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The Argument from Legal Fetishism in Constitutional Discourse

Abstract

The subject of the analysis presented in the text is an argument that tends to (and used to) be raised in the critical discourse on constitutionalism – the allegation of the so-called constitutional fetishism. The argument is to show why the constitutional discourse has lost its potential to explain and create social processes. The reason is that lawyers focus too much only on the content and interpretation of the provisions of the constitution, without considering a broader social context, which makes the constitutional discourse limited solely to legal issues with a simultaneous omission or underestimation of all other aspects of constitutionalism. This attitude of lawyers to the content of the constitution (or – in broader terms – to the provisions of law) is sometimes referred to even as idolatrous, hence the reference to the notion of fetishism in the religious sense. The aim of the text is to analyse the structure of this argument and to attempt to determine the impact it can have on constitutionalism.

Keywords: legal fetishism, constitutionalism, constitutional discourse, mismatch between law and reality, constitutional crisis

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Introduction

At first glance, the allegation of fetishism, appearing quite often in legal (including constitutional) discourse, seems to stigmatise the opponent of the presented argument. It carries clearly negative associations, resulting in attributing a religious, idolatrous, and completely blind attitude to the content of law to the person considered a legal or a constitutional fetishist. Therefore, it may be regarded one of those insults which opponents in legal debates hurl at each other when the atmosphere of the discussion noticeably rises. It would be hard to find a lawyer, or even a constitutional debate participant, referring to themselves as or approving of being called a constitutional fetishist. Nonetheless, I believe that despite the emotional-stigmatising nature of this argument, it is impossible to consider it a merely empty invective. It may actually act as a position towards the adopted attitude to law – even if considerably exaggerated. What is more, the concept of “legal/constitutional fetishism” appears as a notion explaining certain attitudes adopted by lawyers to the constitution. The aim of the article is to analyse the structure and the components of the argument from legal fetishism, and to determine the consequences it may have on constitutionalism – starting from the potential to alter the current paradigms ending with a complete rejection thereof. It needs to be made clear that the attitude to law described as fetishistic is not limited only to constitutional law but may also encompass law in its entirety. However, given the limited space, the notion will refer mainly to constitutional discourse with some general definition-related remarks.

The notion of fetishism in social sciences

The description of the notion of legal fetishism needs to be preceded with an earlier reference to the meaning of this notion in social sciences. The notion comes from religious studies, introduced by Charles de Brosses, a religion historian and ethnographer from France, in his publication entitled “On the Worship of Divine Fetishes” published in 1760.² The term of “fetish” is much older, though, dating back to the 16th/17th century. It was the name Portuguese merchants and travellers used when

² Cf. Ch. de Brosses, *O kulcie fetyszów*, translation, introduction, and footnotes by M. Skrzypek, Warszawa 1992.

referring to talismans or objects of worship of African tribes.³ According to de Brossess, fetishism was: “any religion whose object is a cult of animals or inanimate earthly beings” or “a cult of earthly and material artefacts called fetishes”.⁴ Therefore, the very definition of fetishism provides several qualities characterising the relationships between people and objects of cult. Firstly, such relationships are based on a religious context, and the view of fetish is based on belief without a reference to knowledge. Secondly, fetish is attributed with a magical significance embodied in a specific object of an animate or inanimate nature. Finally, a fetish – as an object of religious cult – is put on a pedestal by the worshipper, who finds it necessary to subordinate their life to this very object.

According to de Brossess, fetishism was the simplest, primitive form of religion, based on a cult of a tangible object, which transformed through the evolution and development of community life into religious forms referring to an abstract absolute. For this reason, the term fetishism gained a pejorative tinge – it grew to mean a blind subordination to a material object which embodied the absolute of its fetishist. The term came soon to be applied in social sciences and was not limited only to studies conducted among African communities but appeared to be generally useful in theories on the stages of the development of mankind, e.g. in August Comte’s historiosophical works or in writing in the field of religious studies.

