European Law Open (2023), **2**, 484–510
doi:10.1017/elo.2023.32

CORE ANALYSIS

Europe's political constitution

Alexander Somek[1] and Elisabeth Paar[2]

[1]Legal Philosophy, University of Vienna, Vienna, Austria and [2]Public Law, University of Vienna, Vienna, Austria
Corresponding author: Alexander Somek; Email: alexander.somek@univie.ac.at

(Received 21 February 2023; revised 23 July 2023; accepted 23 July 2023; first published online 02 October 2023)

Abstract

Pluralism is a defining feature of European human rights law and of the European constitution. Contestability and conditional deference determine how participating states eventually calibrate their relation to international and supranational authority. This structure gives rise to differences of opinion that reverberate throughout a public sphere that is composed of a growing number of scholars. They increasingly rely on digital media to exchange their ideas. A major role has come to be played by blogs such as the *Verfassungsblog*. Since its inception, its focus has rested on defending the values of constitutionalism *vis-à-vis* 'backsliding' Member States. The constitutional culture that results from this is somewhat reminiscent of Germany during the period of the Weimar Republic (1919–1933). While the rise of authoritarianism is a major issue, public law scholarship appears to become increasingly partisan. As European constitutional law emerges against the backdrop of an expanding public sphere, scholarly interventions are drawn into the vortex of politics. Unsurprisingly, scholarship begins to face up to its politicisation by reflecting on its proper task.

Keywords: European constitutional law; transnational constitutional law; public sphere; consensus in human rights law; scholactivism

1. Introduction

The shape of constitutional discourse, and of the law of constitutions, has changed considerably in Europe over the last thirty years.[1] The relevant transformations have as one of their roots the post-war project of stabilising constitutional democracies by means of an international human rights regime.[2] The other root reflects the vicissitudes of European integration, as a result of which the Member States of the European Union (EU) have become part of a *Verfassungsverbund*[3] in the relation of supranational European Union law and national constitutional law. One consequence of this development is that Member States are now subject to a new form of vigilance that is

[1]For a most recent and comprehensive account, see A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022).

[2]See A Moravcik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' 54 (2000) International Organization 217–52.

[3]We owe the term *Verbund*, the meaning of which remains elusive, to the German Constitutional Court that has first used it as part of the compound noun *Staatenverbund* in the reasoning underpinning the so-called *Maastricht* decision. See G Wegen and C Kuner, 'Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty' 33 (1994) International Legal Materials 388–444. German legal scholarship has developed it further into the *Verfassungsverbund*. See I Pernice, 'Die dritte Gewalt im europäischen Verfassungsverbund' (1996) in his *Der Europäische Verfassungsverbund: Ausgewählte Schriften zur verfassungstheoretischen Begründung und Entwicklung der Europäischen Union* (Nomos 2020) 431–54. The best way of describing a *Verbund* is possibly by calling it a loosely connected union.

© The Author(s), 2023. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

exercised by the European Commission and a supranational court system.[4] Its focus rests on the values enshrined in Article 2 of the Treaty on the European Union (TEU).[5] These values – such as democracy, the protection of human rights, and the rule of law[6] – have to be sustained by the Member States severally and, acting through the Union, jointly. This commitment has also given rise to increasing mutual interest in the evolution of constitutional systems throughout Europe and created awareness that each state is a participant in the joint project of sustaining allegiance to these values. Even if one needs to tread with caution here, it can be said that it is no longer the case that scholarly debates of constitutional law remain tied to national jurisdictions. They can easily and quickly spill across boundaries.[7]

2. Beyond comparative constitutional law

These developments have carried forward – and followed through on – a renewed interest in comparative constitutional law that arose in the wake of the fall of the iron curtain.[8] Unsurprisingly, this interest germinated in the country in which it was understood – with greater or lesser glee – that it had won the 'cold war'. As the then existing constitutional system of Eastern European countries unraveled and became amended, replaced or simply given a liberal and democratic spin,[9] scholars in the United States (US) developed a keen interest not only in preparing novices for the ways of the rule of law,[10] but also to account for new developments without using the US constitution single-mindedly as the canonical example. Interestingly, thus, the hegemony of the US led to a decentring of the American system of government of judicial review and to a fresh interest in the study of various constitutional democracies.[11]

Scholarship in the US, to be sure, did not have to begin from scratch. Scholars of comparative constitutional law, such as David Currie[12] and Donald Kommers,[13] had long recognised that something quite momentous had happened in post-war Germany, for which to account more fully it would take a few more decades. Nevertheless, the hype about comparative constitutional law in the 1990s brought many interesting developments into focus, such as the transformative

[4]As is rightly emphasised by LD Spieker, 'Defending Union Values in Judicial Proceedings: On How to Turn Article 2 TEU into a Judicially Applicable Provision' in A von Bogdandy et al (ed), *Defending Checks and Balances in EU Member States* (Springer 2021) 237–68, at 253 (stating that the CJEU is about to develop the judicial system into a value-monitoring system).

[5]See von Bogdandy (n 1), at 209.

[6]JHH Weiler, always fond of theological metaphors, refers to these three ideals as the 'Holy Trinity' of the liberal order, pointing out that the three are indeed one: Democracy without human rights and the rule of law would easily amount to majority tyranny; human rights without the rule of law would be empty slogans; the rule of law, devoid of its democratic context, might serve as a convenient tool of legalistic authoritarian rule. See JHH Weiler, 'Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance' in A von Bogdandy et al (ed), *Defending Checks and Balances in EU Member States* (Springer 2021) 3–13, at 5.

[7]See also A von Bogdandy, 'Comparative Public Law for European Society' 28 (2022) *MPIL Research Paper Series*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298016#, at 15.

[8]A testament to this development is, for example, M Tushnet and V Jackson, *Comparative Constitutional Law* (1st ed, Foundation Press 1999).

[9]For a critical account of the developments immediately following the revolution, see B Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992).

[10]There was, in a sense, no way of recusing oneself from this task, but as is well known, in the long term the strategy to create replicas of Western European democracies was bound to backfire. See I Krastev and S Holmes, *The Light that Failed: A Reckoning* (Penguin Books 2019) 52–4.

[11]For a reconstruction of this situation, see R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

[12]See, eg, DP Currie, 'Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany' 11 (1989) The Supreme Court Review 333–72; DP Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994).

[13]See D Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Sage Publications 1976); D Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1st ed, Duke University Press 1997).

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

constitutionalism of India[14] and South Africa,[15] the evolution of the commonwealth system of judicial review[16] or the activism of constitutional courts in former communist societies.[17] Given that this happened at the time that US law schools were considered the best places to enhance one's social capital if one wanted to pursue an academic career in Europe, the encounter with comparative constitutional law as studied by American scholars could feed into a less nationally parochial approach to scholarship also in countries of the European Union.

Scholarly developments need to be seen, however, in the context of the evolution of law, in this case, fundamental rights law. The 1990s was also the time that scholars began paying closer attention to 'judicial borrowing'.[18] It is particularly relevant in the context of fundamental rights adjudication, that is, in cases in which one court takes explicitly or implicitly the judicial findings of other jurisdictions into account. Even the US Supreme Court has occasionally examined how an issue had been decided by the European Court of Human Rights.[19] As is well known, the issue of borrowing gave rise to a heated debate in the United States, where Justices and scholars were split into the different camps of traditionalists who abhor 'cherry-picking' from other jurisdictions and more liberally minded cosmopolitans who would not mind obtaining inspiration from other countries.[20] Yet, there is a feature of fundamental rights law that makes it particularly amenable to the application of an international perspective.[21] The seat of constitutional normativity is either a set of clause-bound tests[22] that all look, from the perspective of European observers, like specifications of the proportionality principle, or, alternatively, and in Europe, this principle itself and the principle of equality.[23] From that angle, the language of constitutional provision guaranteeing certain rights appears to be quite accidental.[24] What matters is how broadly it sweeps and the weight that is attributed to it in the context of a proportionality analysis. Constitutional law amounts to a variety of practical reasoning the quality of which is enhanced by the diversity of opinions. 'Mutual engagement'[25] in the relation of jurisdictions promises to provide us with more intelligent results.[26] Arguably, national traditions account for the overall result. Yet, from the intellectually commanding heights of the structure of human rights analysis,[27] they are merely a *contingent* factor explaining the diversity of human rights law. In and of itself, constitutional law,

[14]See G Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1999), more recently, AK Thiruvengadam, *The Constitution of India* (Hart Publishing 2017).

[15]See, for example, H Klug, 'South Africa: From Constitutional Promise to Social Transformation' in J Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2007) 266–320. See also M Hailbronner, 'Transformative Constitutionalism: Not Just in the Global South' 65 (2017) American Journal of Comparative Law 527–65.

[16]See S Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2014).

[17]See eg, L Sólyom, 'The Hungarian Constitutional Court and Social Change' (1994) Yale Journal of International Law 223–37.

[18]See, most prominently, S Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2009). On judicial borrowing in general, and judicial borrowing specifically, see eg L Epstein and J Knight, 'Constitutional Borrowing and Nonborrowing' 1 (2003) International Journal of Constitutional Law 196; T Nelson and RL Tsai, 'Constitutional Borrowing' 108/4 (2010) Michigan Law Review 459–522; E Voeten, 'Borrowing and Nonborrowing among International Courts' 39/2 (2010) The Journal of Legal Studies 547–76.

[19]See Roper v. Simmons, 543 U.S. 551 (2005).

[20]See 'A Conversation between U.S. Supreme Court Justices' 3 (2005) International Journal of Constitutional Law 519–41 (featuring Justices Breyer and Scalia).

[21]See already C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' 20 (2000) Oxford Journal of Legal Studies 499–532.

[22]See RH Fallon, *Implementing the Constitution* (Harvard University Press 2001).

[23]For an account, see A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 8, 110–4.

[24]See already M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice: A Review of Robert Alexy's "A Theory of Constitutional Rights"' 2 (2004) International Journal of Constitutional Law 574–96.

[25]See V Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010).

[26]On this, at any rate, comparativists rest their hope. See K Zweigert and H Kötz, *An Introduction to Comparative Law* (trans. T Weir, 3e, Oxford University Press 1998) 46–7.

[27]See K Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

in the field of human rights, is already inherently transnational (in the trivial sense of having grown into a common template).[28] On a purely academic level, this is manifest in what has become a standard casebook on comparative constitutional law, the tome by Dorsen, Baer, Rosenfeld, Sajó and Mancini,[29] that is, in a sense, a modern public law equivalent of the digest.[30] The density of the arrangements of case law from various jurisdictions would make it an apt source for the further development of new constitutional law. The work could play the role of a compilation of global judicial wisdom.

Hence, we are witness to two developments that feed into and reinforce each other: The critical engagement with other constitutional jurisdictions makes the adjudicative process aware of alternate possibilities. The emerging transnational structure of fundamental rights analysis shifts the normative centre of gravity from the text of fundamental rights provisions to the justification of interferences (or of omissions). It prepares the ground on which a new practice of genuinely transnational constitutional law[31] can emerge that adds a horizontal and pluralistic dimension to the traditionally vertical ('we, the people') and nationally bounded conception of constitutional authority.

3. Transnational constitutional law

Europe clearly presents a special case where what states severally practice and sustain as constitutional law, or what they take to be consistent with it, affects the scope of their constitutional authority in relation to both the European Convention and the European Union system. While the source of the constraints that emerge by virtue of convergence remain diffuse,[32]

[28]Traditionally, 'transnational law' is understood, following PC Jessup's lead, as law 'which regulates actions or events that transcend national frontiers'. See his *Transnational Law* (Yale University Press 1956) 2. This characterisation sweeps broadly, but it misses the challenge inherent in the evolution of law across borders. It may be more apt to reserve the designator for law that is *neither* international *nor* national. See P Zumbansen, 'Transnational Law: Theories and Application' in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 3–30, at 5. And, indeed, the 'bad infinity' (Hegel) that this dual negation entails leaves a lot of space for things to fall into this category.

[29]See N Dorsen, S Baer, M Rosenfeld, A Sajó and S Mancini, *Comparative Constitutional Law* (4e, West Academic Publishing 2022).

