



BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University
VOLUME 18, SPECIAL ISSUE (2025)
ISSN 2029-0454



Cit.: *Baltic Journal of Law & Politics* 18 (2025): 3–13
[https://content.sciencedo.com/view/journals/bjlp/
bjlp-overview.xml](https://content.sciencedo.com/view/journals/bjlp/bjlp-overview.xml)
DOI: 10.2478/bjlp-2025-0002

CONTEMPORARY CHALLENGES TO CONSTITUTIONALISM¹

Hanna Suchocka

Professor

Adam Mickiewicz University in Poznan, Poland

**Honorary President of the "European Commission for Democracy through Law"
(Venice Commission), Poland**

Former Prime Minister and Minister of Justice of Poland

Contact information

Address: ul. Wieniawskiego 1, 61-712 Poznan, Poland

E-mail address: hanna.suchocka@amu.edu.pl

ABSTRACT

This article examines the development and abusive use of constitutionalism in Central and Eastern Europe following the post-communist transitions of the 1990s. While new constitutions initially aligned with European standards and values, recent trends reveal a growing misuse of constitutional tools by dominant political forces. The text highlights the role of the Venice Commission and the fragility of democratic institutions. It argues for the importance of constitutional culture, judicial independence and dialogue to prevent the instrumentalization of constitutions for political ends.

KEYWORDS

Constitutionalism, abusive constitutional tools, constitutional control, judicial independence, Venice Commission, European constitutional heritage, Central and Eastern Europe.

¹ This keynote address was delivered by Professor Hanna Suchocka during the first session, titled "*Contemporary Challenges to Constitutionalism*", of the international conference "*Constitutionalism in Europe: Current Challenges and Prospects for the Future*", held on 25 November 2022. The event was organized by the Faculty of Law of Vytautas Magnus University, in cooperation with the International Institute for Democracy and Electoral Assistance (International IDEA) and the Academic Department of Social Sciences at the European Humanities University.

1. TOWARDS THE NEW CONSTITUTIONS IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE – A CONSTITUTIONAL MOMENT

Theory and history have an uncomfortable relationship. Sometimes theory derives from history, as an attempt to explain and reconcile events that have taken place. And sometimes history trips up theory when events stubbornly refuse to conform to the theory we have laid out.²

This quote fully reflects the reality we faced at the beginning of the transition. It was then when “history tripped up theory.”³

Sometimes it has happened in history that the historical moment for constitutional change affected a greater number of states. That was undoubtedly the case at the start of the 1990s. The political transformation that spread across Central and Eastern Europe (hereafter CEE) took place under the heading of a need to change the constitution, to create new axiological foundations of the constitutional system. A clear break was needed with the fictionality of the constitution of the previous system.

We had an Ackerman’s constitutional moment⁴ in the whole region, and it was the most opportune time to change or make a new constitution. There are no doubts that Ackerman’s initial stages of the constitutional moment were followed by CEE countries: signaling, proposing and triggering took place there. The last stage in Ackerman’s theory – consolidating – belonged to the courts. The courts translate the “moment” into formal legal doctrine and uphold statutes that would have been invalidated under the traditional principles of the preceding regime. In the CEE countries the courts could not, in the light of the law, play such a role. In such conditions, the final act of the constitutional moment (consolidating) could be realized only by formal amendments to the written text of the constitution, either by making a totally new constitution or making fundamental changes to the existing constitution.

2. TOWARDS EUROPEAN STANDARDS

One of the crucial factors which determined the constitutional development in CEE during the 1990s was a reorientation of the constitutional system towards the well-established European standards derived from the European constitutional heritage. The concept of a European standard began to emerge, which would become the reference point for the legal solutions of a constitutional nature to be adopted. Due to the different paths that the individual states had taken before the transition, the question often arose as to what specific solutions should be chosen when building a new constitutional model. The historical political model to which a country could refer was often quite flawed, especially as they all had decades of “socialist constitutionalism” behind them, based on completely different principles from European constitutionalism. As a result, it could be seen that references to institutional arrangements existing in stable Western democracies were often stronger than to their own historical experience.

