

Legal Imaginaries of Crisis and Fear

Dark Constitutionalism

Edited by Martin Below

First published 2026

ISBN: 978-1-041-16571-2 (hbk)

ISBN: 978-1-041-16575-0 (pbk)

ISBN: 978-1-003-68530-2 (ebk)

Chapter 1

The Concept of Dark Constitutionalism

Martin Below

(CC-BY-NC-ND) 4.0

DOI: 10.4324/9781003685302-3

The Concept of Dark Constitutionalism¹

Martin Below

1. Introduction

The aim of this chapter is to provide an outline of the main features of dark constitutionalism. It will set the theoretical framework of this innovative concept that enables combined socio-legal, constitutional anthropological, and constitutional semiotic research of negative affective attitudes and negative emotions in constitution, constitutionalism, and constitutional law. It outlines the concept of dark constitutionalism as a socio-legal, semiotic, and semantic paradigm for exploring the role of negative emotions on constitutionalism as broader phenomenon having rational, emotional, and imaginary as well as textual, performative, and socio-legal dimensions. The core of dark constitutionalism and its key semiotic signifier is constitutional darkness. It spreads from the constitutional past through the constitutional present to the constitutional future. Thus, dark constitutionalism and constitutional darkness shall be explored in their ontological, axiological, teleological, and pragmatic interrelatedness.

Hence, this chapter explores dark constitutionalism as a paradigm for shaping dark constitutional imaginaries through dark constitutional politics on the basis of dark constitutional anthropology. It starts with an explanation of why dark constitutionalism is a relational and multilayered concept. It shows that dark constitutionalism is both constitutionalism and anti-constitutionalism. It is anti-constitutional in its value core and the fact that it serves as an instrument of dark constitutional politics. It is constitutionalism with a view to its claim to organise constitutional order and disorder on the basis of a specific normative, emotional, and symbolic-imaginary scheme. The chapter provides structural, functional, ontological, axiological, and volitional perspectives on dark constitutionalism. It outlines the three possible meanings of dark constitutionalism and the semantic variety of constitutional darkness.

1 This chapter is produced as part of and funded by the European Union-NextGenerationEU, through the National Recovery and Resilience Plan of the Republic of Bulgaria, project No. bg-rrp-2.004-0008.

The chapter aims at problematising the tension between constitutional darkness and constitutional light, between dark constitutionalism and the mainstream optimistic, rationalist, and progressive version of constitutional history. It will show that dark imaginaries, emotions, and durable affective attitudes are ever-present features of constitutionalism that are drawing important patterns in constitutional history, but also have their peaks in situations of crisis and emergency. These peaks of non-normalcy, when constitutional darkness is especially dense and intense, produce durable impact on constitutional future as pragmatic and normative, but also as emotional and symbolic-imaginary formants of path dependencies.

I will demonstrate that dark constitutionalism is both ever-present in constitutional history. It is the grey imminence of affective and emotional constitutionalism, with negative emotions producing a transtemporal unfolding of constitutional darkness. Dark constitutionalism also has its historical boosts when it rises as part of a plan for the deliberate promotion of fear, hate, anger, and despair in times of crisis, emergency, and transition. Hence, it is a simultaneously permanent component of the spiral of constitutional time and an extraordinary fact in historic moments deeply marked by dark constitutional politics. The chapter will demonstrate that apart from this long-lasting and imminent quasi-objective presence, dark constitutionalism and constitutional darkness are promoted through dark constitutional politics. Thus, dark constitutional politics can create moments, tendencies, and phases of history when constitutional darkness prevails. These are usually times of crisis and emergency. Hence, dark constitutionalism is especially relevant in the currently ongoing constitutional polycrisis and constitutional polytransition. These are situations when the distinction line between constitutional emergency and constitutional normalcy is in the process of deconstruction and shifting.

The traditional perception of constitutionalism is one of rationality, progress, and permanent improvement. Such a paradigm can be broadly defined as constitutionalism of (en)light(en)ment). This type of constitutionalism is capable of reforming the world according to a rational plan. Constitutionalism, and especially its core – the constitution – and its institutional dimension, which is provided by valid constitutional law, are perceived as universal tools for modernisation via rationalisation, systematisation, and textualisation. Modernisation, based on the rationalist project of Western Modernity, appears as an ongoing, quasi-natural, semi-permanent process of social, political, and legal reform inevitably producing improvement and ultimately also enlightenment. Systematisation is part of the overall rationalist project of Modernity, which culminates in the codification movement. Textualisation creates the belief in the objectivity of the constitutional text, the climax of which is the strong belief that the people acquire constitutional information through reading constitutional texts. The signifier of this rationalist-textual utopia is the presumption, which is actually a fiction, that is expressed in the Latin sententia *ignoratio legis neminem excusat* ('the lack of knowledge of law does not

excuse'). Enlightenment produces a new world order that is making order out of disorder and brings imminent progress to humanity.

Taken altogether, these processes amount to a set of jointly related normative ideologies of constitutional Modernity. In contrast to their claim of pure rationality and full objectivity, they are elements of the factory for the production of symbols, imaginaries, and beliefs which lead to what G. Frankenberg defines as 'constitutionalism between magic and deceit'.² They are part of the 'constitutional make-believe'³ of rationalist Western Modernity. They result in the rationalist and textual entrapment of constitutional Modernity.

Constitutionalism as a rationalist project of Western Modernity is conceived as a 'work in progress' that frequently undergoes turbulence and reconsideration. However, according to the predominant understanding, crises are temporal and produce new stages of improvement in constitutional design and constitutional performance. Hence, phases of darkness, twilight, and decay are an inevitable part of the spiral of constitutional time. They are cyclic events in the space-time continuum, but sooner or later, they are replaced by phases of enlightenment, progress, and prosperity. Hence, according to that hypothesis, constitutional darkness as a holistic phenomenon or the negative objective phenomena to which it is related, such as the crisis in specific policy domains (e.g. financial crisis, migration crisis, wars, pandemics, etc.), has its ups and downs, its positive and negative phases, both of which are inevitable, but also temporary.

This conceptual matrix is based on the logic that constitutional Modernity, which started approximately at the end of the 18th century with the American and French Revolutions (notwithstanding previous phases of pre-constitutionalism, e.g. in England), and lasted until recently, is doomed to imminent ultimate success. The process of gaining constitutional wisdom is based on the logic of constitutionalism as 'invented tradition'⁴ and 'imposed reformist movement' of Western Modernity. It comprises the elitist-driven and popularly supported movement from 'darkness' to 'light' via 'Enlightenment', from chaos to order, from habits and social conventions to constitutional text as '*ratio scripta*' ('written reason') and to constitutional law as a system of codified rules.

The history of constitutionalism during the 'long 19th century'⁵ is typically interpreted as a gradual but steady process of deconstruction of the '*ancien*

2 Gunter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar 2018) 63–66.

3 See K Walton, *Mimesis as Make-Believe, On the Foundations of Representational Arts* (Harvard University Press 1993) 1–480; Cornelius Castoriadis, *The Imaginary Institution of Society* (Polity Press 1987) 160–165.

4 For the concept of 'invented tradition', see Eric Hobsbawm and Terence Ranger (eds) *The Invention of Tradition* (Cambridge University Press 2012) 1–324.

