

# Anxieties of Distrust and Uncertainty as Factors for Constitutional Polycrisis in post-Modern Algorithmic Society

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*This paper aims at briefly exploring the challenges to trust and certainty in post-Modernity and global algorithmic society. It will offer critical assessment of the anxieties of distrust and uncertainty that contribute to the development of constitutional polycrisis and the visible tendencies towards post-democracy and global algorithmic technocracy.*

*The paper shall polemically assess the existential insecurity about the conceptual framework of modern liberal democracies produced by external and internal challenges to constitutional axiology, constitutional design, and constitutional pragmatics. More precisely, it will explore the impact of digitalization on the constitutional orders and its side effects that are producing value insecurity and pragmatic concerns about the feasibility of maintaining the proper functionality of key constitutional concepts in the context of global algorithmic society.*

*The paper shall conclude with reflections on the deconstitutionalization and de-democratization in the context of globalization and digitalization. It will outline the trends towards a global algorithmic technocracy and dark constitutionalism.*

## *A. Introduction*

This paper aims at briefly exploring the challenges to two normative expectations and social phenomena with constitutional relevance, namely trust and certainty, in the context of post-Modernity and global algorithmic society. It will offer critical assessment of the anxieties of distrust and uncertainty that contribute to the development of constitutional polycrisis<sup>1</sup>

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1 See M Belov, 'The Conceptual Shapes of Constitutional Polycrisis: Deconstruction, Asymmetries and Post-Modern Anxieties of Constitutional Normalcy', in (2023) 70 *Irish Jurist*, special issue 'Law in a Time of Crisis', 393-410 and M Belov, 'Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and

and the visible tendencies towards post-democracy<sup>2</sup> and global algorithmic technocracy<sup>3</sup>.

The paper polemically assesses the existential insecurity about the conceptual framework of modern liberal democracies produced by external and internal challenges to constitutional axiology, constitutional design, and constitutional pragmatics. More precisely, it relates to the impact of digitalization on the constitutional orders, producing value insecurity and pragmatic concerns about the feasibility of maintaining the proper functionality of key constitutional concepts in the context of global algorithmic society.

The deconstruction of secure identities, the dismantling of fundamental preconditions for democracy, and the challenges to constitutional imaginaries of modern democracy are promoting democracy, rule of law, and constitutionalism in flux. They have the potential to produce an implosion of constitutional democracy<sup>4</sup> consisting in its internal disintegration due to the failure of the belief in the constitutional imaginaries<sup>5</sup> sustaining it as a coherent, legitimate, and efficient socio-legal project. Democratic implosion may result in maintaining the constitutional framework and the democratic and rule of law cover while immobilizing them in practice and producing alienation, disempowerment, distrust, and frustration of the people. Thus, the implosion of constitutional democracies results in

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Democratic Discontent', in (2023) 3 *Diritto pubblico comparato ed europeo, Rivista trimestrale*, 875-884.

2 See C Crouch, *Post-Democracy* (Cambridge, Polity Press, 2004) 1-144.

3 See M Belov, 'Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?' in M Belov (ed), *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Abingdon, Routledge, 2023) 21-47.

4 See M Belov, 'Constitutional Foundations of Peace and Discontent' in M Belov, (ed.) *Peace, Discontent and Constitutional Law. Challenges to Constitutional Order and Democracy* (Abingdon, Routledge, 2021), 15-30.

5 See J Přibáň, *Constitutional Imaginaries. A Theory of European Societal Constitutionalism* (Abingdon, Routledge, 2020), 1-251 and J Komárek, 'Political Economy in the European Constitutional Imaginary – Moving beyond Fiesole', *Verfassungsblog*, 04 September 2020, <https://verfassungsblog.de/political-economy-in-the-european-constitutional-imaginary-moving-beyond-fiesole/>, M Belov, *Constitutional semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, (Oxford, Hart publishing, 2022) 1-349, M Belov, 'Rule of Law in Bulgaria: Semi-Permanent Transitory Experiences on the Edge between Normative Expectations, Pragmatic Imperatives and Constitutional Imaginaries' (2023) *Poliarchie/Polyarchies Special Issue*.

façade democracies and formal rule of law while triggering socio-political distancing of the people, civic disobedience or both.

According to Seyla Benhabib:

‘We are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world-society of states, has changed, our normative map has not.’<sup>6</sup>

Thus, we need to define the normative concepts of trust and certainty using the shapes through which they emerged in constitutional and political Modernity. Then, we have to deconstruct them in order to see whether they are capable of serving as pillars of constitutional imaginaries and constitutional design in the current situation of constitutional polycrisis and constitutional polytransition<sup>7</sup>.

The paper does not aim at providing extensive research and final definitions of trust and certainty. Clearly, this is a task that goes well beyond the claim of a short paper devoted to a particular topical issue. There is an extensive multidiscursive debate in the literature that cannot even be summarized here. The task of the research provided in the paper is to outline the mainstream understanding of trust and certainty as meta-legal concepts with pivotal importance for constitutionalism in general and constitutional democracy in particular. Such concise outlining of these concepts will allow for exploring the transformative effects of the global algorithmic society on them. It will serve as a starting point for assessing their structural permutations of constitutional (dis)order in the context of digital constitutionalism. It will present the redefinition of trust, accountability, legitimacy, predictability, and certainty in times of globalization, deterritorialization, privatization, and algorithmic transformation of public power and their joint impact on constitutionalism.

