commemorating Poland's first, 1791 constitution): Duda (2018a) stated that country needs a new constitution which would protect the national interests as well as fortify the state's sovereignty. During another speech in Kamienna Góra, the issue of sovereignty appeared in the context of historical enemies and occupying powers—contemporaneously exemplified by the European Union (Duda 2018b).

the case of Central European countries, was already noticed in the EU accession discourse. As Jerzy Szacki observed,

...instead of discussions we have...only noisy clashes of extremist views which, to make things worse, are not even views on the same subject. One gets the impression that spokespersons for those views are searching only for additional arguments against their opponents... (Szacki 1999: 18)

This kind of public debate becomes extraordinarily important in the creation of unconstitutional statutes which destabilize the institutions of liberal democratic constitutionalism. Blame for the crisis is placed on ideas and values linked to liberalism which, in turn, is linked to “degenerative” concepts such as genderism and multiculturalism. Imagined Others, immigrants, enemy forces, and conspiratorial pacts are also found culpable.

With respect to the crisis of liberal democratic constitutionalism in Poland—as well as in other post-communist democracies in East Central Europe—relations with “Brussels,” which are seen as unequal, harmful to national identity, or even neocolonial, are emphasized. Hence slogans appear such as a “return to the wellspring,” that is, a return to “true” values (like Christian values), to founding mythologies, to the cultural community, and to historical policies that glorify the nation. Others postulate the elimination of Others and their purported “sponsors” who, according to conspiracy theories, are the root of all evil. This is the direction taken by the above-mentioned latest alterations to the Hungarian constitution, whose goal is to form a “national constitutional identity” based on Christianity and ethnic bonds (Orban 2018). Key elements in the discourse are narratives dealing with the past, with formative narratives, and with the collective identity. The celebration of defeats on the one hand and heroic acts on the other is unique to the Polish historical narrative. This victimological-heroic narrative presents the Polish nation sometimes as a victim, sometimes as a hero, but never as a perpetrator—which hinders discussions about the Holocaust or about postwar anti-semitic campaigns such as the one in 1968 (Morawiecki as cited in *Szcześniak 2018*).¹³

A sociologist would comment here about a reversal of the process of forming a civil society, the *Gesellschaft*, and a return to ethnic bonds, the *Gemeinschaft*. Or, in a more contemporary language, about a symbolic thickening of the public culture, where a “thick symbolic system offers a narrower definition of collective identity and thus attracts a narrower group of people” (Kotwas, Kubik 2019: 435). A historian argues that the nationalist and fascist ideologies that were once popular in the region are rising again today (Tismaneanu 2019, 1998). Finally, a sociologist of constitutional law would speak about a new form of constitutionalism: instead of a liberal democratic one, it is a constitutionalism that expresses and protects the ethnic and religious identity of the nation.

Vital here are specific axiological-normative elements with their very unique signposts and pathways out of difficult situations: distinctive ways of calming the chaos and dealing

¹³ Noteworthy are quotes from Prime Minister Mateusz Morawiecki. From the perspective of Poland as an politically organized entity (i.e., with a constitution and international relations), the prime minister’s public statements seem to indicate that in the postwar era (until 1989, although this, too, is questionable) Poland sometimes conveniently existed and sometimes not, depending upon whether Poles were agents of heroic acts or of shameful acts. Therefore, during the Koerber Global Leaders Conference (Berlin, 16 Feb 2018), when asked by Nora Mueller about the new, 2018 law regarding the statutory mandate of the Institute for National Remembrance (IPN), Morawiecki claimed that there was no Poland in 1968, but just a communist regime (as cited in *Szcześniak 2018*).

with the contingencies and non-transparencies of the contemporary world. In brief, this entails negation of contemporary processes of globalization, migration, and internationalization, alongside attempts to simplify that negation by, for instance, a constitutionally guaranteed riddance of Others. From the perspective of a political community's constitution, leadership is of crucial significance. Replacing the formal rules which strictly define executive power and regulate its execution in liberal democratic constitutionalism, there is a faith in the uncommon, charismatic leader—the father of the nation who will lead society out of a crisis, using exceptional means in order to ensure compliance as he sets out to conquer the situation. Such political personalities are therefore assigned extraordinary qualities, which—in the name of the community—are supposed to facilitate the correct choices, analyses of causes, and means for surmounting the crisis. Simple evaluations result in simple solutions and very clear moral signposts erected by the head of the nation.

The capital empowering the reactions is linked to a tightening of internal bonds on the basis of a collective sense that the community's culture and tradition is endangered—a binding capital. This type of social capital is characterized by closed interpersonal relations and strong social ties within families, clans, or ethnic groups. An archetypal trait is that these bonds are emotionally loaded (Putnam 1995: 75). Binding capital is typical for the concept of a nation as an ethnic community; cultural and religious ties are vital here. In such a politically organized community the nation and citizenship are defined ethnically with civil rights inherently belonging only to the dominant ethnic group (not to the individual citizen or humanity); a strong role is usually also played by a state religion.

Binding capital is generally contrasted with bridging capital. The latter is more typical in open societies and aims to assist newcomers (seen as persons who can contribute to the development of a society) in their integration into a new political community (Putnam 1995: *ibid.*). As an alternative form of constitutional discourse, civic discourse conceives the nation as a community of free and equal citizens, regardless of any individual traits.

