

Learning lessons from the populist defeats: from negative to positive constitutionalism

Keywords: *liberal constitutionalism, negative constitutionalism, right-wing populism, women's rights, public-private divide, positive obligations, positive constitutionalism*

ABSTRACT

This article argues that the populists' attack on constitutionalism has focused on the concepts of limited government and public-private division. Populists dismantled key elements of negative constitutionalism and denounced the liberal social contract. In its place, they incorporated their vision of a government unrestricted by individual rights and entered the private sphere with their doctrines. Some deny women's reproductive rights and the rights of sexual minorities, while others seek to establish a new social contract based on welfare programs. The lesson of the populists' victories is a paradigm shift from negative freedoms to positive obligations and constitutionalism. Drawing on the concept of relational autonomy, the article explains what this shift consists of in the areas of reproductive rights and gender-based violence. The conclusions outline a shift in the operation of the basic principles of constitutionalism, focusing on the relational nature of rights understood not only as shields, but also as claims to positive state action.

I. Populist challenge to negative constitutionalism and the public-private divide

The emergence and entrenchment of populist and illiberal governments in several countries around the world,² as well as their chances of returning to power, testifies to a deep crisis of liberal constitutionalism (Sadurski, 2022; Krastev and Holmes, 2020; Graber, 2019). It also undermines the assumption of the universality and durability of political liberalism as a project (Fukuyama, 1992). Most of the literature on populism and constitutionalism, especially in law, focuses on populist violations of liberal constitutionalism (Sadurski, 2019; Mudde and Kaltwasser, 2017; Müller, 2016). Liberal constitutionalism presupposes a representative government limited by the constitution as the supreme law, which enshrines the principles of rule of law, separation of powers, democracy and fundamental rights (Sajó and Uitz, 2017). The concept of limited government denotes the limits that a society places on the government to secure the free exercise of individual liberty (Locke, 1988).

Populist and illiberal governments are the antithesis of limited government, as their leaders believe that electoral victory gives them unlimited power.³ The hallmark of populist and illiberal governments is their appeal to emotion, the politics of resentment, a disdain for others, and a departure from rational discourse. Unlike dictators, however, who magnify fear and disdain to maintain their power, populists promise that they will save their people from all evil (Osiatyński 2009, 82). They blame liberal elites and

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² In 2012, as many as 42 countries in the world were liberal democracies, and by 2021 only 34 - the fewest since 1995. As a result, only 13% of the world's population lives in liberal democracies, with electoral authoritarianism being the most popular regime (Boese et al., 2022, 14).

³ For Pippa Norris and Ronald Inglehart, populism is "a discourse about governance that can be adopted by actors across the entire ideological spectrum" and "a rhetoric about the rightful location of governance authority in any society" (Norris and Inglehart, 2019). In my account, populism is rather a strategy of gaining power than a separate ideology (Mudde, 2004).

the establishment, as well as globalization and international organizations, for the evils of the world. They thus appeal to the “real people” as the source of democratic will (Müller, 2016) and dismantle all checks and balances that constrain that will. Yet, over time, they gradually move away from democratic principles to become electoral dictatorships and authoritarian regimes (Bugarič, 2019; Halmai, 2019).

Although populist-led regimes do not attack all elements of liberal constitutionalism with equal force, they use the institutions of the liberal state for purposes other than those for which these institutions were created: they seize electoral rights to achieve a predetermined electoral outcome, the media to make them a propaganda channel for power, the rule of law to instrumentalize rights, human rights to protect the majority, and so on. Populist governments, however, have not overthrown the constitutional state as such for they rule most often without a constitutional super-majority, and seek political legitimacy from existing constitutional acts.⁴ Nevertheless, populists reject the limitations on power embodied in negative constitutionalism.

A central tenet of negative constitutionalism is the concept of limited government and the restriction of majority rule (Sajó, 1999). The lack of a strong public reaction to violations of the limitations of majority rule is not surprising, since the popular belief is that release from self-restraint can serve the interests of the majority. Populists therefore gain support by promising positive changes in the functioning of the state, primarily through the supremacy of majority rule. This is done by politically taking over the institution of judicial control through court-packing or re-(de-)forms of the judiciary (Sadurski 2019). In the international sphere, too, populists are fond of using the rhetoric of regaining lost sovereignty, denouncing international agreements or opposing progressive integration within the European Union (Jones, 2021; Iakhnis et al., 2018). They also promise to strengthen social institutions such as the nation, religion and family. For individuals living in uncertainty and fear, which populists further exacerbate, such promises are very important, even if only symbolic.

Populists - especially those on the right - skillfully use socio-technical instruments (appealing to the emotions of crowds rather than the reason of the individual). They also make accurate social diagnoses and use criticism of the liberal state. On the one hand, this is a critique derived from communitarianism (Sandel 1981; Taylor 1985). Hence, populists turn to the empowerment of the nation, religion and family to provide a deeper sense of identity, community and security. On the other hand, populists effectively reject the public-private dichotomy that has been at the center of feminist criticism (Armstrong and Squires, 2002; Boyd, 1997). By subverting the public-private divide, they ruthlessly enter the private sphere to impose the choices of the "majority" there.

