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THE TWO-FOLD NATURE OF CONSTITUTIONAL ONTOLOGY FROM THE PERSPECTIVE OF THE PURE THEORY OF LAW

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Summary. The subject of the article is the issue of the political nature of the constitution and its scientific description from the point of view of pure Kelsen's theory of law. We propose in it the thesis that although politics is not an object of legal knowledge, it is a necessary condition of the ontology of constitution. According to this theory, the cognition and description of the constitution (metaphorically speaking: its epistemology) relate to the content of valid norms, while its ontology consists of two elements: legal authorization and political will. The ontology of the constitution has a two-fold character: first, its creation and effectiveness is based primarily on the will of the constitution's creator and on the will of entities applying the constitution (politi-

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aspect); secondly, its objectively validity presupposes that the creator of the constitution has a normative authorization to establish it (legal aspect). The inclusion by pure theory of law of the political at the ontological level is concomitant with its complete removal from the epistemological field. the consequence of such a cleansing of the cognitive field is, firstly, the dependence of the description on the condition of efficacy, i.e. ultimately on the acts of will of the subjects performing the functions of state organs, and, secondly, the 'defencelessness' in the event that the legal researcher finds a content incompatibility between the constitution and the acts of its application.

Keywords: pure theory of law, constitutional ontology, Hans Kelsen, constitution.

Dwoisty charakter ontologii konstytucyjnej z perspektywy czystej teorii prawa. Przedmiotem artykułu jest zagadnienie polityczności konstytucji i jej naukowego opisu z punktu widzenia czystej Kelsenowskiej teorii prawa. Proponujemy w nim tezę, że choć polityczność nie jest przedmiotem poznania prawniczego, to jest ona koniecznym warunkiem ontologii konstytucji. Zgodnie z tą teorią poznanie i opis konstytucji (metaforycznie mówiąc: jej epistemologia) odnoszą się do treści obowiązujących norm, jej ontologia zaś składa się z dwóch elementów: upoważnienia prawnego i woli politycznej. Ontologia konstytucji ma dwojaki charakter: po pierwsze, jej powstanie i skuteczność opierają się przede wszystkim na woli twórcy konstytucji oraz na woli podmiotów stosujących konstytucję (aspekt polityczny); po drugie, jej obiektywnie obowiązująca ważność zakłada posiadanie przez twórcę konstytucji normatywnego upoważnienia do jej ustanowienia (aspekt prawny). Uwzględnienie przez czystą teorię prawa tego, co polityczne na poziomie ontologicznym, jest równoczesne z całkowitym usunięciem go z pola epistemologicznego. Konsekwencją takiego oczyszczenia pola poznawczego jest, po pierwsze, uzależnienie opisu od warunku skuteczności, czyli ostatecznie od aktów woli podmiotów wykonujących funkcje organów państwowych, a po drugie – „bezbronność” w przypadku stwierdzenia przez badacza prawa niezgodności treściowej między konstytucją a aktami jej stosowania.

Słowa kluczowe: czysta teoria prawa, ontologia konstytucyjna, Hans Kelsen, konstytucja.

1. INTRODUCTION

The pure theory of law can be defined as a general theory of scientific cognition of positive law. From the point of view of this theory, only legal norms are the subject of legal interpretation, whereas the political is invisible to it. The thesis of our paper is that although the political is not the object of legal cognition, it is a necessary condition for the ontology of constitutional law. We justify it by considering the constitution as a legal act, which has a fundamental

legal significance as the basis of the legal order, and a political significance in the sense of defining the political form of the state by it. Similarly, the ontology of the constitution consists of two elements: legal authorization and political will. In order to substantiate the above thesis, we analyze the writings of Hans Kelsen, on the one hand, without going beyond the conceptual grid of the pure theory of law (the so-called immanent analysis); on the other hand, however, we endeavour to make visible or to accentuate its ontological aspects. In the second section we reconstruct Kelsen's notions of the political (political function) and of formal constitution and analyse the relationship between them. In the third part, we explore the role of the political in relation to the notion of a material constitution. In the fourth section, we consider the more general question of the transformation of political will into a law-making act. In the fifth and sixth sections, we analyze the principle of efficacy as a necessary element of the ontology of the constitution, and the political conditionality of constitutional efficacy and its legal interpretation.