The paper will demonstrate the main challenges of contemporary age to trust and certainty as pillars of constitutional democracy and rule of law. We are living in a situation where globalization, the multitude of technological revolutions (IT revolution included), and the post-modern anxieties are profoundly reshaping the conceptual, ideological, and normative foundations of our constitutional orders. The deconstruction of democ-

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6 S Benhabib, (2005) 38 ‘Borders, Boundaries and Citizenship’, *Political Science and Politics*, 674.

7 M Belov, (2023) 3 ‘Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent’, *Diritto pubblico comparato ed europeo, Rivista trimestrale*, 875-884.

racy, its hollowing-up and the post-democratic tendencies are producing clear trends towards technocratic governance. Thus, the final part of the paper will be devoted to the outline of the post-democratic shapes of the algorithmic society.

The paper will provide a critical account of the current ‘constitutional moment’<sup>8</sup> peculiar paradox of which is that it may produce deconstitution-ization and even anti-constitutionalism. They may result in ‘thin’ and formal-procedural versions of constitutionalism that allow for democracy and rule of law more in name than in nature. The shapes of the emerging ‘brave new world’<sup>9</sup> have been defined with negative labels such as ‘technofeudalism’,<sup>10</sup> ‘digital Leviathan’<sup>11</sup> or ‘surveillance capitalism’<sup>12</sup> or shaped via more optimistic concepts such as ‘digital constitutionalism’<sup>13</sup> or ‘algorithmic constitutionalism.’<sup>14</sup> Finally, I will propose my own hypothesis regarding the future of constitutionalism framed in the concept of ‘global algorithmic technocracy.’<sup>15</sup>

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8 See B Ackerman, *We the People: Foundations* (Harvard University Press, 1991), 266.

9 See A Huxley, *Brave New World* (Harper Perennial, 2006).

10 Y Varoufakis, *Technofeudalism: What Killed Capitalism* (Melville House, 2024), 1-304.

11 S Wróbel, ‘The new Leviathan is an autonomous digital machine’ <https://blogs.lse.ac.uk/businessreview/2021/02/08/the-new-leviathan-is-an-autonomous-digital-machine/>.

12 S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, 2019), 1-704.

13 See E Celeste, 2018 (2) ‘Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology’s Challenges’, *HIIG Discussion Paper Series*, G De Gregorio (2020) ‘The Rise of Digital Constitutionalism in the European Union’, *International Journal of Constitutional Law*, B Wagner, M Kettemann and K Vieth, *Research Handbook on Human Rights and Digital Technology: Global Politics, Law and International Relations* (Oxford, Edward Elgar, 2019).

14 O Perez and N Wimer, 2023 (30, 2) ‘Algorithmic Constitutionalism’, *Indiana Journal of Global Legal Studies*, 81-113, H-W Micklitz, O Pollicino, Oreste, A Reichman, A Simoncini, G Sartor, G De Gregorio (eds), *Constitutional challenges in the algorithmic society* (Cambridge, Cambridge University Press, 2022), <https://hdl.handle.net/1814/74296> and O Pollicino O, G De Gregorio, ‘Constitutional Law in the Algorithmic Society’ in H-W Micklitz, O Pollicino, Oreste, A Reichman, A Simoncini, G Sartor, G De Gregorio (eds) *Constitutional challenges in the algorithmic society* (Cambridge, Cambridge University Press, 2022), 3-24.

15 See M Belov, ‘Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?’ in M Belov (ed) *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Abingdon, Routledge, 2023), 21-47.

*B. Uncertainty in the Digital Age: Constitutional Challenges and Repercussions*

Trust and certainty are normative preconditions for democracy and the rule of law thus being indispensable factors for unfolding and maintenance of liberal-democratic constitutionalism. They are socio-legal determinants of predictability, accountability, and legitimacy of public power, promoting the development of the constitutional process as a trajectory for maximizing of liberty in the time-space continuum.

The principle of legal certainty is key element of rule of law the latter being strategic element of constitutional axiology. Legal certainty is a precondition for securing the normative expectations of the constitutional players. It is a safeguard for the predictability of the legal action of the institutions of public power. It is a guarantee for the due expectations of the citizens that must be able to organize their lives and behave in accordance with stable legal order with understandable rules, implemented via due process, and organized within reasonable and predictable constitutional and legislative framework.

Legal certainty is overarching imperative that functions as justification ground for range of other elements of rule of law. The most important of them are the due process of law, the balancing of rights, and the principle of proportionality in limiting of constitutional rights. In fact, rule of law has emerged in early modernity in order to be able to organize the increasing complexity of social life stemming from the rise of social, political, cultural, religious, and other forms of pluralism. Ordering of constitutional orders<sup>16</sup> has always been a key task of the constitution. It is dependent upon safeguarding of legal certainty.