It was soon borrowed by philosophers – it appears in discussions featured in the philosophical essays by Hegel or Feuerbach. The said authors used it, however, only when speaking of studies or reflections on the societies of the West, with the difference that a tangible object as a fetish became replaced with an abstract and intangible object. This was the nature of the e.g. “commodity fetishism”, which Marx described as an immanent feature of capitalism, involving a substitution of human relationships with relationships based on the exchange of goods and treating production and amassing goods as the superior value, one which all other values should be subordinated to.⁵ In this perspective, the object of worship – the fetish – was money or, speaking in broader terms, material possessions.

Closer to the end of the 19th century, the term of fetishism appeared and found its place in French psychiatry – with one of its exponents, Alfred Binet, referring it to sexual disorders. Such a meaning of the idea was popularised in the early 20th

³ The French word “fétiche” comes from the Portuguese term of “feticó”, meaning an amulet or sorcery, and this comes from the Latin *faciticus* and *facere* – meaning “artificial” and “create” respectively. M. Skrzypek, *Rozwój teorii fetyszu of De Brossa do Freuda*, [in:] Ch. de Brossess, op. cit., p. VI.

⁴ Ibidem, p. 4.

⁵ P. Stallybrass, *Marx’s Coat*, [in:] P. Spyer (ed.), *Border Fetishism. Material Subjects in Unstable Spaces*, New York–London 1998, pp. 183–207; cf. also D. Kennedy, *The role of law in economic thought: An essays on the fetishism of commodity*, “The American University Law Review” 1985, 34, pp. 939–1001.

century by Sigmund Freud and has survived as dominant until today – nowadays it rarely tends to be used in social sciences with a different meaning. Sometimes it appears in the public discourse carrying negative associations, highlighting a blind attachment to a certain thing, idea, lifestyle, etc.

When the notion is used both only to describe some specific phenomenon in scientific terms and in a more popular, journalistic sense, there are still certain qualities characteristic of a relationship defined as fetishistic. It is based on a devotion: 1) to an object (both material – a thing – and non-material – e.g. an idea, a lifestyle), 2) involving a blind, irrational commitment to the said object. The relationship between a fetishist and the object of their worship is similar to a religious relationship – any detachment from or doubt in the object of worship is unacceptable, which involves an absolute necessity to submit oneself to the fetish and to the resulting obligations or certain principles of conduct. Naming someone a fetishist means referring to them as a person who narrows their perspective of the surrounding reality – consciously or not – by looking at it from the angle of the object of reverence, i.e. some material artefact or some idea. However, discourse features criticism of rather the attitude towards a fetish rather than of the person adopting such an attitude – it is more about stigmatising the negative phenomenon, not the person succumbing to this phenomenon.

Fetishism as an attitude towards law

The allegation of legal fetishism with respect to law is and has always been raised in the public debate, but it has also been used many times by lawyers addressing each other, especially in discussions concerning the understanding and the essence of law. The origins of such a discussion can be found in the moment in which positive law gained the upper hand over the concept of natural law, and the full bloom of accusations of the fetishisation of law came with the concept of legal positivism. The essence of the criticism against legal fetishism was the claim of treating law not as a legal measure to achieve objectives set by a given society but as a supreme value and an objective in itself. Law thus became the absolute, the final value, not an instrument of protection of social interest or a tool to model social reality.⁶ Following orders formulated in legal regulations became the overriding goal, even

⁶ J.L. Comaroff, J. Comaroff, *Reflection on Anthropology of Law, Governance and Sovereignty*, [in:] F. Von Benda-Beckmann, K. Von Benda-Beckmann, J. Eckert (eds.), *Rules of Law and Laws of Ruling. On the Governance of Law*, Farnham 2009, p. 33. Cf. also Ch. Tomlins, J. Comaroff, "Law As...": *Theory and Practice in Legal History*, "UC Irvine Law Review" 2011, 1(3).

when they were completely against reason, logic, own interest, or the principles of justice. Legal fetishists are people who focus on a formal, ritualistic – thus automatised – execution of law, completely ignoring the issue of the actual effectiveness of the adopted legal solutions.⁷

It should not thus come as a surprise that the targets of the earliest accusations on the grounds of legal fetishism were mainly exponents of the 19th-century Orthodox variant of legal positivism, and the accusers were predominantly supporters of legal realism in its broad sense. When writing about exponents of the school of exegesis, François Géný referred to them as “legal fetishism practitioners in a quasi-religious trance”.⁸ The attitude was subject to even fiercer attacks of American realists – Jerome Frank referred to American classical jurisprudence (also known as formalism)⁹ by speaking of apparent fetishism of legal rules as attributed to its exponents.¹⁰ The current would also be described as “mechanical jurisprudence”,¹¹ “legal theology”,¹² “transcendental nonsense”, “legal magic and world jugglery, and “theological jurisprudence of concepts”.¹³ It appears that the criticism concentrated mainly on the method of cognition and the manner of the interpretation of law, emphasising the similarity of the methods adopted by formalists to those borrowed directly from religious practices and based on analyses of sacred texts, without a reference to the actual effects.