2. POLITICAL FUNCTION AND CONSTITUTIONAL FORM

Kelsen's pure theory of law distinguishes between the act of creating a law, which is always a factual event, and the normative meaning of this act, i.e. the obligation resulting from it. The norm is exclusively "the meaning of acts of will directed at human behaviour" (Kelsen, 2010b, p. 772). However, the interpretation of an act of will of a certain subject as a lawmaking action is possible only when that action simultaneously constitutes the application of another norm. It can be said that the condition for the existence of a norm is an act of will of a certain subject, while the basis (or, more precisely, the reason) for its validity is the norm, which authorizes the subject to establish it. Both the establishment of the norm and its content result from the act of will of the authorized subject. The will to establish certain legal norms is the consequence of the adoption of a certain policy of law, i.e. embodying certain values of the "arbitrary formation of the social order" (Kelsen, 2010c, p. 506). Kelsen defines the political function of the norm-creating body as its decisive role in the process of determining the criteria for the settlement of conflicts of interest existing in a given society (or their settlement itself) (Kelsen, 2010d, p. 1541). Thus, the subjective aspect of the political of an authority (organ) is decision-making, while the objective aspect is the binding and authoritative effect of its activity. The political function is primarily fulfilled by the legislative body when it authoritatively settles disputes about different views on legal policies. However, it is also fulfilled by

anybody who decides or settles conflicts of interest. From the point of view of pure legal theory, the difference between bodies in fulfilling the political function is quantitative rather than qualitative, e.g. the politicality of a court judgment is much narrower than that of a legislative act. In other words, the scope and significance of the 'political function' diminishes with the progressive concretization of the law. In this view, constitution-making would be the act of law-making with the most extensive political scope.

In the above view, the political is inseparably connected with the will to decide, the object of which is various interpersonal conflicts.¹ The specific content of such acts of will is norms defining the obligation of a certain behavior. The political is related to the conflictual character of human interaction, i.e. the competition for the capacity to impose one's will on others. At the most general level, it manifests itself as a dispute of opinions and ideas concerning the desirable form of government, which would have the competence to determine the way in which the members of a given society should behave, or the binding settlement of disputes of an individual or collective nature.² According to this concept, the relationship between the constitutional law and the political is obvious and natural, since the constitution is the legal way of organizing the political form of the state. A constitution may contain various elements determining the political identity of the state, and thus, not only the norms regulating the functioning of the highest organs of the state, or defining the position of the individual, but also the fundamental principles and values on which the state is based. The norms regulating the above issues become constitutional law when they have a specific form. As Kelsen writes, "The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which is to render the change of these norms more difficult" (Kelsen, 1949, p. 124). A constitution in this sense is an act containing norms established (as well as those

¹ They may concern general and abstract matters (e.g. involving a dispute over values or ideology) as well as specific interests (e.g. in economic disputes, but also in disputes between the individual and the state).

² The phenomenon of 'the political' is associated with actual or potential conflict, whereas 'politics' is a form of institutional handling of conflicts. This difference is strongly emphasized by Ch. Mouffe: "By 'the political', I refer to the dimension of antagonism that is inherent in human relations, antagonism that can take many forms and emerge in different types of social relations. 'Politics,' on the other side, indicates the ensemble of practices, discourses and institutions which seek to establish a certain order and organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of 'the political'" (Mouffe, 2000, p. 101). On constitutionalism as a way of forming the political see Loughlin, 2004, p. 32–52.

amended or derogated from) in a different and more demanding manner than other law-making acts. It makes it possible to distinguish ordinary legislation from constitutional legislation, and thus to distinguish, in addition to the ordinary legislature, the power (the so-called *pouvoir constituant*) to establish or to amend a constitution.³ The decisions of such authority determine the legal form of the political system of the state. The content of the constitution in the formal sense is determined by the decision of the entity being the ‘creator of the constitution’, and thus it may include issues which for political reasons⁴ have been given the form of constitutional norms. The relation of the political to the constitutional in this context lies in the obvious observation that the content of the constitutional act is a consequence of political decisions. Thus, the action of a subject with legal authority to establish, amend, or revise a constitution is necessary: the materialization of a will that transform into law. As Kelsen claims, the description of the content of such norms (i.e. the normative meaning of the acts of the legislator’s will) may be apolitical if it is not related to their evaluation by the person describing them, while the act of law-making itself (the objective aspect of political) would be a consequence of a specific political decision of the legislature (subjective aspect political).

3. CONSTITUTION IN THE NARROW AND BROAD SENSE

The proper concept of a constitution, according to Kelsen, however, does not lie in the formal issues mentioned above, but refers to the role that certain norms play in the legal order. “Such a special form for constitutional laws, a constitutional form, or constitution in the formal sense of the term, is not indispensable, whereas the material constitution, that is to say norms regulating the creation of general norms and – in modern law – norms determining the organs and procedure of legislation, is an essential element of every legal order” (Kelsen, 1949, p. 125). Every legal order contains norms governing the creation of other norms. It can be said that the constitution in the material sense

³ The power to establish a constitution may be interpreted as a non-legal power to constitute the political system or as a constitutionally determined power to change or revise it, although “both notions of constituent power (the ‘original’ and the ‘derived’ one) are seen as capable of producing the same results: the radical transformation of the constitutional regime”, (Colón-Ríos, 2020, p. 9, see p. 1–17). See also the distinction between the concepts of primary and secondary constituent powers, Roznai, 2017, p. 120–122.