Indeed, ordering can also be done in context of a crisis. All constitutions – liberal or illiberal, democratic or authoritarian – provide for more or less developed crisis management models or at least tools. However, history shows that the ‘problem-solution-problem’ spiral, consisting in the artificial creation or the mere use of objectively existing crisis, has been exploited by elites for the establishment and maintenance of authoritarian or oligarchic regimes. Thus, the production of order out of disorder has been achieved at the expense of certainty, in the context of systemic uncertainty, where emer-

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16 See M Belov, ‘Three Models for Ordering Constitutional Orders’, (2022), *Pravni Zapisi*, 361-387.

gency and crisis constitute the normalcy<sup>17</sup>. Trust, under such circumstances, has still been key governmental resource. In contrast to liberal democracies, however, where trust stems from liberty, autonomy, free will, and political engagement, in authoritarian-oligarchic systems it is built through fear politics and anti-constitutionalism of fear<sup>18</sup>. This type of 'façade' constitutional orders can be defined as forms of 'dark constitutionalism'.

Liberal-democratic constitutionalism is based upon liberty, autonomy, free will, and free choice. If a true form of liberal constitutionalism is established, it must maintain certainty and trust through normative ideologies of freedom, humanism, and democracy. Thus, there is a certain minimum of requirements – legal, socio-political, and imaginary – that must be maintained in order to promote that form of constitutionalism as tool for safeguarding of basic equality and existential liberty.

Rule of law is both order and liberty maximizing principle. It is a tool for the achievement of liberty through autopoietic order. Its task is to provide for a substantial degree of personal autonomy safeguarding moral choice and the unfolding of free will. Modern constitutional orders have been born in order to serve as a framework of liberty allowing for maximal freedom for all in an organized society. Legal certainty has been important element of this great philosophic, political, cultural, and legal endeavour. Hence, rule of law is both dependent from trust and certainty and serve as a promotor of these key determinants of liberal-democratic constitutional orders. Moreover, rule of law is an intellectual product of western modernity.

Modernity was a national, territorial, and rational project. Constitutional modernity – the constitutional shapes and forms of this political, social and, last but not least, cultural project – builds upon the heritage of the centralized territorial statehood. The territorial state has been legally, theoretically, and imaginary shaped to serve as a 'territorial container'<sup>19</sup> of different nations the latter being socio-cultural and political projects for

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17 See M Belov, 'The Conceptual Shapes of Constitutional Polycrisis...', 393-410.

18 See M Belov, 'The Role of Fear Politics in Global Constitutional 'Ernstfall': Images of Fear under COVID-19 Health Paternalism' in M Belov (ed) *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Cambridge, Intersentia, 2021), 187-221.

19 See P J Taylor, 'The State as Container: Territoriality in the Modern World-System', in *Progress in Human Geography*, 1994, (18) 2, P J Taylor, 'Beyond Containers: Internationality, Interstateness, Interterritoriality', in *Progress in Human Geography*, 1995, (19) 1 and N Brenner, 'Beyond state-centrism? Space, Territoriality and Geographical Scale in Globalization Studies' in *Theory and Society*, 1999, 28 (1), 39-78.

political integration and mobilization. The state and its socio-political core – the nation – were factually ‘captured’ and entrenched within a territory. Moreover, territory has been legally shaped through different versions of territoriality as its legal and imaginary signifier<sup>20</sup>. Legally, state and society were shaped, and entrenched within a rational plan, preconditioned upon the existence of common will, common good, public reason, and representation. This plan has been normatively vested in written, systematic, logical, and presumably rational constitutions.

In the context of modern, national, territorial, constitutional, and rational statehood certainty in general and legal certainty in particular is an element with key role for sustaining the socio-legal equilibrium, the eudemonia, and the legitimacy of the state monopoly over violence.<sup>21</sup> Hence, certainty is among the intellectual, social, and normative pillars of modern constitutional orders stretched between the ‘rational’, ‘national’, and ‘territorial’ entrapment of modernity.

It must be underlined, that modern democracy and rule of law were calibrated to address national problems, confined within statehood, and having clear territorial dimension. They were preconditioned upon the presumption of rationality of constitution and constitutional law and the territoriality of power. Hence, modern constitutional orders were supposed to produce, maintain, and safeguard certainty and predictability only within the ‘squared territoriality’<sup>22</sup> of the modern state. Thus, the constitutional design and constitutional axiology of modern constitutional orders as well as the normative expectations of the people shaped as constitutional imaginaries are incapable of properly, legitimately, and efficiently addressing constitutionalism beyond statehood and even less capable of responding to post-territorial and aterritorial constitutionalism of the global algorithmic society.

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20 See M Belov, ‘Territory, Territoriality and Territorial Politics as Public Law Concepts’ in M Belov (ed) *Territorial Politics and Secession. Constitutional and International Law Dimensions* (London, Palgrave, 2021), 21.

21 A Munro, ‘State Monopoly on Violence’, in *Encyclopedia Britannica*, <https://www.britannica.com/topic/state-monopoly-on-violence> and M Weber, *Politik als Beruf* (Berlin, Duncker&Humblot, 2016), 1-56.

22 See P J Taylor, ‘The State as Container: Territoriality in the Modern World-System’, in *Progress in Human Geography*, 1994, (18) 2, P J Taylor, ‘Beyond Containers: Internationality, Interstateness, Interterritoriality’, in *Progress in Human Geography*, 1995, (19) 1 and N Brenner, ‘Beyond state-centrism? Space, Territoriality and Geographical Scale in Globalization Studies’ in *Theory and Society*, 1999, 28 (1).