5 See Eric Hobsbawm, *The Age of Revolution: 1789–1848* (Vintage 1996) 1–368.

régime’ with its traditional order based on pre-modern forms of authority and the promotion of forms of enlightened statehood capable of sustaining more democratic regimes. The deep crisis of representative democracy in the inter-war period of the 20th century is believed by the mainstream theory of parliamentarism, constitutional democracy, and democratisation to have made the Western constitutional orders immune to authoritarianism in the post-World War II phase of constitutional development. This has been achieved via the so-called rationalisation of parliamentarism and representative democracy.⁶ After the fall of the Berlin Wall and the demise of many authoritarian regimes, the tendencies towards liberal democratic ‘end of history’ *a la* Fukuyama⁷ seemed to be triumphant. Thus, rationalised parliamentarism and neo-constitutionalism⁸ seem to have framed the durable patterns of constitutionalism of light, progress, and rationalism at the end of the history, producing a logic of irreversibility of democracy and the rule of law.

To sum up, the optimistic version of constitutional history based on the belief in the inevitability of constitutionalism of light rests upon three main narratives (resulting in correspondent constitutional imaginaries) for the emergence, development, and essence of the constitution, constitutionalism, and constitutional law. These are the permanent progress narrative, the restoration of a ‘golden age’ narrative, and the rationalist narrative. The permanent progress narrative suggests that the spiral of history goes through crises, but crisis can be overcome; progress is stable (until the next crisis), and emergency is never a normalcy. The restoration of the ‘golden age’ narrative is of pivotal importance for contemporary constitutionalism as invented tradition. According to it, there are some eternal principles that have been formed in the previous phases of human development and just need to be restored in order to achieve constitutional perfection. The rationalist narrative has been described above.

This optimistic interpretation of permanent gradual improvement and positive constitutional development has reached its limits in the first decades of the 21st century, when democratic backsliding, the crisis of rule of law,⁹ and representative democracy are in flux but especially the multitude of crises and transitions which I define elsewhere as constitutional polycrisis and constitutional

6 See Georgi Bliznashki, *Principles of Parliamentary Government* (University of Sofia ‘St. Kliment Ohridski’ Press 2010) 1–262 (in Bulgarian).

7 See Francis Fukuyama, *The End of History and the Last Man* (Free Press 2006) 1–464.

8 See Joseph Weiler, ‘European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order’ (1996) 44(3) *Political Studies* 517–533; Evgeni Tanchev, ‘Parliamentarism Rationalized’ (1993) 33(2) *E. Eur. Const. Rev.* 33 and the following.

9 See Martin Belov (ed), *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 1–280.

polytransition,¹⁰ have gained momentum. The current socio-political and collective imaginary context produces a situation where positive expectations for the development of constitutional civilisation clearly give way to increasingly pessimistic versions of a constitutional future.

Thus, the question arises whether we are facing just the next turbulent period in the history of constitutionalism and democracy or whether this is a major shift that leads to a new constitutional civilisation based on different institutional and intellectual codes, pillars, structures, and markers. Even more importantly, the negative phenomena related to crisis, emergency, and transition that have been unfolding since the beginning of the 21st century have the potential to push us out of the ‘zone of constitutional comfort’. They raise the question of whether negative emotions, stimuli, and affects shaped as constitutional imaginaries of crisis, fear, and emergency have not been always present in our constitutional orders and constitutional anthropologies.

Hence, it appears reasonable to try to deconstruct the traditional narrative of permanent progress and enlightenment in order to explore whether constitutional darkness, as semiotic signifier of dark emotions and feelings in constitutional law and constitutionalism, has not been an imminent threat in the constitutional past, constitutional present, and constitutional future. It seems that the time has come for exploring dark constitutionalism and its components, such as dark constitutional memories, dark constitutional emotions, dark constitutional politics, and dark constitutionalism.

My claim here is that constitutionalism has always had its dark side. Constitutional darkness has been largely underestimated. It has been tackled as a functional and temporary phenomenon that comes and goes with the quasi-natural cycles of constitutional history. Dark constitutional emotions and dark constitutional imaginaries have been overshadowed by the predominant optimistic and rational discourse predominated by theories of legal positivism, legal institutionalism, and legal realism. However, the current age of constitutional polycrisis and constitutional polytransition is the perfect context to start explaining and exploring dark constitutionalism from emotional, semiotic, anthropological, and especially from a symbolic-imaginary perspective. This is particularly true after the emotional turn in social sciences and humanities that is currently ongoing, although with a delay, also in constitutional theory.

10 See Martin Belov, ‘The Conceptual Shapes of Constitutional Polycrisis: Deconstruction, Asymmetries and Post-Modern Anxieties of Constitutional Normalcy’ (2023) 70 *Irish Jurist*, special issue Law in a Time of Crisis, 393–410; Martin Belov, ‘Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent’ (2023) 3 *Diritto pubblico comparato ed europeo* 875–884; and Martin Belov, ‘Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?’ in Martin Belov (ed) *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 21–47.

2. Dark Constitutionalism as Relational and Multilayered Concept

Dark constitutionalism is proposed here as a fundamental framing socio-legal concept for the analysis of constitutional and constitutionally relevant negative emotions, feelings, anthropological predispositions, and durable affective attitudes. It is a concept that is imminently and intrinsically bound to both emotional and symbolic-imaginary constitutionalism. It is promoted, sustained, and represented through the means of textual, visual, and performative constitutionalism.¹¹ Hence, the concept of dark constitutionalism is the signifier of a complex phenomenon with normative, performative, and imaginary dimensions. It is used for strategic and tactical mastery of constitutional imaginaries stretching from dark constitutional memories of the past through constitutional experiences of the present related to negative emotions and dark constitutional politics up to negative and dark constitutional expectations of the future, some of which may result in dark constitutional utopias. Hence, dark constitutionalism is shaping dark emotional and symbolic-imaginary constitutional semiotic landscapes.¹²

Thus, dark constitutionalism is simultaneously linked to the epistemology of constitutional and constitutionally relevant feelings, constitutional anthropology, and constitutional semiotics. This is due to the fact that it is loaded with both constitutional and constitutionally relevant emotions and with constitutional imaginaries. Constitutional emotions are expressions of durable anthropologically entrenched attitudes, but can also be a reflection of emotional push-up events stemming from emotional constitutional politics. Constitutional imaginaries typically represent normative ideologies, myths, mythologies, taboos, and utopias which, in the case of dark constitutionalism, are related to constitutional darkness.

Dark constitutionalism is a concept that is stretched between the collective constitutional conscious, subconscious, and unconscious. It spreads between the legal, socio-legal, and symbolic-imaginary dimensions of constitutionalism. In that regard, dark constitutionalism is clearly a multilayered and relational concept and a composite constitutional phenomenon. It is at the crossroad of the normative, the real, and the imaginary discourses of constitutionalism.

Dark constitutionalism is proposed here as a new concept at the crossroad of constitutional epistemology, constitutional semiotics, and constitutional anthropology. It is a legal, socio-legal, and constitutional imaginary framework of constitutional darkness as both a holistic and composite category. It includes the structures of constitutional evil, its socio-legal performance, its

11 See Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 1–349.

12 Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 1–349.

political (mis)use, and its impact on the constitution, constitutional law, and constitutionalism. Dark constitutionalism comprises a set of instruments for the accomplishment of constitutional policy for the promotion of dark emotions. The toolkit of dark constitutionalism includes strategies, tactics, and pragmatic trajectories of symbolic and imaginary predetermined implementation of constitutional design.