² Michael W. McConnell, “The forgotten constitutional moment,” *Constitutional Commentary* 11 (1994): 115 // <https://scholarship.law.umn.edu/concomm/749>

³ See also, Hanna Suchocka, “Moment Konstytucyjny jako „uzasadnienie” zmiany Konstytucji. Kilka refleksji w kontekście doświadczeń Komisji Weneckiej,” *Z prawem ustrojowym porównawczym przez ponad półwiecze*, Księga Jubileuszowa dedykowana profesorowi Marianowi Grzybowskiemu z okazji 55 – lecia pracy naukowej, red. nauk. B. Przywora, A. Rogacka-Łukasik, K. Skotnicki (Uniwersytet Humanistyczno-Przyrodniczy im. Jana Długosza, 2022), 119–133.

⁴ Bruce Ackerman, *We the People. Foundations*, Volume 1 (Cambridge, Massachusetts, 1991), 272.

At this historical moment, the European Commission for Democracy through Law (Venice Commission) was established. As a consequence, the role of the Venice Commission as a source of information, guidance and advice, as well as a *de facto* monitoring tool assisting states in constitutional reforms became central. Primarily, its task was to help Central and Eastern European partners to become acquainted with and internalize the European constitutional legacy by interpreting the specific content of the so-called European standards in the areas of democracy, rule of law and human rights.⁵

The newly established democratic procedures and institutions in the post-communist states were weaker than in well-established democracies, and, for obvious reasons, more fragile with respect to a number of hazards.⁶ These countries often suffered from deficits in political culture and traditions featuring consolidated democracies. It is understandable, since countries in this part of Europe usually did not have the historical opportunity to collect relevant experience. Most of them were unable to develop their own political system at a time when the democratic systems of Western Europe already were stabilizing. Thus, the Venice Commission in many cases was and still is confronted with the difficult problem of how to match the European standards and some institutions of the concerned countries, strongly rooted in the communist heritage, such as the Prokuratura in Russia or Ukraine.

Within this process in the various CEE countries one was able to observe a temptation to look for a shorter way, which sometimes means a way if not *contra legem*, then at least *preter legem*. An important example here is the low level of awareness of the concept of a limited government, which need not only to be formally recognized in the constitutions but also internalized at all levels of governance. It was important but also difficult in such circumstances to define the substance of constitutionalism as a determination to subject the government to scrutiny and to impose limits on the exercise of its power.

The modern concept of constitutionalism is anchored on two fundamental strands. The first is the existence of certain limitations imposed on the state particularly in its relationship with its citizens, based on some clearly defined set of core values. The second is the existence of a clearly defined mechanism to ensure that the restrictions imposed on the government can be legally enforced. A government that exceeds its limitations should be held accountable. Under constitutionalism, citizens must have the right to participate in political life and the government must be controlled by substantive limits on what it can do.⁷

The purpose of enacting a constitution is not so much to create only a written constitution, but precisely to promote constitutionalism, a posture of constitutionalism.⁸

⁵ Gianni Buquicchio and Simona Granata-Menghini, "The Venice Commission twenty years on. Challenge met but new challenges ahead": 241; in: Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof and Merten Oostling (eds.), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*, Intersentia (Cambridge, Antwerp, Portland, 2013); Sergio Bartole, "International Constitutionalism and conditionality. The experience of the Venice Commission," *Rivista AIC* 4 (2014): 1–9; see also Jean Petaux, "Democracy and Human Rights for Europe. The Council of Europe's Contribution," *Council of Europe Publishing* (2009): 106.

⁶ This is apparent in the reports of the Venice Commission, concerning the rule of law (CDLAD (2011) 003rev.), as well as opinions on individual states, for example, on the new constitution of Hungary (CDL-AD (2011) 016) and on Romania (CDL-AD (2012) 026). See also Hanna Suchocka, "The Venice Commission and the making of Constitutions in the Central and Eastern European Countries," *Revista General de Derecho Constitucional* 30 (2019).