[30]The digest, to wit, is the compilation of Roman law that had been put together under the authority of emperor Justinian. It is composed of countless excerpts of Roman jurists most of whom enjoyed the privilege of the *ius respondendi ex autoritate principii*. Over time, their findings were elevated to the status of legislation.

[31]When the *International Journal of Constitutional Law* in 2003 was created, many different matters were subsumed under the heading of an internationally relevant constitutional law. The editorial talked about the 'globalization' of constitutional norms, the increasing use of comparative analysis in adjudication and scholarship as well as the rising importance of international or regional adjudicatory bodies. See N Dorsen and M Rosenfeld, 'Note to Readers' 1 (2003) International Journal of Constitutional Law 1. The concept of 'international constitutional law' has hitherto been narrowly understood, *qua* norms that constitute and organise bodies such as the United Nations. See B Fassbender, *The UN Charter as the Constitution of the International Community* (Martinus Nijhoff 2009). With regard to its source, it is plainly and simply international law. The c-word, however, has also been used to reconstruct phenomena suggesting that public international law also recognises a body of higher law. See J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009). See von Bogdandy, n 1, at 131. Now the concept needs to be taken to a different level in order to designate constitutional law that emerges from a comparison of national constitutional or legal traditions and whose source remains *diffuse*. It stands for a sublation of national constitutional law in a messy international context. A good example for it is the transformative constitutionalism of Latin American countries where national constitutional regimes and the Inter-American Court of Human Rights have joined forces to disempower repressive forces. See, for example, R Urueña, 'Democracy and Human Rights Adjudication in the Inter-American Legal Space' in *Oxford Handbook*, n 28, at 867–91. See also von Bogdandy, n 1, at 131. According to von Bogdandy, Ibid., at 126, 'transformative constitutionalism' uses constitutional interpretation and adjudication in order to effect the transformation of social structures. For a different concept of transnational constitutional law that stresses the socially transformative potential of cross-border legal processes, see P Zumbansen and K Bhatt, 'Transnational Constitutional Law', <https://ssrn.com/abstract=3117352>. See also C Thornhill, 'Transnational Constitutional Law' in *Oxford Handbook*, n 28, 135–56.

[32]See S Cassese, 'Ruling from Below: Common Constitutional Traditions and Their Role' 29 (2021) New York University Environmental Law Journal 591–618, at 585–6.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

their scope is subject to occasional, albeit tentative, determinations by international and supranational adjudicating bodies.[33]

In contrast to the horizontal set-up of international law, transnational constitutional law is characterised by a persistent duality of verticality and horizontality.[34] The substance of norms relevant to the vertical top-down-perspective grows out of horizontal convergence. Cassese speaks, therefore, quite accurately, of 'higher law, made of lower law'.[35] But this is not the end of the story, for the participating states retain the power and the privilege to contest, or to claim exemption from, the determinations made along the vertical axis.[36] The latter concerns both the scope and shape of transnational constitutional law proper and the conditions under which the participating national and supranational entities yield to one another and defer to their authority (see section 10). It will be demonstrated (see section 12) that what lends unity to this fragile structure is that, at its most elementary level, European public law exhibits the features that Hannah Arendt attributed to the public sphere.

4. Margin and consensus

The countries participating in the system of the European Convention are liable to experience transformations of their human rights law that are not brought about pursuant to their own constitutional procedures but merely reflect developments in other countries participating in the same regime. This is the case, even though the European Court of Human Rights famously introduced in the *Handyside* case the concept of the margin of appreciation.[37] It means that the participating states are in principle free to determine by their own lights the necessity of an interference with fundamental freedoms on the grounds listed in the provisions of the Convention. Consequently, the Convention system makes room for various degrees of protection among the participating nations – with a lower level of protection in one country, and a higher in another.[38] At the same time, this margin becomes more narrowly circumscribed and may even disappear altogether[39] if a high number of states converges in their legislation (or constitution) on a certain

[33]See, for example, K Lenaerts and K Gutman, 'The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015) 141–76, at 158. Such a determination observes the logic of abduction. See CS Peirce, *Reasoning and the Logic of Things* (ed KL Ketner, Harvard University Press 1992) at 139–42. The process of abduction results in the formulation of a hypothesis that is supposed to identify cases that exemplify a rule. An abduction permits us to state that this or that is a case of the 'abducted' rule.

[34]Not all concepts of transnational constitutional law highlight this simultaneity. Von Bogdandy (n 7), at 12, uses the concept of transnational public law more broadly and includes into it the 'constitutional' features of European Union law and European administrative law.

[35]See Cassese (n 32), at 593.

[36]See, for the European Convention system, A Nußberger, *The European Court of Human Rights* (Oxford University Press 2020) 87.

[37]See Handyside v. United Kingdom, Judgement of 7 December 1976, 1 EHRR 737, para 48. According to Benvenisti, the overall conception predates the *Handyside* case and originated from cases concerning public security, that is, from official derogations on the ground of emergencies. See E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' 31 (1999) New York University Journal of International Law and Politics 843–54, at 845. The matter need not concern us here.

[38]See JHH Weiler, 'Fundamental Rights and Fundamental Boundaries' in his *The Constitution of Europe* (Cambridge University Press 1999) 102–29. Nußberger (n 36), at 89–90, explains with reference to the relevant case law what this entails in practice: permission as well as prohibition of displays of crucifixes in classrooms, permission as well as prohibition of the wearing of burkas by women, permissible discontinuance as well as mandatory sustenance of life support for patients that have fallen into some comatose state.

[39]On the respective indeterminacy, see A Somek, 'Cosmopolitan Constitutionalism: The Case of the European Convention' (2020) 9 Global Constitutionalism 1–23.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

standard.[40] It is thus that horizontal convergence among a sizeable number of participating legal systems can alter obligations of states in the fundamental rights realm.[41] Convergent practice merges into a transnational source of law[42] provided that its relevance is asserted by the European Court of Human Rights. Horizontal overlap, if, and only if, ascertained *qua* 'consensus', becomes flipped into a vertical constraint.[43]

5. Determining and challenging the margin

Of course, matters are messier than they appear at first glance. The width of the margin is determined – in a rather indeterminate fashion – by other factors, too. They concern whether or not an individual's existence or identity is at stake, whether there is disagreement over the relative importance of either the interest at stake or the best means of protecting it, whether the subject matter is morally sensitive and whether a balance has to be struck between colliding rights.[44] The uncertainty concerning the stringency of the margin is compounded by the fact that the court is also willing to see the relevance of consensus overridden in the face of deeply held convictions that have found an expression in constitutional law or political processes.[45] Hence, that appeal to 'consensus' cannot establish more than a rebuttable presumption that the co-evolution of legal systems alters the scope and substance of protection afforded by European human rights law.[46]

As is well known, the authority of consensus has not remained uncontested in human rights scholarship.[47]

First, one may want to object that contingent convergence must not play a role in a forum of principle.[48] Fundamental rights are to be espoused pursuant to the soundest or best possible interpretation of what they mean from the moral point of view.[49]

Second, reliance on consensus can be cast into doubt from the perspective of a theory of international judicial review. This path is chosen by Eyal Benvenisti – indeed, quite impressively so.[50] Drawing on John Hart Ely's theory of judicial review,[51] he claims that it is the task of the international tribunal to protect ('discrete and insular'[52]) minorities or outsiders against a systemic neglect of their interests in the context of national majoritarian processes.[53] Since such a neglect

[40]See, on same sex marriage, *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, paras. 98, 105–106. The European Court of Human Rights (ECHR) often speaks cautiously and speculatively about an 'emerging consensus', 'nearly a consensus', or 'certain tendencies'. See Nußberger (n 36), at 84.

[41]Of course, the number is not clear. The estimate is that the Court would not perceive a consensus where six to ten states practice matters differently. See D Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019) 156. Yet in the notorious *Hirst* case, the court ascertained consensus even though 13 states did not grant voting rights to prisoners. See Hirst v United Kingdom (No 2) (2005) ECHR 681. See also Nußberger (n 36), at 87. It is not by accident that this case led to massive resistance in the UK.

[42]See von Bogdandy (n 7), at 11 on European consensus.

[43]See Peat (n 41), at 146–53.

[44]See A, B and C v Ireland App no 25579/05, 16 December 2010, Reports 2010 para 232; S. H. and Others v Austria [GC] App no 57813/00, 3 November 2011, Reports 2011, para 94.

[45]See A, B and C v Ireland App no 25579/05, 16 December 2010, Reports 2010.

[46]See Peat (n 41), at 145–6, 151.

[47]The most elementary defense of reliance on consensus is that its existence restricts judicial discretion. See Peat (n 41), at 167–70.

[48]See G Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (Oxford University Press 2008) 121–3.

[49]See R Dworkin, 'The Forum of Principle' in his *A Matter of Principle* (Harvard University Press 1985) 33–71, at 69–70.

[50]See Benvenisti (n 37), at 847–8.

[51]See JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1982).

[52]Benvenisti, n 37, at 850, draws indeed on the famous Caroline Products n 4 rationale. See United States v. Caroline Products Co., 304 U.S. 144 (1938).

[53]See also E Benvenisti, 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy' 9 (2018) Journal of International Dispute Settlement 240–53, at 241–5.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

may well be deeply engrained in cultural traditions or steeped, when it comes to refugees, asylum seekers or foreigners in general,[54] in an in-group bias, it may extend all the way to the judiciary. Benvenisti claims that under these conditions the relevance of consensus would be false and harmful. It would be false, for it would reintroduce sovereignty through the back door;[55] it would be harmful, for it would place a huge burden on those promoting the cause of human rights. They would have to coordinate their efforts to amend legislation in various national arenas in order to precipitate an evolution of human rights by means of changing the consensus.[56]

Benvenisti, however, stops short of throwing out the baby with the bathwater. He translates, indeed, the margin of appreciation into a two-tiered theory of international judicial review. A lower level of scrutiny – deference, that is – may be called for in all cases in which the subject matter of legislation affects all equally (for example, hate speech regulations).[57] As soon as, however, minority groups are implicated or anyone else who is liable to be inadequately represented in a democratic process, the scope of application of the margin comes to its end and a more searching form of judicial solicitude is called for.[58]

6. The peer group

While Benvenisti's normative theory does not lack appeal, at any rate *prima facie*, it does not fit with how the ECtHR accounts for the reason underlying the margin. Moreover, it also gives Ely's original idea of representation reinforcement an altogether different twist.

The ECtHR clearly perceives the margin grounded in national traditions and in the close contact of national legislation with the moral sentiments of a people ('vital forces of society'). The Court also appeals to the respect that is due to the diversity of cultural traditions in Europe. This approach makes sense. Freedoms and public interests attain their particular significance and weight only from within a certain lifeworld the shape of which grows out of a society's history. A classic example is the different attitudes that cultures have towards nudity. Indeed, the operation of balancing would remain unconvincing without presupposing a shared normative background that is either taken for granted or supposed to be accepted.[59] Thus understood, the justification of the margin is not tied to the conditions under which a low level of judicial scrutiny may be raised to a higher level. On the contrary, its thrust is reverse. It is about relaxing strict scrutiny for the sake of cultural diversity. Benvenisti does not take this into account. This explains also why representation–reinforcement, as a maxim, is given a different twist in the international context to which he transplants the idea. It protects not only against oppressive or neglectful majorities, but also against the adverse effects of national boundaries. It is based, therefore, on a disregard of the more profound question whether such boundaries may not permissibly have adverse effects by preventing the free movement of capital or people.[60] Benvenisti's approach is hence potentially vulnerable to capture by the neoliberal agenda that one often encounters in 'progressive'

[54]So, this is essentially about 'outsiders within' and 'outsiders without'. See Benevisti (n 53), at 242.

[55]See Benvenisti (n 37), n 37, at 852:

> [. . .] [T]he court eschews responsibility for its decisions. But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities.

[56]See Ibid., at 853.

[57]See Ibid., at 847.