Hence, dark constitutionalism is both an independent concept and a relational concept. It has its own reasons for existence, including specific ontology, axiology, teleology, and pragmatics that shall be explored below. Simultaneously, it is also stretched between and powered by other forms of constitutionalism. These are mostly emotional constitutionalism,¹³ symbolic-imaginary constitutionalism,¹⁴ and emergency constitutionalism.¹⁵ Dark constitutionalism frames negative emotions and is thus related to emotional constitutionalism. It signifies dark constitutional imaginaries in a dynamic and policy-related way, thus being bound to symbolic-imaginary constitutionalism. The crisis – especially the constitutional polycrisis – is the most appropriate context for the development, spread, and maintenance of negative emotions and dark imaginaries. This creates a link (although not imminent, permanent, and necessary) between dark constitutionalism and emergency constitutionalism as a mechanism for dealing with crisis and, hence, for crisis management. In that regard, dark constitutionalism is a result of emotions and imaginaries, but also of policies and politics. It is a tool for understanding and conceptual framing of constitutional imagination and at the same time also of constitutional pragmatics.

The peculiarity of dark constitutionalism is that it is a less institutional and institutionalised phenomenon. It has structural importance for constitutional anthropology but otherwise is mostly a functional phenomenon shaping dark symbolic-imaginary landscapes. It is dependent on a dynamic

13 See A Sajo, 'Emotions in Constitutional Institutions' (2016) 8(1) *Emotion Review* 44–49; A Sajo, 'Emotions in Constitutional Design' (2010) 8(3) *I•CON* 354–384; S Bandes, J Madeira, K Temple, E Kidd White (eds) *Research Handbook on Law and Emotion* (Edward Elgar 2021) 1–640; A Amaya and M Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020) 1–275; and J Lachs, 'Law and the Importance of Feelings', in R Kevelson (ed), *Law and Semiotics*, Vol. 2 (Plenum Press 1988) 221–229.

14 See Martin Below, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 107–197.

15 Martin Below, 'The Conceptual Shapes of Constitutional Polycrisis: Deconstruction, Asymmetries and Post-Modern Anxieties of Constitutional Normalcy' (2023) 70 *Irish Jurist*, special issue Law in a Time of Crisis 393–410; Martin Below, 'Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent' (2023) 3 *Diritto pubblico comparato ed europeo* 875–884; and Martin Below, 'Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?' in Martin Below (ed) *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 21–47.

determinant such as dark constitutional politics and results in constitutional imaginaries and anthropological affectual tendencies, constellations, and predispositions. Hence, dark constitutionalism is more the result of dark constitutional politics, dynamic signification of dark constitutional meaning, and negative emotional constitutionalism rather than a highly institutionalised form of constitutionalism with separate and distinguishable institutional design concerning human rights and state institutions. However, this does not deprive it of specific and significant constitutional importance as a relatively coherent concept comprising a variety of schemes for the promotion of constitutional darkness. Moreover, it acquires structural embeddedness in the collective constitutional imaginaries. This happens either via formative emergencies and extraordinary situations (push-up events of constitutional darkness) or through systematic and evolutionary patterns of its shaping. Both options (methods and practices) produce its inclusion in dark constitutional anthropology. Consequently, the structural importance of dark constitutionalism stems from its socio-legal institutionalisation rather than its provision in written constitutional law.

To sum up, dark constitutionalism is a relational concept. This is because it is embedded in a network of meanings, produced and sustained through a mix of reason and emotions, and shaped via a range of concepts. Some of these concepts, such as constitutional darkness, dark constitutional politics, and dark constitutional anthropology, have paradigmatic importance. Others, e.g. emergency constitutionalism, constitutional polycrisis, constitutional non-normalcy, unconstitutional normalcy, and unconstitutional non-normalcy, produce framing perspectives for the proper understanding of the shapes, forms, manifestations, and performance of constitutional evil. Thus, dark constitutionalism can be properly understood in the context of this conceptual network that looks at constitutional darkness, constitutional evil, and constitutional non-normalcy from different perspectives. These concepts will be briefly outlined in part 6 of this chapter.

Moreover, dark constitutionalism is a multidimensional concept. Its multidimensionality consists in the various meanings it may acquire, but also in the static and dynamic aspects it possesses and in its composite character. In other words, dark constitutionalism is a bulky phenomenon that can be adequately conceptualised only if using a multidimensional raster and interdisciplinary methodology – legal and socio-legal (semiotic, semantic, and anthropological). This is also due to the fact that dark constitutionalism is an emotionally loaded phenomenon based on symbolism and imaginaries which should be signified through the means of dark constitutional semiotics. The result is the encoding of forms of dark symbolic-imaginary constitutionalism through textual, performative, and visual means.

Dark constitutionalism as a theory and conceptual paradigm, and constitutional darkness as its object, core content, and semiotic signifier, should be explored in both static and dynamic aspects. Here, I am focusing on dark

constitutionalism, but the analysis is relevant with certain adjustments also for constitutional darkness.

The static and dynamic aspects are mutually intertwined. The static aspect can also be defined as the structural-institutional aspect, while the dynamic aspect relates to dark constitutional politics. It serves as a source that powers the dynamic aspect, gives it content, and is the point of departure for the development and unfolding of the dynamic aspect. Conversely, the constitutional design of constitutional darkness and constitutional evil is also a result of the dark constitutional politics that constitute the dynamic aspect of dark constitutionalism.

The static aspect includes the constitutional and constitutionally relevant structures of constitutionalism of fear, anger, hate, frustration, and despair. Hence, it is a structural phenomenon (with the qualifications and modalities explained above) that can be either fully or partially legally provided or institutionalised in the socio-legal realm. In that regard, special attention must be devoted to the structures and institutions of constitutional darkness provided by valid law, practised in the constitutionally relevant socio-political interactions and relations, and signified, symbolised, and collectively imagined as part of dark constitutional imaginaries.

The dynamic aspect of dark constitutionalism encompasses the constitutional politics related to these negative emotions. This is the dark constitutional politics which includes constitutional (and unconstitutional) politics of fear, rage, anger, frustration, hate, despair, and other negative emotions.

Dark constitutionalism, as already mentioned, is a bulky concept. It includes negative emotions embedded in constitutional text and texture, practiced, signified, and imagined in a range of constitutional discourses – performative, visual, textual, official, semi-official or non-official, and promoted by emotional agenda setters. The role of an emotional agenda setter can be performed by individuals, groups, or structural entities having the status of constitutional and political institutions (e.g. media, political parties, pressure groups, lobbies, religious denominations, etc.). Hence, dark constitutionalism is stretched between the policy fields of law, religion (in the broadest sense), ethics, social psychology, and politics. It is a policy tool, but also an ideological device, a mechanism for constitutional policymaking and, last but not least, an instrumental toolkit for emotional control and management of constitutionally relevant feelings, affectual attitudes, and imaginaries.

In that regard, dark constitutionalism is a bridge between symbolic-imaginary and emotional constitutionalism. It is a phenomenon that is relevant for both constitutional semiotics and constitutional anthropology, notwithstanding its importance for constitutional politics and constitutional ideology implied in both discourses – semiotic and anthropological. Dark constitutionalism is a complex epistemic phenomenon that has to be explored also through the means of constitutional semiotics, semantics, and epistemology. In that regard, dark constitutionalism does not include only dark content explicitly

provided by textual constitutionalism in general and the constitutional text in particular. It also encompasses other forms of dark constitutionally relevant content expressed through news, film, art, architecture, performance, and all other means of visual and performative constitutionalism.¹⁶

3. Dark Constitutionalism – Constitutionalism or Anti-Constitutionalism?

Dark constitutionalism is constitutionalism proper interrelated with other forms of constitutionalism, as explained above. It is not just a social phenomenon with a degree of legal relevance. It is not a phenomenon belonging just to different realms of social life, e.g. politics, collective psychology, history, etc. It has legal relevance because of its impact on constitutional axiology and teleology, but especially due to the shaping and forming of constitutional imaginaries and constitutional anthropology. Hence, dark constitutionalism has its own epistemic value for the understanding of the constitution and constitutional law through the prisms of dark imaginaries, dark politics, and dark feelings. The reason is that it contains specific constitutional axiology bound to dark feelings, values of emotional oppression, and forms of control via negative emotions.