⁷ Dante B. Gatmaytan, "Can Constitutionalism Constrain Constitutional Change?" *Northwestern interdisciplinary law review* 22(3) (2010): 22–38. This Article expands the ideas originally presented at the IALS Conference on Constitutional Law, American University Washington College of Law and Georgetown University Law Center, Washington DC, United States of America, 11–12 September 2009).

⁸ Vicki C. Jackson, "What's in a Name? Reflections on Timing, Naming, and Constitution-Making," *William & Mary Law Review* 49 (2008): 1249, 1254, also see Dante B. Gatmaytan, *supra* note 7.

Therefore constitutionalism implies that the Constitution cannot be suspended or disregarded by the political branches of the government.

Such a state of affairs takes shape slowly, evolutionarily. It cannot be imposed, nor does it automatically form as soon as a constitution is adopted or even a few constitutional tribunal rulings are issued. The Constitution is only the beginning of such a path. Legal culture is important. This should be a legal culture capable of producing a legal civilisation, which is so necessary for the proper functioning of the rule of law.⁹ However, this takes time. And for the states undergoing transformation that time meant a tension in political power that was not tranquil for the constitution and thus did not allow the rules of constitutional culture to solidify.

Populist elements have intensified in many countries. In such a situation, the institutions of the constitutional state (constitutional court, ombudsman, judicial or media councils) still exist, but their strength is very limited. As G. Halmai underlines with regard to Hungary: "The backslide occurred through the misuse of constitutional instruments, called sometimes 'abusive constitutional tools'¹⁰, such as constitutional amendments in countries where the ruling party has a constitutional majority. This fact has had a significant (negative) impact on the proper understanding of constitutionalism. This led to the transformation of the substance of constitutionalism into politically manipulative constitutionalism.

The politically exploited notion of constitutional identity, used to instrumentalise the constitution, cannot be overlooked in this context either. This concept has begun to be given a new political meaning and has also, paradoxically, become a kind of weapon in depreciating this constitution and at the same time undermining the European constitutional heritage.

In this context, one of the main challenges in many countries is now fighting in the name of constitutionalism against the instrumentalization of the Constitution. Undoubtedly one such factor would be the violation of proper lawmaking principles, the rules of proper legislation at the constitutional level.

In many countries, the problem has arisen of a "democratic" version of concentration of power – concentration achieved through elections and obtaining a qualified majority capable of amending the constitution. One of the main goals of transformation had been to break with the concentration of power and allow the voice of minority parties to be heard. Thirty years after the start of the transformation the problem of a "democratic" version of power concentration has made its appearance. This was concentration achieved as a result of elections and the acquisition of a qualified majority capable of changing the constitution. This creates the temptation to disregard other political forces and leads to an imbalance of political power.¹¹ It also leads to a rather arbitrary deter-

⁹ Marek Zubik, "O „grzechach społecznych" przeciwko ustawie zasadniczej," *Państwo i Prawo* 1 (2018): 6–7.

¹⁰ The category of "abusive constitutionalism" was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (2013): 189–260. Abusive constitutional tools are known from the very beginning of constitutionalism. In Hungary: the backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacements, because both the internal and the external democratic defence mechanisms against the abuse of constitutional tools failed. The internal ones (constitutional courts, judiciary) failed because the new regime managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

¹¹ This problem has been strongly pointed out in the reports of the Venice Commission on the role of the opposition. See Report on the role of the opposition in a democratic Parliament, adopted by the Venice Commission, at its 84th Plenary Session (Venice 15–16 October 2010) (CDL-AD (2010) 025) and Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21–22 June 2019) and endorsed by the Committee of Ministers on 5 February 2020 (CDL-AD (2019) 015).

mination of the constitutional moment and the making of constitutional amendments, in line with Carl Schmitt's principle that "the rhetoric of political struggle causes each party involved in this struggle to recognise as true only that constitution which corresponds to its political demands. If the fundamental political and social contradictions are very strong, it can easily come to the point where a party can deny any constitution that does not meet its demands this designation at all."¹² In such a situation, appealing to the constitutional moment constitutes a kind of fictitious procedure. It becomes very useful to those in power but is used in a purely instrumentalised way.

