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DIALOGUE AND DEBATE: ESSAY

European constitutional scholars in the digital public sphere: reply to Somek and Paar

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Abstract

In their recent article 'Europe's political constitution', Alexander Somek and Elisabeth Paar conclude: 'scholactivism is the form of constitutional law of Europe. There is nothing below or above it. It is all there is'. In this reply I want to take issue with such (rather bleak) view of what European constitutional scholarship is about. Firstly, I argue that scholactivism undermines the very conditions of scholarship as a pursuit of knowledge autonomous from both public and private power. The current attacks on academic institutions by authoritarian governments, and also the increasing dependence of research on private funders result, at least in part, from the politicization of scholarship. Secondly, I argue that we should be more critical towards the infrastructure of the digital public sphere, which Somek and Paar see to be emerging through blogs and other platforms, and be more protective of the existing practices that we inherited from our predecessors.

Keywords: European constitutional law; digital public sphere; scholactivism; pursuit of knowledge; pragmatism

1. Introduction

In their recent article 'Europe's political constitution', Alexander Somek and Elisabeth Paar conclude: 'scholactivism is the form of constitutional law of Europe. There is nothing below or above it. It is all there is'.[1] In this reply I want to take issue with such (rather bleak) view of what European constitutional scholarship is about. It builds on my earlier article, which criticised academics, who were invoking academic freedom (and the privileges which come with it) for other objectives than what I see as the key purpose of scholarship: 'the pursuit of knowledge'.[2] Not only were those academics relying on academic freedom when promoting their private interest or political agenda; by doing so they were undermining the very conditions under which academics can stay protected from the pressures coming from various forms of power – public (eg, authoritarian governments), private ('a new patron class'),[3] or communicative (media of all sorts).

However, there is another issue that I want to address in this Reply: Somek and Paaar describe the engagement with contemporary issues by European academics on blogs and other platforms

[1]A Somek and E Paar, 'Europe's Political Constitution' 2 (2023) European Law Open 484–510.

[2]J Komárek, 'Freedom and Power of European Constitutional Scholarship' 17 (2021) European Constitutional Law Review 422–41. Somek and Paar address also T Khaitan, 'On Scholactivism in Constitutional Studies: Skeptical Thoughts' 20 (2022) International Journal of Constitutional Law 547–56. For my view on Khaitan's article see 'Scholarship is About Knowledge, Not Justice' 20 (2022) International Journal of Constitutional Law 558–9.

[3]See DV Johnson, 'Academe on the Auction Block', The Baffler No. 36, September 2017, available at <https://thebaffler.com/salvos/academe-on-the-auction-block-johnson> accessed 21 February 2024.

(particularly Twitter) as part of public sphere, which forms part of Europe's political constitution.[4] I think we (European constitutional scholars) should be more critical towards the 'infrastructure' of such 'digital public sphere',[5] and perhaps more protective of the existing practices that we inherited from our predecessors.

In what follows I firstly shortly summarise the key points of Somek and Paar's conceptualisation of Europe's political constitution (Section 2). Then I explain why relying on Hannah Arendt's notion of 'public sphere', as they do, does not really give us the critical tools needed to understand the normative potential of public sphere (and what we should be mindful of when participating in it – Section 3). Section 4 then applies the framework of analysis introduced by Jürgen Habermas and those who have built on his work[6] to problematise Somek and Paar's uncritical take on blogs and particularly social media platforms. In Section 5, I get back to the issue of scholactivism in order to explain why we should look elsewhere than to Hans Kelsen in order to navigate the space between scholarship and politics. Section 6 outlines what can be considered the pursuit of scholarly knowledge, not depending on some questionable (and some of them long time ago refuted) assumptions about what counts as 'science'. All this is done in the awareness of contingency of all 'rules' one can prescribe for themselves and others, as put forward in Section 7. Section 8 concludes with an invitation to further debate.