Hence, there is huge potential for constitutional dysfunctionality impeding the achievement of basic legal certainty in the context of globalization, IT revolution<sup>23</sup>, and digitalization of the power grid of de-nationalized and de-territorialized society. This is even more problematic with regard to the ongoing dismantling of rationalism as normative ideology of constitutionalism and the deconstruction of the partially failed rational constitutionalism<sup>24</sup>.

Since the beginning of the XXI century we are living in an age of uncertainty. Uncertainty is produced by five major groups of factors. These are the post-modern situation, the constitutional polycrisis, the constitutional polytransition, the globalization (including processes of de-globalization, regionalization and renationalization which I define elsewhere as Westphalian, post-Westphalian and neo-Westphalian constitutionalism<sup>25</sup>), and last but not least the IT revolution with all its aspects. Let's briefly consider all five groups of factors while paying special attention to the crisis of certainty in the context of algorithmic society.

The post-modern situation is characterized by several features. The belief in the existence of a single version of objective truth is dismantled. Rather, there are different versions of truth which are negotiated and are largely contextually dependent. Thus, truth is much more a matter of narratives, semiotic, and semantic games rather than rock-solid phenomenon with universal meaning. This is clearly a conceptual challenge to certainty of meaning and thus also to the legal certainty.

The versatility of meaning, the narrative character of truth and the multidiscursive pluralism in an increasingly globalized world render difficult and even impossible the establishment of a single universal meaning of legal phenomena. Hence, the post-modern, deconstructive, and narrative-based approach to meaning is reinforced by globalization and the ethical, moral, and philosophical relativism stemming from it.

The attempts at organizing the world through constitutional pluralism<sup>26</sup> is also a promoter of uncertainty. The failure of hierarchical approaches

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23 See M Belov, *The IT Revolution and its Impact on State, Constitutionalism and Public Law*, (Oxford, Hart, 2021).

24 See M Belov, *Constitutional semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, (Oxford, Hart publishing, 2022), 49-55.

25 See M Belov, 'Three Models for Ordering Constitutional Orders...', 361-387.

26 N Walker, 2002 (65, 3) 'The Idea of Constitutional Pluralism', in *The Modern Law Review*, 317-59, M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart, 2003),

such as multilevel constitutionalism<sup>27</sup> to produce a feasible model for organization of constitutionalism beyond statehood, but also beyond regional forms of supranational cooperation, allowed the promotion of a more nuanced global approach such as constitutional pluralism. They are intellectually appealing but produce huge uncertainty regarding their application as practical models capable of durably organizing the world via single and clear ordering matrix. Thus, constitutional pluralism is itself a postmodern scheme for ordering of constitutional orders transforming uncertainty from exception to *de facto* rule with structural importance.

Constitutional polycrisis and constitutional polytransition jointly contribute to the substantial increase of legal, socio-legal, and imaginary uncertainty. Constitutional polycrisis consists in the multitude of crisis that are overlapping and jointly produce an overall detrimental context for the functioning of liberal constitutional democracy. Constitutional polycrisis transforms the emergency into normalcy. The security and terrorism crisis, the financial, migration, and pandemic crisis that deeply marked our social, political and constitutional orders since the beginning of the XXI century destroy predictability, certainty, and trust. Thus, they dismantle the fundamental prerequisites for liberty, autonomy, and self-determination which were the pillars of post-World War II liberal democratic constitutionalism.

Constitutional polytransition is a concept that frames the multitude of transitions which are currently unfolding and are challenging the legal, constitutional, political, and social orders. The most important of them are the transitions from authoritarianism to democracy (democratization) and from democracy to authoritarianism (democratic backsliding), from modern and holistic to post-modern and fragmented constitutionalism, from national to post-national, transnational, supranational, and global constitutionalism, from Westphalian to post-Westphalian, and neo-Westphalian constitutionalism, from constitutionalism ‘within’ to constitutionalism ‘be-

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501-538 and M Poiares Maduro, ‘Three Claims of Constitutional Pluralism’ in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart, 2012), 67-84.

27 See E U Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Oxford, Hart, 2017), 1-416, G della Cananea, ‘Is European Constitutionalism Really “Multilevel”?’ in *ZaöRV* 2010, (70), 283-317 and I Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ in *European Constitutional Law Review*, 2015, 11(3), 541-562.

yond' statehood, from sovereigntist to post-sovereigntist constitutionalism, and from state centred to societal constitutionalism<sup>28</sup>.

There are also constitutional transitions which are of special importance for the challenges to legal certainty in the context of the emerging global algorithmic society. These are the transitions from territorial to post-territorial and aterritorial constitutionalism, from real (physical-spatial) to meta-real (Internet-based, digital, algorithmic) constitutionalism, and from democratic to post-democratic (technocratic) constitutionalism. Last but not least, we should mention a possible game-changer transition from constitutionalism to governance and administrative technocracy.

The joint impact of these transitions that run in parallel and change the core, substance, institutional manifestations, and functionality of constitutionalism on legal certainty is dramatic and generally very negative. The polytransition produces structural changes in constitutionalism as legal, socio-legal, and imaginary phenomenon. The digital transition puts immense pressure on fundamental pillars of constitutionalism. It produces global power grid, crisis of territoriality resulting in transterritorial and post-territorial networks of power and governance. It changes the context and concept of rights, jurisdiction, and authority. It blurs the 'public-private divide', privatizes public power, produces governance instead of government, and technocracy instead of democratic constitutionalism.