[58]For additional 'external pressures' on democracies that should trigger a more searching inquiry, see Ibid., (n 53), at 250–1.

[59]See A Somek, 'From Republican Self-Love to Cosmopolitan *Amour-Propre*: Europe's New Constitutional Experience' in J Bomhoff, D Dyzenhaus and T Poole (eds), *The Double-Facing Constitution* (Cambridge University Press 2020) 153–73, 169.

[60]In all fairness, it needs to be said that Benvenisti addresses these issues in 'Sovereigns as Trustees of Humanity: The Responsibility of States to Foreign Stakeholders' 105 (2013) American Journal of International Law 295–333.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

international legal circles. In any event, his theory is not only superimposed on the Court's jurisprudence and does, therefore, not 'fit', it is also based on a potentially inappropriate analogy between democratic majorities and national democracies.

By contrast, from the perspective of the Court, European constitutional law constitutes itself, even where transnational authority is ascertained, as internally pluralistic. This matches the two building blocks of the Convention system: diversity, on the one hand, and peer review, on the other. It has been argued that consensus could be regarded as 'subsequent treaty practice' in a wider sense and therefore relevant to the interpretation of the Convention pursuant to Article 31(3)(b) of the Vienna Convention.[61] This argument, even though it must struggle with equating political practice with an application of the treaty, should not be dismissed out of hand. It points to the remarkable fact that under cosmopolitan conditions the authority of constitutional law avails of more than one anchor. While the 'will of the people', however tricky to pin down it may be in process of a constitution's adaption, is certainly one root of constitutional authority, the other root, at any rate where fundamental rights are concerned, is the nod of approval by the international peer group whose voice adds an additional layer of control. The voice of the peer group is articulated by the ECtHR.[62] And it seems not entirely inappropriate to take the practice of peers into account in determining the margin. What else would explain that the convention may permissibly be regarded as a 'living instrument' the meaning of which can be drawn out by means of 'evolutive interpretation'? One encounters here, in what must admittedly be regarded as a shrouded way, the constituent power in a transnational context.

7. Resistance

In the transnational context, however, this is not the end of the story. Occasionally, participating states – often, but not exclusively, per their high courts[63] – contest findings made by the European Court of Human Rights.[64] Sometimes, as in the *Hirst* case, the resistance concerns indeed the claim as to the existence of consensus, in other cases it relates to questions of interpretation.[65] Both the ECtHR and national or constitutional courts often demonstrate readiness to engage in 'judicial dialogue'.[66] In the course of such as process it can happen that the national court yields to an international ruling, possibly subject to the proviso that it refuses to attribute to it the force of a precedent, or that the ECtHR modifies its view in light of the objections or observations made by its national counterpart.[67] Where the Convention has not been transposed into national constitutional law, courts can easily recognise that the state has an obligation under international law to observe how it is interpreted by the ECtHR, but that it may, at the same time, do so in a manner that is not inconsistent with the system of constitutional law established in the domestic sphere.[68] In the case that the attempt to arrive at international consistency and national coherence would give rise to an outright collision with

[61]But see the critical discussion of Nolte's respective views in Peat (n 41), at 164–6.

[62]This would explain, in this instance, in whose name an international tribunal exercises jurisdiction. See generally, A von Bogdandy and I Venzke, *In Whose Name? A Theory of International Adjudication* (Oxford University Press 2016).

[63]See, generally, M Claes and B de Witte, 'The Role of Constitutional Courts in the European Legal Space' in A v Bogdandy, P M Huber and C. Grabenwarter (eds.) *The Max Planck Handbooks in European Public Law, vol. 4: Constitutional Adjudication: Common Themes and Challenges* (Oxford UP 2023) 495.

[64]For a rich account of various constellations, see N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 112–52.

[65]See Nußberger (n 36), at 122–23. On the *Al-Khawaja* case concerning the right to a fair trial in British law, see M de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014) 435–6.

[66]See de Visser (n 65), at 435–8; Krisch (n 64), at 127, 140.

[67]See Krisch (n 64), at 134–40.

[68]This is a matter in which the Austrian and the German constitutional court seem to agree, even though the Convention is part of constitutional law in Austria. See *Miltner* and *Görgülü* cases.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

fundamental principles of the constitution, state courts raise the specter of the primacy constitutional law as they have no power to expose constitutional essentials to an international override.[69]

In more recent years, and in particular with Eastern European Courts taking the lead,[70] this approach seems to merge into the doctrine of principled resistance. According to Breuer, it has its roots in a twin concern with *ultra vires* interpretations of the Convention by an inventive court and with the defence of fundamental principles of the constitution.[71]

At any event, constitutional authority is eventually left at loose ends. 'Pluralism'[72] and 'open-minded co-operation'[73] are the euphemisms used to characterise this situation.[74]

8. Common constitutional traditions and Article 2 TEU

The fundamental rights protected by the European Union, even though now also laid down in a Charter, initially and possibly still ultimately[75] originate from the 'common constitutional traditions' of the Member States.[76] Again, the Court, in cases in which the Court of Justice of the European Union (CJEU) regards this source of primary Union law as relevant, needs to formulate a hypothesis about what constitutes such a tradition without availing of a clear standard.[77] It should come as no surprise that in the absence of a clear yardstick for ascertaining its existence, the findings on the part of the CJEU are at times bewildering.[78] This explains also why such findings are occasionally subject to contestation from below.[79] Clearly, with the Treaty of Lisbon's incorporation of the Fundamental Rights Charter into primary Union Law, the exact relation between these rights and their original 'source' has been cast into doubt. While the first section of Article 6 TEU effects the incorporation, the third sustains the fundamental rights, 'as they result from the constitutional traditions common to the Member States' as general principles of European Union law.[80] Hence, fundamental rights that flow from that source have not disappeared, which explains why this source is at least of relevance to the interpretation of

[69]This is the other part of the message send out on *Görgülü*. See Nußberger (n 36), at 119.

[70]See M Breuer, 'Principled Resistance Meets '*ultra vires*': New Techniques in Opposing ECtHR Judgments' 82 (2022) Heidelberg Journal of International Law 641–70, at 644–6.

[71]See Breuer (n 70), at 642; Nußberger (n 36), at 127–8 (Also observing that Russia went further than other states in applying a national constitutional counter-limits doctrine).

[72]Krisch (n 64), at 152, for an overall positive assessment of the situation that largely avoids clashes and encourages pragmatic accommodations.

[73]Nußberger (n 36), at 128.

[74]See Breuer (n 70), at 649 note 31 citing authors who seem to support principled resistance.

[75]The meaning of 'ultimately' depends on how one reads Article 6 TEU. One can view the EU Charter of Fundamental Rights as an outgrowth of the common constitutional traditions or as an independent piece of law that is based on an international agreement.

[76]See Case C- 11/70 *Internationale Handelgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* ECLI:EU:C:1970:114. See O Pollicino, '"Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past Present and Future' (2018) Global Jurist 1–16, at 4–5. For a more recent analysis, see M Fichera and O Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' 20 (2019) German Law Journal 1097–18, at 1102–11.

[77]For illuminating discussion of the difficulties involved therein, see Cassese, n 32, at 598, who perceives the CJEU invested with a high degree of discretion: 'This court has the power to decide whether a given national constitutional tradition effectively exists, as well as the number of converging national traditions that must be found in order to conclude that a tradition is indeed "common"'.

[78]See the notorious Mangold case. Case C-144/04 *Mangold v Helm* EU:C:2005:709.

[79]See, most prominently, R Herzog and L Gerken, 'Stoppt den Europäischen Gerichtshof' *Frankfurter Allgemeine Zeitung*, 8 September 2008.

[80]Lenaerts and Gutman (n 33), at 173, suggest that the constitutional traditions common to the Member States are a source of inspiration for all general principles of EU law, including, but not limited to, fundamental rights. Thus understood, Article 6 (3) TEU can be read as confirming that the common constitutional traditions are relevant for fundamental rights without thereby ruling out that they are also relevant for other general principles. Cassese (n 32), at 599, seems to disagree.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

Charter rights.[81] This is explicitly recognised in Article 54(2) of the Charter saying that if the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, 'those rights shall be interpreted in harmony with those traditions'.

An additional question arises about the values mentioned in Article 2 TEU. On their face, they seem to be self-standing and independent of the elusive common constitutional traditions from which general principles such as fundamental rights emerge. At the same time, Article 2 TEU states that the 'values are common to the Member States', and Article 7 suggests quite strongly that this communality concerns the national constitutional systems severally and EU law jointly. The values are common to the Member States in that they are bound by EU law to commit themselves to these within their own constitutional system.[82] What we have, at any rate, is the simultaneity of principles on the EU and national level, which is also characteristic of common constitutional traditions. What is different, to be sure, is that the supranational authority of these values is not, in contrast to rights that originate from constitutional traditions, derivative of being shared. Their authority is supranational and, therefore, not merely transnational in the sense of being 'higher law, made of lower law'.[83] And yet, it is plausible to assume that any determination of the content of these principles must be informed by a comparison of what is understood by these principles in various Member States. Article 2 says that they *are* common to the Member States. Hence, this is transnational law in at least an interpretive sense.[84]

9. The principle of contestability

Ostensibly, in the case of common constitutional traditions the source of transnational law remains rather mushy, even more so than in the case of 'consensus'. Neither its substance nor the required level of institutional support by participating constitutional systems are clearly defined.

The traditional constitutionalist[85] way of dealing with such an unsatisfactory situation is to resist deflection by the aura of values and to focus rather on the position of those who claim to have the power to say what these values mean. What one can capture, from this angle, is the *form* of transnational constitutional law.[86] The reconstruction of the form reveals power or the lack thereof, concealed behind grand gestures. Once one has identified those who exercise power, means can be designed to hold them to account.

The power to identify constitutional traditions must be governed by a principle of contestability. Otherwise, the CJEU would have the power to make them up.[87] The contestability, however, originates from two different sources, namely, first, doubts regarding their existence and, second, claims to exemption based on national constitutional identity (Article 4[2] TEU). Nevertheless, the conditions under which 'common constitutional traditions' – and also a 'consensus' in the convention context – can be validly ascertained remain indeterminate.

[81]See Cassese (n 32), at 601. See also Lenaerts and Gutman (n 33), at 173.

[82]This is what their genealogy from the Copenhagen criteria suggest. See M Klamert and D Kochenov, Art 2 TEU (manuscript on file with the authors) at 1.

[83]See Cassese (n 32), at 593.

[84]Ibid., n 32, at 597 views Article 2 as one among other 'Common Constitutional Traditions Clauses'. See also A von Bogdandy, 'Principles of Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' 57 (2020) Common Market Law Review 705–40, at 707. According to von Bogdandy, the values of Art 2 TEU are informed by the constitutional traditions of all Member States, and from this follows:

> If not contradicted by the European Union and its Member States, 'illiberal democracies', ie, constitutional orders with very few operative checks on and balances against a governing majority under a powerful leader, will become part of European constitutional pluralism and even participate in shaping European values, thereby heralding the end of the Union's current self-understanding. What we consider a systemic deficiency today, might become normal tomorrow.

[85]Constitutionalism is the project to submit public power to the discipline of law. See Somek (n 23), at 1.

[86]For an alternative analysis of 'eight peculiarities' see Cassese (n 32), at 597–9.

[87]This explains why Cassese's attribution of broad discretion to the CJEU is ultimately not convincing. See above n 77.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

In a sense, courts must perform a stab in the dark *and see what happens*, since what they claim may well be met with defiance.

If one attempts to articulate what this comes to in deontic terms, it means that the power of inter- or supranational courts to declare what is transnational constitutional law is not in and of itself correlated with a liability on the national level. This is the case, for in a pluralist context each participating system must be aware that what it takes to be an exercise of its powers is likely to be mirrored with a corresponding claim to immunity (or voidness) from another system. Powers and immunities exist relative to systems. In a pluralist context, the system asserting a power has to reflect this relativity within itself, from which results the lack of the correlation of a power with a liability. This involves a triple paradox.