Just such a warning was made by the Venice Commission to Hungary:

In some post-communist countries, a situation has arisen in which the winner takes all and then attempts to solidify the entire political system by introducing amendments to the constitution adopted by a qualified majority, which diminish the role of the minority – which is an important element in a democratic society.¹³

The Venice Commission has expressed a similar opinion to the constitutional situation in Romania:

The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities.¹⁴

An instrumental approach to the Constitution is one of the chief threats to democracy. A state order in which the constitution is treated instrumentally as a tool for achieving political aims is a bad state order. A perception of the law solely as a method of achieving one's own group's or party's political objectives is incompatible with the principle of the rule of law.

The manner (mode) in which some modifications have been introduced into several constitutions in recent years,¹⁵ and even more, amendments to the law not in line with the constitution (Polish laws on courts), have brought the Venice Commission face to face with the problem of restoring the meaning of mechanisms of proper lawmaking, including the proper drafting and amending of constitutions. That may block the creation of pluralism and obstruct the balance of political forces and state organs and has a negative impact on constitutionalism.

In the early days of the transformation, the motive for amending the constitution was the words of the well-known constitutionalist Loewenstein, who wrote that the history of constitutionalism is nothing other than the political man's search for the limits of absolute authority by its bearers and his endeavour to establish a spiritually, morally

¹² Carl Schmitt, "Nauka o konstytucji," *Teologia polityczna* (Warszawa, 2013), 77.

¹³ See Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011) (CDL-AD (2011) 001).

¹⁴ See Opinion on the Draft Law on the Review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21–22 March 2014) (CDL-AD (2014) 010).

¹⁵ Venice Commission expressed its view clearly: "Frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates" (CDL-AD (2011) 001).

and ethically justified authority in place of the blind subordination to the absolutism of existing supremacy¹⁶.

Constitutional debates have also pointed out that the constitution should give rise to a sense of constitutionalism in society, and thus that the constitution is really a fundamental document and not just an occasional political document. Not only the enactment of the constitution, but its permanence cannot be based solely on arithmetical considerations related to the relationship between the number of parliamentary clubs of the ruling parties and the opposition parties established in a given parliamentary term but must be based on the conviction that the constitution by its very nature is a stable act that does not adapt to opportunistic political needs.

The question arises to what extent the words of Loewenstein are currently a motive for politicians, in particular when they make new laws and amendments to the constitution. A phenomenon called *extreme majoritarianism*¹⁷ has emerged, which derives from the majority principle but is in fact a deformation of it. It represents an attempt to transform the majority into a permanent majority, i.e. a majority that is no longer variable and temporary (from election to election), but is to be consolidated, through legal interventions, into a permanent power base.

In such a situation we have a constitutionalism which has been described by Drinóczi and Bień-Kacała as *illiberal constitutionalism*, which is

a state in which the political power relativizes the rule of law, democracy and human rights in politically sensitive cases, constitutionalizes populist nationalism, and takes advantage of identity politics, new patrimonialism, clientelism and state-controlled corruption. Consequently, constitutional democracy still exists but its formal implementation outweighs its substantial realization.¹⁸

3. POLITICS AND JUDICIARY

In this context, questions arose as to how to safeguard constitutions against politics. This became one of the crucial challenges for constitutionalism. Constitutional courts are supposed to provide such a guarantee. But we could observe a clear tendency towards political manipulation around the constitutional courts.¹⁹ In this situation, the issue of the direct applicability of the Constitution by ordinary courts has gained importance.