Indeed, the digital transformation and transition has also many positive effects on constitutional orders. It expands the sphere of rights, promotes new right, creates new opportunities for engagement, information and inclusion and broadens the realm of horizontal, societal, networked constitutionalism while limiting the power of domestic and regional hierarchies to impose restraints on liberty. Nevertheless, while old hierarchies are dismantled, new ones are established on supranational, global, transterritorial, and post-territorial scale. Moreover, the dynamic of the digital and algorithmic transformation is so intense and the combination of globalization, IT revolution, crisis of territoriality, and time-space compression is so powerful that they produce immense power asymmetries. They are elitist biased and lead to global reemergence of biases, hierarchies, and spheres of inequality. The increasing complexity of the algorithmic world and the

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28 G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford, Oxford University Press, 2012), 38-42 and J Příbáň, *Constitutional Imaginaries. A Theory of European Societal Constitutionalism* (Abingdon, Routledge, 2020), 1-251.

multilayered and fragmented character of decision-making promote by necessity the rise of technocracy.

The speed, scale, and complexity of transition altogether overburden legal certainty. They create a situation of radical uncertainty which suffocates the chances for maintenance of the degree of predictability, trust, accountability, and information needed in order to sustain rule of law and democracy. Thus, constitutional polytransition contributes to the constitutional polycrisis and in the context of radical deconstruction of the old constitutional world in a global, post-modern, and post-territorial situation produces technocratic and algorithmic society where post-truth, post-trust, and post-certainty are gradually becoming the rule.

It seems that post-certainty shall be an imminent feature of the global algorithmic society. The narrative character of truth, negotiable only in certain contexts, the complexity of the rule grid, the non-transparent power relations, the remoteness of power centres, the augmented reality blurring the shapes of reality and making post-truth the norm rather than exception are some of the key factors for the emergence of the phenomenon of post-certainty in the digital age. This is the situation notwithstanding the power of AI to transform reality, the capacity of big data to create algorithmic worlds and the tendencies of digitalization to produce new layers of reality in a post-constitutional metaverse.

### *C. Challenges to Trust produced by Algorithmic Transformations of Power*

Trust is key factor and normative precondition for authority, legitimacy, and efficiency of constitutional orders. All constitutional orders, irrespectively whether they are democratic, liberal or authoritarian, technocratic or oligarchic, provide for instruments for generating and sustaining of trust of their citizens. Nevertheless, the trust building mechanisms they use largely differ. The increasing use of non-democratic trust building mechanisms will be addressed in the final part of the paper.

Authoritarian and populist orders frequently rely on charismatic and traditional legitimacy<sup>29</sup>. Populism is not exclusively related to authoritarianism. There are degrees and forms of populism which can be elements

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29 See M Weber, *Soziologie. Weltgeschichtliche Analysen. Politik* (Stuttgart, Kröner Verlag, 1968), 151 ff.

also of democratic orders<sup>30</sup>. However, true liberal democracies provide for mechanisms for sustaining of trust via accountability and limited government deriving its justification mostly from rational legitimacy<sup>31</sup>. In contrast, trust in authoritarian-technocratic orders may stem from range of strategies that are detrimental to liberty. Usually, such orders use fear politics employing the presumed monopoly of truth for suggesting ways out of crisis through recourse to expertise. Hence, political mobilization through emergency and crisis and with the instruments of fear politics is essential element of dark constitutionalism. This problem shall be explored in the final part of this paper devoted to global algorithmic technocracy.

Authority of democratic constitutional orders is based on trust. They are both derived from complex chains of democratic accountability and control and not from meta-constitutional sources such as God, the nature of things or the tradition. The authority of liberal democracy is not supposed to be justified only through the efficiency of the state institutions as forms of legitimate coercion<sup>32</sup>. Democratic legitimacy in late modernity has been a complex and multilayered phenomenon. Nevertheless, two forms of legitimacy that are pillars of liberal democracy are very dependent on trust as a power source for their feasibility. These are the input legitimacy and the rational legitimacy.

Input legitimacy<sup>33</sup> suggests direct impact of the popular will on taking key decisions or at least the selection of office holders. Hence, according to this normative concept, people must be able to directly or indirectly influence decision-making. The theory and practice of liberal democracies has produced a general outline of typical decisions that must be taken by political institutions having input democratic legitimacy and not by purely technocratic bodies relying only on output legitimacy. The concepts of parliamentary and legislative reserve are result of such trust in political, democratically elected, and democratically accountable institutions. This

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30 See P Blokker, 'Varieties of populist constitutionalism: The transnational dimension' in German Law Journal, 2019 (20) 332 – 350 and B Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, Massachusetts, Belknap Press, 2019), 1-472.

31 See M Weber, *Soziologie. Weltgeschichtliche Analysen. Politik* (Stuttgart, Kröner Verlag, 1968), 151 ff.

32 See M Weber, *Politik als Beruf* (Berlin, Duncker&Humblot, 2016), 1-56.

33 See F W Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999) and F W Scharpf, 'Problem-Solving Effectiveness and Democratic Accountability in the EU' *Mpifg Working Paper* 2003 (3), available at: [www.mpiifg.de/pu/workpap/wp03-1/wp03-1.html](http://www.mpiifg.de/pu/workpap/wp03-1/wp03-1.html).

is also the case with the democratic theory of sovereignty and the special procedures for constitutional amendment stemming from it.