First, the ability of inter- and supranational courts to say what the law is, is indeed supposed to be power, for any such declaration is intended to alter an existent legal situation.[88] Any determination on the part of these courts has the capacity to make a difference.

Second, at the same time, the alteration is deemed to arise from a mere declaration, that is, from an act that is decidedly *not* an alteration of rights, obligations or of a status. A proposition, that is, would at best merely say that an alteration has already taken place, even if hitherto it has not been noticed. It begs the question, however, why such a declaration should matter only if it is made by a court and not, for example, by a comparative law institute. If it makes legally a difference that the declaration is made by a court, the court must possess the power to alter the legal situation of others.

The only way to make sense of this apparent paradox consists of regarding the exercise of the court's power as self-effacing. A self-effacement of this type can, again, mean two different things. It can amount to a revocation of the claim to alter a legal situation. What would otherwise be an exercise of a legal power then resigns itself to a mere declaration of facts. A mere declaration of facts, however, would be, as we have already seen, without legal effect. Alternatively, the court may only *claim* to bind others without being able to do so. On the contrary, in raising a claim it must face up to the fact that others might object. In deontic terms, this means that the power is effectively toned down to the level of what is considered a mere 'privilege' in the field of action. Privileges are rights to something that are uncorrelated with an obligation of others.[89] Privileges entitle a person to grab something, however, without preventing others from grabbing the same thing and, possibly, without preempting their privilege to take it from you once you have established control of it. There may well be a 'protective perimeter' of real rights[90] regulating the conditions under which it is permissible to exercise a privilege and to take possession of something. Combative sports provide a clear example of how this works.

Third, for the shape of powers and liabilities in a pluralist context this means, borrowing Griffith's memorable expression, that the constitution is what happens.[91] A Court's power to say what is transnational law is not correlated with the liability to accept such a finding. Rather, a relevant assertion is susceptible to negotiation and renegotiation with those deeming themselves affected by it.

The indeterminacy of its substance[92] and the lack of clarity of the conditions under which it can be validly claimed likens transnational constitutional law to custom and convention. Indeed, the fact that its existence may be permissibly claimed, but that such claims can also be rejected, indicates that such law emerges from a debate over its existence. This is a matter to which we shall return below.

[88]Cassese (n 32), at 597, speaks of a 'new manner of lawmaking'.

[89]See WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (2e, ed WW Cook, Yale University Press 1946) 36.

[90]See HLA Hart, 'Legal Rights' in his *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 171–3.

[91]See JAG Griffith, 'The Political Constitution' 42 (1979) Modern Law Review 1–21, at 19.

[92]There is also the indeterminacy concerning which legal order matters for the purpose of a synthesising comparison. See Cassese (n 32), at 617.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

10. The principle of conditional deference

Transnational constitutional law that is asserted in the guise of 'consensus' and 'common traditions' concerns the creation of higher law from lower law.[93] It is a different matter, though, how, in a pluralist context, the participating systems recognise each other's power with regard to the tasks that any such system is supposed to accomplish. In this context, possibly the most fundamental principle of the interlocking constitutional arrangements in Europe is the commitment to defer, not least owing to treaty obligations, to another participating polity, however, subject to the proviso that the latter do what it claims to do well enough.[94]

The core idea was first formulated in the *Solange I* judgment of the German Federal Constitutional Court[95] in which the court essentially held that it would review European Community acts on grounds of German fundamental rights law

> [a]s long as the integration process [of the European Community] has not progressed so far that [European] Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution.[96]

Reacting to the damage this decision has done to its authority, the CJEU developed a fundamental rights standard in a number of cases.[97] Subsequently, the German court ceded the ground again to the Union, however, subject to the proviso that it would sit still and watch only 'so long as' (*solange*) the Union sustains an equivalent standard for the protection of fundamental rights. While this principle has led, at least for a long period of time,[98] to much 'barking' on the part of the German Federal Constitutional Court,[99] it has not yet been given bite in the field of human rights law.[100]

We owe to Armin von Bogdandy and his collaborators the idea that the *Solange* principle could also be applied in reverse gear.[101] The Union could review Member States acts on fundamental rights grounds, even if they are not implementing European Union law and even outside of the scope of the application of the Treaty, as soon as a Member State's system of fundamental rights

[93]See Ibid.

[94]See von Bogdandy (n 1), at 491. In a sense, the subsidiarity principle is just an exemplification of this general idea.

[95]See BVerfGE 37, 271. Available in English translation at A Oppenheimer (ed), *The Relationship Between European Community Law and National Law: The Cases* (Cambridge University Press 1994).

[96]See Oppenheimer (n 95), at 452. On the history, see B Davis, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press 2012) 78–87.

[97]See Case 44/79 *Hauer v Rheinland-Pfalz* EU:C:1979:290.

[98]The sudden change is evident in the PSPP-decision concerning the powers of this European Central Bank and how these had been rendered by the CJEU. See note 100.

[99]See CU Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' 7 (2001) European Law Journal 95–113.

[100]Yet, as is well known, in the PSPP decision the Federal Constitutional Court regarded a ruling by the CJEU as ultra vires and thus null and void. See BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15.

[101]See A von Bogdandy, C Antpöhler, J Dickschen, et al, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' 49 (2012) Common Market Law Review 489–519. The core of the doctrine has been recently restated by von Bogdandy and Spieker as follows:

> Beyond the scope of Article 51(1) of the Charter, any Member State remains autonomous in its fundamental rights protection *as long as (Solange)* the presumption holds that it respects the essence of fundamental rights enshrined in Article 2 TEU. All courts in the European Union are competent to police this presumption. If the presumption is rebutted, the protection under EU law applies.

A von Bogdandy and D Spieker, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CjEU's Article 2 Case-Law' in M Bobek and J Prassl (eds), *The European Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 525–46, at 530.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

protection has systematically[102] fallen below the level that is to be sustained by a Member State of the European Union. Moreover, the idea can be also applied horizontally in the relation between the Member States directly, for example, if states have misgivings about extraditions because the arrest warrant has originated from a state in which the criminal justice system does not meet the European fundamental rights standards.[103] The CJEU has even opened the gate for individuals to suggest preliminary references concerning the question whether a Member States' court system satisfies the conditions for fair procedures on human rights grounds.[104]

While these quite consistent extensions of the *Solange* principle are as of yet still merely proposals by scholars, they elicit that Europe's constitution results from mutual conditional yielding to sites of authority along both, the vertical and the horizontal dimension.[105] Each of the participating entities – the Union, the Convention system and the nation states – pledge to abstain from applying their own constitutional standards, or their interpretation thereof, as long as what the others practice appears to be sufficient to warrant non-interference.[106] Thus understood, even the margin of appreciation is just one more instantiation of the more basic *Solange* principle. What it is that warrants non-interference is determined by each participating system autonomously and independently. This is the principle of conditional deference, which is complemented, as we have seen, by the principle of contestability.

Indeed, European constitutional law is quite 'anarchical', if what we understand by this is the absence of a unified mechanism of coordination.

11. European values and constitutional identity

This system has in the meanwhile gone beyond an isolated focus on fundamental rights. This is obvious for the role that is now played by Article 2 TEU[107] and how it informs the action taken by the Union against 'backsliding' by newer Member States, such as, in particular, Hungary and Poland.[108] Article 2 TEU[109] introduces six plus six core values[110] on which the Union is built and

[102]On this condition and the requisite 'red lines' approach see von Bogdandy (n 84), at 715–6, 733.

[103]See I Canor, 'Suspending Horizontal *Solange*: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law' in A v Bogdandy et al (eds), *Defending Checks and Balances in the EU Member States* (Nomos 2021) 183–206.

[104]See Case C-216/18 PPU, *Minister for Justice and Equality (L.M.)*, EU:C:2018:586, paras 35, 48, 50.

[105]For a similar observation von Bogdandy (n 1), at 487.

[106]All the participating entities need to take the necessary diversity of public law in Europe into account. As von Bogdandy (n 7), at 13 puts it, we are confronted with 'multiple modernities' in Europe.

[107]Von Bogdandy (n 1), at 158–9, 181 refers to it as a constitutional nucleus (*Verfassungskern*) which has implications for Europe's 'identity'.

[108]For a brief introduction, see von Bogdandy (n 1), at 268–9. T Drinóczi and A Bień-Kacala, 'Illiberal Constitutionalism: The Case of Hungary and Poland' 20 (2019) German Law Journal 1140–66. On the question whether the Commission has failed to enlighten the candidate countries about the true meaning of the Copenhagen criteria, which subsequently found their way into Article 2 TEU, see R Janse, 'Is the European Commission a Credible Guardian in the Values? A Revisionist Account of the Copenhagen Political Criteria During the Big Bang Enlargement' 17 (2019) International Journal of Constitutional Law 43–65.

[109]Article 2 EU Treaty reads as follows:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[110]Von Bogdandy (n 1), at 160 describes their significance in politico-theological terms:

> Die Bestimmung listet zwölf Prinzipien auf. Die Zahl 12 ist, als die Zahl des geschlossenen Kreises, die symbolträchtigste Zahl überhaupt: Zwölf Stämme umfasste Israel, zwölf Jünger hatte Christus, zwölf Tore hat das himmlische Jerusalem, zwölf Sterne, als Kranz geordnet, bilden die Krone des apokalyptischen Weibes. Art. 2 EUV nimmt mit der Zahl seiner Prinzipien die Symbolik und das Heilsversprechen der Fahne auf, den zwölf goldenen, im Kreis angeordneten Sternen auf blauem Grund.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

which the Member States, according to Article 7 TEU (and Article 49), are expected to observe within their own constitutional systems.[111] Meanwhile, the CJEU is also actively involved in sustaining the rule of law by giving Article 2 direct effect in the context of Article 19 (dealing with a functioning court system).[112]

Article 2 is clearly supposed to establish a limit to constitutional diversity in Europe.[113] In the transnational constitutional setting, however, the meaning of these principles needs to be calibrated by formulating hypotheses about what it is exactly that the Member States share. In the selfsame setting, the commitment to Article 2 values is, in addition, offset by the Union's promise, made in Article 4 section 2 of the Treaty, to respect the national identity (and fundamental political and constitutional structures) of the Member States.[114] Hence, one should not be surprised to see Member States flag concerns regarding their constitutional identity[115] in order to

---

This reads in English translation as follows:

> The provision lists twelve principles. The number 12 is, as the number of the closed circle, the most symbolic number of all: twelve tribes comprised Israel, twelve disciples had Christ, twelve gates has the heavenly Jerusalem, twelve stars, arranged as a wreath, form the crown of the apocalyptic woman. Art. 2 TEU takes up with the number of its principles the symbolism and the promise of salvation of the flag, the twelve golden stars arranged in a circle on a blue background.

[111]Mind that owing to the 'abductive' nature of the principles used along the vertical axis (see above n 33) the Union cannot remain indifferent to how principles such as democracy and the rule of law are understood within the constitutional systems of the Member States. There is a paradox here, which should be duly noted. European transnational constitutional law is based on a surplus that exceeds individual national constitutional traditions, even though this surplus somehow originates from them. On the *Verfassungsaufsicht* (constitutional supervision) by the Union, see von Bodgandy, n 1, at 274–5. That the CJEU was supposed to play a role at all in this had to be asserted by, indeed, the CJEU. See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117. See also Case C-284/16, *Achmea*, EU:C:2018:158, para 34; Case C-621/18, *Wighman*, EU:C:2018:999, paras. 62–3. See also von Bogdandy (n 1), at 283, 414 and von Bodgandy (n 84), at footnote 48 for more case law on Poland. Initially, one would have assumed that pursuant to Art 7 TEU the authority of 'constitutional supervision' is the exclusive preserve – the prerogative, indeed – of the European Council. But see Spieker (n 4), at 248 and von Bogdandy (n 84), at 724–5, for the view that Article 7 does not preempt actions by other institutions, in particular by the CJEU.