The article examines the lessons of populist victories. The first lesson is that populists have challenged the paradigm based on negative liberties and the absence of the state in the private sphere. The second lesson is that the answer to populism may be to accept the state's responsibility for the private sphere by creating conditions for the realization of individual autonomy. Drawing on the concept of relational autonomy, the article explains specifically what this paradigm shift should consist of in the areas of reproductive rights and gender-based violence. The conclusions outline a shift in the operation of the basic principles of constitutionalism, focusing on the relational nature of rights understood not only as shields, but also as claims to positive state action. In this view, the role of the state is to empower individuals and their communities and create laws that foster autonomy.

⁴ Only the Hungarian populists have managed to achieve a supermajority and adopt a new illiberal constitution. See further Bánkuti, Halmai, and Scheppele, 2012. Other populists either attempt to change the existing constitution through amendments or divert from the existing interpretation and practice.

II. Populist dismantling of negative constitutionalism

In this section, I point out the ways in which populists use the key elements of negative constitutionalism to gain and maintain power. Populist governments exploit the weaknesses of negative constitutionalism, primarily the lack of defense mechanisms built into the model against a hostile seizure of power. Essentially, negative constitutionalism was designed to create weak governments in response to the abuses of absolutist monarchs. While a weak government does not necessarily mean a weak state, modern international relations have changed the meaning of national sovereignty and reduced the possibilities of unilateralism. Populism, therefore, is an attempt to rebuild a strong state and effective government in response to the public's growing resentment of ruling elites and international organisations and experts.

The first weakness of the liberal state lies in the idea of the normativity of the constitution as supreme law (Schmitt, 1929). For liberals, a government is legitimate only if it derives its powers from the constitution, the basic norm from which all other norms stem. Hence, liberals seek to subordinate the political authority to legal rules. In practice, however, the liberal state cannot avoid legal actions that take the form of highly discretionary power decisions that betray the ideal of the general norm and its morality (an example would be legislation suspending the application of human rights to combat terrorism, illegal migration or global pandemics). As a result, the constitution loses its relevance as a fundamental law, as there is a tension between the normative position and the actual practice, especially when a living constitution is actually created by the ruling party and the mouths of judges (Bellamy, 2009). In this way, the liberal idea of constitutional normativity turns out to be utopian. Populists not only expose the politicisation of constitutional interpretation, but further compound it (Gárdos-Orosz and Szenté, 2021).

The second weakness of liberalism is the idea of the rule of law. The abstractness of the rule of law reverberates in court battles and is conditioned by access to the court and the resources necessary for effective litigation. On the one hand, populists criticize the growing power of the courts (Hirshl, 2007) and agree that judicial empowerment (which came with the growing position of constitutional courts and judicial review) had a negative effect on the democratic process (Arato, 2019). On the other hand, they capture courts and pursue lawsuits that legitimize their own political decisions. In this way, populists use their own laws, including new constitutions or constitutional amendments, to stay in power and to avoid responsibility for breaking the law (Sajó, 2021).

A third weakness of the liberal state is the principle of separation of powers and checks and balances mechanisms. The checks and balances mechanisms are created to counter the ambitions of office holders. They are complemented by independent institutions to control the executive branch. Yet, again, it turns out that checks and balances mechanisms work as long as all actors loyally cooperate and abide by constitutional rules and principles. Moreover, some of the rules of constitutional cooperation are unwritten and conventional, and their maintenance requires a mature political culture (Kavanagh, 2023; Siegel, 2016; Ludwikowski, 2000). Especially after the political takeover of the constitutional courts, there is a lack of effective mechanisms to curb executive abuses while constitutional or political accountability is blocked by the ruling majority. In most cases, after the political packing of constitutional courts, prosecutors and the judiciary, the limit of the government's power lies in the goodwill of the leadership.

The fourth weakness of the liberal state lies in the idea of democracy. Most populist leaders are anti-pluralist and pursue the idea of unity of popular will. Although they hold regular parliamentary and local elections, they exploit the shortcomings of the electoral process and the democratic representation of the

people in parliaments (Tushnet and Bugarič, 2021). Even though they preach rule by the people, they shift the center of power to the executive branch and worship charismatic leaders who purport to embody the people (Rosanvallon, 2018). They also orchestrate campaigns criticizing the free media and independent experts and their role in policy-making. These de-legitimization efforts are intended to justify the replacement of existing elites with individuals who openly represent the views of the winning majority. Therefore, once in power, populists immediately seek to secure public office and other political and economic benefits for their cronies (Ligeti and Martin, 2017). In this way, populists reject the main assumption of the liberal state, which is that public institutions can be neutral (Greenberg, 2018; Mouffe, 1994). Instead, populists emphasize the need for institutions to be responsive.⁵