This approach places a strong emphasis on judicial activism, and this in turn raises questions about the relationship between political power and judicial power. In the contemporary world, many areas of policy, previously the exclusive domain of political power, are subject to judicial review. Virtually all acts of political power may, to a greater or lesser extent, be subject to judicial review.²⁰ Here arises the question

¹⁶ See Karl Loewenstein, "Constitutions and constitutional law in the West and in the East," *The Indian Journal of Political Science* 30(3) (1969): 204.

¹⁷ Paul Blokker, "Populism as a constitutional project," *International Journal of Constitutional Law* 17(2) (2019): 536–553.

¹⁸ Tímea Drinóczi, Agnieszka Bień-Kacała, "Illiberal Constitutionalism: The Case of Hungary and Poland," *German Law Journal* 20 (2019): 1.

¹⁹ Gábor Halmai, "A Coup Against Constitutional Democracy the Case of Hungary," *The rule of law revolution of 1989 and the Constitutional Counter-Revolution after 2010* // <https://me.eui.eu/gabor-halmi/wp-content/uploads/sites/385/2018/06/Chapter-15-Halmi-Hungary.pdf>

²⁰ Elene Sekhniashvili, Economic consequences of the Constitutional Control and the Impact of the Constitutional Justice on the Transition al. Economy in Georgia; Constitutional Court as Political Actor in the Political System // https://www.academia.edu/16076200/Economic_Consequences_of_the_Constitutional_Control_and_the_Impact_of_the_Constitutional_Justice_on_the_Transitional_Economy_in_Georgia_Constitutional_Court_as_Political_Actor_in_the_Political_System

of whether it can be done only by Constitutional Courts or to what extent be done also by ordinary courts. Article 178(1) of the Polish Constitution states clearly that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes."

In general, such a solution should be assessed positively from the point of view of constitutionalism. It makes it possible to guarantee the central role of the constitution, seeing it as the most important act, with the highest legal force in the system of sources of law. The Constitution in practice, not only in theory, becomes the main point of reference in a situation where there is an inconsistency (contradiction) between the law (statute) on the basis of which the judge has to make his judgment and the constitution.

At the same time, this concept implies the transfer of much more power to judges than would appear to be the case under Montesquieu's very narrow conception that the judge is merely the mouth of the law.²¹ However, the idea of judicial activism in such a broad sense is not assessed unequivocally positively in the literature. The voices are divided.²² Despite the existence of Article 178 of the Polish Constitution, the position prevailing in the literature is that the creation of competing procedures for the control of the constitutionality of laws alongside the Constitutional Tribunal is not necessary to protect the supremacy of the Constitution, and its negative effect could be to weaken the position of the Constitutional Tribunal and disrupt the consistency of its jurisprudence.²³

However, in view of the changed situation of the Constitutional Tribunal in Poland after 2015, the views hitherto expressed in the doctrine of constitutional law on the problem of the direct applicability of the constitution by ordinary courts have been re-evaluated. The central challenge became the question of how, in the changing situation (politically captured) of the Constitutional Court, not to marginalise the principle of the supremacy of the Constitution, and encourage the enactment of unconstitutional laws, and just avoid any constitutional control? This would mean depriving basic constitutional principles, such as the principle of constitutionalism, of their meaning. In the words of Garlicki, "the violation of the constitutional position of the Constitutional Tribunal cannot be rewarded by acknowledging that the Constitution of the Republic of Poland – as such – is deprived of the guarantee of its supremacy over the law".²⁴ And this would be the case if one were to categorically deny ordinary court judges the right to disregard an unconstitutional law in the adjudication process. Hence, despite various resistances, the principle of direct application of the Constitution by the ordinary courts is an important weapon to guarantee the supremacy of the Constitution and thus the principle of constitutionalism.