Dark constitutional axiology is impacting the constitutional values of freedom, liberty, autonomy, and basic equality. These values constitute the axiological core of liberal-democratic constitutionalism. Dark axiology and negative emotions as pillars of dark constitutionalism are deliberately promoted through dark constitutional politics as instruments for mastering the constitutional pragmatics. They are shaping constitutional design in a way that is permissive for the establishment of various regimes of non-freedom. These regimes of non-freedom and even anti-freedom contain mechanisms of emotional domination, affectual attachment to dark imaginaries, as well as symbolic, imaginary, and emotional control through dark feelings.

In this context, a regime of non-freedom means a political regime that does not sustain the institutions capable of securing the spread and maintenance of free will, free choice, and personal autonomy as pillars of constitutional liberty. However, there are also regimes that promote dark feelings and dark emotions and aim to produce emotional suppression of freedom, liberty, and autonomy. Usually this is achieved through fear politics, but also via politics of hatred, anger, despair, etc. Such regimes can be defined as regimes of anti-freedom. This is due to the fact that they are not just detrimental to the promotion of freedom but are actively aiming at its negation through the emotional suppression of the constitutionalism of freedom and enlightenment. Hence, these

16 Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 197–241.

regimes are deliberately created as forms of rational, emotional, and symbolic-imaginary anti-freedom.

Dark constitutionalism is a framing and composite phenomenon. It results from, but also enables, dark constitutional politics of fear, anger, hate, frustration, and despair. Dark constitutionalism (mis)uses the constitutional values, principles, and institutions in order to achieve legal authority, (anti) constitutional legitimacy, and social control based on the oppressive emotional and intellectual power of dark constitutional imaginaries. It strives for the establishment of contextual, but from a strategic viewpoint mostly durable attitudes of fear, anger, hate, frustration, and despair. These attitudes and emotional-anthropological predispositions should be capable of sustaining a specific political regime with a range of constitutional implications. This regime has to be grounded in negative emotional constitutionalism. Its strategic aim is to produce, as a mid- or long-term result, dark constitutional anthropology.

Hence, the ontology, teleology, axiology, and pragmatics of dark constitutionalism attribute to the specific shaping of the political and social order framed through constitutional and constitutionally relevant phenomena that are signified via constitutional signifiers of meaning. Thus, it falls under the category of constitutionalism as a socio-legal, emotional, and symbolic-imaginary phenomenon. This is because its aim is to frame the political and social power and to master the hearts and minds of the members of the constitutionally framed socio-legal community.

Indeed, it is questionable (mostly from a political and moral standpoint) whether constitutionalism in the negative – constitutionalism as a reversed and opaque version of the mainstream understanding of this phenomenon – has a proper justification for existence. The moral and political problem here, which can be possibly also shaped as a conceptual issue, concerns the permissibility of defining a phenomenon as constitutionalism despite the fact that it is actually a form of negation of the constitutional core of true constitutionalism as a regime for promotion of freedom, liberty, and equality. In other words, the dilemma is whether one can define anti-constitutionalism (such as dark constitutionalism) as a form of constitutionalism.

This principal question is directly related to dark constitutionalism. This is because it constitutes a clear example of anti-constitutionalism. Anti-constitutionalism is an abusive misinterpretation of constitutionalism that implements anti-constitutional values and aims through constitutional shapes and forms. It has content that adheres to the main elements of the object of constitutional regulation – the constitutional status of the person, the institutions of public power, the institutions of the public sphere, the ‘sector-specific constitutions’, etc. However, dark constitutionalism, as a form of anti-constitutionalism, negates and misuses for the purpose of dark (anti)constitutional teleology the mainstream, established, and generally cherished form of liberal-democratic constitutionalism that we have inherited from the ‘long 19th

century¹⁷ and the ‘short 20th century’.¹⁸ Dark constitutionalism is an antipode of constitutionalism of light because it constitutes a regime of oppressive emotional politics and compulsion and grounds its authority on dark feelings.

I believe that such deviated and distorted forms of constitutionalism – even forms of anti-constitutionalism defined as such from an axiological and teleological perspective – must be explained and explored, but not neglected and avoided. This counts not just for dark constitutionalism (itself a novel concept I am proposing here), but also for authoritarian and oligarchic-technocratic constitutionalism. Such regimes of non-freedom and anti-freedom, indeed, depart from the axiological and to an extent also the institutional core of constitutionalism. Nevertheless, they aim at shaping our understanding of the constitutional world by forming the values, principles, and institutions through which the social and political life of the constitutionally framed socio-legal community shall be mastered. Thus, they deserve proper attention. Otherwise, we risk ignoring the possible reshaping of our social realm and its redefinition in terms of anti-constitutionalism. This might happen while pretending that such tendencies and phenomena are inexistent or treating them as temporary and functional deviations from the otherwise desirable models for the promotion of constitutionally framed freedom. Moreover, anti-constitutionalism (different regimes of non-freedom and anti-freedom) is not non-constitutionalism (inexistent or nominal constitutionalism). Hence, it has the potential for determining the rules of the socio-political game and shaping the collective constitutional imaginaries. That is why its shapes, forms, manifestations, and performances must be carefully studied.

4. Structural, Functional, Ontological, Axiological, and Volitional Perspectives on Dark Constitutionalism

Dark constitutionalism has to be assessed from structural, functional, ontological, axiological, and volitional perspectives as a framing paradigm of dark constitutional emotions and dark constitutional imaginaries. It serves as the main paradigm for conceptualising, explaining, and exploring dark constitutional semiotics and dark constitutional anthropology. This demonstrates again its multilayered characteristics.

Structurally, dark constitutionalism rests upon the legally and socio-legally institutionalised forms of evil. They include dark constitutional memories from the constitutional past and dark constitutional dreams, hopes, and fears from the constitutional present and the constitutional future. These are mostly institutionalised and semi-institutionalised factors for constitutional crisis and

17 See Eric Hobsbawm, *The Age of Revolution: 1789–1848* (Vintage 1996) 1–368.

18 See Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914–1991* (Time Warner Books 1995) 1–627.

emergency (mis)management as well as other forms of constitutional evil. Functionally, dark constitutionalism stems from and contributes to dark constitutional politics.

The ontology of dark constitutionalism is related to its teleology and axiology. They are all deeply interrelated with dark constitutional politics. In other words, dark constitutionalism is established in order to produce and sustain negative emotions, which are embedded in dark values, and lead to affective and emotional control of the people and society through dark feelings.

The ontology of dark constitutionalism may be deductive, hierarchical, and imposed by office holders and key players of an established regime. Key agenda setters of dark constitutional ontology can be the institutions of the constituent power. They determine the initial outlook of the structural elements of dark constitutionalism provided in the text of the constitution. However, when the constitutional text is adopted, they step aside and give way to a range of interpreters. This situation is in line with the idea of the ‘death of the author’ and the ‘birth of the interpreter’, proposed by Roland Barthes.¹⁹ Hence, these interpreters create stories and narratives on constitutional darkness and constitutional evil and further develop the model of dark constitutionalism in constructive, deconstructive, and reconstructive ways. These stories and narratives can be negotiated but are usually initially imposed on the socio-legal constitutionally framed community. Thus, together with the initial constitutional narrative set by the constituent power and its institutions, these subsequent narratives of constitutional darkness create a composite model of dark constitutionalism and jointly shape dark constitutional imaginaries.

