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The Janus Face of Constitutionalism

Abstract

The article is based on an assumption that constitutionalism has a Janus face. A constitution is both a legal and a political act. So far, the public domain has been dominated by legal constitutionalism (constitutional dogmatics), which excludes the constitution from the public sphere, subjecting it to the authority of lawyers-experts. The contemporary political phenomena such as: new populism, illiberal democracy or new constitutionalism should shift the interest of researchers to the political aspect of constitutionalism. Constitutionalism is, therefore, a multidimensional social practice. A political game featuring many actors. And the constitutionalism of lawyers is only one of its possible interpretations. Citizens also have their own constitutionalisms, and different perspectives on constitutionalism, reflecting opposing interests, may lead to conflicts. The constitutional law dogmatics applied to resolve such conflicts would argue for the existence of a transcendental framework for their resolution. A more political approach denies the existence of such a framework. In other words, the dogmatics in question requires democracy to adapt to constitutionalism, while the political approach requires constitutionalism to adapt to democracy. The text is an introduction to a part of a volume featuring articles by authors affiliated with the Centre for Legal Education and Social Theory of the University of Wrocław.

Keywords: constitutionalism, dogma, political nature

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Constitutionalism is on everyone's lips – not only in Poland or in our part of Europe. It is spoken of in Venezuela, Brazil, but also in the Philippines and the US. On both the national and supranational levels (i.e. so-called global constitutionalism). The structure of the discourse on constitutions is very similar – self-confident journalists, celebrities from academia, loud politicians, and all kinds of grand authorities deliberate on the provisions of constitutions and on their correct application. A constitution has ceased to be a domain of lawyers-experts, becoming what it always have been – an element of the public domain. But the lawyers' perspective on constitutionalism is still overshadowing the public debate. The manner of dealing with constitutionalism as worked out by lawyers earned the name of "constitutional dogmatics" long ago. And like every kind of dogmatics, it has its advocates, sacred writing, and rituals. It is focused on maintaining dogmatic purity and defending the existing hierarchy. Every kind of dogma, as observed by T.S. Eliot some time ago, needs heresy to remain alive.

The texts featured therein go beyond constitutional dogmatics.[3] The authors, affiliated with CLEST (Centre for Legal Education and Social Theory of the University of Wrocław), adopting different theoretical perspectives, question the common opinions on constitutionalism and the rule of law. They criticise the apoliticality of constitutional dogmatics and explore the meanings of the contemporary political and social trends like: new populism, illiberal democracy or new constitutionalism. They argue that contrary to what prominent exponents of constitutional dogmatics write, we are not dealing with a temporary aberration, a disease that will slowly subside with everything coming back to as it was before. We are rather dealing with trends and processes which are making attempts to change the political compromise existing since WWII by referring to local constitutional traditions. The current trends critical of constitutional dogmas are based on the assumption of constitutional pluralism and on discoveries of local constitutional traditions. The irreducibility of constitutionalism to the text of a constitution offers new ways of taking advantage of local resources of collective constitutional memory. This results in a rejection of the postcolonial imitational approach, which dominated post-Communist countries after 1989 and functions among prominent constitutional dogmatists in the form of the thesis of the existence of only one (i.e. liberal) form of

[3] Most texts, including this one, have been developed as part of the National Science Centre's no. 2015/17/B/HS5/00768.

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constitutionalism. So the return to the *status quo ante* is rather doubtful. Speaking of a need for a new constitutionalism is thus highly reasonable.

We will use the outline that follows below to ask a question about a common methodological minimum of the presented texts. We believe that this minimum involves accepting that constitutionalism is Janus-faced, meaning acknowledging that a constitution is both a legal and a political act. This is why all the legal-only ways to examine constitutions are unable to grasp their relationships with authority and social processes. The price to be paid for this incapacity is the risk of legal constitutionalism being taken advantage of instrumentally. On the other hand, only a political consideration of a constitution may lead to it being reduced to the language of politics. The constitution then becomes a scene for a battle for hegemony. This leads, in turn, to the disappearance of any potential for emancipation. The presented texts share a conviction that the legal aspect has currently dominated the discussion on constitutions. And this is why more attention should be given to the political aspect. A convenient starting point for this shift can be a precise definition and critical analysis of constitutional dogma.