Legal fetishism would be attacked from a yet another point of view by the Marxist school of law – its exponents saw fetishism in treating law as an objective value in itself, without any reference to the class and ideological nature of law.¹⁴ Viewing law as an objective value obscured and blurred the picture of the actual structures of authority, and that is why in order to reveal the true nature of law, it was necessary to fight the fetishistic approach to law since it favoured and supported the bourgeoisie status quo.

Positivism tended to be criticised also in later eras on the grounds of excessive submissiveness to the magic of dead letter at the expense of social consequences

⁷ J. Lemaitre, *Legal Fetishism at Home and Abroad*, “Unbound” 2007, 3, p. 8.

⁸ F. Géný, *Méthode d'interprétation et sources en droit privé positif: A Critical Essay*, St Paul 1954.

⁹ More on the nomenclature used for this current of legal thought in the American history of law – see: J. Srokosz, *Geneza Case Method i jej wpływ na kształt amerykańskiej filozofii prawa*, “Krytyka Prawa” 2018, 10(2), p. 298.

¹⁰ J. Frank, *Law and the Modern Mind*, New York 1930, pp. 81, 283.

¹¹ R. Pound, *Mechanical Jurisprudence*, “Columbia Law Review” 1908, 8, p. 605

¹² O.W. Holmes, *Book Review*, “American Law Review” 1880, 14, p. 234.

¹³ F.S. Cohen, *Transcendental Nonsense and the Functional Approach* “Columbia Law Review” 1935, 35, p. 821.

¹⁴ E. Pashukanis, *The General Theory of Law and Marxism*, New Brunswick–London 2002, p. 87 et seq.

or e.g. references to the system of values and axiological judgements in particular communities. Of course, focusing too much on an orthodoxly positivist attitude to law may not only be caused by the very nature of legal positivism but can also be a form of reaction to trauma. According to Evgen Tachev, the fetishistic attitude to law in the former states of real socialism after 1989 was to substitute and be a natural reaction to earlier legal nihilism.¹⁵ According to the author, the nature of fetishism boils down to thinking of law as the best recipe to solve every social problem, but this does not lead to a proper application of the regulations but rather to creating them *ad hoc* to regulate any problematic issues. This contains an element of wishful thinking – the sole fact of regulation is to be a sufficient remedy to the occurring social problems. Janusz Kochanowski claims that this kind of legal “magical thinking” has never solved any social problems, and only contributed to the enhancement of the phenomenon of juridification of community life.¹⁶ The latter, understood as law encompassing successive areas of community life, may also somehow be perceived as a natural outcome of the fetishistic construction of law as it treats it as the only proper way to regulate public behaviour and perceive the actors of community life.¹⁷

As shown above, there is no clear and precise way to define legal fetishism. The phenomenon may be understood in many ways, i.e. as treating law as a kind of absolute, considering law as an objectively binding and apolitical or non-ideological system of obligations and prohibitions, or as a sort of idealisation of law as a tool to solve social issues. All these interpretations share some common qualities – treating law as a value in itself and “magical thinking” – viewing law as a sort of unquestionable value that should be protected and enforced at all costs.¹⁸ It can be therefore said that the criticism expressed through references to legal fetishism mainly addresses the attitude of persons idealising and absolutising law, rendering

¹⁵ E. Tachev, *Historical and Psychological Sources Shaping Constitutionalism and Constitution Performance in Post-Socialistic Countries*, [in:] S. Frankowski, P. Stephan (eds.), *Legal Reform in Post-Communist Europe: The View from Within*, Dordrecht–Boston–London 1995, pp. 158–159.