The fifth weakness of the liberal state lies in the idea of human rights, the realization of which depends either on the will of the legislature or on the resolution of conflicts over rights in the courts. Moreover, the realization of human rights in horizontal relations (between individuals or private actors) is contingent on state action, specifically the effective definition and fulfillment of the rights, and in the absence of state action, the rights remain unenforced (Knox, 2018). Moreover, the majority of society is likely to feel no connection to human rights and understands them as privileges working to defend “asylum seekers,” “criminals,” “terrorists,” and the like (Alston, 2017). For their part, populists proclaim allegiance to human rights, but they exploit the idea of human rights for political ends (Neuman, 2020). They reject human rights mechanisms as shields to protect minorities and instead use them to protect the rights of the majority (Orgad, 2016). They employ strategies of co-optation, and argue that they need to defend the majority and its values from the oppression of minorities (minority cultures) (NeJaime and Siegel, 2014).

Thus, in addition to a “counter-playbook” to prevent abuse and concentration of power (Gardbaum, 2019), the question should be how a liberal state should learn from populist success. This does not at all mean the answer to populism must be populist. While populist governments have visibly eroded the liberal state, they have not sunk constitutionalism as a project. They have, however, undermined the usefulness of negative constitutionalism and the liberal understanding of the social contract.

III. Populists dismantling of the liberal social contract

The birth of modern liberal constitutionalism was based on the idea of the social contract, elaborated in the works of Thomas Hobbes, John Locke and Jean-Jacques Rousseau, and the separation between the public and private sphere, the latter conceived as an area free from government interference. Social contract theories provided an important symbolic framework for modern constitutions, which were adopted to limit the exercise of power by government and establish zones of private autonomy. The public-private divide is thus central to the concept of limited government, as it aims to „prevent power from substituting itself for society” and „to prevent society from appropriating all power to itself” (Gauchet, 2009). Ideally, the distinction between the public and private spheres serves to mitigate the temptation of the ruling majorities to decide on the only acceptable vision of the good life (Sajó and Uitz, 2017).

Since ancient Greek times, the public sphere (*polis*) has been associated with rational debate as the domain of men, and the private sphere (*oikos*) with family and the household, where men and women played distinct roles (Aristotle, 1984). In this vein, Rawls (2001) distinguished between the basic structure

⁵ Some courts taken over by populists try to fulfill this promise by adjusting their decision-making to favor the populists’ positions and thereby achieve social legitimacy in cases involving economic and social issues (Friedman, 2019).

of society and its basic institutions, which belong to the political sphere, and voluntary associations and personal and family relationships, which belong to the non-political sphere. For Rawls, public space excludes not only the prejudices of participants, but also certain topics that cannot be effectively discussed. Similarly, Habermas (1991) argued that existential questions that are not about justice but about the good life or distributive problems can only be resolved through compromise and are outside the realm of rational debate.

Locke's social contract, in particular, provided a legitimizing theory for asserting the political power of the people over the king, but in reality, it was "an elaborate trick devised by property-holders to protect their interests: the claim that the establishment of a regime governed by law provides security and liberty" (Loughlin, 2015:8). For Locke, the purpose of a constitution is to preserve pre-political rights, not to grant them. This is because the social contract is made only by rights-bearing individuals. This account thus implies a vision of negative bourgeois constitutionalism (Somek, 2014). In contrast, in Rousseau's theory, the social contract replaces natural inequality with political equality, a necessary condition for the emergence of a unified will (Rousseau, 1997). That said, it has become clear, in the following centuries, that political equality is worth little in the face of existing social inequalities.

The theory of the social contract laid the foundation for the U.S. Constitution, which still serves an important inclusive function in American society today. However, it is also an example of exclusionary constitutionalism that disregarded the poor, people of color and women (Rubio Marin, 2021). Even after census suffrage (in which voting rights are determined by economic status, wealth or education) was replaced by equal suffrage and African-Americans, as well as women, were granted the right to vote, political equality was only a formal principle to legitimize power. In reality, the conditions for participation in power proved limited. While historical inequalities are difficult to rectify, liberalism does not condone intensive interference with personal status. The guarantees of liberal freedoms have become the privilege of those who have the resources to claim them. Only to a limited extent have they become a source of social transformation toward true emancipation and freedom.

Populism has thus exposed the weakness of the social contract, which assumes the preservation of a private social order. It exposed the utopianism of the liberal belief that individualism and the merit principle would lead to political, economic and social institutions that serve not only freedom, but also equality (equal opportunity for all). Instead, liberal capitalism (liberalism and capitalism as its product) has exacerbated economic and social disparities (Piketty, 2020; Milanovic, 2019). For this reason, populists have used growing income and wealth inequality to accuse political elites of selfishness (Inglehart and Norris, 2016; Iakhnis et al., 2018). Therefore, the success of populists can be linked to economic inequality, which they blame on globalism and the selfishness of political elites (Stankov, 2018; O'Connor, 2017). Voters of populist parties or candidates are largely, but not exclusively, from underprivileged classes, as there are clear links between the rise of populism and the 2008 global crisis (Guriev and Papaioannou, 2020). For some voters, the choice of populists had an ideological and cultural rationale - as opposition to the moral relativism and corruption with which populists identify the political establishment.