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A dogmatic perception of constitutionalism is based on three theses: a textual thesis, a separation thesis, and a determination thesis. Lawyers tend to view constitutions as a text (the **textual thesis**). The text is a being, independent of its interpreter. It is internally organised and ordered. Moreover, the text is an outcome of a political process, but after the process ends, the text is independent of the ongoing politics (the **separation thesis**). A constitution is a result of a broad political and social compromise. It is a minimum vision of a community inclusive to all rational political actors. In the process of application of constitutional provisions, the discretion of a lawyer is very limited (the **determination thesis**). A decision of a constitutional court remains in a simple, deductive relationship with the provisions of a constitution. There is no room for real conflicts of values or creativity because the constitution includes all answers to any future political questions. Having sufficient technical knowledge to notice it is sufficient.

Accepting these theses makes the dogmatics acknowledge the negative concept of constitutionalism as a limitation of power, mainly of the legislative and executive powers. Every real authority should be subordinated to the superior legal authority of the constitution. Authority should subject itself to procedures imposed by the constitution and to the limitations to its range. The first restriction can be referred to as horizontal. It concerns the necessity for constitutional bodies to exist and the need to obey their procedures. The second restriction can be referred to as vertical.

It is about the need for every authority to respect the constitutional rights granted to individuals and groups. A constitutionalism so understood appears to stand in opposition to dictatorship and as a realisation of the the rule of law. A constitution is non-negotiable and thus excluded from the public domain. The case becomes more complicated when we ask the question of who determines the content and the limits of constitutional rules. The political neutrality of constitutionalism, built with the utmost effort, can become threatened. A dogmatic answer will be to name the constitution itself as the designer of its limits.[4] A constitution, like Baron Münchhausen, is able to grab and lift itself up. The solution becomes problematic if we take the semantic imperfection of the language of every constitution into consideration. Constitutions use notions such as "liberty", "conscience", "independence", "rule of law", which are all notions open to interpretation. These notions are positivised in the process of the application of law, gaining in judicial decisions and commentaries, and this is what lawyers deal with. A claim of deductive familiarity with the content of these notions may be considered an ideological smokescreen, an intention to take instrumental advantage of a constitution's authority. This gives rise to a problem of the relationship between constitutions and power. In order to last, constitutional dogma needs some institutional and intellectual foundations. The institutional role is played by constitutional tribunals and courts, embodiments of the constitution. The court formula and the idea of impartiality associated therewith let these institutions appear as apolitical. An additional feature is the anthropological game, typical of every court (rituals, attire, magical formulas – all the ceremony of authority). Another institutional pillar of the dogma in question is education in law. Legal education, hierarchic and based on dogmatic claims, presents these claims not as an outcome of a discourse but as a part of the very nature of law. This education is based on "scholastic truth",[5] which is manifested in the dominance of narrative methods of teaching and a monologue-styled manner of formulating arguments in academic textbooks. Scholastic truth is guaranteed by the institution of examination, during which a disciplinary supervision of the internalisation of the dogma takes place. Next, this textbook and monologue line of thought is exported to the justifications of court decisions and commentaries, which become then the basis for the development of textbooks. The intellectual role is assumed by the theory of constitutional interpretation. The theory appears

[4] Sometimes this argument takes the form of "the Nation", "the Sovereign Ruler" or "the People". However, "the Nation", "the Sovereign Ruler" or "the People" do exist because they are mentioned in constitutions. In the end, it is a given constitution that decides on its own limits.

[5] The notion was first used by Ewa Łętowska. See: E. Łętowska, *Boska sztuka interpretacji*, [in:] A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz (eds.), *Prawo, Społeczeństwo, Jednostka. Księga pamiątkowa dedykowana Profesorowi Leszkowi Kubickiemu*, Warszawa 2003, pp. 25–35.

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as a scientific one, which helps it legitimise the dogmatic practice by depicting it as an intersubjective scientific procedure subject to control.

The abovementioned point of view can be accused of externality. Such an argument, adopting H.L.A. Hart's distinction into an internal and an external perspective, could imply that constitutional dogmatics is an internal, lawyer-specific point of view. Although a constitution itself may not include its determinants, this role is played by the legal culture, which substantially limits lawyers in their capacity to act, and thus they have no discretionary power. It is a different version of the determination thesis. Two claims can be made against such an argument. First, it is based on an essential interpretation of culture, on the juridicisation of culture, which is viewed as a legal framework functioning on the basis of binary rules. If we accept that culture includes patterns that can be materialised to a gradable extent and that may come into conflict with one another, the thesis on cultural determination needs to be at least made more specific, if not rejected. Second, the claim of an internal point of view can be accepted – but as a symptom, not an explanation. Constitutional dogmatics as the basis for a reflection on constitutions does harmonise with the perspective of constitutional judges and other participants of legal constitutional transactions. This proves that the reflection has no critical detachment from its subject. An institutional condition for the lack of criticism here is the frequently encountered combination of the roles of a judge and a scholar. Scholars practicing law tend to project this perspective onto their research activity and therefore to legitimise their practice. In this context, the repeated arguments according to which combining these two functions grants researchers some special and otherwise inaccessible insight into constitutional law should be treated as proof of the lack of critical reflection, which should be typical of constitutionalism, and as a justification for having additional sources of income.