⁴ These political reasons can range from ideological ones to the desire to accumulate power.

expresses the essence of the concept of the constitution as the most important rules determining the creation of law in a given system. They are an indispensable element of a legal order, and therefore any such system must contain norms governing the creation of law. Otherwise, no act of will could be interpreted as a law-making act. Kelsen argues that the material understanding of the constitution is “the essential, original, and narrow concept of constitution,” which explicitly refers to its most important role in the legal order: “the idea of a highest principle that determines the whole legal and political order, a principle that is decisive for the nature of the community constituted by that order” (Kelsen, 2015a, p. 28). The constitution in its original sense contains “the rule for the generation of the legal norms that primarily form the order of the state, the determination of the organs and of the procedure of legislation” (Kelsen, 2015a, p. 28). In contrast, a “constitution in the broad sense” may contain more content (Kelsen, 2015a, p. 28–19). The norms that go beyond the constitution in the material sense owe their specific legal status to the form in which they are established, and not to their specific content. In other words, the ‘creator of the constitution’ in the formal sense may decide that the fundamental law will contain other norms in addition to the necessary content (law-making bodies and procedures). Such a decision of the ‘creator of the constitution’ is of a political nature, since it refers to the most important issues determining the political system of the state. The content of the formal constitution restricts the legislator’s freedom in the sense that the political will of the legislator should at least not violate the norms established by the ‘creator of the constitution’ (see Vinx, 2007, p. 159–160). Thanks to the form of constitutional law, all the contents deemed important by the lawmaking authority gain stability and primacy over ordinary legislation (Kelsen, 2005, p. 222).

In the view of the author of “*Reine Rechtslehre*,” the law-making process consists in concretization. Higher-order norms are specified by lower-order norms. The constitution constitutes “the highest level of positive law” (Kelsen, 2005, p. 222). A purely material constitution would in principle not determine the content of laws, whereas a formal constitution influences the content of sub-constitutional norms. A constitution in this sense contains positive norms governing the creation of general and abstract legal norms, i.e. legislation (Kelsen, 2005, p. 222). It may be established by a specific act (written constitution) or by custom (unwritten constitution), or it may consist of both custom and a specific established act (Kelsen, 2005, p. 222). A constitution in the formal sense is a document defined as a ‘constitution,’ which contains ‘not only norms regulating the creation of general norms,’ but also other politically significant issues, and also defines the permissible conditions for amending the constitu-

tion (conditions more difficult than in the case of ordinary legislation). “The purpose of the regulations which render more difficult the abolition or amendment of the content of the constitution in a formal sense is primarily to stabilize the norm designated here as »material constitution« and which is the positive-legal basis of the entire national order” (Kelsen, 2005, p. 222). The formal constitution can be interpreted as stabilizing, firstly, the norms regulating law making (the norms of the material constitution), and secondly, the norms relevant from a political point of view. The norms of the constitution in the material sense refer to the most important (essential) function of the constitution, i.e. regulating legislation, whereas the norms contained in the concept of the formal constitution would be somewhat incidental: their particular weight and significance (e.g. of the adoption of a certain ‘package’ of constitutional principles or norms defining the position of the individual) would result from their political role (shaping the substantive identity of the political system), and not strictly legal. The political character of a constitution in the narrow and substantive sense is much weaker than in the broad and formal sense. However, a material constitution may also have political significance when it determines the democratic or autocratic method of lawmaking.⁵

4. SUBJECTIVE CONTENT AND OBJECTIVE VALIDITY

The enactment of a constitution would be, in its content, an entirely political act in the case of the ‘historically first constitution-maker,’ who would determine the form of the political system in an original and unconditioned manner. However, the effect of such an action would have to be seen as a lawmaking act: its content would be to establish generally binding norms governing the manner in which law is established.⁶ Each successive ‘creator of the constitution’ would already be functioning in some legal context, so his action would be, on the one hand, deciding on the content of the constitution (the political aspect), and on the other, applying the norms regulating the amendment, revision, or establishment of a new constitution (the legal aspect). From the point of view of the pure theory of law, every lawmaking initiative presupposes the application of some other norm: in the case of the ‘first constitution-maker’ it will be a hypo-

⁵ In Kelsen’s approach, the form of the state should be understood as “the method by which general legal norms are regulated through the constitution”, e.g. democratic or autocratic, see Kelsen, 2005, p. 279–280.

⁶ We confine ourselves above to the established and material constitution.

thetical basic norm, in the case of subsequent ‘constitution-makers’ it will be the norms regulating the constitutional activity of the relevant subjects.⁷ These norms function as a kind of ‘interpretative schemata.’ They make it possible to interpret decisions that are political in their content (in the case of constitutions relating to the state’s political system) as acts of lawmaking (see Kelsen, 2005, p. 3 et seq.). Thanks to them such decisions have the nature of acts of creating objectively valid norms, whose subjective content is derived from the decision of the ‘creator of the constitution’ (see Kelsen, 2005, p. 7–8).