Populism has also unveiled the weakness of social consensus, which according to John Rawls (1987) can be generated even in heterogeneous societies. The idea of overlapping consensus assumes that individuals who adhere to different comprehensive doctrines are capable of agreeing on solutions in the name of public reason (Vallier, 2011). Rawls (1993) believed that even deeply opposing but reasonable comprehensive doctrines can live together and all affirm the political concept of a constitutional regime. His belief proved naïve over time, because it expects that adherents of non-liberal (illiberal) doctrines will

recognize the superiority of liberalism over time. In fact, proponents of illiberal comprehensive doctrines seek to extend the reach of those doctrines into the public sphere to influence public policy and law. The populist subordination of the institutions of the state to the ruling majority allows them to achieve this goal.

As Gila Stopler eloquently noted, “the liberal choice to allow bigotry and intolerance to flourish in the private sphere and require respect for equality only in the public sphere has made liberalism extremely vulnerable to attack by right-wing populists” (Stopler, 2021:394). That is why the right-wing populist capture of liberal institutions has enabled a retreat from women's rights and the rights of sexual minorities.⁶ After right-wing populists dismantled the institutions of the liberal state, they gained the tools to extend their religious doctrines into the public sphere. Hence, the populist attack on the rights of women and sexual minorities marks not only the collapse of private autonomy, but also the active involvement of the state in the private sphere. The populists have thus effectively rejected the liberal division between the public and private spheres in order to reclaim the private sphere.

IV. Right-wing populists dismantling the public-private divide

For years, political liberalism ignored feminist criticism of the liberal distinction between the public and private spheres to insist that the private sphere should be free from state interference. As legal feminism argued, the classical theories of the social contract underlie the sexual contract, in which men exercise power and women fulfill domestic duties, and the law systematically fails to recognize women's ability to play an active role in the public sphere and refuses to consider their contributions in the private sphere to be civic contributions (Pateman, 1988). In this way, classical social contract theories promote what is implicitly a masculine, white standard of objectivity, especially in liberal jurisprudence (MacKinnon, 1989). By leaving individuals and their voluntary organizations, such as churches and religious associations, alone to pursue their own conceptions of the good, political liberalism has allowed the private sphere to become a terrain of oppression and subjugation. While liberalism is attractive to feminists because of its focus on autonomy and freedom of personal choices, feminists claim that the principles of justice should also apply to the private sphere (Okin, 1991).

The populist attack on the rights of women and sexual minorities shows that the private sphere is not (and never has been) a zone free from state intervention. Right-wing populists expose that private and family relations are shaped and sustained by law and court rulings, and disagree with the liberal foundations of the law. In their view, the new forms of family emerging in liberal democracies, especially the recognition of women's rights to abortion and the rights of sexual minorities, threaten the family and the nation, and therefore the state. In particular, populists criticize laws granting same-sex couples the right to marry or start a family, including the adoption of children, as a threat to national traditions and values. Their goal, then, is to stop social change resulting from the emancipation of women and LGBT people. They also oppose anti-discrimination laws that apply to the public and private spheres. This law aims not only to overturn existing stereotypes, but also to redress social inequalities, which in turn are the source of low levels of political and public participation for some groups.

The struggle against women's rights, primarily reproductive rights, and the LGBT community is thus a struggle for ideological domination in the private sphere and the introduction of cultural and religious

⁶ From an academic perspective, it is important to avoid replicating the division of political actors into only two categories of liberals and populists, and to pay attention to what actually threatens women's rights and the rights of sexual minorities or other projects of equality and social justice. See also Verloo and Paternotte, 2018.

norms into public policies. It is also a struggle for the recognition of the rights of private actors, such as private entrepreneurs or corporations, to refuse to provide services or respect the labor rights of LGBT people because of those actors' religious views.⁷ In this way, right-wing populists undermine the application of anti-discrimination laws in private relationships and extend religious freedom protections even to businesses.⁸ By the same token, they note that it was the introduction of anti-discrimination laws, especially the expanded protection based on gender, gender identity and sexual orientation, that undermined the division between the public and private spheres. At the same time, right-wing populists engage in activities that completely invalidate this division.