¹⁶ J. Kochanowski, *Jurydyzacja życia*, “Palestra” 2002, 7–8, p. 95.

¹⁷ According to Lars Blichner and Andreas Molander, there are five dimensions of juridification, and it can be understood as: 1. a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system, 2. a process through which law comes to regulate an increasing number of different activities, 3. a process whereby conflicts increasingly are being solved by or with reference to law, 4. a process by which the legal system and the legal profession get more power as contrasted with formal authority, and 5. a process by which people increasingly tend to think of themselves and others as legal subjects. L.Ch. Blichner, A. Molander, *Mapping Juridification*, “European Law Journal” 2008, 14.

¹⁸ J. Lemaitre calls it “magical legalism”. J. Lemaitre, *Legal Fetishism: Law, Violence, And Social Movements In Colombia*, “Revista Juridica U.P.R.” 2008, 77, pp. 331–332.

it absolute in terms of values at the expense of other elements of social reality. The allegation is targeted mainly at lawyers because they are the ones who refer to law most often in this way – which is not a rule, of course.

Constitutional fetishism

Although the notion of fetishism regarding law originally pertained to its nature or methods of interpretation, in the 20th and 21st century it most often concerns the matter of the situational context and constitutionalism as elements that determine the nature of contemporary community life – especially in liberal democratic systems. This is so because of the special importance of constitutions and constitutionalism in the public debate of today – combined with the decline of traditional legitimacies to exercise authority, such as tradition or charisma, legality becomes the main criterion to justify ruling. In these circumstances it is law – and especially constitutions – that entrusts the exercise of authority and limits this authority at the same time. It grows to act as the basis and guarantee of state functioning, in particular if it is a state of law. According to Artur Ławniczak, constitutions have substituted the social order existing so far, shifting the weight from tradition and common values towards legal principles.¹⁹ This law embodied in constitutions has become a social contract concluded in contemporary states, serving as the basis for community life to take place. On the one hand, it increases the significance of law and the prestige lawyers in social structures, but on the other, it exposes them to accusations: of extending the range of their authority excessively, of appropriating too much room in the public debate and bringing its essence down only to law, and of – obviously – constitutional fetishism.²⁰

Analysing the issue of the narrative of constitutional fetishism, I will refer to three perspectives on the phenomenon: lawyers' attempts to limit the public discourse to a constitutional framework; constitutions and constitutionalism as a means of protection against populism; and constitutions and constitutionalism as obstacles and brakes to the development of states and societies. It seems that the presented issues, though certainly not fully exhaustive of the entire context of use of the argument from fetishism in constitutional discourse, illustrate the essence and the context of use of this argument.

¹⁹ More on the matter – see: A. Ławniczak, *Geneza konstytucji*, Wrocław 2015.

²⁰ Such claims result in demands to limit legal authority. See: M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton 1999; L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford 2004.

The relatively most lenient accusation addressed to lawyers is that of fetishism understood in the first sense, i.e. ascribing them a tendency to trivialise and narrow the public debate down to law only. The allegations presented against constitutionalism can be discussed using the example of the debate on European integration and of the matter of adoption of the European Constitution, which was a subject discussed in the first decade of the new millennium, which came to nothing.²¹ The discussion that ensued then featured allegations of occurrence of legal fetishism, being one of the obstacles to the shaping and functioning of the European community.

According to Neil Walker, one of the most often raised lines of criticism of constitutionalism is that concerning it being fetishised by the participants of the public debate. Walker claims that one of the accusations addressed to constitutionalism understood as such is the excessive focus on mechanisms of explaining the reality as offered by law at the expense of marginalisation or a complete omission of other mechanisms that may affect the shape of public discourse and the vision of an entire community.²² The essence of constitutional fetishism is the excessive attention drawn to constitutions or – in broader terms – to constitutionalism as tools to shape and explain the nature of the occurring social phenomena while there are other, even better, instruments to pursue and achieve these goals.