The science of law (legal interpretation) refers to the constitution (both in the material and formal sense) precisely as a set of objectively valid norms, and thus perceives only the law-making effect of the action of the ‘creator of the constitution’: the establishment of objectively valid norms. Their specifically legal existence (validity, see Kelsen, 2005, p. 10) presupposes, that a certain political action can be interpreted in a legal manner. What is legally pre-determined is first of all the form of establishing, amending or revising the constitution as a law-making act, while the content of such an act results from premises of a political nature (the will of the founding subject). In legal interpretation the political nature is invisible, as it is directed at the procedure of law creation and its result, i.e. the content of the normative act. Referring to Kant’s epistemology, one can say that just as in scientific cognition the human mind transforms the subjectivity of empirical impressions into the objectivity of laws of nature (see Kant, 1998), so the political subjective content of the act of will is transformed into the legal form of law-making acts creating objectively valid norms. Legal ontology (a theory that explains validity as the existence of a norm) assumes that every act of enacting a particular norm occurs in the form provided by another norm, and is thus a specific way of interpreting certain actual actions (facts).⁸ In the case of establishing, revising or amending a constitution, legal interpretation is directed towards empirically perceivable acts of will (political actions), the legal sense of which is reduced to acts of lawmaking. The legal ontology of the constitution is conditioned by the existence of a specific political will that can act in the law-making mode: fulfil the formal and substantial prerequisites contained in the norms governing the establishment, amendment, or revision of the constitution.

The action of the ‘historically first constitution maker’ constitutes a law-making act only if it can be interpreted as an application of another norm.

⁷ On the function of the basic norm in relation to the legal legitimacy of the constitution see Alexy, 2002, p. 96–116.

⁸ On the ontological metaphors of Kelsen’s theory see Zalewska, 2018, p. 185–206.

However, in the purely theoretical case of the creation of the ‘historically first constitution,’ positive norms of a higher order are not yet in force. In such a case, is the validity of the norms of the ‘historically first constitution’ determined solely by political efficacy? Kelsen, of course, rejects such an interpretation by distinguishing the reason of validity from the condition of validity. The reason of validity is determined by the principle of legitimacy: legal norms are valid as long as “as they have not been invalidated in the way which the legal order itself determines” (Kelsen, 1949, p. 117). The above principle is a consequence of the thesis that the law itself regulates the forms of its creation, so the reason for the norm’s validity can only be another norm. The highest positive criterion for the legitimacy of a given system is the norms of a constitution, while logically the highest criterion is the basic norm of this system. The principle of legitimacy boils down to the question of whether a given norm was established in accordance with the norms governing its establishment. The action of the ‘historically first constitution-maker’ is a law-making act only if it can be interpreted as the application of the basic norm, i.e. the norm giving legislative authority to the said ‘first constitution-maker.’ The validity of this type of norm is assumed for cognitive purposes by the interpreter of the law (Kelsen, 2005, p. 201 et seq.). With the principle of legitimacy, Kelsen points to a specific formal property of a normative system considered abstractly, in isolation from social and political phenomena. However, this is not a complete and total abstraction, for the principle of legitimacy applies, not to all possible conceived legal orders, but to positive orders (established by acts of human will) and effective orders (affecting human behavior). “The principle of legitimacy is restricted by the principle of effectiveness” (Kelsen, 1949, p. 119). As Kelsen claims, “The basic norm is not an intellectual »construct« because [...] it is not »created« by juristic thinking, but *presupposed* in it” (Kelsen, 1965, p. 1148), making it possible to consider certain acts, not as the expression of a subjective will, but as the establishment of objectively valid norms.

5. EFFICACY OF THE CONSTITUTION AS A PRECONDITION

In concord with the efficacy principle, “every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole” (Kelsen, 1949, p. 119, see Cohen, 1978, p. 13). The principle of efficacy is a necessary condition of validity, but not its reason. Norms are not valid (binding) because they are effective, but they are so because they are established in the manner prescribed by the constitution of a particular system. However, a sys-

tem of law based on a constitution must as a whole be efficient. Thus, the question of the validity of the ‘historically first constitution’ depends on fulfilling the condition,⁹ that the norms of the system based on it actually regulate human behavior. Kelsen writes that “a norm is valid legal norm if (a) it has been created in a way provided for by the legal order to which it belongs, and (b) if it has not been annulled either in a way provided for by that legal order, or by way of desuetude, or by the fact that the legal order as a whole has lost its efficacy” (Kelsen, 1949, p. 120). The efficacy of the ‘historically first constitution’ cannot constitute the authorization of the ‘first constitution-maker,’ but it does condition a positive answer on this issue: the political will to establish the constitution would have to translate into human behavior (as authorities and as individuals). The fulfilment of this condition would enable the legal interpretation of certain actions as acts of making, applying, and observing the law.