Right-wing populists are adopting laws and public policies that promote the traditional family model and assign women social roles related to raising children and running a household (Roggeband and Krizsán, 2020). Globally, these strategies are presented as a cultural war against an invisible enemy - the so-called "gender ideology" (Butler, 2021). Anti-genderism is essentially a conservative defense against progressive laws promoting the rights of women and sexual minorities, combined with a critique of neoliberalism and globalization (Korolczuk and Graff, 2018). Yet, populists also use international forums, such as UN bodies (Farrall, 2021; Rana, 2021) and international courts (McCrudden, 2015), for this purpose. Moreover, in their fight against gender ideology, they rely on a network of right-wing fundamentalist organizations and their funding (Datta, 2021). They also restrict civil society organizations that support women and LGBT people and limit their access to public and foreign funding (Szuleka, 2018). In its extreme form, fighting the LGBT community takes the form of legal harassment and police violence against LGBT activists (Amnesty International, 2022).

The first area of populist backlash against women's rights is the sphere of reproductive autonomy. Populists have violently encroached on this sphere by keeping a pregnancy registry (Kocemba, 2022) or ordering women who choose abortion to listen to the fetal heartbeat (Strzyzyska, 2022). Their loudest chord was the overturning of the right to abortion as a fundamental right by the U.S. Supreme Court⁹ and the declaration of the unconstitutionality of abortion laws in situations of severe prenatal fetal defects by the Constitutional Tribunal in Poland.¹⁰ While the tightening of abortion laws is not a peculiarity of populist governments, it would not have been possible in either the US or Poland if the ruling populists had not staffed the highest courts with their loyalists. These two cases also show the close alliance of conservative political movements and religious organizations, which often work together in global networks to reverse progress on reproductive autonomy, access to contraception and assisted reproduction, and sex education.¹¹

The consequence of stricter abortion laws is not only a reduction in the number of legal abortions, but also a widening of social divisions. Tougher abortion laws primarily affect poor women living outside of large urban centers, who do not have the means to take the abortion route. This observation further confirms the social nature of access to legal, safe and free abortion. More importantly, the populists have

⁷ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018). See also judgment of the Polish Constitutional Tribunal of 26 June 2019, Case no. K 16/17 (denial of service on the grounds of freedom of conscience and religion of the service provider).

⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁹ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022)

¹⁰ Judgment of the Polish Constitutional Tribunal of 22 October 2020, Case no. K 1/20 (family planning, protection of the human fetus and conditions of permissibility of abortion).

¹¹ In Europe, such an initiative is Agenda Europe, which brings together more than 100 organizations. Cf <https://agendaeurope.wordpress.com/>. See also Suchanow, 2020.

broken the social consensus, based on the *Roe v. Wade* ruling in the US,¹² and on the so-called "abortion compromise" in Poland.¹³ The reaction to this rupture of the social contract is mobilization for the constitutionalization of the right to abortion, as well as LGBT rights.

The second goal of the right-wing populists is to restore the natural family order based on marriage between a woman and a man and their biological offspring. To this end, they attempt to write the definition of marriage and family into the text of the Constitution.¹⁴ These attempts limit the possibility of marriage to heterosexual couples only and exclude other forms of marriage from the constitutional definition of family. Populists are undertaking campaigns to promote traditional religious values and portray LGBT people as pedophiles and in need of conversion therapy. The fight for the family is also encroaching on the educational level, where populists are introducing bans on "promoting" homosexuality in schools and restricting the ability to cooperate with organizations working for tolerance and equality. In Hungary, gender reassignments are being denied, and in Poland more than a dozen local government bodies have adopted the declaration of LGBT-free zones (Grabowska-Moroz and Wójcik, 2021). Although in most cases they have been invalidated by administrative courts as unlawful, in a few cases they remain in force and there is no agreement to revoke them.

A third area of struggle for right-wing populists in Europe is the rejection of the Istanbul Convention on preventing and combating violence against women and domestic violence.¹⁵ While several countries in the CEE region have refused its ratification, Turkey recently denounced the convention, and the Polish government is considering such a move. Moreover, the Bulgarian Constitutional Court has ruled the convention unconstitutional (Vassileva, 2018), and a similar motion is pending before the Polish Constitutional Tribunal.¹⁶ At the same time, populists in these countries claim that their laws effectively protect victims from domestic violence. They allege that national legislation protects women better than "foreign" norms, which is supposedly evidenced by the low level of reported violence. However, low reporting of domestic violence is not an indicator of the true scale of the phenomenon, but lack of trust towards law enforcement.

In Central and Eastern Europe, resistance to the Istanbul Convention is mainly cultural. The convention defines gender as "the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men" (Article 3(c)) and holds gender stereotypes as a main source of violence against women.¹⁷ Right-wing populists denounce gender as a product of feminism¹⁸ and link it

¹² 410 U.S. 113 (1973).

¹³ The abortion compromise was enshrined in the 1993 abortion law, which allowed abortion in cases where the pregnancy poses a threat to a woman's life or health, where severe fetal defects are likely, or in cases of rape (Gliszczynska-Grabias and Sadurski, 2021).

¹⁴ In CEE, referendums on the constitutional definition of marriage or family were initiated in Bulgaria (2018), Croatia (2013), Estonia (2021), Latvia (2021 and 2022), Romania (2018), Slovakia (2015) and Slovenia (2012 and 2015). In Romania and Slovakia, it proved invalid. In Croatia, however, the constitution was amended to define marriage as a union between a man and a woman. In Hungary, a valid referendum was held in 2021 on banning the promotion of the LGBT movement in education, but the majority of the population was against it.