[112]For a reconstruction of the legal premises of the CJEU taking the helm, see Spieker, n 4. The basic crux is that even though Art 2 values are relevant also for situation falling outside the cross-border settings of EU law (241), it is not directly effective. Art 2 values, in a sense, must acquire such effect by being combined with more specific provisions (251). These other provisions, such as Art 19 TEU concerning the independent judiciary, lack application outside of the scope of EU law. Through their combination, however, Spieker suggests, the provisions are subject to a 'mutual amplification' (247, 251). Art 2 becomes directly applicable in the medium of Art 19, and Art 19 increases its scope of application to entirely internal situations. According to Spieker, this alchemy should work for any directly effective provision, such as provisions of the fundamental rights charter, that is substantively linked to Art 2 values. Conceivably, then, the CJEU could assert jurisdiction for entirely internal interferences with freedom of speech, not least because such freedom is relevant to the value of democracy (252). This would open the gate to countless supranational interferences with national constitutional autonomy. The alchemist setting the example here was, of course, the CJEU, which in cases such as Kücüdeveci applied a Directive horizontally by combining it with a general principle. See Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21. In the face of these opportunities for vast expansions of supranational jurisdiction, Spieker had to introduce stopgaps (see 257, 258). See also Bogdandy and Spieker (n 101), at 733–4.

[113]See von Bogdandy (n 7), at 13.

[114]See von Bogdandy (n 1), at 184, on the presumptive priority of Art 2, see Ibid. at 186–7. The first sentence of Art 4 section 2 reads as follows: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

[115]See on Germany and Italy von Bogdandy (n 7), at 38–42. See Case C-156/21 *Hungary v Parliament and Council* EU: C:2022:97, para 202, and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, para 253. See on the *Taricco* cases (concerning Italy) A Somek, 'The Cosmopolitan and the Federal Margins of Appreciation' in M Bobek and J Prassl (eds), *The European Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 547–58, at 553–4, 556–7. The also Fichera and Pollicino (n 76). The *Taricco* cases concern the rule of law – differences in interpretation between the Union and a Member State. On the cases decided by the Polish constitutional court, see 'Primacy of EU law and jurisprudence of Polish Constitutional Tribunal' <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf>.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

object to supranational renderings of Article 2 values (or other encroachments of national constitutional law on the basis of EU law).

This decentralised structure, which is in a way typical of the pluralism of a mere federation in contrast to a federal state,[116] is based on a commitment to mutual stabilisation (if one system fails or goes astray, the other considers itself authorised to intervene or to take over); Article 7 TEU aside, it is, however, not at all based upon mutually agreed upon standards of intervention.

12. Public law as public sphere

Arguably, the best justification of the principle of conditional deference is the mutual pledge to sustain liberal democracies.[117] It entails, however, that inter-, supra- and national systems are ultimately embedded in the rather anarchical structure of European constitutional law. It does not upset the operation of these systems when run-of-the-mill business is at stake. But if the tectonic plates collide, as they not infrequently do in the relation between the EU and Germany, Italy and a number of Eastern European countries, this gives rise to what can be considered the equivalent of earthquakes, at any rate, from the perspective of scholarly commentary. The new European nomos of the earth is unsettled and keeps rumbling.

The significance of this situation can be drawn out by taking one's cue from von Bogdandy's characterisation of the Union's Europe as a 'society' (*Gesellschaft*).[118] If Europe is a society (as the language of Article 2 TEU in fact submits), it makes sense to view it as encompassed by a public sphere. The basic commitment to yield to others subject to negotiated or renegotiated conditions and to sustain a common practice despite striking differences of opinion coincides with how Hannah Arendt characterised the public sphere or, possibly even more profoundly, what it means to have a 'common world'.[119]

Two essential features account for what this sphere is: first, the mutual understanding that independently of our apprehension of it there is something that we talk and argue about – a common referent, as it were; and second, the awareness that the views that we develop of it are invariably different and perspectival. They are unlikely to overlap. Arendt puts this in the following way[120]:

> Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position. This is the meaning of public life, compared to which even the richest and most satisfying family life can offer only the prolongation or multiplication of one's own position with its attending aspects and perspectives. The subjectivity of privacy can be prolonged and multiplied in a family, it can even become so strong that its weight is felt in the public realm; but this family 'world' can never replace the

[116]For fine elaborations of this point, see S Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021); C Schönberger, 'Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Bundestaat-Staatenbund-Schemas' 129 (2004) *Archiv des öffentlichen Rechts* 81–120.

[117]It should be noted that front-loading European integration with this aim is a relatively recent development. It has emerged as a result of repeated attempts to cope with 'backsliding' and systemic deficiencies within more recent members. Thus understood, the Union has underwritten (and overwritten!) the core function of the convention system. See, on the 'second saddle period' of European integration and the two tracks of protection, von Bogdandy (n 1), at 192–3, 209–17, 210, 276.

[118]See von Bogdandy (n 7), at 17–8. I would add that it is, indeed, a civil society in the Hegelian sense, a claim that is rejected by von Bogdandy. But see von Bogdandy (n 1), at 13, 17–8, 77. 'Society' is the only term that von Bodgandy considers adequate to capture what it is that lends unity to the European Union. The Union is not a state, it is internally pluralistic and self-organising. One is inclined to add that since market relations are at its core, it is not a *Gemeinschaft* (community), but rather a *Gesellschaft*. See F Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie* (9e, Wissenschaftliche Buchgesellschaft 1979) 34–42.

[119]H Arendt, *The Human Condition* (Chicago University Press 1958) at 55–6.

[120]Ibid., at 57.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

> reality rising out of the sum total of aspects presented by one object to a multitude of spectators. Only where things can be seen by many in a variety of aspects without changing their identity, so that those who are gathered around them know they see sameness in utter diversity, can worldly reality truly and reliably appear.

Putting the matter in terms more familiar to legal scholars, it can be said that European constitutional law does not avail of a rule of recognition applied by law-applying officials;[121] it is manifest, rather in occasional, fragmentary and often competing interpretive elaborations of the limits drawn to one of the participating authorities. Various principles are in play, but these are subject to potentially colliding elaborations. European constitutional law, in particular its transnational instantiations, is thus embedded in the public sphere composed primarily of institutions that are tied to national constitutional traditions. They cooperate, antagonistically on occasion, with those representing a supranational elite project. Supranational courts make an effort to accommodate the position of their national interlocutors,[122] national courts on occasion resign themselves to having the supranational court prevail. This is the sphere of European constitutional politics.[123] There is no 'rock-solid' foundation of Europe's constitutional law. Its structure is congenial to how Ronald Dworkin imagined the reasoning of adjudicative bodies to stem, at least implicitly and in rudimentary form, from various interpretive elaborations of the morally most appealing view of existing legal practice.[124] In order to drive home a point, one needs to be and act like a shrewd political player, possessing the requisite skills to negotiate and to carve out fields of influence.[125] Not by accident, von Bogdandy emphasises that European constitutionalism embraces a culture of compromise.[126] It goes without saying that in such a context, the appeal to principles and their 'best possible interpretation' is necessarily overlain with the realities of power play.

13. Griffith at long last

It is somewhat ironic that in a 'society' such as the European which claims to base itself on 'law', the political quality of the constitution[127] is so openly at display. Any constitution, to be sure, is 'political' in the sense that whatever is deemed to be binding about it reflects the influence of preference, persuasion, faith, routine, or a humdrum legalism that is part of the *habitus* of contending players. The meaning of the constitution as law results from victory, defeat and compromise, '[. ..] laws are merely a statement of a power relationship'.[128]

In recent decades, such a sober political understanding of the constitution has been modified into the normative project of 'political constitutionalism' and been subsequently contrasted with 'legal constitutionalism'.[129] The major difference, roughly speaking, between the two is whether or not one puts parliament at the centre of constitutional authority and more or less dispenses with

[121]See HLA Hart, *The Concept of Law* (2e, Clarendon Press 1994) 110–7.

[122]See Case C-42/17 *Taricco II* EU:C:2017:936.

[123]For a rather early elaboration of this point about legal scholarship, however, formulated without regard to the European Union, see A Somek, *Rechtssystem und Republik: Über die politische Funktion des systematischen Rechtsdenkens* (Springer 1992).

[124]See R Dworkin, *Law's Empire* (Harvard University Press 1986) 90–1. The diversity of such reflective accounts of authority is consistent with what Hegel would have called 'objective spirit'. See RB Pippin, *Hegel's Practical Philosophy: Rational Agency as Ethical Life* (Cambridge University Press 2008) at 242.

[125]For a further elaboration of this rather Madisonian point, see A Somek, 'Real Constitutional Law: A Revised Madisonian Perspective' in C Bezemek, M Potacs and A Somek (eds), *Vienna Lectures in Legal Philosophy*, vol. 2 (Hart Publishing 2020) 161–83.

[126]See Von Bodgandy (n 1), at 14, 245, 255, 260.

[127]See Griffith (n 91), at 19.

[128]Ibid.

[129]See M Loughlin, 'The Political Constitution Revisited' 30 (2018) King's Law Journal 5–20 (with extensive references to the literature).

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

judicial review. If one does so, one is alleged to favour the 'political constitution' *qua* alternative to American or German style constitutionalism.[130] As Martin Loughlin pointed out with much circumspection, this contrast is not at all consistent with Griffith's perspective that was decidedly not normative and keenly interested in seeing constitutional routines emerge from the push and shove of political interactions.

A political constitutionalist, thus understood, views the guidance that one obtains from norms as derivative of relations of power.[131] The constitutional reality, however, has implications for the role that is played by legal scholars within it. While a 'value-neutral' (*wertfrei*)[132] account of the constitution might at best be provided from an external and descriptive point of view, those raising claims about what ought to be done are unavoidably perceived as taking sides or pursuing an agenda, at any rate, as soon as the difference of their views is thrown into sharper relief.[133] This is invariably the effect of a public sphere. Normative scholarship becomes drawn into the 'impetuous vortex' of politics.[134] One should not be surprised, then, to see groups of scholars involved in creating networks of power[135] with the aim to make certain constitutional developments happen.

14. Verfassungsblog.de

The efforts to curb 'illiberal democracy' or 'authoritarian backsliding'[136] have given rise to a public debate in which scholars – in particular of the up-and-coming generation – participate with great vigor. Hence, not only structurally exhibits constitutional law the features of a public sphere, whatever happens to become law in Europe is comprised by a widening public debate.

Digitalisation has helped to increase vigilance and to accelerate the exchange of information and ideas. In legal scholarship in general, blogs are becoming increasingly popular,[137] leading to a great number of different kinds of blogs.[138] Numerous such formats exist in particular on

[130]For the appropriation of this very British idea by the 'Law and Justice' Party in Poland, see A Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Façade Rhetoric of Political Constitutionalism and Actual Abuse of Apex Courts' 19 (2023) European Constitutional Law Review 25–58, at 36–56.

[131]This does not rule out that on the surface the relevant equilibria are reflected in the shared meanings of agreed-upon conventions. See above n 125.

[132]See M Weber, 'Science as a vocation' in his *Essays in Sociology* (eds HH Gerth and CW Mills, Oxford University Press 1958) 129–56.

[133]See von Bogdandy and Spieker (n 101), at 709.

[134]See T Risse, 'European Public Sphere, the Politicization of EU Affairs, and its Consequences, in T Risse (ed), *European Public Spheres* (Cambridge University Press 2015) 141–64, at 144. The semblance of objectivity can only be maintained by the mutual recognition of plurality and reasonable disagreements.

[135]See the subtle characterisation of power in Arendt (n 119), at 200:

> Power is always, as we would say, a power potential and not an unchangeable, measurable, and reliable entity like force or strength. While strength is the natural quality of an individual seen in isolation, power springs up between men when they act together, and vanishes the moment they disperse. Because of this peculiarity, which power shares with all potentialities that can only be actualized but never fully materialized, power is to an astonishing degree independent of material factors, either of numbers or means.".

[136]On the shifting terminology, see Janse (n 108), at 61.

[137]Even back in 2006, US legal scholars already discussed how legal blogs might transform legal scholarship. See, for example, LB Solum, 'Blogging and the Transformation of Legal Scholarship' 84 (2006) Washington University Law Review 1071–88.