Kelsen claims that a “constitution is »effective« if the norms created in conformity with it are by and large applied and obeyed” (Kelsen, 2005, p. 210). In other words, an efficient constitution directly influences the behavior of the organs (authorities) applying the constitution, and indirectly (through the “norms established in accordance with it”) influences the observance of the norms by the addressees.¹⁰ Thus, such a situation occurs if the conformity of the behavior of entities with the content of the norms established on the basis of the constitution can be ascertained. In such an approach, “A constitution *C* is efficacious if and only if the lower-level norms created in conformity with *C* are efficacious (i.e. by and large applied and obeyed)” (Navarro, 2013, p. 87). The above principle primarily refers to the constitution in the material sense, i.e. the norms authorizing certain entities to establish sub-constitutional general-abstract norms (legislation). It seems that also the constitution in the formal sense may be considered effective insofar as the legal order based on it is effective: the legal norms based on constitution *C* are applied and respected, thus *C* is effective. The condition of efficacy is therefore fulfilled when the sub-constitutional norms are effective. A consequence of such a position would be to recognize the irrelevance of the question of constitutional effectiveness, since it

⁹ In this case it is not a temporal relationship. “I call attention – writes Kelsen – to the fact that a legal norm becomes valid *before* it can be effective. A court has to apply only a valid statute. Hence if a court applies a statute immediately after it has been enacted by the legislator it applies legal norms which are *not yet* effective, which become effective by their application” (Kelsen, 1965, p. 1140; see Kelsen, 2015b, p. 67).

¹⁰ In Kelsen’s view, application *N* means establishing *NI* on its basis, while “law is observed by that behavior to whose opposite is attached the coercive act of sanction” (Kelsen, 2005, p. 236). On the concept of the effectiveness of the law see Burazin, 2017.

actually boils down to the effectiveness of sub-constitutional norms (Navarro, 2013, p. 88–90). A ‘historically first constitution’ would be effective if it constituted an effective legal order. So is the basic norm presumed in relation to an effective legal order or in relation to the ‘first constitution’? Kelsen states that the basic norm refers directly to a certain positive and effective constitution created by a certain act (by custom or by establishment), while indirectly it refers to the norms of the entire legal system established in accordance with it (Kelsen, 2010a, p. 1618). The function of the basic norm is directly to justify the objective validity of the constitution, and indirectly the objective validity of the norms of a given legal system. Therefore, the condition of effectiveness should be formulated differently: the constitution is effective when “in accordance with [it] laws and judicial decisions and administrative decisions are effectively issued” (Kelsen, 2010a, p. 1619). In other words, “A constitution *C* is efficacious if lower-level norms are created in conformity with it (i.e. by the organs and according to the procedures that *C* prescribes for norm-creation)” (Navarro, 2013, p. 91). In the case of a constitution in the formal sense, this conformity would relate not only to the legislative procedure but also to any content contained therein.

The legal order in the perception of the pure theory of law is a dynamic system of concretization running from the basic norm up to the individual concrete act of law application. In this sense, the creation of sub-constitutional norms is the application of the constitution. To the extent that legislation is an application of the constitution, the “idea of legality” is applicable to it, as “legality is nothing more than the relation of conformity in which the lower level of legal order stands to the higher” (Kelsen, 2015a, p. 24). The efficacy of a constitution would consist in the actual¹¹ conformity of constitutional and sub-constitutional norms (in terms of procedures and substance). However, Kelsen argues that any law enacted on the basis of a constitution *C* should be considered valid, and thus “as long as it is valid it cannot be unconstitutional” (Kelsen, 2005, p. 271). A consequence of such a position could be the claim that every act of a legislative body is constitutional regardless of whether it corresponds to the content of *C* in procedural and substantive aspects. If constitution *C* authorized body *AI* to enact directly sub-constitutional norms, while it did not provide for the operation of any other body with the power to derogate from acts enacted by *AI*, then in essence *AI* itself could decide on the constitutionality of the norms it enacts (Kelsen, 2005, p. 273; see Tarnowska, Włoch, 2019, p. 277–298). In such a case, every act of *AI* would be constitutional, and thus constitution *C* would

¹¹ In a factual sense, based on an empirically verifiable statement.

be effective in every case (Navarro, 2013, p. 94), i.e. even if the sub-constitutional acts did not correspond to its content. In such a view, the problem of constitutional efficacy is reduced to the efficacy of legislation, and the question of the content conformity of constitutional norms with legislative norms would be completely irrelevant. Thus, any act of *AI*'s will expressed in the form of a legislative act, which would effectively regulate the behavior of the addressees, would be authorized by constitution *C*.