2. Public sphere lending unity to the 'fragile structure' of Europe's political constitution

The first half of Somek and Paar's article deals with the nature of Europe's political constitution and deals with other actors than scholars. It conceptualises the structure of European law as 'transnational', 'characterised by a persistent duality of verticality and horizontality'.[7] It emerges from the interactions at the horizontal level (among national constitutional courts in particular), but also contains the vertical – supranational – dimension embodied in the Court of Justice (and other EU institutions). The Court's pronouncements on primacy notwithstanding, Europe's constitution lacks a clear hierarchy, and the participating actors only *yield* one to another, subject to various conditions (such as the 'so long as' reservation made by national constitutional courts, or the respect for national constitutional identities, enshrined in Article 4(2) TEU).[8] Somek and Paar get inspiration from Armin von Bogdandy's recent work on European public law in order to explain what holds this heterarchy (of states, peoples, institutions and other actors) together: European society and its public sphere, with Article 2 TEU at the centre.[9]

Von Bogdandy reads Article 2 TEU in a 'republican' way and argues: 'Since 2009, the republican manifesto of Article 2 TEU offers a collective singular: society. Society is in no way inferior to terms such as people, state, nation, and constituent power. An important difference, however, is that state-

[4]This Reply concerns also E Paar and A Somek, 'A Letter from Europe: European Constitutional Law and Its Digital Public Sphere' 25 (2023) Yale Journal of Law and Technology 41–58.

[5]Interestingly, it appears as if the authors did not read the other contributions to the Yale symposium, especially JE Cohen, 'Infrastructuring the Digital Public Sphere' 25 (2023) Yale Journal of Law and Technology 1–40.

[6]J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press 1989), first published in German in 1962.

[7]Somek and Paar (n 1) 488 and then in detail 488–500.

[8]The authors refer to the peculiarly German term *'Verfassungsverbund* – see Somek and Paar (n 1) 484 and Johnson (n 3). On the concept and why it is difficult to translate it into English see FC Mayer and M Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism: Querelle Allemande or Querelle d'Allemand?' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in Europe and Beyond* (Hart 2012) 127–51, especially at 128–32.

[9]A von Bogdandy, *Strukturwandel des Öffentlichen Rechts: Entstehung und Demokratisierung der Europäischen Gesellschaft* (Suhrkamp 2022). For the key argument relevant for this Reply see A von Bogdandy, 'The European Renaissance of Republicanism: On the Future of EU Law in Light of Article 2 TEU' *MPIL Research Paper Series* No. 2024-02, available at <https://ssrn.com/abstract=4695467> accessed 31 January 2024.

centred thinking does not claim it as a central category, unlike the other terms'.[10] Relying on the concept of society therefore appears rather strategic than analytical: since it has not been appropriated by those who insist to study the nature of the EU in the traditional (that is, bound to the state) terms of public law, it is useful for those who believe that EU's law and politics can be made legitimate (or simply intelligible) otherwise.[11] Somek and Paar then make a bold claim:

> 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'.[12]

Now one must be excused to recall similar debates on the European constitution (or democracy), where for some people it was enough to adopt a document bearing the name 'constitution' to declare that Europe has one,[13] or, to refer to Article 10 TEU and say that the EU is capable of becoming democracy (and even serve as a model for other international organisations).[14] There has always been an important voice explaining that these terms demand more than legal declarations: Alexander Somek.[15]

It is therefore surprising to see the same author making such simplistic argument: because there is a word 'society' mentioned in Article 2 TEU, then Europe is a society. And, even more consequentially, to infer from this 'finding' that 'it makes sense to view it [the society] as encompassed by a public sphere'.[16] Now, it is of course possible to say both things, as all depends on how we understand the key terms. However, saying that the EU actually has a kind of 'constitution', and can be thought through as 'democratic', is usually possible only by simplifying such terms (or stripping them of important context, in which they usually appear). The same applies to the concepts of 'society' and 'public sphere', which are embedded in rich philosophical debates dating back several decades (and still alive and ongoing).