In fact, dark constitutionalism is imposed mostly by semi-institutionalised or non-institutionalised political elites. Some of them use formal constitutional roles as institutional office holders, whereas others are part of the dispersed group of lobbies, pressure groups, and political circles. They impose dark constitutional politics mostly through the different types of media – traditional or new – not necessarily using official, institutionalised, and formalised variants of dark constitutionalism explicitly provided by the constitution and valid constitutional law. Hence, the ontology of dark constitutionalism is closer to a ‘game of dark constitutional imaginaries’, which relates it to constitutional semiotics as a ‘game of constitutional codes’.²⁰ This is due to the fact that rules are imposed in the contexts of ‘law in action’ and the ‘law in imagination’ rather than to a strictly legal model of institutional interplay performed through formal and explicit rules of the valid law. Nevertheless, this is still

19 See Roland Barthes, *La mort de l'auteur*, https://monoskop.org/images/3/38/Barthes_Roland_1968_1984_La_mort_de_l_auteur.pdf

20 Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 147–156.

a constitutionally relevant ontology because it is part of the socio-legal and symbolic-imaginary discourses of constitutionalism and constitutional law.

The purposes of such a deductive imposition of an emotional, symbolic, and imaginary regime of constitutional darkness can vary. They are usually related to the justification of the seizure and control of power by the key players of the regime and to strengthening the unity of the socio-legal and imaginary community based on dark emotions.

Dark constitutionalism may be produced and spread also horizontally. This happens in a networked way through a web of strategic players in dark games of power. These players can be institutionalised (e.g. political parties, media, etc.), semi-institutionalised (e.g. think-tanks, advisory boards, expert councils, etc.) or non-institutionalised (e.g. lobbies, pressure groups, etc.). As a result, such networked promotion of dark constitutionalism through dark politics may also be jointly imposed on society by the aforementioned key players in dark constitutional games of imaginaries, emotions, and affective attitudes. Hence, the horizontal and vertical ontology of dark constitutionalism are not mutually exclusive. Instead, they are rather mutually related and supportive.

In that regard, the geometry of dark constitutionalism²¹ can be based on a range of signifiers of constitutional and constitutionally relevant meaning. They may vary from pyramids and institutional polygons (triangles, rectangles, etc.) to circles and networks. The pyramids and polygons reflect and signify inter-institutional relations. The circles and networks signify the structures of participation and influence of non-state actors beyond the official constitutional architecture of the state on the spread and maintenance of constitutional darkness through dark constitutional politics.

The teleology of dark constitutionalism consists of the range of goals that it aims to achieve. These goals are neither provided by the constitution and valid constitutional law, nor necessarily form an uncontroversial or permanent system. This means that the dark constitutional teleology is the result of a socio-legal process that shapes the constitutional imaginaries of the community and its constitutional anthropology. Frequently, dark constitutional teleology is shaped through dark constitutional pragmatics, the core of which is dark constitutional politics. There is one commonality between the diversity of goals of dark constitutionalism: the pursuit of social impact, formative influence, and ultimately social control through dark constitutional feelings and especially via politics of fear.

The typical goals of dark constitutionalism, forming its teleology, are related to its functions. They spread in the three main planes of unfolding of dark constitutionalism. These are the legal, socio-legal, and symbolic-imaginary realms.

21 For the concept of constitutional geometry, see Martin Belov, *Constitutional semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 241–297.

Most of them concern the second and third realms and have structural but mostly functional implications. It must also be noted that the teleology of dark constitutionalism is facilitated by and frequently interrelated with the ontology, teleology, and pragmatics of emergency constitutionalism and the policies of crisis mismanagement based on the promotion of constitutionally relevant forms of negative emotional politics, and especially on the politics of fear.

The ontology and teleology of dark constitutionalism predetermine also its volitional aspect. In other words, dark constitutionalism is rarely a bulk of dark feeling coincidentally emerging out of an emotional, symbolic, and imaginary chaos. It is not a random assemblage of emotions and their pragmatic and symbolic explications in the spheres of the normative, the imaginary, and the real. Instead, it is rather the result of the will for the establishment of a regime of dark constitutional feelings and for the production of dark constitutional anthropology via dark constitutional politics.

Dark constitutionalism is an orchestrated phenomenon, although multidimensional, multilayered, and bulky. It is produced as part of intentional plans for social and political control. Not infrequently, there is no single plan, but a range of plans that are partially cooperative, partially competitive, and not necessarily fully fledged, purely systematic, rational, and resulting in political success. Rather, dark constitutionalism consists of the shapes of constitutional evil and constitutional darkness. They are produced through the semiotic brushes of various emotional players on the canvas of socio-legal and symbolic-imaginary constitutionalism.

In that regard, the volitional aspect of dark constitutionalism requires a 'will for (dark) constitution' *a la* Carl Schmitt.²² The volitional aspect of dark constitutionalism is the binding thread between dark constitutional ontology, dark constitutional teleology, and dark constitutional axiology. That will for the establishment of dark constitutionalism and for the promotion of constitutional darkness is elitist and imposed, but also requires a substantial degree of social acceptance for its justification and sustainability. Hence, the establishment of dark constitutionalism and the promotion of constitutional darkness are both elitist and popular, populist and technocratic, imposed and consensual phenomena. The imposition of constitutional darkness and the establishment and maintenance of dark constitutionalism is impossible without a permissive consensus based on structures of dark constitutional anthropology and sustained via dark constitutional emotions and imaginaries.

Thus, constitutional darkness requires three components. These are elitist decisions, popular or at least majoritarian acceptance, and objective preconditions typically consisting of different versions of crisis and emergency. In that regard, constitutional polycrisis is the perfect context for the establishment,

22 See Carl Schmitt, *The Concept of the Political* (University of Chicago Press 2007).

promotion, unfolding, and maintenance of dark constitutionalism and constitutional darkness. It contains all three elements and creates the legal, socio-legal, and symbolic-imaginary framework promoted, preserved, and fostered through dark constitutional emotions.

5. The Three Possible Meanings of Dark Constitutionalism and the Semantic Variety of Constitutional Darkness

Dark constitutionalism is related to several important phenomena. These are constitutional fear, constitutional fear politics, negative or dark constitutional emotions, dark constitutional imaginaries, dark constitutional memories, and dark constitutional anthropology. Frequently, dark constitutionalism relates to constitutional crisis and constitutional emergency. That is why dark constitutionalism must be defined as a separate and independent concept, but also as a phenomenon embedded in the just-mentioned paradigmatic context and conceptual network.

Intuitively, dark constitutionalism may seem to be a framing paradigm denoting three partially related but different phenomena. These are obscurity and darkness as pending non-fulfilment of existential potential (but not as lack of clarity); darkness as twilight and decay;²³ and darkness as a framework of negative emotions such as fear, anger, frustration, etc. These three different meanings outline the range of semantic variety of the concept of constitutional darkness. The brief outlining of the three alternative meanings – in fact, three independent concepts – shall be followed by a justified choice of one of them as the ‘dark constitutionalism proper’, which shall be the object of analysis in this chapter.