The problem has been discussed more extensively by Ian Ward, who sees the root of the phenomenon referred to as constitutional fetishism (he himself does not use the notion) in the limited vision and the lack of social intuition among European elites, with lawyers at their forefront, of course.²³ These elites – according to Ward – focus only on establishing a community using legal instruments. They see the path towards a European community in the process of moving from a treaty to a treaty, from a directive to a directive, trusting that it is possible to build such a community using only – and at least mainly – legal regulations.²⁴ The reality is, however, that most citizens of EU member states are not interested in legal discourse – it fails to address the actual expectations of EU communities. This is so because

²¹ More on the debate on European constitutionalism – see: M. Brand, *Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union*, EUI Working Paper LAW 2004, 2; M. Kielhorn, *The Constitution for Europe: The Point of No Return?*, Aberdeen 2004; M.A. Graber, *The Law Professor as Populist*, “University of Richmond Law Review” 2000, 34(2).

²² N. Walker, *The Idea of Constitutional Pluralism*, “Modern Law Review” 2002, 65, pp. 317–359.

²³ I. Ward, *Beyond Constitutionalism: The Search for a European Political Imagination*, “European Law Journal” 2001, 7(1).

²⁴ Ward points to the example of lawyers’ thinking, to their conviction that they are the ones who have built the common Europe thanks to legal instruments and that they can be attributed with its present shape, referring to: E. Denza, *Two Legal Orders: Divergent or Convergent?*, “International and Comparative Law Quarterly” 1999, pp. 257–284.

by focusing solely on the application of legal instruments, many other aspects and ongoing discourses tend to be forgotten – and the legal narrative, especially the constitutional variant thereof, is just one of such forgotten aspects.

Lawyers are unable and do not want to open themselves up to other discourses. This is firstly because, in fact, they are not able to reason in categories other than constitutional, which is a certain learned “occupational disability”.²⁵ Secondly, lawyers do not want to open themselves up to other discourses because they are tempted to increase the scope of their authority and social significance, attained through dominating the European discourse by boiling it down to a discussion on law.²⁶ Combining these two elements causes an expanding fetishistic attitude towards constitutionalism as a tool designed to build a lasting and strong New Europe – which is only an illusion since constitutionalism is unable to fulfil this role even if it wanted to. Lawyers can somewhat outline the institutional framework or the legal form for the processes of integration, but they are not able to lay the grounds for them, merely performing a role secondary to these processes, and not a role of creators – like they would like to view themselves.²⁷

Ward claims that the precondition for the success of integration is to develop a sort of joint political vision of all Europeans, which should serve as the foundation for legal instruments. The vision should originate from a common European heritage, from the principles of humanism and philosophy, not from “wishful thinking” and “vague phrases” included in treaties.²⁸ Thus, forming such a vision calls for going beyond the limits of constitutionalism and focus on a broader discourse taking the social and philosophical context and the complexity of “social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions” into consideration.²⁹ If lawyers remain self-content and keep on producing more and more legal documents – like thus far, it will in no way help build such a common European political creation. Forcing through further legal tools as community-building solutions will only result in an advancing the fetishisation of law, leading to an increasing disparity between law and the social reality.

The presented vision of the fetishistic perception of constitutionalism is in line with arguments offered by Emiliios Christodoulidis, who has made critical remarks regarding the attempts to supplant elements of politics from the public discourse and to substitute them with law. The public sphere of state functioning is an arena

²⁵ N. Walker, *op. cit.*

²⁶ I. Ward, *op. cit.*, p. 28.

²⁷ *Ibidem*, p. 39.

²⁸ *Ibidem*, p. 25.

²⁹ W. Twining, *Globalisation and Legal Theory*, Cambridge 2000, pp. 3–8, 47–49.

where different systems clash in the Luhmannian sense – mainly law and politics. But there is a noticeable trend of a gradually increasing dominance of law in this field, supplanting and taking over the role of politics – and it is not a welcome trend. Law may not replace areas reserved for politics as it will not be effective in serving the latter's purpose.³⁰ This is so because law is based on a clear division and categories of legality and illegality whereas the domain of politics is much more complex. If legal categories are introduced to fields dedicated to politics, this will lead to a reduction of the complexity of political issues, to an oversimplification and trivialisation of these matters. Also, more importantly, such attempts to regulate and systematise political issues through law will be ineffective because the political battle, according to its logic, will still last, escaping the legal framework designed for it – it will thus continue parallel to law, outside of its limits. The outcome will be a set of artificial legal categories which will not coincide with the actual social reality to the slightest extent.

