Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country

András Jakab

15.07.2020 doi: 10.17176/20200715-235342-0

We often (here and here) talk about the methodological challenges that autocratizing regimes pose to constitutional scholars. However, so far we have not given enough attention to the moral dilemmas that constitutional law scholars face on a daily basis when teaching at universities that are geographically located in autocratizing countries. Constitutional law professors in such regimes are today facing moral dilemmas that they definitely did not sign up for when they originally chose their jobs. Traditionally, in continental legal cultures, university education focuses on doctrinal-conceptual legal thinking *(Rechtsdogmatik)* which systematizes elements of positive law (legal provisions, judicial decisions) along key concepts, with the help of doctrinal academic writings. All this presupposes a minimum level of the rule of law, and exactly this is fading away in autocratizing countries.

Constitutional law professors have to hold lectures, for example about the separation of powers (which can even be explicitly laid down in the Constitution of their country), even when they know in fact that there are party soldiers of the government sitting in the so called independent institutions who are blatantly making decisions along party lines (sometimes even in clear breach of the legal provisions). Moreover, their students are also aware of this fact. Several strategies exist in practice for dealing with this situation.

1. Ignore the problems

You can just be cynical and continue teaching as usual. You can try to ignore constitutional reality and the blatantly biased decisions of the constitutional court of your country. You might disagree with such decisions but you continue to receive your monthly salary, and you separate your internal choices from what you have to teach. This is a relatively comfortable option, requiring little consideration and resulting in minimal internal conflict. Thinking too much makes life difficult anyway!

2. Cherish the brave new world

If you identify with the autocratizing regime and internalize their main slogans, then your internal conflicts can entirely disappear. You do not have to ignore the gap between constitutional reality and constitutional law; you should defend and cherish it! You just absurdly redefine legal concepts and reinterpret legal provisions (if necessary, then several times) in order to fit the new legal reality and the presumed needs of the regime. Moreover, if you voice your unconditional support for the new regime during your lectures (also in writings and even possibly in the propaganda media), then you might even be rewarded with a well-payed position at the supreme court, at the constitutional court or at another captured institution. You pay the price in moral integrity for your psychological and financial well-being. You should especially consider this option if you are not particularly talented and/or industrious, but you are very-very ambitious and morally flexible. This is your once-in-a-lifetime opportunity!

If you have always disliked the principles of constitutional democracy anyway (in this case constitutional law was probably never for you…) and you are able to ignore many (I mean: many!) elements of constitutional reality, then you might even depict yourself as a national hero that is fighting against the international conspiracy of human rights lawyers. If you stay long enough in your bubble with like-minded pro-autocracy colleagues and benefit from mutual daily re-confirmations (don't forget that they need

your psychological support just as much as you need theirs!), then you might even begin to believe (at least a little bit) what you are saying. You should, however, be aware that if the regime ends one day and your bubble bursts, that you might find yourself in a very awkward situation.

3. Stand up and fight openly

A similarly political stance, but in the very opposite direction is this one. You decide to openly and unequivocally criticize the new constitutional reality, even during your lectures and in the media (if there is any independent or non-governmental media left where you can do so). You might even join a pro-rule-of-law political party or hold speeches in pro-rule-of-law demonstrations. By doing so, however, you are leaving the role of a constitutional scholar. One of the key functions of constitutional law is the softening of political conflicts (i.e., integration, peaceful conflict resolution etc.). In order to fulfil this function, constitutional lawyers (constitutional scholars) should behave in a manner that is compatible with being (and looking like being) above everyday party political conflicts. A constitutional law scholar who openly acts like a party politician (either on the side of the government, or on the side of the opposition) is a self-contradiction. It is, of course, possible to change careers, but you cannot exercise these two roles at the same time. No matter how much you love football, you cannot be the referee and the striker at the same time. The traditional role division, however, fits the normal operation of a constitutional democracy, and it is exactly this that is being unmounted in front of your eyes.

The precondition of your traditional role as a constitutional law professor, namely the teaching of conceptual-doctrinal legal analysis, is fading away (see above in Section 1). However, if you try to protect it like a political warrior, you are actually contradicting the conventional unwritten rules of your profession. No matter how morally appealing it may be, this intrinsic contradiction will not go away. Moreover, specifically in an autocratizing country, you can also expect criticism from propaganda media and sooner or later you might lose your university job (or miss out on promotion), or your university (academic research institute) might be stigmatized and punished.

4. Protect with dignity what you can

You can partially redefine the situation by reshaping the teaching material. You want to teach something meaningful, but you are ashamed to teach the positive law because you would sound hypocritical and/or simply blind (remember: the rift between constitutional law and constitutional reality is growing every day). Therefore you begin to concentrate on theoretical questions, i.e. you talk more about "the rule of law in general" as a theoretical abstract concept, and you can explain what the *telos* (abstract purpose) of a key concept is in the sense of a teleological (purposive) interpretation (e.g., in the case of the rule of law: limitation of or fight against the arbitrary use of government power). You can also only include cursory remarks (among them also a few critical ones in an emotionless lawyerly style) about the positive law of your country, but that should not be your main focus—you should rather concentrate on the fundamentals and the ideas behind them.

Besides constitutional theory, you also have escape routes to constitutional history, comparative constitutional law, international constitutional law (ECHR) or a combination of these. You can also write new textbooks in this spirit in order to show the students what the abstract standard is on which your own constitutional regime can and should be measured. This would be a legitimate option in legal education even under normal circumstances; consequently, it would be difficult to accuse you of engaging in political activity if you were to adopt this approach. Intellectually, this is probably the most challenging, but also the most rewarding option. It is also subtle, self-reflective, and strategic in the interest of constitutional values. If you have any hope that the night will end and the sun will once again shine over your country, then you should choose this option. This might not sound very heroic, but actually it is: you are preserving constitutional culture in the minds of your students and, when the time is ripe, they will be able to bring it to life. As a teacher, this is the best you can hope for.

5. Try to work somewhere else

You can try to escape the daily moral dilemmas either by changing the university subject that you teach (perhaps to administrative law, international law or EU law), or by taking up an academic position in another country (unfortunately, as legal academic work is traditionally bound to positive law and national language, this is not an easy option). Or you can just leave legal academia entirely.

ABOUT THE AUTHOR

András Jakab

András Jakab is Professor of Constitutional and Administrative Law at the University of Salzburg (currently on leave) and serves as a judge at the European Court of Human Rights.

SUGGESTED CITATION

Jakab, András: Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country, Verfassungsblog, 15.07.2020, doi: 10.17176/20200715-235342-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200715-235342-0.