In this Reply I will focus on the concept of 'public sphere' and will leave 'society' for some other occasion, although Arendt might have been surprised to see *The Human Condition* invoked in pieces that seek to elevate the concept of society to be the new collective singular of a supposedly political community.[17] It is the conception of public sphere that raises questions that relate most

[10]Von Bogdandy (n 9) 13. I do not want to engage in the debate whether there is a true republican ethos in Article 2 TEU (or the structure of EU law at all). I only want to focus on the invocation of the term 'society' and the rather paradoxical inspiration in the work of Hannah Arendt that Somek and Paar take in their conceptualization of public sphere.

[11]On 'intelligibility' as an important category of theoretical analysis see M Loughlin, 'The State: *Conditio sine qua non*' 16 (2018) International Journal of Constitutional Law 1156–63.

[12]Somek and Paar (n 1) 498 referring to H Arendt, *The Human Condition* (Chicago University Press 1958) 55–6.

[13]K Lenaerts and M Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' 39 (2002) Common Market Law Review 1217–53, 1219 illustrates well the spirit of the time when a formal constitutional document was to be adopted: 'there are no convincing legal arguments why a Constitution may not be made up of a variety of interconnected Treaty texts founding the legal order. The qualification "Constitution" depends solely on the content and origin of the Treaty texts concerned'.

[14]A Von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations' 23 (2012) European Journal of International Law 315–34. One point I must concede to Von Bogdandy, however: for lawyers, these pronouncements *can* (and possibly) *should* be enough. It depends on whether we want to be 'doctrinal constructivists' or critical scholars: and *both* approaches are legitimate and necessary in my view. On the former approach see A Von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' 7 (2009) International Journal of Constitutional Law 364–400.

[15]Among the many, see particularly A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

[16]See Arendt (n 12).

[17]See eg, P Walsh, 'The Human Condition as Social Ontology: Hannah Arendt on Society, Action and Knowledge' 24 (2011) History of the Human Sciences 120–37, 121 who mentions the general 'perception that Arendt regarded the modern

directly to the role of scholars and their public engagement on the internet (and elsewhere). It is therefore this concept with which I begin my reply (Sections 3 and 4), to turn later to scholactivism (Sections 5–7).

3. 'Blawgosphere' and Twitter creating a meaningful public sphere?

It is usually Jürgen Habermas and *The Structural Transformation of the Public Sphere*[18] (and not Hanah Arendt and *The Human Condition*)[19] that provides the starting point for any discussion of the public sphere in political or social theory. However, as I will show, it is also transformation with the small 't' which has miraculously escaped Somek and Paar's attention. And it is indeed Habermas (and the whole theoretical approach to public sphere that builds on his ground-breaking work), not Arendt,[20] who provides analytical tools to understand this transformation.[21]

In Habermas's own words, until his book was published in Germany in 1962, 'the notion of public sphere was used in a rather unspecific sense, primarily within the conceptual field of "public opinion"'.[22] Habermas instead put emphasis on 'the function of the public sphere in ensuring the sustainability of the democratic political community',[23] and this has been studied and critically assessed in political and social theory ever since. Public sphere in Habermas's understanding mediates concerns emerging from the 'life-world' to other functional spheres, primarily politics, and thus contributes to social and political integration of citizens. It is the backbone of deliberative democracy, as Habermas came to conceptualise it in his later work.[24] To do this, however, public sphere must fulfil certain conditions: a common language or even 'common world' (as Arendt had it) will not be sufficient (and for some even necessary) qualities of the public sphere capable of legitimating democratic polity and its institutions.[25]

It has been a contested topic for decades now, how the public sphere should be shaped so that it serves the legitimating function. One of the most influential contributions (and critiques of

realms of "the political" and "the social" as fundamentally antagonistic to each other, and sought to rescue politics from "society"'. Much of course depends on what Arendt understood as the 'society'. On this question see M Canovan, *Hannah Arendt: A Reinterpretation of her Political Thought* (Cambridge University Press 1992) 116–22.

[18]Habermas (n 6). Interestingly, the German title of Von Bogdandy's book (n 9), that inspired Somek and Paar, evokes Habermas's work ('Strukturwandel des öffentlichen Rechts' translates into English as The Structural Transformation of Public Law').