According to Christiadoulidis, it is impossible to consider the functioning of one social system from the point of view of the rules of another system – which is exactly what constitutionalism intends to do, trying to regulate and organise the political sphere according to its internal rules.³¹ Lawyers believe it is, in fact, possible because of the fetishistic approach to the rules of the system they themselves function in. In these circumstances, the solution would be to free political discourse from the legal framework imposed top-down upon it, to pursue broadly-profiled politics of deliberation, with different visions of the direction of political activity confronting each other. The role of lawyers will be to impart an institutional shape to these visions – law needs to be downgraded from the role of a creator to the role of an executor of these visions.

Another perspective of constitutional fetishism is that which sees it as a fortification acting as a means of protection against populism.³² The problem has been discussed by Richard Parker, who criticised the American model of liberal democracy – especially constitutionalism – by viewing it as an attempt to lawfully protect the status quo against the changes brought about by politics. One of the main features of the system – according to Parker – was “a chronic fetishism of the Constitution, constitutional law, and the Supreme Court”.³³ This fetishism came from

³⁰ E. Christodoulidis, *Law and Reflexive Politics*, Dordrecht, 1998, pp. 19–20.

³¹ Ibidem.

³² More on the nature of the phenomenon of populism – see: J. W. Müller, *Co to jest populizm?*, Warszawa 2017; P. Taggart, *Populism*, Philadelphia 2000; P. Blokker, *Populist Constitutionalism*, [in:] C. de la Torre (ed.), *Routledge Handbook of Global Populism*, London 2018.

³³ R.D. Parker, “Here, the People Rule”: *A Constitutional Populist Manifesto*, “Valparaiso University Law Review” 1993, 27(3), p. 564.

American elites' fear of populist movements appearing now and then with different demands, but always calling for changes to be made in the existing framework of social and political life.

The fear of those changes pushed elites towards a fetishistic attitude to constitutionalism as a guarantee of constancy of the status quo, which – according to Parker – took two forms. The first involves the adoption of the existence of a “proper” meaning of the constitution, with the way to understanding it leading though a “proper” reasoning – provided in the existing constitutional practice. The effect of the idolatrous faith in constitutionalism was attributing a special significance to law with respect to politics, treating the former as a far superior point of reference – something held sacred as if. The relationship of elites and law was supposed to be based not on rationalism and reasonable arguments but simply on a faith in the existence of a dogma of superiority of law over politics, even if facts would seem to prove otherwise.³⁴ In such a perspective, law and – in broader terms – constitutionalism are idealised and viewed as systems of clear rules as opposed to “dirty” politics, depicted as an absolutely negative phenomenon.

The second element of constitutional fetishism was the narrative of elites – especially of lawyers as experts in the field – justifying the necessity to protect the system against changes where the constitution would be presented as the supreme social value. It is quite frequent to see debates on the necessity of legal changes featuring emotional arguments on the need to treat the constitution “as the most precious legacy we can leave to our children”, with each amendment thereto seen as an act of destroying this legacy for good.³⁵ In the quoted narratives, constitutions and constitutionalism are shown as vital and at the same time vulnerable values, which can easily be destroyed by politics given the right circumstances.³⁶ The relationships formed between authorities in the current practice are so fragile that any more serious crisis is able to sever them – a guarantee of the system balance, achieved through tremendous efforts, to last is therefore to accept the limitations of politics as imposed by constitutionalism.

According to Parker, but also many other theoreticians affiliated with movements defined as populist (with the former having described their beliefs in this scope to the broadest extent), the constitutional fetishism of American elites has in fact one objective – to maintain the status quo. Elites, through a clear and final

³⁴ Ibidem.

³⁵ A. Clymer, *Starring Role In Budget Act: Fear of Voters*, “New York Times”, 5 June 1992, after: R.D. Parker, op. cit., p. 565.

³⁶ P. Berman, *The Vanities of Patriotism*, “The New Republic”, 1 July 1991, after: R.D. Parker, op. cit., p. 565.

determination of the principles of functioning of the society and the mutual relationships between the state's authorities as well as by adopting the only possible interpretation of the constitution, aim to "limit and bind the natural energy of citizens", which has so far always found an outlet in new political movements.³⁷ These movements are called populist, with the word having a decidedly negative connotations, and as such are regarded as a threat to the efficient, 'healthy' functioning of the entire state mechanism.