The condition of effectiveness of a constitution would be met if the question of the compatibility of the constitutional and legislative degrees of legal order were not irrelevant. An effective constitution would have to contain institutional measures to ensure the "guarantee of the legality of the levels of law that stand immediately below the constitution" (Kelsen, 2015a, p. 25). As regards the compatibility in substance of acts of different levels, this criterion would mean "the annullability of a legally defective act", and thus "the possibility of removing it, together with its legal effects" (Kelsen, 2015a, p. 39). The guarantee of constitutionality would consist in the fact that constitution *C* establishes a body *A2*, which would have the power to annul the legislative acts of *AI*, while the criterion for such derogation would be the procedural or substantive compliance of the acts enacted by *AI* with *C*. In other words, the effectiveness of the constitution can be recognized only if, within the framework of the legal order, the legal possibilities of challenging the constitutionality of a legislative act and its elimination from that order operate. This presupposes both the effectiveness of the legislative acts of *AI* and the invalidating decisions of *A2*. According to Kelsen, "As long as a constitution lacks the guarantee [...] of the annullability of unconstitutional acts, it also lacks the character of full legal bindingness in the technical sense" (Kelsen, 2015a, p. 69). Effectiveness is a condition for the validity of the constitution, and the constitution is effective when it is possible to invalidate an act contrary to it. This in turn means that within a given legal order there functions an effective system of guarantees of constitutionality (Kelsen, 2005, p. 276). And so, that the nullifying act issued by *A2* affects both the action of the body *AI* and the whole system of the application of law. Ultimately, the problem boils down to whether the will of the 'maker of constitution' *C* will influence the legislative activity of *AI*, or whether the will of *AI* will prevail over that of the 'maker of the constitution.' The establishment of *A2*'s authority would reinforce the will of the 'constitution maker' expressed in *C*. Thus, if *AI*'s acts are invalidated on the grounds of incompliance with *C*, a basic norm can be assumed against *C* and interpreted as authorizing *C*. If *AI*'s acts could not be invalidated, then its will would constitute the constitution (subject to the condition of the effectiveness of *AI*'s acts).

6. A TWO-FOLDED ONTOLOGY OF THE CONSTITUTION

In a general perspective, the effectiveness of the constitution is based on the will of the bodies to act in accordance with the content of the constitution (primarily the legislature – *A1*), and in a strict sense on the will of the body with the power to annul unconstitutional acts (*A2*) (see Kelsen, 2010b, p. 777–778). The decision to comply with *C* would be of a political nature in the sense that it would be a real will to act in the way that the will of the ‘constitution maker’ dictates. The science of law may capture the meaning of the act of will of the constitution maker as the establishment of objectively valid norms on condition that unconstitutional acts of lawmakers are annulled by *A2*, which in essence consists in the recognition of such annulment by other bodies (in particular *A1*). The ontology of the constitution would thus be two-fold: first, its real establishment and efficacy is based initially on the will of the constitution-maker and on the will of the entities applying the constitution (the condition of validity); second, its objective validity presupposes that the constitution-maker has normative authorization to establish it (the reason of validity). The first aspect can be described as political and the second as strictly legal. Thus, if the condition (not the reason) of *C*’s objective validity is its effectiveness, then it can be said that its legal existence is conditioned by the political will to establish it by the creator of the constitution and to apply it by the authorities (primarily *A1* and *A2*).

According to the theory outlined above, the effectiveness of the constitution is based on the attitudes of those acting as *A1* and *A2* authorities. The science of law can study the content of *C* and the law-making acts of *A1*, as well as the nullifying acts of *A2*. The action of *A1* and *A2* can be considered as a consequence of their interpretation of *C*. In the case of a generally shared consensus on the interpretation of *C*, the effectiveness of *C* would consist in *A2* removing the consequences of the misinterpretation made by *A1*. In the alternative case, where a deep dispute arises as to the interpretation of *C*, the adoption of the interpretation of *A1* or *A2* would not be determined by the substantive correspondence between *C* and the action of those bodies, but by the effect of the acts of *A1* and *A2* on the action of other bodies in that legal system, e.g. the *A_{jd}* bodies issuing judgments or decisions. Suppose that authority *A1* has established norm *NI*, which *A2* has annulled by a corresponding act. If *A_{jd}* behave in accordance with *A2*’s decision, it can be assumed that *C* in *A2*’s interpretation applies, whereas if *A_{jd}* apply *NI*, it can be assumed that *C* in *A1*’s interpretation