[138]Examples for prominent blogs in legal scholarship are the SCOTUS Blog, Lex Blog, Jurist, Artificial Lawyer, I·CONnect, Verdict Justia, Opinio Juris and the Legal Scholarship Blog. Blogs in law are of such popularity that there even has been a word created to capture this phenomenon, namely 'blawg', a fusing of the words 'law' and 'blog'. See FC Mayer, 'Die offene Gemeinschaft des Verfassungs-blogs: Zehn Thesen zu zehn Jahren Verfassungsblog' (VerfBlog 2019) <https://verfassungsblog.de/die-offene-gemeinschaft-des-verfassungsblogs/> accessed 9 February September 2019. DOI: 10.17176/20190902-201540-0.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

European law.[139] One medium that publishes contributions in German and in English, deserves special mention, namely, the *Verfassungsblog*. It has, without doubt, put 'constitutionalism' at the centre of its agenda.

Maximilian Steinbeis, the founder, former sole-author and now lead-editor and owner, initiated the *Verfassungsblog* in 2009 as a one-journalist project.[140] A driving force to turn the *Verfassungsblog* into something bigger were the momentous, and momentously disconcerting, developments in Hungary when Viktor Orbán and his party Fidesz enacted a new Constitution in 2011 to instrumentalise it for their political agenda.[141] The *Verfassungsblog* observed critically this authoritarian (mis)use of constitutional law as a mere means to asphyxiate liberal democracy. Experts from Europe and the US, but in particular scholars from the country affected, were using their knowledge to 'call out' this dangerous dynamic caused by the developments in Hungary.[142] By doing so, legal scholarship used its power to identify an authoritarian (mis)use of constitutional law without having to observe the constraints of diplomatic courtesy that are faced by politicians.[143]

By now, the *Verfassungsblog* has innumerous contributions, not just to the Hungarian crisis but also to the Polish crisis, starting in 2015.[144] It has thereby achieved, as noted by Franz C. Mayer, three more important things: First, it has made talk of European constitutional law eventually become a matter of course. It is now taken for granted by participants that certain key aspects of primary European Union law are of a constitutional nature. Second, it has put much emphasis on the battles of jurisdiction that are fought out in relation to the CJEU and national constitutional courts, in particular the German constitutional court. This affects the essence of European constitutionalism, not least because in this context the room that has to be left for the nation state has become a subject of contention. Finally, the *Verfassungsblog* is clearly a site of scholactivists who believe that liberal constitutions are a good thing.[145] The contributors engage in the advocacy of constitutionalism (and do not publish diatribes 'against constitutionalism'[146]).

[139]One may think, for example, of EUROPP, European Law Blog, UNIO Blog, EU Law Live, European Parliamentary Research Service Blog and EJIL Talk. Compared to the US, however, the 'law blog scene' in Europe is still in its earlier stages. See, once again, Mayer (n 138 who cites a statistic of the American Bar Association listing around 4500 'Blawgs'.

[140]See M Steinbeis, 'Verfassung schützen, Verfassung missbrauchen, Verfassungsmissbrauch beobachten' 71 (2023) *Jahrbuch des öffentlichen Rechts der Gegenwart* 135–48.

[141]See M Steinbeis, 'Verfassungs-Barbarei in Budapest' (VerfBlog 2011), <https://verfassungsblog.de/verfassungsbarbarei-budapest-2/> accessed 20 January 2011. DOI: 10.17176/20181008-125156-0. On the developments in Hungary, see the introduction by M Bánuti, G Halmai and K Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' 23 (2012) Journal of Democracy 138–46; K Scheppele, 'Understanding Hungary's Constitutional Revolution' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart Publishing 2015) 111–24.

[142]See, for example, G Halmai and K Scheppele, 'Orbán is Still the Sole Judge of his Own Law' (VerfBlog 2020) <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/> accessed 30 April 2020. DOI: 10.17176/20200501-013725-0; D Karsai, 'The Curious and Alarming Story of the City of Göd: How the Hungarian Government Misuses Its Power in Their Political Fight against Opposition-led Municipalities' (VerfBlog 2020) <https://verfassungsblog.de/the-curious-and-alarming-story-of-the-city-of-goed/> accessed 15 May 2020. DOI: 10.17176/20200515-133737-0; G Halmai, 'Restoring Constitutionalism in Hungary: How Should Constitution Making Be Different from What Happened in 1989?' (VerfBlog 2021) <https://verfassungsblog.de/restoring-constitutionalism-in-hungary/> accessed 13 December 2021. DOI: 10.17176/20211215-142526-0. One of the latest posts in this regard is K Scheppele, DR Kelemen, nd J Morijn, 'The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary' (VerfBlog 2022) <https://verfassungsblog.de/the-good-the-bad-and-the-ugly-2/> accessed 01 December 2022. DOI: 10.17176/20221202-001548-0.

[143]See Steinbeis (n 140).

[144]The *Verfassungsblog* even features a set of Podcasts that provide detailed historical accounts of how both of these crises unfolded. See <https://verfassungsblog.de/pod/>. On a side note, it seems worth mentioning that not only podcasts but also videos on constitutional questions form a new dimension of scholarship, too. One recent example with regard to the US Constitution is the weekly podcast 'Amarica's Constitution' by Professor Akhil Reed Amar, offering 'weekly in-depth discussions on the most urgent and fascinating constitutional issues of our day'. See <https://akhilamar.com/podcast-2/>. It could be considered as a way of not just changing the mode and style of publishing legal texts (in the broader sense) but to even move beyond text altogether. Somewhat sceptical of this development is eg Mayer, n 138.

[145]See Mayer (n 138).

[146]See, recently, M Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

Nevertheless, since the *Verfassungsblog* is a suitable medium for the quick exchange of constitutional ideas across national boundaries, it is also a means to follow constitutional developments, in particular various crises, on a global scale. While, understandably, comments on the Russian war of aggression against the Ukraine recently abound,[147] one also finds entries on Kashmir[148] and the latest developments in Israel.[149] The Blog is therefore growing into an important element of an international discourse of constitutional scholars. It provides them with the opportunity to present and to discuss their views on topical issues that are likely to attract the attention of people situated at other places of the globe.[150]

15. Two times Kelsen light

These changes in the way scholars communicate, thereby pursuing a certain agenda, have given rise to broader, more fundamental reflections on the role they ought to play, particularly in contrast to political activists. One of the first reactions to these newer forms of 'real-world' engagement by scholars was formulated by Komárek.[151] His objection to the current trend is at core based on some of the aspects mentioned above. In his view, the swiftness and brevity of internet interventions cannot guarantee that they are right for the proper task of scholars, namely to pursue 'knowledge'. Komárek does not elaborate further what this means, but we take him to understand by knowledge propositions that are susceptible to verification or falsification.

Internet media outlets may provide suitable channels to exercise pressure and to influence public opinion. But both are a matter of power and, hence, outside the sphere in which scholars are supposed to enjoy their academic freedom.[152] Komárek is afraid that, owing to their social standing, scholars have many and too easily accessible opportunities to throw their weight around,[153] even though their curt and pointed statements cannot live up to the disciplinary standards of academic knowledge production.

While Komárek discusses the question in the context of academic freedom and examines whether it should extend to scholarly activism (which he rejects),[154] his intervention is clearly reminiscent of the admonition with which Hans Kelsen embarked on his project to extricate legal scholarship from its embrace by ideologies and political agendas. Genuine scholarship is supposed to arrive at true descriptive statements of the law and not about doing good or improving the world.[155]

Interestingly, Kelsen, who was without doubt among the most prominent public law scholars of the 20th century,[156] does not appear even once in Komárek's critical commentary on the role that is

[147] There are countless articles on that issue, see <https://verfassungsblog.de/category/regionen/ukraine/>.

[148] See <https://verfassungsblog.de/category/debates/casting-light-on-kashmir-debates/>.

[149] See, for example, AE Gross, 'The Populist Constitutional Revolution in Israel: Towards a Constitutional Crisis' (VerfBlog 2023), <https://verfassungsblog.de/populist-const-rev-israel/> accessed 19 January 2023.

[150] Coming back to the aforementioned relevance of having a common language, it seems worth pointing out that posts on the Verfassungsblog are – despite its German origin – not limited to German but they are also available in English.

[151] See J Komárek, 'Freedom and Power of European Constitutional Law Scholarship' 17 (2021) European Constitutional Law Review 422–41.

[152] Whether power and scholarship are in fact incompatible, is of course up for debate. Rethinking the role of constitutional scholars and attributing them a certain degree and form of 'power' in analogy to 'constitutional actors' in this regard, see L Lazarus, 'Constitutional Scholars as Constitutional Actors' 48 (2020) Federal Law Review 483–96. She also elaborates on the immanent tension between academic freedom (as regularly attributed to constitutional scholars) on the one hand and freedom of speech (as regularly attributed to constitutional actors).

[153] See Komárek (n 151), at 426.

[154] Ibid., at 435. We take it that Komárek is concerned about the abuse of academic freedom, that is, the invocation of the prestige and freedom of the scholar for the pursuit of political objectives.

[155] See H Kelsen, *An Introduction to the Problem of Legal Theory* (trans B Litchevski Paulson and SL Paulson, Clarendon Press 1991).

[156] Owing to the provocative way in which he professed his legal–positivist creed, he was also possibly the one whose work was met with the most hostility. See H-J Koch, 'Einleitung: Über juristisch-dogmatisches Argumentieren im Staatsrecht' in

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

to be played by scholarship, properly understood. Contrary to Kelsen, who presented a critical account of the conditions under which the practice of legal scholarship might live up to the level of a science, Komárek rests content with pointing to professional routines and practices that conventionally pass *qua* pursuit of knowledge. It is in this context that he cites Stanley Fish.[157] There is a touch of irony to this, for Fish's position is initially the outgrowth of a rejection of foundationalism, which is exactly the position exemplified by Kelsen (even though in the legal context Fish's sworn opponent has often been Ronald Dworkin).[158] The appeal to Fish cannot, therefore, carry much weight. The 'pursuit of knowledge' is merely one practice (or 'language game') among others, but there is nothing about this practice that would guarantee its ability to unveil truth with a capital T. The only objection that can be made from this angle – the angle of Fish's rejection of foundationalism[159] – is that those who pursue political aims are playing a different game and are therefore cheating about what they are really up to. But this objection can once again not be successful, for nothing can be said, from Fish's perspective, against playing at the game one plays. Komárek merely wishes to see the conventional standards of the genre 'pursuit of truth' observed. But this cannot do the trick for him. First, he does not demonstrate that, if one is concerned about truth, one is bound to adopt *particular* intellectual routines. He also does not show why truth should matter, for he cannot demonstrate that one ought to follow the code of conduct governing the discipline, in particular not, if, for example, assisting governments in transforming access to citizenship into a valuable commodity is a far more profitable business (as Komárek mentions with an eye to Kochenov).[160] Second, Komárek's objections ignore completely that what it takes to pursue the truth is contested within the genre that is supposedly characterised by stable conventions.

In a word, Komárek gives us Kelsen without the intellectual rigor, Kelsen light, as it were. The problem with this is that Kelsen light is also Kelsen without bite.

Interestingly, light versions of Kelsen seem to be as good as it gets these days. Khaitan[161] is another example of how little heed is paid by participants in the emerging debate of older, and possibly even more profound, controversies.[162] Again, very much in the spirit of Kelsen, but without mentioning him, Khaitan insists that scholarship is about the pursuit of truth and the dissemination of knowledge. Contrary to Kelsen, however, he does not limit this objective to the 'value-neutral' description of positive law, but admits a commitment to moral objectivity, provided that it translates into an appropriately scholarly attitude:[163]

> This entails a concern with what morality demands, investigated with appropriate disciplinary tools (eg of moral philosophy), based on a thorough knowledge of the extant scholarly literature on the issue, in constant engagement with peers who disagree, and an abiding attitude of revisability on light of new evidence or irrefutable arguments.

H-J Koch (ed), *Seminar: die juristische Methode im Staatsrecht: Über die Grenzen von Verfassungs- und Gesetzesbindung* (Suhrkamp 1977) 13–158, at 67.