Despite the change in position, however, it is feared that the tension between politics and judicial power may be increasing. Symptoms of this can be observed in the area of the relationship between domestic law and European law. The existence of European law means that there are norms in the domestic order of states that have been significantly conditioned by supranational norms. Constitutionalism under the conditions of a united Europe, therefore, cannot be confined to the borders of one state only. It is shaped by European standards, which consist of both written law and the case

²¹ Manuel Atienza, *Konstytucjonalizm, globalizacja, prawo* // <https://bip.brpo.gov.pl/pliki/12421353110>

²² Hanna Suchocka, "Geneza i ewolucja bezpośredniego stosowania Konstytucji RP", *Studia Prawnicze* 226(2) (2022): 9–29.

²³ Leszek Garlicki, *Sądy a Konstytucja Rzeczypospolitej Polskiej*, (2016): 21 // https://konstytucyjny.pl/wp-content/uploads/2017/02/ps_2016_07_007_Garlicki.pdf

²⁴ Leszek Garlicki, *supra* note 23.

law of the European courts. It is often no longer the legislators but the judges who are the main adjudicators in case of conflict. The Court of Justice of the European Union in Luxembourg that plays a key role in the interpretation process of current European law.

And this problem seems to be a significant challenge for contemporary constitutionalism. This is evidenced, for example, by the rulings of the Karlsruhe Court²⁵ or the Polish Constitutional Court²⁶.

The key issue under these conditions is in the event of a conflict arising, to seek a method of dialogue to resolve the conflict. Although the Luxembourg Court and the national constitutional courts have recognised that they are supreme on legal issues within their respective domains, the question of "boundary disputes" between legal orders has remained open: which court has jurisdiction to rule on the borderlines between the legal competences of the European Union and those of the national system? The doctrine of constitutional pluralism accepts the legitimacy of constitutional identity claims but suggests that conflicts between the Court of Justice of the European Union and national constitutional courts should be resolved through dialogue and mutual accommodation rather than through the doctrine of the "last word"²⁷, derived from the concept of constitutional identity.²⁸

One has to agree with the position of the European Parliament that a violation of the common principles and values of the European Union by a Member State cannot be justified as an expression of national identity if the effect of such a violation is to weaken or even to override the principles underlying European integration, such as the democratic rule of law or the principle of judicial independence. It is this last principle that is crucial in shaping the foundations of constitutionalism. The so-called judicial reforms carried out in some states in recent years show that a constitutional order that lacks respect for an independent judiciary is ready to betray its own constitution.

Today, the leaders of a number of states are invoking the notion of sovereignty, the will of the people, to limit the roles of constitutional courts. Legal constitutionalism is being replaced by "political constitutionalism." As a consequence, not only the judiciary but also other democratic institutions, including the constitution itself, are being weakened. A crucial aspect of the constitution-making process was reaching an agreement with society — the need to build social consensus around the values the constitution would protect. This consensus was essential to foster a shared sense that the constitution represents a common good. It was also intended to ensure that the constitution would stabilize the rules of the game and support a degree of independence in the legal system from short-term political shifts.

These principles have not changed.

At the same time, it is clear that a solution to every potential conflict cannot be written into the Constitution. A constitution is always written without being able to

²⁵ Federal Constitutional Court of Germany. Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 – 2 BvR 1651/15 – 2 BvR 2006/15 – 2 BvR 980/16.

²⁶ Ruling of the Constitutional Tribunal of 7 October 2021 (K 3/21).

²⁷ R. Daniel Keleman, Laurent Pech, *Why autocrats love constitutional identity and constitutional pluralism*, Lessons from Hungary and Poland, working paper No. 2 (September 2018) // <http://icedd.luiss.it/files/2019/02/Why-autocrats-love-constitutional.pdf>. Also, Władysław Józwicki, *Ultra vires and constitutional identity control – apples and oranges or two drops of water?* Some remarks on the possible role of the New Mixed Chamber of the Court of Justice in the context of the "sequential" model of adjudication on art. 4(2) TUE, *Verfassungsblog* (2020) // <https://verfassungsblog.de/ultra-vires-and-constitutional-identity-control-apples-and-oranges-or-two-drops-of-water/>