applies.¹² The question arises as to whether in such a situation, according to the condition of effectiveness, legal science must accept the interpretation made by *A1* or *A2* depending on how *Ajd* behaves? The assertion of the efficacy of either interpretation can be regarded as a statement of facts on which the legal description of an objectively valid law depends. It can therefore be argued that a legal researcher remains impartial when, irrespective of his or her personal beliefs, he or she concludes that one interpretation rather than another is effective and adjusts his or her description accordingly. This description, however, would be a consequence of the strength of a particular political will determining which of the competing interpretations was successful. On the other hand, from the perspective of a pure theory of law, any criticism of the effective interpretation of *C* by an authority *A1* or *A2* as being in fact incompatible with the content of *C* would not be so much an description of objective law as practising criticism of the activity of the authorities, which can be said to be just another interpretation of *C*.¹³ In the case of legal criticism, the researcher cannot invoke some objectively verifiable fact, as is the case with the researcher who bases his interpretation on the assertion of the effectiveness of a given norm. The critical researcher may invoke the content of the constitution; however, his/her stance may be considered political in the sense that it expresses a certain way of reading *C* which is a consequence of his/her research and axiological stance, e.g. the recognition of the values encoded in *C* norms and the necessity to defend them in the case of the establishment of acts that are content-wise incompatible with *C*. The adoption of the condition of effectiveness therefore has a twofold effect: from the perspective of the organs it means that, in fact, each of their actions has a political and constitutional component; from the perspective of the science of law it means that either it will only describe an effective interpretation of the constitution, which means making the description conditional on acts of political will, or it will criticize the constitutional practice of the organs in view of the principles and values expressed in *C*, which, however, can be read as a polit-

¹² P. E. Navarro considers that Kelsen's theory of efficacy is not satisfactory in that it leads to the claim that *C* is always effective, so that the condition of the efficacy of *C* would be irrelevant (cf. Navarro, 2013, p. 94). However, the theoretical possibility of an institutional dispute between the bodies *A1* and *A2* means that the efficacy of *C* need not always be an irrelevant issue and irrelevant to the functioning of the legal order.

¹³ Kelsen writes that "there is no criterion by which one possibility within the frame [of positive law] is preferable to another. There simply is no method (that can be characterized as a method of positive law), by which only one of several meanings of a norm may gain the distinction of being the only »correct« one – provided, of course, that several possible interpretations are available" (Kelsen, 2005, p. 352).

ical interpretation of *C*. Taking the position of epistemological purity (focusing on the description of a binding and effective law), the science of law, on the one hand, provides knowledge about law (see Alexy, 2002, p. 112), but on the other hand, it fulfills an indirect political function, because it stabilizes a given political status quo. If it goes beyond the purely descriptive function and criticizes certain actions of organs as inconsistent with the constitution, then when evaluating given behaviors, it becomes directly entangled in political discourse. The political aspect of the ontology of the constitution causes that, either indirectly (as a description) or directly (as a critique), the science of law will have political significance: in stabilizing the political system or in assessing the constitutionality of certain political activities.

The two-folded nature of the ontology of the constitution is therefore not reduced to the principle of legitimacy. Of course, Kelsen argues that the specific existence of the constitution consists in its validity (see Kelsen, 1949, p. 117 et seq.). However, existence (validity) concerns a particular constitution *C*. Ontology is a theory of the existence of every constitution and concerns every *C*.¹⁴ The ontology of *C* is twofold, for it consists of two elements: the principle of efficacy as a condition and the principle of legitimacy as the reason of validity. Thus, if we associate the principle of efficacy with political will, we condition the existence of *C* with it at the ontological level. This two-foldedness is particularly evident in the case of revolution as discussed by Kelsen. From the point of view of pure legal theory, revolution is the undermining of the existence of “the entire legal order directly based on the constitution” (Kelsen, 2005, p. 208; see Kelsen, 1949, p.117 et seq.). It implies a revision or replacement of the hitherto existing constitution *C* in a manner not envisaged by *C*. The effect of a revolution is not only to establish a new constitution *Cr*, but also a new legal order (Kelsen, 1949, p. 118). However, the act of revolution itself (from the perspective of Kelsen’s theory, it does not matter in what form it occurs) is an event that has no legal legitimacy, for it does not so much transcend the existing legal order as actually destroy it and create a new one. Constitution *C* ceases to be in force and *Cr* begins. On what basis can it be assumed that *C* ceases to be valid and *Cr* becomes objectively binding law? In other words, what makes the act of revolution interpreted as an act of establishing *Cr*? The answer is as follows: the factual state of affairs to which the basic norm authorizing the establishment of a constitution by a given actor refers has changed. The new political reality no

¹⁴ We make a general reference above to the distinction between ontic (it concerns a specific being) and ontological (concerns the theoretical considerations of the meaning of being), see Heidegger, 2010.

longer corresponds to an order based on *C* (Kelsen, 1949, p. 118), and consequently the creation and application of norms no longer takes place on the basis of *C*, but on the basis of *Cr*. The result of a successful revolution is a new political reality in which bodies act in a manner regulated by the *Cr*, and therefore it is the *Cr* that fulfils the condition of effectiveness that makes it possible to establish its objective validity.