[157]See S Fish, *Save the World on Your Own Time* (Oxford University Press 2008).

[158]See S Fish, 'Introduction: Going Down the Anti-Formalist Road' in his *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Press 1989) 1–36.

[159]See M Robertson, *Fish on Philosophy, Politics and Law: How Fish Works* (Cambridge University Press 2014) 18–28.

[160]See Komárek (n 151), at 425.

[161]T Khaitan, 'On Scholactivism in Constitutional Studies: Skeptical Thoughts' 20 (2022) International Journal of Constitutional Law 547–56. The original article did not address the relation between a well-meaning, but lecturing global north and the global south, however, the subsequent discussion on the *Verfassungsblog* did. See C Farid and S Latorre, 'Scholactivism and the Global South' (VerfBlog 2022) <https://verfassungsblog.de/scholactivism-and-the-global-south/> accessed 24 August 2022. DOI: 10.17176/20220824-181812-0/.

[162]We shall return to the controversies of the Weimar period below.

[163]See Khaitan, n 161, at 549.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

There is much to be said on behalf of lightening Kelsen up, in particular by opening up the gates of genuine scholarship to projects premised on moral objectivity.[164] Obviously, however, there is also a strong institutional and ethical dimension to how Khaitan characterises the vocation of the scholar. To this dimension belong the workshopping of papers, frequent discussions with colleagues, readiness to revise one's views in light of objections and to concede mistakes. What is more, scholarship must admit of the possibility of scepticism.[165] Khaitan also repeatedly points to double-blind peer review as though this was the hallmark of scholarly excellence (a matter that may be doubted, for the quality of reviewers depends on the pool from which they are drawn).[166] In any event, the vision of true scholarship that emerges from Khaitan's casual sketch matches roughly with what Karl-Otto Apel und Jürgen Habermas would call 'theoretical discourse'.[167]

Against the backdrop to his commitment to theoretical discourse, Khaitan formulates an 'instrumentalist' objection to 'scholactivism'.[168] In his view, scholarship that seeks to promote actively a project of social justice is likely not to achieve its goal.[169] To support his claim, he distinguishes between radical and moderate scholactivism.

Radical scholactivism[170] matches exactly what Vermeule understands by 'strategic legalism'.[171] The idea is straightforward: The result of constitutional interpretation that one believes to be correct pursuant to one's own standard of interpretation needs to be presented in another garb when the dominating method of interpretation is different from one's own. For example, living constitutionalists need to present their case in a format in which it appeals to original understandings of the constitution if the jurisdiction is dominated by originalists.

It is difficult to see why one should find this objectionable, in particular, as is claimed by Khaitan, on purely instrumentalist grounds. Why should one rob oneself of an opportunity to have an impact by fudging an originalist argument if its conclusion is sound pursuant to what one takes to be the most persuasive method of interpretation? Khaitan appears to be concerned that such dishonest behavior harms the pursuit of truth because what one takes to be a false approach is left unchallenged. But this fear is not well-founded, for it rests on a misapprehension of the social constitution of how what is to be known as 'law' is known.[172] Legal scholarship is invariably intellectually enslaving. Not only, quoting Robert Cover's memorable phrase, is knowledge of the

[164]This point is repeated and underscored by Khaitan in his reply to criticisms on the Verfassungsblog. See 'Facing Up: Impact-Motivated Research Endangers not only Truth, but Justice' (VerfBlog 2022) <https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/> accessed 06 September 2022.

[165]See Khaitan (n 161), at 553.

[166]This is a point that he actually concedes. See n 164.

[167]See K-O Apel, 'Die Kommunikationsgemeinschaft als transzendentale Voraussetzung der Sozialwissenschaften' in his *Transformationen der Philosophie, vol. 2: Das Apriori der Kommunikationsgemeinschaft* (Suhrkamp 1973) 220–63; J Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' in N Luhmann und J Habermas (eds), *Theorie der Gesellschaft oder Sozialtechnologie: Was leistet die Systemforschung?* (Suhrkamp 1971) 101–41.

[168]Khaitan, however, would not object to publishing simplified versions of one's own scholarship in order to spread the ideas among a wider public. See also V Amar, 'First Monday Musings By Dean Vik Amar: Why We In Legal Academia Should Assist In Legal Journalism, But Do So Carefully' (2017) <https://abovethelaw.com/2017/09/first-monday-musings-by-dean-vik-amar-why-we-in-legal-academia-should-assist-in-legal-journalism-but-do-so-carefully>:

> Quite often, I use shorter, lay-friendly essays and media interviews to explain ideas I have already developed in more depth in academic literature or, more exciting still, to begin to explore the contours of ideas that I have been thinking about and that I plan on examining in more depth in future scholarly work. And I often use (and assign) my essays (or interview segments) in my classroom teaching, helping students appreciate and evaluate the application of legal theories to important topics drawn from the headlines.

[169]See Khaitan (n 161), at 548.

[170]Ibid., at 550–1.

[171]See A Vermeule, *The System of the Constitution* (Oxford University Press 2011) 135. Interestingly, Khaitan does not mention Vermeule's book.

[172]On the following, see the lucid account of the master–slave dialectic to be found in T Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (Cambridge University Press 1994) 52–4.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

law obtained 'in a field of pain and death',[173] it has to take place subject to conditions under which the participants necessarily have to take debatable premises for granted.[174] If courts jauntily develop mind-boggling doctrines and routinely decide cases on their basis, the doctrines are part of the law *as it exists*. Legal scholars need to put up with it. That is the intellectually enslaving part of 'doing law'. Are therefore all those conducting legal scholarship in the shadow of outlandish precedents and peculiar judicial doctrines radical scholactivists? Scarcely so, for legal scholarship is not based on eternal principles, but rather on what Edward Coke memorably called 'artificial reason'.[175] Even the reasoning modes inherent in doctrines, and not just their normative premises, are at times a matter of mindless conventions, and one has to avail oneself of the ropes in order to present an argument that will pass as skillfully presented and appropriate in the doctrinal context.

But Khaitan's objection not only misapprehends the intellectual inclemency of doctrinal scholarship, it rests also on a fallacy of which *both* legal positivists and moralists are guilty. He seems to suggest that legal statements are statements about something and, therefore, in one sense or another, detached propositions.[176] But this perspective is misleading owing to its disregard that doctrinal legal knowledge exists in the two states of either expertise or advocacy. In none of these states, is it merely 'about' something. While expertise makes explicit the vagaries of legal arguments (the pros and cons, the gaps, the presuppositions), advocacy must seek to suppress them. In both forms, however, legal knowledge is formulated with what Habermas would call a performative attitude and hence not only 'about' something as it implicitly or explicitly takes into account the views of actual or potential adversaries. In the form of advocacy, legal statements are *actually* normative, while in the form of expertise, they are only *potentially* so. In the first form, they say what ought to be done or what may permissibly happen or what can be ordered. By saying what ought to be done, one commits oneself to seeing it happen.[177] By saying what *may* be right – *ceteris paribus* or subject to further conditions – one retracts the normative into the subjunctive mood, which is the trademark of expertise. It proceeds with circumspection ('it could', 'it might', 'maybe'). Viewed from that angle, radical scholactivism is more congenial to the normativity of law than the communication of expert scholars dropping hesitantly from the sideline a few cautionary remarks. Indeed, within the larger public sphere of European constitutional law, the reasoning offered in support of genuine normative statements will often appear as adversarial, which is, after all, part of the type of skill that the study of law imparts on its students.[178] In fact, it is part of a legal scholars' skill to argue a point while knowing, when wearing the hat of an expert, that there is merit to the other side. There is a deeply oratory element in legal scholarship that eludes Khaitan's analysis.

Echoing an old creed of American legal realists, it can be said that law is a process, never a given. Before it is given closure in acts of advocacy and official decision it exists as expertise – in the form, that is, which reveals the contingency of its reproduction. We should not, however,

[173]R Cover, 'Violence and the Word' 95 (1986) Yale Law Journal 1601.

[174]This, if anything, is the perennially relevant observation made by Hart about the constitutive rule of conventions for the existence of valid laws (ie, rule of recognition). See Hart (n 121).

[175]E Coke, Prohibitions del Roy (1607) 12 Co, Rep. 63, cited after JE Bickenbach, 'The 'Artificial Reason' of the Law' (1990) 12 Informal Logic 23. See also, even if from a critical perspective, T Hobbes, *A Dialogue between a Philosopher and a Student of the Common Law of England* (ed J Cropsey, Chicago University Press 1971) 54–5.

[176]This becomes particularly obvious when he presses the point that interpretation is also about truth, thereby not taking into account that hermeneutics has developed a concept of truth that does not at all appeal to some form of 'correspondence' between legal facts and statements. See, for an introduction, C Lafont, *The Linguistic Turn in Hermeneutic Philosophy* (trans J Medina, MIT Press 1999) 102–7.

[177]This statement would require further elaboration, for it presupposes viewing law as the field of genuine volition. If I will something, I am therewith transforming myself into a means to realise an end. See CM Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009) 84–90.

[178]On the close connection between the profession of the lawyer and the prerequisites necessary for participation in politics, see Weber, *Gesammelte politische Schriften* (2e, ed J Winckelmann, Mohr 1958) 260–1, 512.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

follow Khaitan and mistake the *potentia* of law, which is laid out in academic contexts, with its *actus*.[179]

Even more difficult to accept is Khaitan's rejection of what he calls 'moderate scholactivism'.[180] In his view, this type of activism subordinates the actual and sincerely articulated beliefs of scholars to a particular political purpose. Khaitan believes moderate scholasticism is compromised owing to the following factors: It is – as pointed out above – often produced quickly and cannot be tested in the academic environment before publication. Hence, there is no opportunity for an extended discussion of pros and cons. Authors who have taken a stand on an issue of public policy come under pressure to dig in their heels in the face of opposition. Moreover, scholars may be myopic and easily flattered by the attention they receive and fail to take long-term consequences and unintended side-effects of their position into account.[181] But one must wonder whether this could ever be done? How should even the most reclusive scholars, spending most of their life in an academic environment, ever anticipate the effects of the application of some of their conclusions? It is, thus, in the course of the discussion of moderate scholactivism that the normative vision of scholarship underlying Khaitan's intervention is emerging more clearly. It seems to be at home in the world of theoretical discourse and thereby avoiding the world of action altogether.[182] One is inclined to conclude that Khaitan defends the world of legal academics against the always present lure of yielding to the desire to change the world for the better through one's own interventions. This would, again, match Kelsen's project but one cannot help but have the impression that Khaitan takes the most academic part of legal scholarship for the whole. What drops out of the picture, however, is the *real* normative orientation of legal expertise. Once one has formed an opinion about what the law is, then one commits oneself to having it applied or implemented. One cannot make normative statements and sit still if one has opportunities to help to give effect to the stated normative views. This would amount to a performative contradiction.[183]

16. What is really at stake

At the same time, however, it cannot be denied that Khaitan's text identifies an impending loss.

Digital public law is cast in a quickly digestible presentation. It needs to be brief. It also must be produced instantaneously – at the spur of the moment, as it were. Modulating the early Wittgenstein who stated famously that everything that can be said can be said clearly,[184] digital public law is based on the premise that everything that can be said can be said right away and must not exceed the limit of, say, 1000 words or even only 280 characters. This is, indeed, one of the directions into which transnational public law is currently heading.

This format of legal knowledge is quite different from the type of knowledge that needs to be produced in order to make it to the front-row of legal knowers in the first place. It is manifest in what German-speaking countries call *Qualifikationsarbeiten*, such as a PhD thesis and a *Habilitation* ('second book'). In the ideal case, such works put legal phenomena into a larger perspective, for example, by accounting for their proper 'legal construction'. The works need to be

[179] Potentia is the source of the force of legal arguments, nonetheless. On *potentia qua* potential, see Arendt (n 119), at 200–2.

[180] See Khaitan (n 161), at 551–5.

[181] Ibid., at 553.

