

**CALL FOR PAPERS
FOR WORKSHOP:**

**NEW
CONSTITUTIONALISM?
NEW FORMS OF
DEMOCRACY AND
RULE OF LAW BEYOND
LIBERALISM**

12-13 July 2018

Oñati International Institute for
the Sociology of Law

CLEST

CENTRE
FOR LEGAL EDUCATION
AND SOCIAL THEORY



WORKSHOP

DESCRIPTION

On the universal level the sphere of 'the political', i.e. the public space of conflict within the democratic community, has been shrinking in the past decades due to the processes of juridification and economisation of politics. This has led to the emergence of so-called 'post-politics', i.e. a situation in which politics is increasingly made by professional "*politicians*" and experts, rather than through an authentic engagement of citizens. This process was strengthened in connection with European integration and the transfer of further competences onto the technocratic institutions of the EU; as a result, the *demos* became an abstract notion.

Where, therefore, we can find a solution to way out of the crisis of the political, as described above, and therefore a way of overcoming the post-political situation? What political tools are at the disposal of the contemporary democratic community and what are its aims?

Is the idea of common decision-making currently present in political life and if not, is it possible to create new procedures guaranteeing a broad civic participation in the public sphere? Is there a possibility for the community to consciously take part in defining what belongs to the common good and what is just, as well as to create a common world of sense and meaning?

Could an idea of *new constitutionalism* be an optimal theoretical framework for a re-politicisation of politics, i.e. the rebuilding of civic participation in political decision-making and the revitalisation of the democratic community as an authentic decision-making subject? And, more fundamental question, what kind of analytical instruments for describe and understand this process of *new constitutionalism* give for us contemporary political philosophy?

We want to address above issues in relation to recent processes and events in Central-Eastern Europe. Over the past 30 years we have witnessed an unprecedented increase of the judiciary at the expense of representational power in Central and Eastern Europe. The American predilection to settle all conflicts in the legal forum, remarked upon with surprise by Alexis de Tocqueville, has become ours too - almost every controversial political decision may be heard by court. The judiciary, based on constitution, formed one of the foundations of the transformation, and in its assumptions, is a guarantor of efficient and just conduct of such transformation.

This fact is the consequence of the prevalence of a liberal-democratic vision of social order. But liberal type of social and political theory and practice is in crisis. Every new theoretical proposal, from communitarians to supporters of agonistic democracy, starts with a critique of the liberal democracy project. Especially it lacks legitimization and non-democratic character.

The emerging in CEE new form of democracy sometimes called “illiberal”, with its populism and nationalism, presents itself as a political answer to this crisis.

Highlighting the role of the sovereign, collective subject (“the people”, “the nation”) it wants to fill the legitimacy gap of state power, even at the expense of individual rights. **In our workshop we would like to examine, in the scope of constitutionalism and rule of law, answers to the challenge of new forms of democracies.**

Due to the main assumptions of liberalism (independence of individuals, freedom in making choices and rationality of motives of action), the basic problem of this doctrine is the transition from rationality of an individual’s actions to social co-ordination of actions and the formation of political identities.

Any correction of liberal democracy should answer the question: How does individual rationality translate into collective rationality? Because observed trends refer to the form of society, its essence, which used to be described as *polis*. The formation of a constitution’s subject reveals itself in a double mechanism, in which form of society manifests itself and is simultaneously obscured.

It is visible in the sense that the process in which social reality gains its form, which C. Schmitt called adoption of the concrete form of supremacy and subordination, becomes visible. It is obscured because the place of constitution in the public sphere is defined as special, whereas the principle that creates the conditions of constitutionalism remains hidden.

Hence we deal with a paradoxical situation. Constitution, which sets out the framework of political and social order, itself needs a minimum of order from which to emerge.

IMPORTANCE

New constitutionalism is an interdisciplinary research project combining methods appropriate to political philosophy, the sociology of law, and jurisprudence. New Constitutionalism is about creating a new interdisciplinary cognitive perspective, which will allow a pronouncement on issues relating to restrictive character of constitutional liberal democracies. Proposed workshop is based on assumption of specific cognitive assumptions that decide which kind of problems are possible to articulate. The new cognitive perspective of constitution exceeds the limitations of traditional constitutionalism.

On one hand, it broadens the scope of research so that it encompasses political foundations of constitution and its social functioning. Because of this, constitution is as if freed from lawyers, which means that legal practice no longer determines the possible questions but is one of the available. Hence questions unfamiliar to the legal practice of applying constitution, such as the question of as hegemony, networks, dimensions of equality.