²⁸ Hanna Suchocka, "Zmieniająca się funkcja idei tożsamości konstytucyjnej," *Rządy prawa jako wartość uniwersalna*, Księga Jubileuszowa Profesora Krzysztofa Wójtowicza, red. A. Kozłowski (Wrocław, 2022), 229–239.

foresee all versions of events. Even the best constitution cannot prevent abuses of the law, social conflicts or crises caused by the exuberant ambitions of politicians.²⁹

We are then confronted with the phenomenon aptly described by Zajadło that “the constitution is gradually stripped of its axiology and so, step by step, ceases to protect us from a return to the past to that past with which, precisely through the adoption of the values and principles contained in this constitution, we wanted to break away”³⁰ Politics eats the Constitution.

CONCLUSION

The challenge today is the same challenge that existed in the process of amending the constitution in the early days of transition, namely, the search for dialogue and consensus, both in the internal discourse and in the relationship between the European and national courts. Thus, the method of interpreting the Constitution to seek a “common word” rather than the “last word” is central to contemporary constitutionalism.

BIBLIOGRAPHY

1. Ackerman, Bruce. *We the People. Foundations*. Vol. 1. Cambridge, Massachusetts, 1991.
2. Atienza, Manuel. *Konstytucjonalizm, globalizacja, prawo* // <https://bip.brpo.gov.pl/pliki/12421353110>
3. Bartole, Sergio. “International Constitutionalism and conditionality. The experience of the Venice Commission.” *Rivista AIC* 4 (2014): 1–9.
4. Blokker, Paul. “Populism as a constitutional project.” *International Journal of Constitutional Law* 17(2) (2019): 536–553.
5. Buquicchio, Gianni, Simona Granata-Menghini. “The Venice Commission twenty years on. Challenge met but new challenges ahead.” In: Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof and Merten Oostling (eds.), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*. Cambridge, Antwerp, Portland. Intersentia, 2013.
6. Drinóczi, Tímea, Agnieszka Bień-Kacała. “Illiberal Constitutionalism: The Case of Hungary and Poland.” *German Law Journal* 20 (2019).
7. Gatmaytan, Dante B. “Can Constitutionalism Constrain Constitutional Change?” *Northwestern interdisciplinary law review* 22(3) (2010): 22–38.
8. Halmai, Gábor. “A Coup Against Constitutional Democracy the Case of Hungary.” *The rule of law revolution of 1989 and the Constitutional Counter-Revolution after 2010* // <https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Chapter-15-Halmai-Hungary.pdf>
9. Garlicki, Leszek. *Sądy a Konstytucja Rzeczypospolitej Polskiej*. (2016) // https://konstytucyjny.pl/wp-content/uploads/2017/02/ps_2016_07_007_Garlicki.pdf
10. Jackson, Vicki C. “What’s in a Name? Reflections on Timing, Naming, and Constitution-Making.” *William & Mary Law Review* 49 (2008): 1249–1305.

²⁹ Janina Zakrzewska, *Spór o konstytucję* (Warszawa, 1993), 190.

³⁰ Jerzy Zajadło, *Felietony gorszego sortu, o Trybunale Konstytucyjnym i nie tylko*, wyd. Arche (Sopot, 2017), 125–126.