[182] In all fairness, it needs to be conceded that *within the world of theoretical discourse* supposedly better and more reliable knowledge is produced than on the battlefields of scholactivism. Khaitan believes that such knowledge will benefit the projects of professional activists better. See Khaitan (n 164).

[183] We sense that our ideas would be supported by those advocating the 'moral impact' theory of law, according to which legal facts alter moral facts, such as our moral obligations. See M Greenberg, 'The Moral Impact Theory of Law' 123 (2014) Yale Law Journal 1290–342. For a useful critical introduction, see EH Monti, 'On the Moral Impact Theory of Law' 42 (2022) Oxford Journal of Legal Studies 298–324.

[184] L Wittgenstein, *Tractatus logico-philosophicus* (Suhrkamp 1976) at 7.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

thorough, comprehensive and systematic. They represent the type of works which are supposed to help us find our way in the legal system and not make us better at pleading in a court of law. They are about drawing an intellectual map and not about using it in order to get from A to B.

Qualifikationsarbeiten will still be necessary, yet the disconnect between them and the routine publication of expertise will be greater in the age of digital public law. Possibly, Khaitan had something similar in mind when he contrasted the world of scholactivism with the world of workshops, discussion groups and peer reviewed journals. The slowly moving map-drawing exercise is very much an academic pursuit.

17. The Weimar *Methodenstreit* reloaded?

Before arriving at concluding observations, it needs to be noted with a modicum of regret that the emerging European debate on scholarship[185] fails to perceive the similarity of the situation to the Weimar *Methodenstreit*, more precisely, to a certain dimension of it.[186] This famous controversy over the methods and basic outlook of public law scholarship (*Staatsrechtslehre*) emerged in the wake of the radical transformation of Germany's political system after the Great War.[187] Whereas during the period of the Second German Empire (1871–1918) a 'constructivist'[188] version of legal positivism prevailed and was able to surround itself with the aura of value neutrality, the shift of the foundations of the political order cracked open the hidden value commitment that this methodology had involved. All of a sudden, the hidden agenda of established legal positivists became exposed. As is well known, while Carl Schmitt, the most pointed critic of legal positivism, regarded legal positivism as nothing but liberalism in 'value neutral' disguise, such liberalism amounted in his eyes to an economically motivated way of obscuring – and thereby holding at bay – the true significance of the political.[189] Liberalism was serviceable to the interests of the bourgeoise and legal positivism its zealous ally.[190] As a result of such an upending of positivism and with the demise of its hegemony in German public law scholarship, it became an open question whether legal scholarship should be either sociological or traditionally doctrinal in its orientation – and if so, how?[191]

Hence, the Weimar crisis cut down deeply into the received self-understanding of legal scholarship; more deeply, indeed, than the emerging transnational debate over 'scholactivism' has done so far. At the same time, there are two striking parallels: First, the major political challenge is the instability of liberal democracy. Second, the debate concerns the question of how 'political' public law scholarship may permissibly be. The instability of liberal democracy is nowadays, to be sure, of a different kind. It is not the question over whether a democratic system is returning to monarchy or adopting some form of fascist rule, but rather what kind of democracy is consistent with the values of Article 2 and how far the CJEU may go in developing the standard that Member States are legitimately expected to meet. In a sense, the situation is far less dramatic than it used to

[185]We could now quip and remind those who uphold truth-seeking and knowledge-dissemination as hallmarks of scholarship not to forget that learnedness is also a scholarly virtue.

[186]See C Möllers, 'Der Methodenstreit als politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' 43 (2004) *Der Staat* 399–423 who notes (at 423) that the topicality of the Weimar debates is owed their open debate of the relation between politics and law. See also MH Wiegand, 'Die Weimarer Staatsrechtslehre aus dem Blickwinkel des 21. Jahrhunderts' 46 (2013) *Kritische Justiz* 442–59, at 444.

[187]For a very useful introduction to the historical context, see AJ Jacobson and B Schlink, 'Constitutional Crisis: The German and the American Experience' in AJ Jacobson and B Schlink (ed), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 1–39, at 4–7.

[188]Constructivism means, in this context, that it is the task of legal scholarship to condense the meaning of legal norms or judicial decision into conceptual content that is simultaneously determined by its place within a system of such content. In it resounds the legacy of 19th century private law doctrine. See W Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert: Die Herkunft der Methode Paul Labands aus der Privatrechtswissenschaft* (Klostermann 1958).

[189]See C Schmitt, *The Concept of the Political* (expanded edition, trans G Schwab, Chicago University Press 2007).

[190]See C Schmitt, *The Types of Juristic Thought* (trans. J Bendersky, Praeger 2004).

[191]See Jacobson and Schlink (n 187), at 15.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

be during the Weimar Republic. Nevertheless, another question has returned that was also prominently discussed then, namely, whether scholars are permitted to take sides. While in the context of the Weimar debates the question was cast as involving the objectivity of value judgments[192] or the relevance of natural law,[193] it has now reappeared in the form of the contrast between the pursuit of knowledge or rallying for scholactivist engagements.

What we can take from the Weimar debates is that legal positivism *qua* detached and 'value-neutral' pursuit of truth is a retreat in a cul-de-sac. This is clear if one considers how large the political element looms in Kelsen's theory of adjudication and how little value he ascribes to methods of interpretation, let alone its received canon.[194] A legal science in the Kelsenian sense can provide us with rough outlines of statutory provisions and pinpoint the relevance of political choices for the purpose of their application. Moreover, it can unveil as ideological what wishes to pass as value-neutral statements, but it is incapable of providing guidance in hard cases. If it could, it would fail to live up to its own standard of purity.[195] Kelsen, however, may therewith have anticipated one development that is of greater significance to our generation, namely, that a line needs to be drawn between the production of useful legal advocacy and a far more 'objectifying' (or 'external') analysis of its context that may include an elaboration of its basic concepts. If the latter amounts to what Komárek and Khaitan have in mind by talking about a disinterested pursuit of knowledge, then the scope of genuine legal scholarship is restricted to what legal scholars ordinarily call 'theory'.

And yet, one thing has become evident in the course debates over what Article 2 values seem to require. The constitutional law of the members of the European society involve different conceptions of constitutionalism that are historically path-dependent.[196] While countries that did not go through a process of democratic self-demolition have no qualms about continuing to accord priority to legislatures over courts and waive constitutional review altogether, others, such as countries with a fascist past, rely on strong constitutional courts and the inviolability of the 'basic structure' as safeguards against tyrannical democratic majorities. Eastern European countries may fall in the middle of this spectrum, for their historical experience suggests that oppression is more to be feared from foreign forces, possibly even a supranational federation, than from one's own people. Far from whitewashing current Polish and Hungarian practice, the application of this historical perspective suggests that the collisions that we are occasionally witnesses to are indeed collision of different conceptions of constitutionalism.[197]

Such competing conceptions articulate their relative trust or distrust of majoritarian institutions by developing institutional precautions, such as supermajorities, constitutional courts or unamendable principles. Since the by now relatively extinct scare of fascism has reappeared in the guise of 'populism' or 'authoritarian democracy', those professing their faith in constitutionalist ideas strongly endorse the protective role to be played by a multilevel system of judicial protection.[198] This need not concern us here. It should, however, not escape our attention

[192]See, for example, R von Laun, 'Der Staatsrechtslehrer und die Politik' 43 (1922) *Archiv des öffentlichen Rechts* 145–99 (arguing that value judgments are unavoidable, however, subjective and need to be separated from what can be stated in value neutral terms). By contrast, H Triepel appears to have believed that the apprehension of the objectives of legal norms mediates the objectivity of value judgments. See H Triepel, 'Law of the State and Politics' (1926) in *Weimar* (n 187), 176–88.

[193]See the references in Jacobson and Schlink (n 187), at 18.

[194]See Kelsen (n 155).

[195]For this perspective on Kelsen, see A Somek, *Knowing What the Law Is: Legal Theory in a New Key* (Hart Publishing 2021).

[196]On the following, see the observations by S Larsen, 'Varieties of Constitutionalism in the European Union' 84 (2021) Modern Law Review 477–502.

[197]We take this also to be the theme of the work of Loughlin (n 146).

[198]See the forthcoming book by LD Spieker, *EU Values Before the Court of Justice: Foundations, Potentials, Risks* (Oxford University Press 2023).

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

that while the question of who is to be the ultimate arbiter of the limits of reasonableness within a constitutional system can be settled within certain conceptions of constitutionalism, the reasonable disagreement between and among these conceptions is bound to persist. From this follows, however, that with such persistence the role of the ultimate arbiter itself must also remain in doubt, for the reasonable disagreements over models of constitutionalism are transitive *vis-à-vis* constitutional systems. Any claim of legitimacy of such a system derives from the soundness of a conception that it is deemed to represent. The reasonable disagreements between and among conceptions of constitutionalism are relevant to constitutional law.

What is ultimately left for us to do is to place our faith in the resolution of disagreements within historical time. It is only in hindsight that we can truly make sense of what we have done. The legal relation is ultimately a reflection of the force inherent in living together. The force of history determines the limits within which our political actions, even if contested, will eventually pass as rationally acceptable.

18. Conclusion

The form of European transnational constitutional law is the form of the public sphere. It is rendered determinate in a context of exchanges in which participants intend to speak about the same things and yet invariably come to realise that they are at cross-purposes. The Polish perspective on the independence of the judiciary is different from the German, the CJEU's take on the supremacy of EU law leaves no room for the priority that the Polish constitutional court accords to the constitution.[199] Both talk about the relation of EU law and national constitutional law, but their perspectives differ.

This is manifest not only in cases where high courts are indirectly involved in a 'debate' or in a tacit process of negating their respective spheres of authority, but the structure of public exchange is also repeated in Blogs and other formats of accelerated digital communication. The significance of statements and their quality depends on whether they attempt to respond to the claims made by others. Such responsiveness takes the place that would otherwise, within a traditional legal system, be occupied by deductions from norms. There is nothing outside of the structure of public debate, which, owing to its anarchical setup, can only be supported by itself.[200]

The statements made in the course of debates are genuinely normative. They mean to say what ought to be done. They are not detached statements,[201] they are committed. Their power is, however, limited to their respective sphere and can only translate into the softer medium of 'influence'.[202] Even if, by contrast, scholarly participants to a debate do not mean to commit themselves to what they legally argue for, their statements are bound to attain a genuinely normative quality owing to the context in which they are made. For whoever contributes to a debate that is rife with disagreement must invariably be perceived as taking sides. Napoleon was right. We are destined to be political and to struggle for what we profess to believe or else none of

[199]See the brief report by R Uitz, <https://bridgenetwork.eu/2021/10/08/poland-constitution-eu-law/>. For those reading Polish, here is the link to the decision: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>. The Commission has recently launched an infringement action against Poland on the ground of this decision: <https://notesfrompoland.com/2023/02/15/brussels-launches-legal-action-against-poland-for-challenging-primacy-of-eu-law/>. Ziobro replied by alleging that this is part of a German plan to crush the Member States: <https://notesfrompoland.com/2023/02/16/new-eu-action-against-poland-part-of-german-plan-to-liquidate-member-states-says-justice-minister/> all last accessed 6 September 2023.

[200]See J Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 447.

[201]On detached statements, see J Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2e, Clarendon Press 1980) 236; *Practical Reason and Norms* (2nd ed, Princeton University Press 1990) 170–7.

[202]See Habermas (n 200), at 449.

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press

the things we say will be of any significance. Putting the matter in terms congenial to the mindset of Oxford circles, we conclude that scholactivism is the form of constitutional law of Europe. There is nothing below or above it. It is all there is.

Acknowledgements. We would like to thank Armin von Bogdandy and anonymous reviewers of the ELO for helpful comments and suggestions. Parts of this paper have been published in abbreviated and condensed form in a special issue of the 25 (2023) Yale Journal of Law and Technology 41–58.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: Somek A and Paar E (2023). Europe's political constitution. *European Law Open* **2**, 484–510. https://doi.org/10.1017/elo.2023.32

https://doi.org/10.1017/elo.2023.32 Published online by Cambridge University Press