Rational legitimacy<sup>34</sup> is the second type of legitimacy that lays at the core not only of liberal-democratic constitutionalism but also of constitutional Modernity. In fact, Modernity as intellectual, philosophical, social, political, and constitutional project is based on rationalism as normative ideology<sup>35</sup>. The trust in rationality of constitutional orders has been excessive. The trust in rational political behavior, in the rational design of constitutional institutions and in the rationality of the constitutional order in general led to a phenomenon which I have defined elsewhere as ‘rationalist entrapment’<sup>36</sup> of constitutional Modernity.

Liberal constitutional democracies are structured on the basis of a chain of selection procedures that are supposed to safeguard the democratic input and the ability of the electorate to control the governing elites. Liberal representative party democracy is grounded on several conditions. The most important of them is the existence of a set of political rights providing for basic political equality and critical levels of democratic inclusion. They presuppose free and fair elections, pluralist and representative party systems, polycentric and free media, channels for rational and regular voicing of democratic discontent and rights for political participation generating trust and accountability.

The system of representative democracy aims at making government controllable, responsible, responsive, and accountable. All these elements of representative democracy in their capacity as constitutional imaginaries, normative ideologies, institutional pillars, and normative practices are based on the existence of at least critical levels of trust.

In fact, the distrust in elites and their capacity to promote the common good is the main reason for the emergence of the constitution as a social contract including a variety of instruments for increasing the trust. Separation of powers, the principle of competence of state institutions, the various

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34 See M Weber, *Soziologie. Weltgeschichtliche Analysen. Politik* (Stuttgart, Kröner Verlag, 1968), 151 ff.

35 See M Belov, ‘Humanism and Rationalism as Fundamental Normative Ideologies of Constitutionalism’ in M. Novkirishka, M. Belov and D. Nachev (eds) *Scientific Conference “Human Rights – 70 Years Since the Adoption of the Universal Declaration of Human Rights”* (Sofia, University of Sofia ‘St. Kliment Ohridski’ Press, 2019), 69-90 and M Belov, *Constitutional semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, (Oxford, Hart publishing, 2022), 1-349.

36 Ibid.

instruments for political (direct democratic or parliamentary) or technocratic (administrative and judicial) control are institutional expressions of distrust. Hence, the interplay between trust and distrust is one of the main driving forces of constitutionalism as a liberty maximizing and power abuse preventing mechanism.

Trust as constitutional imaginary, normative precondition, and factual requirement of constitutional Modernity is profoundly challenged in the context of post-Modernity and in the process of the rise of global algorithmic society. There are several factors for distrust in the context of algorithmic society. The most important of them are the use of instruments for information bias (e.g. filter bubbles and micro targeting)<sup>37</sup>, the paradoxical remoteness and democratic detachment of the power centres combined with simultaneity of their digital availability and performance, and the postmodern-fragmentation of truth as factor for distrust.

Trust usually requires predictability and is based on experience. In territorial democracies trust building mechanisms were generally based on territorially entrenched experiences with politicians, activists, opinion leaders, etc. that have gradually acquired the roles of heroes, saints, or villains through political experience embedded in the national political life. The detachment of addressees of trust from the mass public has started with the rise of mass media. However, in the context of the new Internet based media this detachment has reached new level. Truth became almost detached from reality. Trust has been detached from truth as well. Thus, trust in algorithmic society has become social imaginary with constitutional importance rather than practical experience based on and generated through political rights.

The AI brings the problems of trust, truth, and certainty to a whole new level. Until the emergence of the AI the manipulation of truth as a precondition for trust and certainty has been attributed to fake news, filter bubbles, micro targeting, and algorithmic biases produced by the big data. All these forms of manipulation of truth presuppose the existence of a solid reality with objective truth that is just misrepresented or faked either deliberately or as a side effect of the new technologies. The AI is the key to

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37 See S Hardt, 'Data Revolution and Public Will Formation: Regulating Democratic Process in the Digital Age' in M Belov (ed) *The IT Revolution and its Impact on State, Constitutionalism and Public Law* (Oxford, Hart, 2021), 109-127 and H-T Nguyen, 'The Disruptive Effects of Social Media Platforms on Democratic Will-Formation Process', in M Belov (ed) *The IT Revolution and its Impact on State, Constitutionalism and Public Law* (Oxford, Hart, 2021), 93-109.

creating reality – digital, virtual, algorithmic – that can be fully detached from the reality of fact, norms, institutions, and social imaginaries to which our constitutional and legal orders are adjusted. Hence, there is a real chance that the augmented reality of the global algorithmic society largely or even fully escapes from the normative-institutional regulatory grid of the constitution and the socio-legal order it has to establish. This triggers the challenging question are we going to live in a ‘deep-fake’ reality dominated by post-truth, post-certainty, and post-trust.