¹⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210.

¹⁶ Motion for constitutional review of the Istanbul Convention lodged by the President of the Council of Ministers on 31 July 2020, Case no. K 11/20 (pending).

¹⁷ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, para.43.

¹⁸ In this context, feminism is treated as a single movement, regardless of internal differences and variations.

to Marxism or neo-Marxism (Grzebalska, Kováts and Pető, 2017). In CEE, the word “gender” is not easily translatable into national languages and carries a high emotional load of defending national values against Westernization. Hence, right-wing populists present gender as the colonization of the East by the West (Ostolski and Graff, 2020). They defend the biological notion of “sex” and biologically determined social roles (and thus the patriarchal culture) and claim that gender (ideology) contravenes their national constitutions and identity.¹⁹ Further moves include the ban on gender studies in Hungary²⁰ and the attempts to introduce such a ban in Romania (Brodeală and Epure, 2021).

A final area of activity for right-wing populists is subsidizing families and the elderly. Social programs in Poland or Hungary have been adopted to stem the trend of demographic decline, and while they have not helped increase fertility rates, they have undoubtedly been an effective means of combating extreme poverty for both families with children and the elderly.²¹ Moreover, in Poland, the 500+ program, as well as the school layette or other child benefits, are not dependent on Polish citizenship and are also available to refugees from Ukraine. While this is an element of public handouts, targeting specific groups of voters and contributing to the growing public debt, no previous government has made such a gesture. In this case, populist redistributive programs accurately diagnosed social needs and formed the basis of a new social contract (Adamski, 2019).

Nevertheless, the success of the right-wing populists cannot be explained only by the mobilization of voters who oppose new social movements (feminism, anti-racism, multiculturalism, and LGBTQ rights) and emancipation of minority groups. It is also the consequence of long-term disempowerment of the working class and social fatigue with “the lethal combination of austerity, free trade, predatory debt, and precarious, ill-paid work that characterize financialized capitalism today” (Fraser, 2017a). The blame, then, lies with elitist or corporatist liberalism, which failed to heed the demands of working people, including working (single) mothers, for access to publicly funded education, child or health care. In this respect, some right-wing populists responded to the problem of the financialization of care and the erosion of social rights, borrowing from feminist discourse the critique of underestimating care as a valuable activity.

V. From negative liberties to positive obligations

The encroachment of populists into the private sphere shows the extent of disillusionment among citizens who condone such drastic restrictions on their freedom (privacy). Apparently, neither the concept of limited government nor negative liberties creates a lasting foundation for the community, so that its members are ready to defend them from those who want to destroy them. Perhaps, then, liberal constitutionalism has not brought individuals a sense of true freedom. It certainly did not instill in them a sense of responsibility for the community. As communitarians argued in the 1980s, individualism and self-reliance as a social virtue is a trap because society weans itself from thinking in terms of duties and belonging (Taylor, 1985). Such thinking is also not generated by state-centered ideologies, because the

¹⁹ See the Bulgarian Constitutional Court’s decision no. 13 of 27 July 2018 (finding that the Istanbul Convention promotes gender ideology, which it defined as: “all ideas, beliefs and convictions according to which biologically determined sexual characteristics are irrelevant, and only gender self-identification is important”) and interpretative decision of 26 October 2021 (declaring that the Bulgarian Constitution does not recognize “gender” as a category independent of biological sex).

²⁰ Note that the European Commission challenged the measures adopted in Hungary as contrary to the EU fundamental values: principle of non-discrimination and economic freedoms. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668

²¹ In Poland, social programs for the elderly include payments of 13 and 14 pensions and maternity pensions, as well as tax-free pensions.

legal imposition of duties does not give a sense of belonging, but of coercion, and builds a wall between society and the state coercive apparatus.

The problem with limited government and negative liberties is that they focus on guarantees of individual rights, but not on their effective implementation. Moreover, limited government remains passive in the face of oppression within communities, including religious communities that hide behind their autonomy. What is needed, therefore, is an active government that respects negative freedoms, but does not leave individuals to fend for themselves in the face of crisis. It is a government that grants autonomy to communities, including those that preach traditional values, but also responds effectively to oppression within their structures. It is also a government that responds to popular concerns and is open to the political participation of new social groups and, above all, to the alternatives they propose (Grzymala Busse, 2019). More specifically, the government must not stop at merely guaranteeing negative freedoms, but fulfill its positive duties to individuals and their communities and promote the realization of the duties of individuals and their communities to each other.

