Are These "Moral Dilemmas" Real?

A Response to András Jakab

Wojciech Sadurski

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I disagree with my friend András Jakab's characterization of the dilemma of a constitutional scholar who at the same time expresses strong views, including in (what may be seen as) political action. His views are best encapsulated in this passage:

> *"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".*

Let me say straight away that I may be biased and even self-serving in making my comment. I have not been totally immune to some of the actions András describes (and condemns, as long as they are undertaken by an active constitutional scholar).

András is probably making the case for his argument a bit easier by characterizing the actions he decries as "act[ing] like a party politician". But "joining a pro-rule-of-law political party" or "holding speeches in pro-rule-of-law demonstrations" (the examples of conduct incompatible, in his view, with the role of a constitutional scholar): why would that contaminate the integrity of a scholar? Sure, all analogies may be misleading, but isn't it a little like an epidemiologist who actively participates in public actions to counter the pandemic, as long as the view she propounds in public meetings are sincerely held and based on her scientific knowledge? Further, Jakab's s analogy to "being a referee and a striker at the same time" is in my view somewhat misleading: we, as constitutional scholars, are not "referees" in the sense of being required to be neutral and impartial. We have to be objective (whatever it means) but not neutral (whatever it means).

As my role model I may think of my great scholarly hero Ronald Dworkin who, in addition to his scholarly roles, was also active in the Democratic Party (its overseas branch), actively favored and endorsed a presidential candidate (Obama), and never disguised his political preferences stemming from his scholarship. Was one or the other compromised?

Finally, I do not know what it means to "exercise these two roles at the same time". I do not want to sound pedantic but in our lives we normally perform different roles "at the same time", and as long as there is not a strong contradiction between them, it is OK. If you insist, I may be a constitutional scholar from 8:00 am (well, in my case make it 9:00 am) till 5:00 pm, and a pro-rule of law activist in the afternoon and evening. But does it make any sense?

So the only reasonable question is: is there such a contradiction? I guess some things are obvious: in our lectures we should not advocate for political parties, and we should not dismiss our students' anti-rule-of-law views (as we may take them to be) in a way we would do in a rally or a current-affairs TV program or in a newspaper's op-ed. But this has to do with the deontology of a teacher. Outside this role, describing

your country's constitutional breakdown (to take one example close to my heart) and "at the same time" decrying it, for instance such as in a clearly "political" expression of strong views in this Blog, does not raise the specter of inconsistency or moral failure, unless of course one holds a radically "positivistic" (in a compromised sense of the word) view of law, legal scholarship, and constitutional scholarship in particular.

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