From the perspective of the discourse on constitutionalism, what is significant here is the classic idea of an open, civic society, and republican notions associated with moral and psychosocial aspects of participation in the public sphere. The enlightened citizen manifests civic virtues, including “civil courage” (Schutz 1985). Such a member of a politically organized community bravely protects civil rights, controls against the pathologies of power, and defends constitutionalism as the foundation for coexistence in a culturally diverse society.

In the current situation, defense of the constitution by literal and direct reference to it when justifying decisions and verdicts—particularly when these pertain to application of the law—is very important. In sharp contrast to the emotional and idealized arguments for the ethnic nation (and against liberal democratic constitutionalism), arguments anchored in the constitution and in the idea of an open society are a vital kind of civic discourse.

Conclusion: Abusive Constitutionalism and an Abused Constitutionalism in the Broader Context

The concepts of abusive constitutionalism and an abused constitutionalism are not only “clever rhetorical figures” but have considerable analytical and explanatory potential. They

enable the exploration of the phenomenon of “peaceful counter-revolution,” that is, a deep change of the political regime where the law and constitution are used, against the primary values they are meant to protect, as a means of limiting or even destroying liberal democracy.

“A new authoritarian wave has gathered momentum in eastern and central Europe. The same can be said of Western Europe” writes Ignatieff (2014). Thus, the cases of Poland and Hungary discussed above illustrate the broader process of the deterioration of democratic liberal constitutionalism in East Central Europe and elsewhere. A breakdown in the social consciousness as well as in democratic representation is occurring; the requisite institutions have lost (or perhaps never fully acquired) their binding force. Certainly, in the eyes of the segment of the electorate that supports parties propagating abusive constitutionalism, or that shows a clear lack of interest in the abuse of the constitution, the cornerstone values of liberal democracy are bankrupt. As was stressed at the beginning of this paper, despite the entire array of institutional instruments, liberal democratic constitutionalism must be rooted in social discourses which justify and defend its existence. If this component is missing, then the consequence is a distortion of the idea of constitutionalism and the destruction of its fundamental institutions.

As the examples provided here demonstrate, under specific political conditions—namely, when political parties and leaders come to power whose attitudes toward liberal constitutionalism are decisively critical or dismissive—constitutionalism becomes its own contradiction. Its primary principles and values are denied; the effect is chaos and anarchy. Further, citizens convey their fears in residual sentiments, strong emotions, and irrational arguments; their binding capital is sought in ethnic and/or religious connections. The politically organized community becomes rooted in morals, notions, and tenets other than those necessary for the foundation of a liberal democracy. The likely development is abusive constitutionalism or an abused constitutionalism.

There are two additional reasons for the recent constitutional crisis in East Central Europe in general, and in Poland in particular: the specific tradition of legal positivism on the one hand, and on the other, the reduction of the meaning of liberalism to free market ideology (Bugarcic 2015). However in Poland, and elsewhere, there are visible signs of growing civic engagement in defense of liberal constitutionalism. Civic society is learning lessons that suggest there is a chance, in the future, for the support of democratic liberal constitutionalism in social discourses and practices.

Therefore, it is worth stressing that in Poland new actors are appearing on the political stage. Already in 2015 the most significant of these was the extra-parliamentary social movement called Committee for the Defense of Democracy [KOD—Komitet Obrony Demokracji]. This new, spontaneous grassroots movement began to organize protests against the violation of the constitution and in defense of the independent Constitutional Tribunal and independent judiciary. In 2015, KOD was able to mobilize 240,000 people to demonstrate in Warsaw in defense of the Constitutional Tribunal, the freedom of mass media, and civic rights. Women have been another strong and quite effective actor on the public stage: in 2016 they successfully protested a proposal to change the law on abortion, which was already very restrictive. Another important actor has been the judiciary, and lawyers in general—particularly key professional organizations of judges, but also individual judges.

Organizations of judges (and other organizations of lawyers) have constantly and courageously protested against the attacks on first the Constitutional Tribunal and then on the Supreme Court, and on the limits placed on the independence of judges.¹⁴ There is thus a burning question about the possible significance and possible impact of these recent developments on the content and meaning of constitutionalism—whether it is still possible to stop the development of abusive constitutionalism and constitutionalism abused. The abuse of liberal constitutionalism in Poland is contributing to the revival of its moral value at least in the consciousness of parts of society, though these are mostly city dwellers and better educated persons.

It should also be remembered that liberalism is not a “once-and-for-all,” permanent, and unalterable doctrine; it changes in response to the new trials and ordeals it faces. As Ralf Dahrendorf (1983: 15) wrote in his volume on the opportunities that a crisis affords: “... we must start from the beginning again and consider what freedom will mean tomorrow and how we can achieve it. Nothing is a given, understood in and of itself; everything must be justified anew.” Taking advantage of such an opportunity thus requires great civic maturity, courage, and imagination (not to mention skill).

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¹⁴ An illustration of civic courage by judges was a court decision (26 Apr 2018) with regard to protesters blocking a monthly march organized by PiS. The Warsaw regional court dismissed a case against 22 persons accused of obstructing the scheduled manifestation, declaring that the actions of the demonstrators were not unlawful misdemeanors. Particularly significant was the judge’s statement to the court that the right to demonstrate in any democratic country is intertwined with the right to counter-demonstrate; he further underscored that the actions taken by the accused individuals must be assessed through the prism of a constitutionally-guaranteed freedom to express one’s own beliefs (fakty.interia.pl/news-polska 2018).

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