This normative proposal is a reminder that modern constitutionalism requires not only mechanisms to limit the arbitrariness of majority power, but also the active participation of the state in the realization of rights. This proposal recognizes the complementarity of negative and positive constitutionalism, and consequently of negative freedoms and positive duties. The above perspective is not new, but it resonates better with the European tradition of statehood and the welfare state. Moreover, in Europe, this vision is shaped by the jurisprudence of the European Court of Human Rights, which exposes the notion of positive duties that states should fulfill (Xenos, 2012).

Historically, positive constitutionalism derives from the much older Aristotelian tradition, which focuses on the effectiveness of the state and state institutions. In its weak version, the constitution legitimizes state power not only in what it constrains, but in what it enables (Stone and Weis, 2021). This means that both the limiting and enabling functions of the state (and its constitution) should focus on the well-being of the people (Barber, 2018; Jackson, 2010; Waldron, 2009). Therefore, an essential function of the state is to promote the pursuit of human flourishing, rather than mere individualism or laissez-faire (Waldron, 2016). In addition, positive constitutionalism authorizes state actions that protect individuals from both external threats and threats arising from private relationships. Hence, positive constitutionalism is not a new invention, as it is part of contemporary constitutional designs. As Martin Loughlin noted, its strength has grown as the utopian (idealistic) aspects of constitutionalism have declined, inversely proportional to the ability of governments to demand sacrifices from their citizens for the sake of future rewards (Loughlin, 2015:20).

From the perspective of women, positive constitutionalism realizes the expectation that an active state will improve the position of women in private and family relationships and in the labor market, as well as provide public services that socialize care work. An active state should not only provide remedies for existing violations, but also take proactive measures for equality and autonomy in horizontal relations. This expectation confirms that the private sphere cannot remain free from state interference. However, this interference can only be justified by defending individual autonomy. Consequently, human rights should be understood as safety valves when interpersonal relationships fail (Waldron, 1988). Depending on the context, privacy should mean both the right to be left alone and the right to state or social support, hence - the right not to be left alone.

VI. Reimagining women's rights as positive obligations

The above sections have shown that the sin of liberalism is to withdraw from the private sphere and leave women to their fate within unequal social institutions. Populism, on the other hand, positively affirms the inequality (complementarity) of gender roles within social institutions. The answer to this problem of the liberal government's absenteeism, on the one hand, and the populist government's ideological domination of the private sphere, on the other, is the proposal of positive constitutionalism, which aims to activate state resources for the realization of human rights. In this perspective, human rights are not only a shield against the interference of public power, but also a claim of individuals and their communities for state actions.

In this proposition, positive constitutionalism finds a source of autonomy in relations. This understanding of autonomy is developed by Jennifer Nedelsky in her seminal book. She argues that "[t]he collective is not simply a potential threat to individuals; it is constitutive of them and, thus, a source of their autonomy as well as a danger to it" (Nedelsky, 2011:132). She further notes that "the aim is not to achieve mythical autonomy, but to arrange relationships in a way that promotes autonomy" (Nedelsky, 2011:118). She also demonstrates that liberal individualism ignores how our basic humanity is neither possible nor understandable without the network of relationships of which it is a part (Nedelsky, 2011:248). Although feminism draws its interest in autonomy from liberalism, feminists understand that relationships can be both a source of freedom and as oppression.

The idea, then, is that the state should promote the kind of relationships that provide individuals with autonomy, and rescue them from the kind of relationships that are oppressive. The question is how the state should shape and maintain relations between people so that they serve autonomy. This question presupposes that, like autonomy, rights are also relational: rights-holders are always matched with duty-bearers. Above all, however, rights require the creation of the conditions for their realization, that is, appropriate institutions, procedures and public services, as well as broad social acceptance and participation. Only then the gap between law in books and the law in play vanishes.

Adopting this perspective, women's rights need to be reimagined not as "autonomous" individual rights, but as claims that depend on a network of institutions, procedures and people who implement them. Women's rights, to be effective, require state action, but also the formation of social relations. A shift in thinking in this direction is already taking place in the area of key reproductive rights, which definitively cannot be understood as "rights to be left alone" (Brandeis and Warren, 1980). Reproductive rights, and related sexual rights, are about access to appropriate services, but also about the procedures for obtaining that access. There is (should be) a shift in focus from the right to privacy, or freedom from state interference, to rights of access and health care, or - in classic terms - social rights.²² This shift is due to the recognition of the sources of social inequality, which lie mainly in social relations. Importantly, limiting reproductive autonomy can perpetuate gender stereotypes and exclude women from participating in public life.

Indeed, women's autonomy ends where their choices depend on social support, including support from partners and family, as well as the availability of medical services, professional consultation, diagnostics and prenatal testing. For autonomy is not only freedom from external constraints, but above all awareness of one's own limitations, status and social network (Berlin, 1969:121; Taylor, 1985:209). Reproductive autonomy is also conditioned by social attitudes toward freedom of choice. In this context, it could be argued that abortion is never a choice, but the absence of the prospect of a choice other than abortion.