The third perspective on constitutional fetishism depicts the concept as an attitude that aims to hamper the inevitable social or political changes, necessary from the point of view of the national interest or social needs but standing in contradiction to the binding law. Such a point of view was offered by Władysław Maliniak in his writing. He believed that the most firm or stable constitutional system would have to deal sooner or later with a functional crisis originating from unavoidable social and political changes which need to be reflected in the adopted law. An ideal situation would be, of course, if such changes were implemented harmoniously into the legal framework, but what often happens is the opposite – there are attempts to block or limit them. The main argument to support such attitudes involves quoting the contradiction between changes and the applicable law, especially the constitution, which is to be the final argument for deciding to reject any such changes. Of course, it is lawyers who act as brakes to such changes most often because, according to Maliniak, they are frequently constitutional fetishists, treating the text of the constitution as sanctity that does not allow for any deviations whatsoever. Meanwhile, in constitutionalism as a legal form of organisation of community life, it is important to avoid excessive generalisations and formulating sacred slogans.³⁸ It is always necessary to take local conditions and the need to harmonise the constitution with the local social reality into account, instead of focusing on an imagined and abstract constitutional order understood as a form without any specific content.

The life of societies happens outside constitutions, which even if they wanted to regulate this life, would not have the actual capacity to do so – the solutions provided for by constitutions are always secondary to social processes and have to adapt to them. Of course, they may be different attitudes to constitutions – from blind adoration to a complete and cynical rejection of any and all rules, i.e. from constitutional fetishism to constitutional nihilism. Maliniak positioned himself away from both of the extremes, arguing that – according to Benjamin Constant's principle of moderation – such extremes should be rejected because the former

³⁷ R.D. Parker, op. cit., p. 564.

³⁸ W. Maliniak, *Fetytyzm prawniczy w doktrynach konstytucyjnych*, "Droga" 1935, 3, p. 200.

underestimates anything that happens outside a constitution and the latter overestimates it. Lawyers tend to underestimate phenomena occurring outside a current constitutional framework, often inclining to fetishistic rationalism involving equating an own internal point of view with social needs. The fetishism of such thinking manifests itself in the simple mechanism of regarding anything that results from a constitutionalism commonly approved by lawyers as being rational in an automatic manner.

In the situation of a conflict with the existing social reality, lawyers automatically consider the rules of constitutional discourse as superior while it is the social reality that should be given priority – depreciating it is an obvious instance of fetishism.³⁹ In such circumstances, legal regulations do not tally with social reality, and the outcome is that the significance of law decreases, but it never leads to the disappearance of social phenomena which lawyers find problematic; on the contrary, in fact. When community life follows a different path than that paved by the provisions of a constitution – leading to a dissonance between the facts and lawyer’s visions, lawyers become fetishists hanging on tightly to their ideations and ignoring the reality. Maliniak names the situation of adopting universal women’s suffrage against the constitution in Belgium in 1919 or Roosevelt’s New Deal policies as examples of the need to overcome constitutional fetishism in the name of the necessity to adapt the law to the requirements of the social reality. The situations clearly violated the regulations in force at the time, but reflected the actual and real social processes that were taking place.⁴⁰

Conclusions

The presented analysis shows that the argument of constitutional fetishism refers to a situation in which there is tension between the dead letter and the phenomena of community life. Constitutionalism aims to organise these phenomena and establish a legal framework for them, while it appears to not be fully possible. The belief

³⁹ The requirements of *raison d'état* can justify a flagrant violation of binding regulations – which, according to Maliniak, happened in Poland in 1926 in the form of the May Coup. As one of very few lawyers, he took up the challenge to legally substantiate the legitimacy of Józef Piłsudski’s political coup, who motivated it by a case of absolute necessity – he considered the threat to the existence of the Polish state a higher value than abiding by the order established on the grounds of the March Constitution. See: W. Maliniak, *Józef Piłsudski jako polityk romantyczny*. “Droga” 1935, 7–8, pp. 585–602; 9, pp. 728–751; 12, pp. 1068–1080; W. Maliniak, *Żywotność i aktualność romantyzmu politycznego*. “Droga” 1936, 1, pp. 72–88; 2–3, pp. 193–212; 4, pp. 318–330; A. Danek, *Wstęp*, [in:] W. Maliniak, *Przeciw fetysyzmowi konstytucyjnemu. Wybór pism*, Kraków 2012.