It should be noted that the term ‘dark’ is preferred to ‘negative’. Indeed, the concept of darkness is much more appropriate since it has a cosmogonic role in shaping the frames of constitutional order, exposes the role of negative emotions in the production of specific order out of disorder, and emphasises the deeper layers of meaning – symbolic-imaginary, semiotic, semantic, etc. – produced by negative emotions. In contrast, negative constitutionalism appears as a rather austere concept focused on constitutional pragmatics. Moreover, while the antipode of dark constitutionalism is light constitutionalism (or constitutionalism of light), the antonymic coupling of negative constitutionalism seems to be positive constitutionalism. This is not productive for demonstrating the axiological, anthropological, but especially the emotional and symbolic-imaginary dimensions of the phenomenon. That is why I shall

23 That metaphor is used in Petra Dobner and Martin Loughlin (eds), *Twilight of Constitutionalism?* (Oxford University Press 2010).

prefer the term ‘dark constitutionalism’ as a framing concept of negative and dark emotions, emotional policies, imaginaries, symbols, and anthropology.

Let’s now turn to the three alternative meanings of dark constitutionalism. It must be emphasised that they all have justification for existence and may be used for the analysis of different aspects of constitutionalism. My choice here is not exclusionary but is rather predetermined by the specific research target of this chapter and the most appropriate analytical framework and lenses that should be used.

The first possible meaning concerns the existence of a phenomenon that I shall call ‘dark constitutional matter’. It drives the constitutional system forward. It produces constitutional dynamics shaping the manifestations of constitutional law in action and constitutional law in imagination. It triggers the performance of the constitutional phenomena and the constitutional order in ways that are not rarely unplanned or unexpected by its creators. The position of such creators and performative agents belongs to the political groupings, players, and stakeholders behind the collective imaginary body defined for conceptual and pragmatic purposes as ‘constitutional legislator’. The constitutional legislator acts as an instrument of the ‘secular god’ of Modernity. This is the sovereign which is usually vested in ‘imaginary communities’ such as ‘the people’ or ‘the nation’.²⁴

Both concepts – ‘constitutional legislator’ and ‘sovereign’ – are rationalist simplifications and epistemic proxies to the much more complex phenomenon of constitutional ontology and eventual subsequent constitutional autopoiesis²⁵ following triggering events of constitutional creation, reform, and transplantation.²⁶ These concepts are key signifiers of the creative potential behind the constitutional project activated through a mixture of factors – elitist, majoritarian, and objective-contextual. Since the intellectual, legal, and pragmatic (political and socio-legal) replacement of the divine, traditional, evolutionary, aristocratic, and metaphysically-theistically justified order of the pre-constitutional and pre-modern age by the secular, revolutionary, and progress-oriented order of Modernity, new normative ideologies and constitutional paradigms signifying constitutional ontology and constitutional development were born and put into practice. They are rationally entrenched and follow the logic of textual and rational constitutionalism embedded in a phenomenon that I define elsewhere as ‘rationalist entrapment of Modernity’.²⁷

24 See e.g. Zoran Oklopčič, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018) 1–416.

25 See Gunter Teubner, *Recht als autopoietisches System* (Suhrkamp 1989) 1–223.

26 For the constitutional transplantation, see Alain Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993).

27 See Martin Belov, *Constitutional semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 49–54.

The excessive but powerful simplification of the genesis and especially the further evolution of the constitutional order through recourse to sovereignist and volitional metaphors (e.g. Rousseau's '*volonte generale*'²⁸) overshadows the substantial degree of unpredictability of the multiple possibilities and various socio-legal ways in which the theoretical and normative model shall unfold on the ground. The huge degree of variability for the projection of the legal model on the planes of the symbolic, the imaginary, the emotional, and the real, which produce perplexed chances for shaping the socio-legal performance of the constitutional order, can be defined via two concepts. They can be framed in terms of 'quantum constitutionalism' using the latest achievements of quantum physics or 'constitutional darkness', placing the accent on the obscurity, variability, and unpredictability of the constitutional future and expressing this fuzziness in a symbolic-imaginary appealing way through a semiotic signifier of meaning.

In this context, darkness serves as a denominator for pending, potential, and probable fulfilment of the capacity of the constitutional institutions and phenomena. Hence, dark is not used as 'negative' but as a 'potential' phenomenon expecting its explication on the constitutional playground. This variant of meaning of 'constitutional darkness' is close to some of the concepts used in physics, such as quantum states and dark matter.

In that regard, dark constitutionalism is the reason for the existence of what I define elsewhere as 'quantum constitutionalism'²⁹. Quantum constitutionalism is a concept that grasps the asymmetry between the constitutional potential or energy implied in the initially created model and its spread on the ground in a specific space-time context predetermined by the particularities and preconditions of the socio-political terrain. The mismatch between the constitutional energy and the constitutional matter shaped through the concept of quantum constitutionalism can be explained through the concept of constitutional dark matter. Here, dark constitutionalism functions as a container of constitutional uncertainty. More precisely, it is a framing paradigm of the certainty about uncertainty. The certainty about uncertainty consists in the fact that we must be sure that the adopted constitutional model (holistic or particular, initial or produced through specific constitutional reform) will most probably result in deviations from our expectations. It will unfold in a multitude of ways that are not necessarily predictable *ab initio* when implemented in the socio-legal context. The highest degree of unpredictability concerns the impact of the legal

28 For the ideological, utopian, and mythological characteristics of the general will, see P Hallward, 'General Wish or General Will? Political Possibility and Collective Capacity From Rousseau Through Marx', in S Chrostowska and J Ingram (eds), *Political Uses of Utopia: New Marxist, Anarchist, and Radical Democratic Perspectives* (Columbia University Press 2016) 126–161.

29 See Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 31–49.

model on the constitutional imaginaries and the constitutional anthropology despite the strategies and tactics for their shaping via emotional politics.

In this first possible understanding, quantum constitutionalism and dark constitutionalism are mutually dependent forms of constitutionalism. They aim to conceptualise the existence of a ‘Schrödinger’s cat’ paradox in the asymmetries between constitutional law in books (in theory and in valid written law), constitutional law in action, and constitutional law in imagination. All three dimensions of law have their impact on constitutional anthropology and define its shapes through the drifting equilibrium between constitutional statics and dynamics, certainty or uncertainty, predictability, expectation and their projection on the socio-legal terrain and on the plain of the constitutional imaginaries. Hence, I prefer to use quantum constitutionalism instead of dark constitutionalism for defining the above-mentioned status of pending fulfilment of constitutional potential, capacity, and energy.

The second possible meaning of dark constitutionalism may be its use as a synonym, alternative, or supplement to ‘twilight constitutionalism’.³⁰ The twilight metaphor has been used in order to signify constitutional decadence and decay. One can even speculate that while twilight is still a phase of gradual demise when constitutionalism continues to function, albeit in a less efficient and legitimate way, constitutional darkness is the ultimate phase of constitutional failure.

Hence, dark constitutionalism may be defined as a historic period of anti-constitutionalism when the constitutional core comprising ultimate constitutional values and design, such as rule of law and democracy, freedom and autonomy, has been dismantled and replaced by a new order of non-freedom, lack of autonomy, and suppression of free will. In that regard, dark constitutionalism can be framed and shaped by different versions of autocracy, oligarchy, and anti-liberty.