Ultimately, it is the behavior of the organs that determines the effectiveness of *C* or *Cr*, since the underlying norm applies, not to an arbitrarily conceived legal order, but “only to a constitution which is actually established by legislative act or custom, and is effective” (Kelsen, 2005, p. 210). The ontological condition for the existence of a constitution is effectiveness, which in the case of constitutional acts is intrinsically political in nature. The content of the constitution depends on the actual existence of a certain political will whose activity can be interpreted (assuming the validity of the basic norm) as a law-making act. However, for such a legal interpretation of the political will to be possible, it is necessary that the condition of effectiveness be fulfilled: the political will must be translated into the activity of the organs which, on its basis, create, apply and enforce legal norms (see Harris, 1971, p. 119 et seq.).

The ontology of the constitution developed in the paradigm of the pure theory of law is purely formal in the sense that it does not link the existence of the constitution (objective validity) with purely content-related (material) criteria. Giving an answer to the question of the objective validity of the constitution *Cr3* depends on the fulfilment of the condition of effectiveness and the indication of the normative basis for the establishment of *Cr3*. Such norms determining the amendment or establishment of a new constitution could be found in *Cr2*, while the validity of *Cr2* would be based on *Cr*, which was an effective act of the ‘historically first constitution maker.’ “That the first constitution – writes Kelsen – is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order” (Kelsen, 1949, p. 115). However, the political content expressed in *Cr3* may be very (or even completely) different from the revolutionary content of *Cr*.¹⁵ The basic norm assumed as the reason for the validity of the legal order constituted by the ‘first maker of the constitution’ is of a purely formal nature: it legitimizes the entity establishing the constitution, provided, however, that the fact of establishment is connected with the effective ‘implementation’ of its provisions. The basic norm is an abstract norm

¹⁵ A revolutionary amendment of the constitution need not entail a complete rejection of the law hitherto in force; however, if it is to be seen as valid, it must be given effect on the basis of *Cr* (see Kelsen, 2005, p. 209–210).

applicable to the various facts of constitutional creation (Alexy, 2005, p. 348–350). “This norm – says Kelsen – is the reason for the validity of the Constitution and hence the basic norm of the legal order established in conformity with the Constitution. It is a norm presupposed in our juristic thinking; it cannot be a norm created by the act of will of a definite individual” (Kelsen, 1959, p. 108–109). The basic norm is assumed by the researcher who interprets and describes the norms of a given constitution (or other norms of the legal order based on it) (see Raz, 1998, p. 63). However, this is not done in an entirely arbitrary manner, since it may refer only to an effective constitution. The content of this constitution may be arbitrary, in the sense that it depends on the act of will of the ‘creator of the constitution.’ The basic norm may be “the reason of the validity of a democratic as well as of an autocratic law, of a capitalistic as well as of a socialistic law, of any positive law, whether considered to be just or unjust” (Kelsen, 1959, p. 110). It represents a normative ‘starting point’ in the development of a given legal order, without predetermining its content. In other words, it is not so much that the basic norm would be changed during the revolution discussed above, but that the political circumstances to which it can be applied would have changed. Ultimately, it is the practice of law-making and law-applying bodies that determines whether legal science will describe *C* or *Cr* as an objectively valid constitution. Thus, within the framework of pure legal theory, political will conditions the legal interpretation and existence of the constitution.

7. CONCLUSIONS

The orientation of pure legal theory towards the description of objectively valid law makes it address only verifiable issues: the authority *AI* has established the norm *NI*, which is applied by the corresponding authorities. With such an attitude, the political ceases to be visible to this theory, but only on an epistemological level. The principle of efficiency is the condition that makes the existence of norms dependent on the acts of will of the establishing and applying bodies. The political (or political function) is a necessary element of the ontology of the legal order that can be subjected to cognitive acts by the science of law. The ontology of the constitution is conditioned by the political will of the ‘creator of the constitution’ and the bodies directly applying its provisions. It can be said that the inclusion by pure theory of law of the political at the ontological level is concomitant with its complete removal from the epistemological field: legal cognition refers exclusively to the sense of the norms of an effective

and objectively valid constitution. However, the consequence of such a cleansing of the cognitive field is, firstly, the dependence of the description on the condition of efficacy, i.e. ultimately on the acts of will of the subjects performing the functions of state organs, and, secondly, the ‘defencelessness’ in the event that the legal researcher finds a content incompatibility between the constitution and the acts of its application. In the case of a political conflict involving the interpretation of the constitution, the researcher can either wait patiently to see which interpretation prevails, or abandon the perspective of objective description in favour of a critical and engaged interpretation. Ultimately, this will be a moral and political decision for the researcher.

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