Constitutionalism is therefore connected with power to a much greater extent than dogmatists are ready and wish to accept. We can make use here of the division between politics and the political, as found in contemporary political philosophy. Politics is an activity of gaining and exercising authority through the process of decision-making, focused on parties and social movements. The political is an ontological condition for such an activity to take place, a situation of necessity and a form of community life in a world of limited resources (capital, land, natural environment, labour, time, etc.). The political determines the ways in which human collectives can organise themselves by defining the methods to solve social conflicts. In order words, the political can be viewed as a matrix through which a community solves its problems. It is a historically-shaped matrix, always negotiable. Given such a perspective, it should be clear that right now constitutionalism is one of the elements of this matrix. There is also a distinction between *constitutional* and *extra-constitu-*

tional politics in constitutionalism itself. The former is about subordinating politics to the constitutional straightjacket. The latter is political nature, with a constitution being its element. Although constitutionalism is detached from party and institutional politics, it does have some serious consequences on the level of the political.

Constitutional dogmatics suggests solving conflicts through bringing them down to compliance/non-compliance with procedures and conflicts between values (laws). Such a translation into the language of law then makes it possible to relate such a conflict to a transcendental and organised constitutional framework of procedural rules and a hierarchy of values. It is a certain power deciding on authority, which requires impartiality to retain its position. Questioning its impartiality may involve an empirical analysis of the ways of selecting the people involved in the process and of the social considerations of formulating the dogmatic hierarchy. The problem is that the political nature of constitutionalism understood as such tends to exclude citizens and may be used for ideological purposes. Lawyers-experts become the main actors deciding on the range of constitutional laws and therefore on the shape of the political community. Citizens have no choice but to submit themselves. The formalism present in the dogmatic line of thought enables depicting ideological solutions and constitutional solutions. Constitutionalism then becomes a justification for the existing power relations. This leads to a weakening or even elimination of its potential for emancipation.

We can clearly see that what appears as excluded from the public domain has a very real, social foundation (judicature, education, and theory) and serious consequences for the community (the conflict matrix).

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Constitutional dogmatics is therefore not convincing in terms of epistemology. As we have tried to show above, it appears that its fundamental assumptions are at least arguable. What raises doubts as knowledge, if it lasts in a given community, needs to have a social function. This is why dogma is not science but rather something we could define as a "regime of truth" of lawyers, borrowing the notion from Michel Foucault's theoretical toolbox.[6] The French philosopher used the concept of the regime of truth to describe a set of procedures and institutions which encouraged or forced individuals to accept some truth. Regimes of truth are responsible for e.g. separating true statements from false ones, for sanctions for violating this separation, and regulating the status of those in charge of guarding this separation.

[6] M. Foucault, *Rządzenie żywymi*, Warszawa 2014, pp. 109–119.

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The criticism of constitutional dogma opens the door to an analysis of the political aspects of constitutionalism. Such an analysis is based on a social thesis, a political nature thesis, and an indeterminacy thesis. The constitution is seen here as a living institutional order (the **social thesis**). It is a system of institutions classifying social conflicts. Constitutionalism divides claims and demands into rational/irrational and compliant/non-compliant with constitutional identity or tradition. It also establishes and arranges the hierarchy of values. Political processes affect constitutionalism (the **political nature thesis**). Access to a constitution is not egalitarian. It actually depends on the access to mass media as well as symbolic and cultural capital. This is why the application of a constitution through the exercise of authority should take the interests of "others" – excluded therefrom – into account. It is a political activity in the sense that it involves reconciling many different interests, where the stability and order of the community is at stake.[7] At the same time, the text of a constitution does not determine its application (the **indeterminacy thesis**). The significance of a constitution is and should be open to renegotiation.[8] Social transformations and articulation of new conflicts make it necessary to adjust the significance of constitutions to new circumstances. Such an adjustment has a creative attribute to it.