In this second meaning, dark constitutionalism is the full replacement of constitutionalism of light – the system of freedom, liberty, autonomy, and basic equality that was established in the course of constitutional Modernity after the Enlightenment. Thus, dark constitutionalism is the final stage of constitutional erosion and degradation similar to Dante Alighieri’s Hell, where no hope is left. It is a stable phase of despair where legal order exists in order to sustain oppressive authority justified via structural threats. These forms of dark constitutionalism serve the role of the monsters from the fairytales, namely to stimulate adherence to the ‘right way’ and to discourage any attempt at free exploration of the ‘dark forest of life’. Thus, dark constitutionalism is an antipode of the free society and its liberal-democratic constitutional order.

30 See Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 1–370.

This second variant of dark constitutionalism perceives constitutional darkness as an accomplished and unchangeable fact. This version of a ‘constitutional Mordor’ seems more stable than a proper historic process of unfolding constitutionalism – dark or light – presupposes. Thus, it describes the scary constitutional dystopia that a sincere constitutionalist must try to avoid, but not necessarily a real moment of constitutional history.

That is why, in this paper, I shall explore dark constitutionalism in its third meaning. Here, darkness means the deliberate use of negative emotions for the promotion of politics of fear, anger, hate, and despair. This third and proper meaning of dark constitutionalism grasps the tendency for the promotion of constitutional fear and other negative emotions that deconstruct personal autonomy and free will, and dismantle constitutionalism of light as a tool for promotion of liberty and freedom as ultimate values of the human condition.

Hence, dark constitutionalism is much more a tendency, process, and strategic development towards the stage of anti-constitutionalism rather than a finalised and unchangeable status quo, as the second possible meaning outlined above may suggest. To sum up, dark constitutionalism is a process that grasps constitutional darkness as a dynamic and dialectical process of permanent combat with enlightenment and freedom, while ultimate and final dark constitutionalism, as this last stage, is a mere option rather than a true and concrete moment in constitutional history.

The third meaning of dark constitutionalism is also interrelated with its second meaning – as a form, synonym or phase of twilight constitutionalism. Both concepts – dark constitutionalism and twilight constitutionalism – signify decay. The decay may be defined in institutional terms, e.g. as democratic backsliding,³¹ democratic erosion,³² rule of law or democracy in flux,³³ etc. However, what is interesting from the perspective of this chapter is the axiological and imaginary decay from the viewpoint of constitutional imaginaries, constitutional semiotics, and constitutional anthropology. The focus here is on the dismantling of constitutionalism of light based on freedom, liberty, and autonomy and its replacement with constitutionalism of fear, anger, hate, frustration, and despair. This process may have two stages of development of constitutionalism of negative emotions – twilight and darkness. They are both

31 See e.g. D Waldner and E Lust, ‘Unwelcome Change: Coming to Terms with Democratic Backsliding’ (2018) 21 *Annual Review of Political Science* 93–113; V Mechkova, A Lührmann, I Lindberg, ‘How Much Democratic Backsliding?’ (2017) 28(4) *Journal of Democracy* 162–168; and Fabio Wolkenstein, ‘What Is Democratic Backsliding?’ (2023) 30(3) *Constellations* 261–275.

32 Marianne Kneuer, ‘Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, and How?’ (2021) 28(8) *Democratization* 1442–1462.

33 See Martin Belov (ed) *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 1–292.

based on a range of negative values, which are signified through dark constitutional imaginaries and produce dark constitutional anthropology.

6. Dark Constitutionalism, Emergency Constitutionalism, Constitutional Polycrisis, and the Interplay between Constitutional and Unconstitutional Normalcy and Emergency

It has been explained that dark constitutionalism is a relational concept. Hence, a brief outline of the concept of dark constitutionalism shall be followed and supplemented by the explanation of its embeddedness in a network of paradigms related to constitutional non-normalcy or to the normalisation of negative emotions that impact constitutionalism and constitutional law from a symbolic and imaginary perspective. This will allow for a relational definition that properly reflects the impact of dark constitutionalism on the fundamental distinction between constitutional normalcy and constitutional emergency that is in fact a continuum rather than a purely dichotomic couple.

That is why dark constitutionalism has to be contextualised and explained with regard to the conceptual network and paradigmatic framework in which it is embedded. This is due to the fact that dark constitutionalism is related to several constitutional phenomena with predominantly rational teleology and design. These are the emergency constitutionalism, constitutional emergency as a form of constitutional (constitutionally provided, justified, and eventually normalised) non-normalcy, unconstitutional normalcy, unconstitutional non-normalcy, and constitutional polycrisis.³⁴

Emergency and crisis are typical triggers and promoters of negative constitutionally relevant emotions. Thus, they can be instruments for the production of constitutional darkness, which, although frequently resting upon objective preconditions, can serve as justification for the limitation of human rights and human liberty, autonomy, and free will. Moreover, they can be used for targeted (strategic or tactical) fear politics that is at the core of dark constitutionalism. In addition, crisis and emergency are excellent objects for the signification of constitutional and constitutionally relevant meaning through dark constitutional imaginaries. Last but not least, the repeating and overlapping crises that constitute constitutional polycrisis and produce real or

34 See Martin Belov, 'The Conceptual Shapes of Constitutional Polycrisis: Deconstruction, Asymmetries and Post-Modern Anxieties of Constitutional Normalcy' (2023) 70 *Irish Jurist*, special issue Law in a Time of Crisis 393–410; Martin Belov, 'Rule of Law in Europe in Times of Constitutional Polycrisis, Constitutional Polytransition and Democratic Discontent' (2023) 3 *Diritto pubblico comparato ed europeo* 875–884; and Martin Belov, 'Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?' in Martin Belov (ed) *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 21–47.

imaginary situations of permanency of disaster, horror, and despair are key factors in the shaping of dark constitutional anthropology.

This does not mean that emergency constitutionalism and crisis management are imminently bound to dark constitutionalism. Indeed, they are usually paralleled by negative emotions, but these emotions are not always triggered or sustained for the sake of fear politics. Hence, not all negative emotions are deliberately targeted and instrumentally misused for the promotion of dark constitutionalism. Only some forms of crisis, emergency, and abnormality lead to the emergence and contribute to the existence of dark constitutionalism. These are the forms of emergency and crisis that are misused for the facilitation and promotion of dark emotional politics, deliberately activating fear, anger, frustration, and other negative emotions.

Indeed, there is a common denominator between dark constitutionalism and emergency constitutionalism. They both address crisis, fear, and emergency. Moreover, they are both focused on dark events that shift the boundaries between constitutional normalcy and constitutional emergency.

Nevertheless, there might also be also important differences between both forms of constitutionalism. Dark constitutionalism is a concept based on a dark anthropology of fear, anger, and despair. It is promoted through dark constitutional politics and signified through various dark constitutional imaginaries. Emergency constitutionalism may function as a pragmatic set of legal instruments for coping with various crises. Hence, it may be an important phase in the restoration of constitutional and legal normalcy, where emergency is just a temporary situation allowing for a swift and efficient, but also constitutionally legitimate, response to disastrous events.

However, frequently the crisis and emergency are stabilised and are rapidly or gradually, immediately or in a postponed manner, reorganised as forms of normalcy using dark constitutional politics. Thus, emergency constitutionalism may evolve into dark constitutionalism through recourse to the politics of negative emotions. Hence, emergency constitutionalism may be (mis)used as a tool for promotion of constitutional darkness and thus as a trigger, precursor, or stabiliser of dark constitutionalism.

In that regard, one should distinguish between constitutional non-normalcy, unconstitutional normalcy, and unconstitutional non-normalcy. These are interrelated, yet separate concepts which all have relevance for explaining dark constitutionalism as a theoretical, legal, pragmatic, and imaginary phenomenon.