[19]Arendt (n 12). On the comparison between Arendt and Habermas's concepts of public sphere see S. Benhabib, 'The Embattled Public Sphere: H Arendt, J Habermas and Beyond' 44 (90) (1997) Theoria: A Journal of Social and Political Theory 1–24.

[20]Much more could be said on why Habermas, and not Arendt; one key difference, explained in an early article by Benhabib (n 19), explains on p 7 the different imaginary behind the idea of public space (or sphere): 'the public is no longer thought of as a group of humans seeing each other, as in the case of the united demos [which Arendt had in mind using various metaphors]. Rather, the public [in Habermas] is increasingly formed through impersonal means of communication like the printing press, newsletters, novels, literary and scientific journals'. I suppose that *especially* when we talk about digital public sphere, the latter imaginary is mor apt.

[21]As evidenced by at least three symposia published with this theme in last two years: 39 (2022) Theory, Culture & Society 3–171, Special Issue: A New Structural Transformation of the Public Sphere? (guest editors Martin Seeliger and Sebastian Sevignani; contains contribution by Habermas); 33 (2023) Communication Theory 61–173, Special Issue: Reconceptualizing public sphere(s) in the digital age? On the role and future of public sphere theory (guest editors Mark Eisenegger and Mike S. Schäfe); and 50 (2024) Philosophy & Social Criticism 3–277, Special Issue: Structural Transformation of the Public Sphere (guest editors Hauke Brunkhorst, Martin Seeliger and Sebastian Sevignani).

[22]J Habermas, 'Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere' 39 (2022) Theory, Culture & Society 145–71, 146.

[23]Ibid.

[24]J Habermas, *Between Facts and Norms* (Polity Press 1996), first published in German in 1992. It is the confusion between the mode of communication, that is essential to both the public sphere and the institutions of deliberative democracy, that leads to conflating the two concepts.

[25]For a glimpse to the rich debate of the time see particularly C Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992).

Habermas's original work) came from Nancy Fraser shortly after *The Structural Transformation* was published in English.[26] Fraser attacked Habermas's gendered, or as she put it back then, the 'bourgeois-masculinist' ideology behind the notion of public sphere. Habermas saw it emerging in literary saloons of Western cities, where mostly wealthy men were allowed, while their households had been taken care of by their wives – something that Habermas was oblivious to in his *Transformation*. Such exclusion (or exclusivity) was not a problem of participation only, but representation (and representativeness) too. Certain topics simply could not become a matter of public debate.

A first observation one can make about Somek and Paar's optimism regarding the digital public sphere is that also blogging (and the online presence) has a significant gender dimension.[27] Fraser was however also critical of some other assumptions made by Habermas, perhaps even more relevant for our reflections on Somek's and Peer's piece: one such assumption concerned the apparent need for the unity of public sphere, whereas especially the critical theory stressed the need for 'counterpublics'[28] that would include voices and perspective not accounted for in the hegemonic public sphere. Fraser explains:

> Let me not be misunderstood. I do not mean to suggest that subaltern counterpublics are always necessarily virtuous; some of them, alas, are explicitly anti-democratic and anti-egalitarian; and even those with democratic and egalitarian intentions are not always above practicing their own modes of informal exclusion and marginalization.[29]

In the context of the rather hegemonic discourse on the *Verfassungsblog* these could be voices not only challenging the liberal variant of constitutionalism (which has increasingly become à la mode), but those advocating quite openly illiberalism, right-wing conservatism or nationalism. Fraser adds:

> Still, insofar as these counterpublics emerge in response to exclusions within dominant publics, they help expand discursive space. In principle, assumptions that were previously exempt from contestation will now have to be publicly argued out. In general, the proliferation of subaltern counterpublics means a widening of discursive contestation, and that is a good thing in stratified societies.[30]

Now, one should perhaps not expect this to happen on one medium: *Verfassungsblog*, which is quite open about its ideological orientation. However, scholars reflecting on the nature of the public sphere in 'Europe's political constitution' should take some distance from that particular blog and not to celebrate it as the place where the 'talk of European constitutional law eventually become a matter of course'.[31] If we truly want to take it seriously as a platform of the emerging public sphere, more needs to be said on its functioning – and whether it can really be conceived of as a public sphere in some *relevant sense*. Reliance on Arendt does not do this, and if the analytical

[26]N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) Social Text 56–80 (also published in Calhoun, n 25).