The combination of the rise of the political importance of expertise, the broadening of the scale of the constitutional game to regional, supranational, and global levels and the emergence of new realities paralleling the physical reality of territorial constitutionalism together with the incredible acceleration of technologies dismantle the well-established mechanisms for generation and maintenance of trust that were so carefully and painfully shaped during the ‘long XIX century’ and the ‘short XX century’<sup>38</sup>. The globalization, deterritorialization, time-space compression, and the IT revolution produce structural asymmetries. They are hardly reconcilable with traditional constitutional schemes of democratic trust, control, and accountability. Reversely, they lead to escape of the elites from the schemes of control and accountability triggering a rapidly increasing distrust by the people.

Hence, it seems, that we are heading towards a post-trust society. Indeed, such concept seems as an internal conceptual contradiction due to the fact that each society is based on trust. In other words, trust is substantial precondition for the establishment and maintenance of durably structured social bonds. Trust is a societal value. It is generated and sustained within communities. Hence, trust is pillar of community, solidarity, and mutual comprehension. That is why trust must be secured by all means. In the context of algorithmic society, where AI will play an increasingly important role, post-trust may be prevented and replaced by post-truth. This is an extremely problematic possibility since it entails the danger of replacement of truth as precondition for the constitutional order. Acquiring of trust and certainty via post-truth constitutes the ultimate dismantling of the rationalist project of Modernity and the constitution and constitutionalism as veritable, rational, and reasonable phenomena.

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38 See E Hobsbawm, *The Age of Revolution: 1789-1848* (New York, Vintage, 1996), 1-368 and E Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (Time Warner Books, 1995), 1-627.

Trust is even more important for constitutionally framed political societies. Politics as the functional core of each constitutionally framed order is impossible without trust. One of the tasks of modern constitutions has been to generate and promote trust in mass societies framed as territorial nation states. Their role has been to establish national integrity in institutionalized way, through founding of a political community based on trust.

The dismantling of the state as ultimate framework of power, the deconstruction of centralized authorities, and the disintegration of traditional political communities paralleled with the rise of the global networked algorithmic society profoundly changes the roots of power, trust, and accountability. The uncertainty of truth, the certainty of uncertainty in the global post-modern disorder, and the crisis of established mechanisms for community building, transform trust from empirical fact and normative expectation into a constitutional imaginary. The imaginaries of trust are nowadays ascribed to atypical contexts such as digital communities, post-territorial and aterritorial forms of power, and even the AI as new sources of expertise, efficiency, and authority. These tendencies jointly render the traditional schemes of trust provided by the constitutions as jurisdictionally entrenched and pre-algorithmic contracts valid for territorial communities increasingly dysfunctional. Thus, we are in dire need of reconceptualization of the concept, patterns, and safeguards of trust in the context of algorithmic society in order to avoid the combined situation of post-truth, post-trust, and post-certainty.

#### *D. Deconstitutionalization and de-democratization through Globalization and Digitalization: towards a Global Algorithmic Technocracy and Dark Constitutionalism?*

Internet seemed as a quite promising platform for reinforcement and promotion of democracy<sup>39</sup>. Its territorial detachment, networked features, and polycentric nature appeared as natural promoters of networks and circles instead of hierarchies and squared territorial containers as forms of consti-

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39 See O. Policino, G. Romero (eds.) *The Internet and Constitutional Law. The Protection of Fundamental Rights and Constitutional Adjudication in Europe* (Abingdon, Routledge, 2016) and G De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society', in *European Journal of Legal Studies* (2019) 11(2), 65-103.

tutional geometry<sup>40</sup>. A global, networked, and territorially detached reality might be conceived as the natural playground for power polycentrism, democratic empowerment, and rule of law embedded in post-territorial and atterritorial societal constitutionalism. It seems as an adequate context not only for the algorithmic society, but also for the fluid or liquid modernity and society<sup>41</sup> and its spaces of flows<sup>42</sup>.

Indeed, global digital constitutionalism is a clear departure from territorial, national, and hierarchical constitutionalism. It is hardly reconcilable with sovereignty and territorial democracy 'within' or even 'beyond' statehood. It looks like a possible escape from the excessive use of public power and as a medium for promotion of universal values, global interests, and innovative forms of policy-making aiming at rationality, humanism, and prosperity. Global digital constitutionalism appeared as the quasi-natural promoter of democratic empowerment on a global scale.

Unfortunately, the combination of globalization, IT revolution, and technocratic governance did not result in a global algorithmic democracy, at least not yet or in the foreseeable future. Instead, visible trends of novel global hierarchies marked the departure from the ideal of global and digital or algorithmic democracy. The simultaneity of transformation and the incredible speed of the new technological revolution created huge information, motivation, and resource asymmetries that could not be reconciled through the means of territorial liberal-democratic constitutionalism. It should be noted that the ongoing technological revolution, paralleled by constitutional polycrisis and constitutional polytransition, possesses the scale, depth and complexity that are unprecedented in human history. Thus, they altogether produce a new civilization as a response to the immense technological shocks on the state, society, and their constitutional order. The responses of the social and political system to the exogeneous pressures of the multifaceted scientific revolution (IT revolution, bio and medical revolution, mobility revolution etc.) producing algorithmic society are neither democratic, nor territorially restrained, nor necessarily compatible with the constitutional axiology, normative ideology, and constitutional design of constitutional and political Modernity.