11. Józwicki, Władysław, *Ultra vires* and constitutional identity control – apples and oranges or two drops of water? Some remarks on the possible role of the New Mixed Chamber of the Court of Justice in the context of the “sequential” model of adjudication on art. 4(2) TUE. *Verfassungsblog* (2020) // <https://verfassungsblog.de/ultra-vires-and-constitutional-identity-control-apples-and-oranges-or-two-drops-of-water/>
12. Keleman, R. Daniel, Laurent Pech. *Why autocrats love constitutional identity and constitutional pluralism*. Lessons from Hungary and Poland, working paper No. 2 (September 2018) // <http://icedd.luiss.it/files/2019/02/Why-autocrats-love-constitutional.pdf>
13. Landau, David. “Abusive Constitutionalism.” *UC Davis Law Review* 47 (2013): 189–260.
14. Loewenstein, Karl. “Constitutions and constitutional law in the West and in the East.” *The Indian Journal of Political Science*, 30(3) (1969): 203–248.
15. McConnell, Michael W. “The forgotten constitutional moment.” *Constitutional Commentary* 11 (1994): 115–144 // <https://scholarship.law.umn.edu/concomm/749>
16. Petaux, Jean. *Democracy and Human Rights for Europe. The Council of Europe’s Contribution*. Council of Europe Publishing, 2009.
17. Schmitt, Carl. “Nauka o konstytucji.” *Teologia polityczna*. Warszawa, 2013.
18. Sekhniashvili, Elene. *Economic consequences of the Constitutional Control and the Impact of the Constitutional Justice on the Transitional Economy in Georgia; Constitutional Court as Political Actor in the Political System* // https://www.academia.edu/16076200/Economic_Consequences_of_the_Constitutional_Control_and_the_Impact_of_the_Constitutional_Justice_on_the_Transitional_Economy_in_Georgia_Constitutional_Court_as_Political_Actor_in_the_Political_System
19. Suchocka, Hanna. “Zmieniająca się funkcja idei tożsamości konstytucyjnej.” *Rządy prawa jako wartość uniwersalna*. Księga Jubileuszowa Profesora Krzysztofa Wójtowicza. red. A. Kozłowski. Wrocław, 2022, 229–239.
20. Suchocka, Hanna. “Moment Konstytucyjny jako „uzasadnienie” zmiany Konstytucji. Kilka refleksji w kontekście doświadczeń Komisji Weneckiej.” *Z prawem ustrojowym porównawczym przez ponad półwiecze*. Księga Jubileuszowa dedykowana profesorowi Marianowi Grzybowskiemu z okazji 55-lecia pracy naukowej. Red. nauk. B. Przywora, A. Rogacka-Łukasik, K. Skotnicki. Uniwersytet Humanistyczno-Przyrodniczy im. Jana Długosza, 2022, 119–133.
21. Suchocka, Hanna, “The Venice Commission and the making of Constitutions in the Central and Eastern European Countries.” *Revista General de Derecho Constitucional* 30 (2019).
22. Suchocka, Hanna. “Geneza i ewolucja bezpośredniego stosowania Konstytucji RP.” *Studia Prawnicze* 226(2) (2022): 9–29.
23. Zajadło, Jerzy. *Felietony gorszego sortu, o Trybunale Konstytucyjnym i nie tylko*. Wyd. Arche. Sopot, 2017.
24. Zakrzewska, Janina. *Spór o konstytucję*. Warszawa, 1993.
25. Zubik, Marek. “O „grzechach społecznych” przeciwko ustawie zasadniczej.” *Państwo i Prawo* 1 (2018): 3–23.

LEGAL REFERENCES

1. Constitutional Tribunal of Poland. Ruling of 7 October 2021 (K 3/21).
2. Federal Constitutional Court of Germany. Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 – 2 BvR 1651/15 – 2 BvR 2006/15 – 2 BvR 980/16.
3. Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14–15 December 2012) ((CDL-AD (2012)026).
4. Opinion on the Draft Law on the Review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21–22 March 2014) (CDL-AD (2014) 010).
5. Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) (CDL-AD (2011) 016).
6. Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011) (CDL-AD (2011) 001).
7. Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21–22 June 2019) and endorsed by the Committee of Ministers on 5 February 2020 (CDL-AD (2019) 015).
8. Report on the role of the opposition in a democratic Parliament, adopted by the Venice Commission, at its 84th Plenary Session (Venice 15–16 October 2010) (CDL-AD (2010) 025).
9. Report on the rule of law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011) (CDLAD (2011) 003rev.).