Such a view translates into a positive interpretation of constitutions. A constitution is not so much a limitation of power as a measure to increase its effectiveness. A constitution establishes an institutional and procedural order thanks to which political decisions can be made in a more efficient manner. The distribution of competence among constitutional bodies relieves these bodies of potential social demands. Moreover, a constitution legitimises power, equipping it with the authority of a social contract even if such a contract has never been concluded. Positive constitutional aspect understood in this way opens the doorway to the negative aspect thereof. Human rights depend much more on the existence of strong institutions that can enforce them rather thanon legal texts or judicial decisions alone, which tends to be unacknowledged in the global discourse on the matter.

Constitutionalism is, therefore, a multidimensional social practice. A political game featuring many actors. And a constitutionalism of lawyers is only one of its possible interpretations. Citizens also have their own constitutionalisms, and different views thereon may involve opposing interests and lead to conflicts. The dogma applied to resolve such conflicts would argue for the existence of a transcendental framework for their resolution. A more political approach denies the existence of

7 More on such a perspective on politics – cf. B. Crick, *W obronie polityki*, Warszawa 2004.

8 T. Jefferson claimed that every generation should have its own constitution.

such a framework. In other words, the dogma in question requires democracy to adapt to constitutionalism, while the political approach requires constitutionalism to adapt to democracy.

This should be reflected in legal education, oriented at taking other perspectives of constitutionalism than the legal perspective into account. Extending the *curriculum* to make it include social, political, historical, and philosophical analyses of constitutionalism would help denaturalise the constitutional dogmas. It would then cease to be "the only game in town". Such changes require, however, a critical detachment from the constitutional practice adopted by scholars. Combining the functions of a judge and a researcher certainly does not make it easy to keep such a distance. The separation of the power to make decisions from the power to review the already made decisions has always been a core issue of constitutionalism. We see no reason why legal science should not be subject to such a separation as well.

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We believe that it is necessary to find a balance between the two faces of constitutionalism. At present, we can see an attack on and an erosion of legal constitutionalism, giving way to political constitutionalism. It is a potential opening of a new door, which does not necessarily have to be materialised institutionally. We see a democratic potential in the criticism of legal constitutionalism. A constitutional conflict may have positive effects, i.e. it can improve the level of knowledge of constitutional law in the society. The criticism of constitutional dogmatics appears to feature traces of an egalitarian attitude, an essential condition of democracy. This short introduction to texts written by people affiliated with CLEST intends to offer a broader perspective on constitutionalism, one irreducible to constitutional law dogmas. The constitutional law dogmatics existing in Poland is a heritage of the communist era, when it was a conscious practice to avoid the reflection on the possible political shape of community life, enhanced later on by a superficially understood liberalism. The constitutional crisis of today, occurring not only in Poland, like any other crisis, offers an opportunity to reach a better uderstading and establish a balance between the political and the legal nature of constitutionalism. We are aware of the many challenges ahead of us. Our plan is to intellectually tackle constitutional pluralism and to lay the grounds for a regional integration. But this calls for intellectual courage – especially in constitutional theories – and requires refraining from relying on a rather automatic repetition of the 19th-century jurisprudence-like "received truths". We hope that these texts will contribute to a discussion on the matter in question, and that the arguments featured in our publications will be used in the teaching practice.

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The democratic potential lying dormant in the "new constitutionalism" movements will materialise not only when the constitution becomes a part of the public domain but also when the key constitutional institutions cease to serve the purpose of juridification of political processes and become elements of the said domain as well. We see no reasons why a constitutional court making decisions regarding values should be composed of lawyers only. The inclusion of ordinary citizens, which might seem like heresy from a dogmatic point of view, could have positive effects and reinforce the constitution.

This short discussion aimed to show that constitutionalism is Janus-faced. There is the legal face of it – a fossilised legal text that needs to be applied strictly from the technical point of view. There is also the political face of it – a living institutional order and the manner of articulation of social conflicts. These two faces may function as masks relative to one another. The problem is that when looking at constitutionalism, a researcher never knows which of the two faces they are looking at. Many years ago, Jürgen Habermas, a German philosopher and sociologist, emphasised the Janus face of law, stressing its colonisation and emancipation role with respect to the world of life. Law tends to regulate further spheres of life in an increasingly detailed manner. On the other hand, it may grant some rights to excluded and dominated groups. This dual function – of colonisation and emancipation – also takes shape in the domain of constitutionalism.