The workshop will be also an attempt to give a meaning to the period of social and legal change. We regard the period from 2007 and 2016 (conflict between Constitutional Courts and parliaments and executive powers in Slovenia, Romania, Hungary, Poland, Slovakia) as symbolically ending the period of post-communist transformation based on naïve copying constitutional institutions from the West. Between 1986 – 2006 the authority of the Constitutional Courts and Tribunals had been not questioned and constitutional judiciary played a leading role in the democratisation of Central and Eastern European countries.

Since that moment, the Tribunal, and so the Constitution itself, has become politicised. This politicisation signals the end of the modernist paradigm in democratisation of Central-Eastern Europe. Categories of objective text, reason, and the scientific character of jurisprudence begin to crumble while their philosophical critique, based on revealing the contingency and relations of power behind these categories, settled for good in the humanistic mainstream.

The above conflict between the executive authority and the Constitutional Tribunal, as well as the related politicisation of constitutional judiciary (including the Constitution) faced a reaction from the academic environment, which raised the subject of the legitimisation of the power of constitutional judiciary.

In all reaction and attempted conceptualisation, politics was treated as a threat to law. This mobilisation of judges and theoreticians of law is striking. It is something akin to a hysterical reaction to a traumatic experience.

It relates to the widespread distrust in the field of Central-eastern European lawyers and legal academia to politics in general. This is probably due to experiences of the previous system and instrumental - concerning political ideology - treatment of law. Politics is a Pandora's box which it is better not to re-open. Actions of some executive powers may be analysed in populist categories, and as such it is an expression of the dangers connected with the disavowal of the political in constitutional doctrine. Simultaneously, the lawyers refusing discussion of the politicality of the law does not solve the crisis of legitimisation, but cause its further intensification.

The proposed workshop will work on an answer to the above problems. New constitutionalism thanks to the politicisation of constitution, places law in the centre of the public sphere, and because of this it leads to dialogue over constitution, and thus over the whole system of the rule of law, between lawyers, philosophers, social theoreticians and political researchers. Politics is no longer treated as a threat but as a practice enabling the emergence of constitution.

STRUCTURE OF THE WORKSHOP

In the workshop we will have participants not only of socio-legal scholars but also constitutional lawyers, legal philosophers, political scientists and political philosophers.

The structure of the workshop will be organised around the main 3 groups of problems:

- Social and political trends undermining liberal constitutional democracy in Central-Eastern Europe.
- Institutions of New Constitutionalism
- New forms of rule of law and its social ontology
- Intellectual instruments (notion and concepts) to make sense of confusing reality.

More specifically following topics will be addressed in discussed papers:

- Philosophical foundations of modern constitutionalism
- The subject of constitution in contemporary political philosophy.
- Specificity of constitutional judiciary in Central and Eastern Europe.
- Contemporary threats to constitutionalism (populism, lack of legitimisation).
- Legitimisation of the Constitutional Tribunal's power, based on the example of selected rulings. Types of political, social and legal arguments used by the Constitutional Tribunal
- Sociological analysis of constitution and constitutional judiciary functioning in contemporary societies of Central and Eastern Europe.
- Sociology of Constitution in Central and Eastern Europe
- Constitution in Action

The workshop will bring together for discussion. The base for discussion will be draft of papers distributed two weeks before workshop. On the workshop the authors will have only 5 minutes to sum up the main arguments. The stress will be on discussion. The proceedings from the workshop we intend to publish through the IISL channel.

SUBMISSIONS

- Workshop is open to all potentially interested scholars, but due to limited number of participants, there will be selection of participants.
- Dates: Abstracts of no more than 500 words should be submitted to Adam Czarnota via e-mail: a.czarnota@unsw.edu.au with affiliation by 15 of January 2018.
- Workshop date: 12-13 July 2018 (arrival at 11 and departure on 14 July 2018)
- A Registration Fee is payable by all participants - **75€** for employed and **55€** for students, unemployed, or retired persons. All potential participants are kindly informed that we are not able to offer any scholarships.
- After the workshop, publication is planned.
- **Organizers:** Centre for Legal Education and Social Theory (CLEST), website: www.clest.pl, International Institute for the Sociology of Law Oñati, website: www.iisj.net.
- The Residencia Antia, belonging to the Institute, could offer accommodation. The price for a single room there per night is 28€ and 42€ for a double room.