⁴⁰ W. Maliniak, *Fetysyzm prawniczy...*, pp. 207–209.

that law is the best instrument to determine the shape of the phenomena of political life is treated exactly as fetishistic – the critics of such an approach stress the necessity to include other discourses and limit the opinions of lawyers in this domain.

The dominance of legal discourse in the public debate was, according to Ward, an effect of the triumph of the Enlightenment and the elimination of religion as the central and final category to decide on the functioning of the society – with the gap attempted to be filled with law.⁴¹ Setting law in the centre of public discourse and enabling it to formulate final decisions was the source of the fetishistic approach – law took the place of God, and was thus attributed godly features. However, it appeared that law was not always able to serve the intended purpose – it actually works best in maintaining the desired states of affairs, but is not always capable of working out some perspective of development. Hence the claims of those criticising constitutional fetishism, calling for limiting the role of law and lawyers only to that of executors of visions worked out in completely different discourses. Law not interpreted as a value in itself, but at best as some instrument to address social expectations, may not therefore oppose social phenomena and trends.

If a crisis arising from a mismatch of the content of law and the social expectations and currents occurs, priority should be given to community life, even at the expense of certainty and order guaranteed by law. After all, if such a formal order is inconsistent with current social trends and trends, it becomes artificial and abstract, and the lawyers who legitimise it start to be perceived as worshippers and ardent defenders of a non-existent idol – their obstinacy is regarded as irrational and inexplicable. The attitude of lawyers is thus similar to a religious attitude – a believer rejects the existence of other gods, and lawyers automatically exclude an option to apply other solutions and instruments of regulating community life. Incidentally, lawyers also defend their own position in the structure of authority, granted to them on the grounds of the superiority of law in the public discourse – they do not want to let changes happen and so keep on defending the status quo and the relationships of power underlying it. Meanwhile, opponents of constitutional fetishism usually wish to see changes resulting from the “release of the natural energy of citizens” take place, even if they mean rejecting the current structure of constitutionalism.⁴²

The above discussion shows that the argument from legal fetishism is to expose and stigmatise the attitude of excessive attachment to strict legal rules and the belief that only constitutionalism-inspired methods make it possible to establish and maintain a political community existing in harmony. Those who raise this

⁴¹ I. Ward, *ibidem*, p. 25.

⁴² R.D. Parker, *ibidem*, p. 564.

argument usually do not offer any precise solutions to substitute current practices – they are mostly limited to some general demands for freeing community life from the straightjacket of legal regulations, or to claims for a broad deliberation in determining the vision of a community and for letting a much broader group than so far have a say. The claims for downgrading law and lawyers, for depriving them of the decisive and final opinion in constitutional matters, and for changing their role of the creators of social order into the role of executors of visions worked out elsewhere are surely strongly articulated. So there is no complete rejection of constitutionalism whatsoever, but rather an intention to render it secondary to social processes and expectations – social practice is to be the source of customs and habits that are to be transformed into specific regulations and institutions by lawyers. An important thing is that these institutions and regulations can be changed anytime when they do not meet current social expectations anymore. So it should not be surprising that the argument is used gladly by exponents of movements referred to as populist – it more or less reflects the anti-establishment message they spread.

The argument from fetishism – according to those who take advantage of it – is to show why constitutional discourse has lost its potential to explain and create social processes. The reason is that lawyers focus too much only on the content and interpretation of the provisions of the constitution, without considering a broader social context, which makes the constitutional discourse limited solely to legal elements with a simultaneous omission of all other social aspects. Therefore, reaching for this argument in the public debate is a signal sent to lawyers that the role they perform is viewed in negative terms by the society and that it should change – it is to encourage them to reflect and change their attitudes. Although the emotional and strongly stigmatising nature of this argument places it more in the domain of politics, it may be treated as a kind of hyperbole whose sharp expression is to force and help lawyers to realise the reason for the criticism addressed to constitutionalism.