²² European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI))

While the legalization of abortion itself remains in the hands of the legislature, abortion law should not take away women's ability to choose in situations where they see "no choice but abortion." Abortion law must not be a trap for women and make their rights illusory. The legislature should therefore make women's right to access prenatal diagnosis and medical consultation more realistic, as well as the right to effective remedies when a legal abortion is denied. The state should also help realize these rights for women who are poor or live outside large urban centers. Thus, the legislator should make women's right to access prenatal diagnosis and medical consultation a reality, as well as the right to effective remedies in the event of a refusal to perform a legal abortion. Therefore, the legislature should ensure that the law is sufficiently precise so that providers are not in doubt about how to proceed.

Similarly, the fight against private violence requires not only redefining violence against women or domestic violence, but also making procedures to combat it socially effective. Therefore, the state should not only create effective procedures for responding to violence, but also build the confidence of society, including victims, in their enforcement. Although the law in question essentially implies negative freedom from bodily harm, its actual implementation requires the fulfilment of positive duties - not only by the state, but also by society. For this reason, the state should properly shape the perpetrator-victim relationship, but also in the perpetrator-society and victim-society relationships through the law.²³ Naming their specific rights and obligations in the law is not enough for society to change its attitude towards violence. Therefore, the state needs to take steps targeting various sectors of society to internalize the prohibition of any violence and reject its justification. Further steps would include mobilizing these groups - including religious communities - to develop other non-violent ways of discharging human emotions (such as anger, frustration or fear). Only then will we be able to reimagine violence as a social problem rather than a private matter.

VII. Conclusions

The reimagining of women's rights shows a shift in thinking about human rights not as a shield, but as a claim on the state. At the same time, positive constitutionalism assigns new functions to all components of liberal constitutionalism, such as separation of powers, rule of law and democracy. While in negative constitutionalism the separation of powers is constructed as a mechanism to constrain and control the government, in positive constitutionalism it emphasizes the differences in the competence of the various branches of government, as well as the need for them to work together to ensure the welfare of all citizens. While in negative constitutionalism the legislature establishes legal restrictions on human rights, and the courts examine their justifications (proportionality), in positive constitutionalism the legislature adapts laws enabling the realization of human rights. In turn, the executive branch is responsible for the effective operation of public services, as well as the control of private entities responsible for providing services available to the public. Finally, the role of the courts is not only to examine whether public officials have exceeded their powers, but whether they have contributed to ensuring individual autonomy.

Further, the rule of law is not only to deter arbitrariness of power, but to create laws that realize the autonomy of individuals and their communities. To this end, the law is to be clear and precise, and to provide for appeal procedures and for the participation and hearing of concerned individuals and their

²³ As Jennifer Nedelsky explains, the prevalence of violent relationships is due in part to multiple layers of difficulties in getting out of them: the autonomy-impairing fear and dependency created by the relationship itself; difficulties in supporting children after leaving; and the increased risk of death that the police are unable to prevent (Nedelsky, 2011:312).

organizations in these procedures. Similarly, the principle of democracy should be realized not only through majority rule, but through as many self-determination venues as possible. These forums for self-determination should allow for the participation and hearing of various stakeholders. Ensuring the participation of all those who are genuinely interested (either for ideological reasons or because of knowledge, personal experience or competence) in influencing a given area of regulation will simultaneously ensure broad inclusion and foster pragmatic solutions.

Just as liberals once created a vision of a society of free individuals based on the concept of property and autonomy in the private sphere, positive (post-populist) constitutionalism should now be based on a vision of interdependent individuals and the concept of mutual care.²⁴ Such a vision presupposes not the guarantee of rights as a condition of the social contract, but the effective realization of the right as a result of this contract. The sense of belonging to this society cannot be built on the promise of equality of opportunity in the enjoyment of rights, which in reality amounts to a legal right to justify limitations on rights (Kumm, 2010). Instead, belonging must be founded on the effective realization of rights. Therefore, the state should be held accountable not for whether it proportionately restricts rights, but for whether (and how) it seeks to ensure their fullest possible realization for all.

Positive constitutionalism recognizes the active exercise of political power by the state in the spirit of liberal egalitarianism. In this spirit, liberal egalitarianism and social welfare are seen as essential for human flourishing and the realization of political egalitarianism. In this regard, the idea of positive constitutionalism contradicts the original idea of the U.S. Constitution: that “the people who wrote the Bill of Rights were not concerned that government could do too little for the people, but that it could do too much for them.”²⁵ The shift from negative constitutionalism to positive constitutionalism in the spirit of liberal egalitarianism and the welfare state also justifies the move away from using the bourgeois-liberal “privacy” argument in defense of social security. On the contrary, the strength of the state comes from how it fulfills its obligations to society, by promoting social solidarity and public services, the lack of which becomes a social hardship for the poor and a social obligation for women.

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²⁴ “If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy. I think, therefore, that the most promising model, symbol, or metaphor for autonomy is not property, but child rearing” (Nedelsky, 2011:124).

²⁵ As Judge Posner explains, “[t]he Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.” Cf *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

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