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40 See M Belov, 'Constitutional semiotics...', 241 ff.

41 See Z Bauman, *Liquid Modernity* (Cambridge, Polity Press, 1999), 1-240 and U Eco, *Chronicles of a Liquid Society* (Houghton Mifflin Harcourt, 2019), 1-320.

42 See M Castells, *The Rise of the Network Society* (Oxford, Wiley-Blackwell, 2009), 407-460 and M Belov, 'Rule of Law in Space of Flows, in M Belov (ed) *Rule of Law at the Beginning of the Twenty-First Century* (The Hague, Eleven publ., 2018), 97-141.

Thus, the current process of adaptation of the socio-political order to the joint pressures of globalization and the technological revolution objectively promote the rise of global algorithmic technocracy. The increasing complexity of policy-making, the deep crisis of representative party democracy, the inefficiency of the numerous (predominantly theoretical) proposals for ‘democratization of democracy’<sup>43</sup> jointly contribute to the establishment of global algorithmic technocracy. Technocracy is gradually but visibly overburdening both democratic and authoritarian orders where democracy and authoritarianism seem to be transformed into a façade for technocratic-oligarchic governance. The current form of technocracy that is gaining momentum is global since it is unfolding in a globalized world. It is algorithmic due to the impact and results of the ongoing technological transformation and the IT revolution that is its driving force.

Each constitutional order and political regime require legitimation and strives at achieving the trust of the society. Unfortunately, the current experiences with constitutional polycrisis and constitutional polytransition reveal that global algorithmic technocracy is frequently legitimized through fear politics resulting in forms of post-democracy and promoting dark constitutionalism.

It must be noted, that the chances for promotion of fear politics and dark constitutionalism in the context of algorithmic society are much greater than in non-digital and pre-digital contexts. This is due to their global outreach, incomparably diverse instruments for digital manipulation of meaning, and the non-transparent and elitist-technocratic ontology. The combination of the new digital tools for shaping of meaning and promotion of negative emotions and the rise of emotional politics of fear seem a dangerous combination that is capable of deconstructing traditional chains of trust and creating new ones based on dark constitutional imaginaries.

Especially the technocratic authoritarian-oligarchic regimes strive at detachment of expertocracy from democratic (popular and parliamentary) control. Their promise is to deliver the anticipated presumable efficiency and expertise of government while their final objective is to reverse the direction of control and to produce unquestionable technocratic governance. Thus, while the line of control and accountability in liberal democracy stems from the people and through the parliament is directed towards the government and the technocratic parts of the governmental structure

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43 C. Offe (Hrsg.) *Demokratisierung der Demokratie. Diagnosen und Reformvorschläge*, (Campus, 2003), 1-304.

in authoritarian-oligarchic technocracies it is the experts who make the government dependent, disable the parliamentary control, and transform the people from sovereigns into a mere object of governance.

The rising technocracy is launching the anti-democratic impetus by promoting efficiency and blunt belief in science as a new political ideology. In fact, the very concept of unquestionable belief in science goes against the critical-rational core of scientific knowledge making scientific absolutism, e.g. in the form of digital, financial or health paternalism, a new religion. The constitutional polycrisis is and has been the natural context for the rise of 'digital', 'surveillance', 'security', and 'health Leviathans'<sup>44</sup> promoting trust based on fear politics safeguarded by a mixture of technocratic, authoritarian, and oligarchic means. Thus, democratic control and accountability are replaced by technocracy, justice, liberty and autonomy are replaced by efficiency and government is replaced by governance. Under such autocratic-oligarchic-technocratic regimes trust in expertise and unquestionable knowledge should justify the monopoly over violence<sup>45</sup> replacing democratic engagement, activism, control, and checks and balances.

In the last decades two enemies of liberal democracies have been on the rise. These are the populist regimes and the forms of technocratic governance. They both render traditional modes of trust dysfunctional replacing them with charismatic or technocratic authority. Paradoxically, algorithmic society is fostering both of them although in a different way. Digitalization, IT revolution, and algorithmic governance are all promoters of technocracy. They lead to overburdening of traditional forms and procedures for creation of trust. The rise of populism is to an extent a side effect of technocracy and the increasing feeling of democratic disempowerment. The people distrust technocracies. They feel the trend towards post-democracy. Unfortunately, they make recourse to a wrong medicine for this disease by hoping to be able to get themselves out of the post-democratic swamp trusting populist politicians, parties, and movements.

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44 See M Below, *The Role of Fear Politics ...*, 187-221 and A Mercescu, 'The COVID-19 Crisis in Romania, or on How One Cannot Escape (Bad, Legal) Culture' [http://exceptions.eu/2020/05/11/the-covid-19-crisis-in-romania-or-on-how-one-cannot-escape-bad-legal-culture/?fbclid=IwAR3hTyciWC-Kiei2r9KFjHVN0KjGzx6aepFuZ9VYlnDz89Jr94dWUydAh\\_Y](http://exceptions.eu/2020/05/11/the-covid-19-crisis-in-romania-or-on-how-one-cannot-escape-bad-legal-culture/?fbclid=IwAR3hTyciWC-Kiei2r9KFjHVN0KjGzx6aepFuZ9VYlnDz89Jr94dWUydAh_Y).

45 See M Weber, *Op. cit.*