Constitutional non-normalcy means a state of exception that is constitutionally provided. It is legal, but departs from the social standards of normalcy. What is especially problematic is that it is emotionally and imaginarily apprehended as a deviation from the patterns of normal life. In that regard, constitutional non-normalcy, irrespective of which legal form it is established (war, state of siege, state of emergency, state of disaster, etc.) and whether it is understood as legitimate (e.g. justified, timely, and efficient) is necessarily

related to negative emotions and signifiers of negative feelings. If these negative affectual aspects of the constitutional non-normalcy are legal, legitimate, and not deliberately promoted and overemphasised by the constitutional actors (especially the state institutions and the media), then it is not part of dark constitutionalism. Instead, it constitutes a necessary element of emergency constitutionalism as a tool for legal and legitimate crisis management. Conversely, if constitutional non-normalcy is deliberately misused as a tool for spreading dark feelings such as fear, despair, anger, hate, etc., then it constitutes a clear case of dark constitutionalism.

Unconstitutional normalcy is typical for systems with façade constitutionalism, defined also as nominal constitutionalism.³⁵ It results in a situation of acceptance of the unconstitutional status quo by the elites and the people. The reasons for the establishment of unconstitutional normalcy may vary from an initial lack of intent to implement the official constitutional model to a shift in the boundaries between the legal and factual constitution, rearranging the legal, social, political, affective, imaginary, and symbolic parameters of normal, abnormal, and nominally normal.

Unconstitutional normalcy may be justified via dark constitutionalism. The stabilisation of a regime that is beyond the parameters prescribed by the legal constitutional model may be legitimised through negative emotions promoted by the political elites or other stakeholders of the (un)constitutional game. Thus, the parallel existence of unconstitutional normalcy and dark constitutionalism is not automatic but is very likely.

Unconstitutional non-normalcy is a situation of deviation from both legal (constitutional) and social (emotional, performative, and imaginary) criteria for normalcy. This is the case when the deviations and bias from the patterns of constitutional behaviour, which are deemed usual, typical, and normal, are not legally framed by a constitutional model of emergency. Hence, unconstitutional non-normalcy is a deviation from both normalcy and constitutional non-normalcy. It does not fit into emergency constitutionalism as a form for legal mastering of different types of states of exception. Thus, unconstitutional non-normalcy is prone to dark constitutionalism. In other words, dark constitutionalism and the various dark policies of negative emotions such as fear, anger, despair, hate, etc., are typical instruments for promotion and sustaining of unconstitutional non-normalcy.

The phenomenon of constitutional polycrisis is a huge promotor of the rise of dark constitutionalism in recent decades. Indeed, the core of the multitude of crises that have hit our social, political, and constitutional orders since the beginning of the 21st century is objective. Nevertheless, these objective detrimental events, e.g. the security, financial, migration, health, ecological, etc.

35 See Karl Loewenstein, 'Réflexions sur la valeur des Constitutions dans une époque révolutionnaire' (1952) 2(1) *Revue Française de Science Politique* 5.

crises, are practised as targets of constitutional politics of fear and produce dark constitutionalism.

What is particularly problematic is that dark constitutionalism gradually becomes a structural phenomenon. It is becoming entrenched in dark constitutional anthropology and has long-lasting effects on the constitutional present and the constitutional future.

To sum up, crisis and emergency produce negative emotions, shape dark constitutional memories, sustain dark expectations for the future and keep the community mobilised through dark emotions. This magmatic field of fear, anger, frustration, and desperation is the perfect nourishing context for dark constitutionalism. They are the strings in which the dark melody of fear politics is played in front of a public that is disciplined through negative emotions and whose collective conscious, subconscious, and unconscious are being structured around dark constitutional imaginaries. In other words, the constitutional polycrisis is the perfect playground for spreading fear, anger and hate politics and for shaping dark constitutional imaginaries, most of which are grouped in dark constitutional semiotic landscapes.³⁶ The linguistic, visual, and performative games of crisis, emergency, and fear are the tools for the production of dark constitutionalism. Gradually dark constitutionalism becomes the ‘new normal’, stretching from the dark memories through a thriving contemporary politics of fear towards the frightening perspectives of a dark constitutional future.

7. Conclusion

Dark constitutionalism is a multilayered, chameleonic, and bulky phenomenon. It is text and context, signifier and signified, determinant and result of determination, an objective trend and a product of elitist-driven policies, set of constitutional imaginaries and a toolkit of constitutional pragmatics. This multifaceted character of dark constitutionalism makes it both difficult to explain and a self-evident phenomenon intuitively accessible to human sense.

Dark constitutionalism is a permanent companion of the constitutional civilisation that has emerged in constitutional Modernity. It is also a contextual phenomenon that is brought to the forefront in times of crisis and emergency. It is currently used as a disciplinary stick for generating authority, legitimacy, and obedience in the context of fear politics, which is the main instrument for socio-political mobilisation in the age of constitutional polycrisis and constitutional polytransition.

Dark constitutionalism is the intellectual, normative, and symbolic-imaginary prism through which we can outline and detect its dialectic antipode – the

36 Martin Belov, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory* (Hart Publishing 2022) 130.

constitutionalism of light. They both constitute the conceptual scheme in which the dynamics of constitutional history unfold from the constitutional past, present, and future in cyclic and linear, but also in temporarily compressed forms stemming from loopholes in the matrix of constitutional transtemporal raster.

Dark constitutionalism is the context for the unfolding of constitutional phenomena as part of the structured trends in constitutional history. It frames the range of elements of constitutional darkness in the text of the written constitution. It is the targeted result of deliberate dark constitutional politics. It is also a structurally embedded element of dark constitutional anthropology. Last but not least, it is a semiotic phenomenon. In this last aspect, dark constitutionalism is both a signifier of negative emotions and constitutional instruments for promotion of dark constitutional politics and signified. In its capacity as a semiotic signified, dark constitutionalism is represented by the signifier of constitutional darkness.

Despite the possible apprehension of dark constitutionalism through intuitive means, its permanence but especially the rise of its importance in times of crisis, emergency, and transition, requires its proper analysis and explanation. This can be best accomplished through the deconstruction of the mainstream paradigm of constitutionalism of light in order to detect, excavate, and assemble the essence and elements of constitutional darkness. This deconstructive enterprise must be paralleled by a reconstructive exercise that has to assemble the elements of dark constitutionalism, join its multifaceted meanings, and offer a relatively coherent concept for explaining and exploring constitutional darkness. This is exactly the task of the theory of dark constitutionalism. Here, I have outlined the concept of dark constitutionalism. In subsequent publications I shall explore also its functions and elements. I shall also propose a thorough analysis of the concepts of dark constitutional politics, dark constitutional imaginaries, and dark constitutional anthropology.

Hence, the concept of dark constitutionalism must be conceived as a 'work in progress'. Sufficient attention must be devoted to proposing a comparative typology of the forms of constitutional fear and the elements of constitutional darkness. Interpretative systematisation of the institutionalised and semi-institutionalised elements of dark constitutionalism is part of this constructive and reconstructive programme. Special attention must be devoted to the creation of a typology of dark constitutional imaginaries. Such typology should rest upon historic, socio-legal, and comparative analysis of constitutional text, but also of constitutional textures. Hence, it requires engagement with textual, but also with visual and performative constitutionalism explaining and exploring the different planes for signification of constitutional and constitutionally relevant meaning. In this case, this is the meaning related to dark constitutional imaginaries.