[27]For observations in the US context see JC Murphy and S Maldonado, 'Reproducing Gender and Race Inequality in the Blawgosphere' *University of Baltimore School of Law Legal Studies Research Paper* 2017–17, available at <https://ssrn.com/abstract=2947223> accessed 5 February 2024.

[28]Fraser (n 26), 67 uses the term 'subaltern counterpublics' – the adjective putting emphasis on the subordination of certain groups, their identities and modes of expression in the hegemonic political culture.

[29]Ibid.

[30]Ibid.

[31]Somek and Paar (n 1) 501. As a member of the editorial board of European Constitutional Law Review I may be perhaps excused to think that this happened long before *Verfassungsblog* came into existence, although in *EuConst* the 'talk of European constitutional law' is perhaps less casual than on blogs or Twitter.

tools developed in the context of the Habermasian theory are applied, lots of questions emerge and cry for answering.[32]

Finally, it is also important to stress that as a medium between society and politics, public sphere does include communication among and within formal institutions (such as the 'judicial dialogue' among Europe's highest courts or parliamentary debates in national assemblies or the European Parliament). They belong to the 'system' and are structurally different from the public sphere emerging from the life-world.

I do understand that since Somek and Paar did not base their conceptualization of the public sphere on Habermas, they do not need to be concerned with such distinctions. If not, however, then it is not very clear what exactly the concept of public sphere conceived in Arendtinian terms does for Europe's political constitution – apart from providing a certain 'confirmation bias', as the contributors to the *Verfassungsblog* engage 'in the advocacy of constitutionalism (and do not publish diatribes 'against constitutionalism'.[33] The world may appear comfortably 'common' – to those who are allowed to the debate (or willing to participate in it under its rules). The rest is 'left behind' (pun intended).

4. Digital transformation and its relevance for Europe's political constitution

In this section I want to move from critiquing Somek and Paar's failure to explore the normative dimension of the public sphere (my suggestion that they should have read Habermas, not Arendt, so to speak). Here I want to explain what makes Habermasian analysis relevant at the time of another transformation, this time in our digital age. This is why transformation with a small 't' is important too. What I am going to say then applies more to other forms of digital communication than blogs, especially to X (formerly Twitter), which Paar and Somek take as another example of how academics engage in the public sphere of Europe's constitution.[34]

First, however, something needs to be said on Paar and Somek's observation that 'in legal scholarship in general, blogs are becoming increasingly popular',[35] suggesting that it still is a relatively recent phenomenon (and that we can only start exploring what it means for us, scholars. The question of course is what it means '*becoming* increasingly popular' and when something already *is*, or even *was* popular. Neither Paar and Somek, nor do I have empirical data on how many professors abandoned blogs for X, as I suggested rather causally in my 'Freedom and Power' piece.[36] However, as someone who used to be very active in the blogosphere not so recently ago,[37] I did observe few important changes in the mode of blogging since 2006 (when, as Paar and Somek noticed, 'US legal scholars already discussed how legal blogs might transform legal scholarship'.[38]

First, compared to the heydays of blogging (which led to the symposia reflecting on that issue), today there is very few blogs by individual professors, or at least run at platforms that allow for

[32]As this is only a Reply to another article, I do not go further here, no matter how much it would be interesting to explore questions such as: whether the discourse of constitutional lawyers is in any sense binding and forms part of what is called the 'strong publics'; whether the orientation towards the common good and the deliberative mode of communication is even capable of legitimating anything; to what extent is the very idea of 'public sphere' ideological, etc.

[33]Somek and Paar (n 1) 501.

[34]Ibid., 49–51.

[35]Ibid., 47.

[36]Komárek (n 2) 434, referred to by Ibid., 46, Somek (n 15).

[37]In 2006 I co-founded the 'blawg' *Jiné právo* (<https://jinepravo.blogspot.com/> accessed 8 February 2024) that was extremely popular in the Czech Republic (and one may say influential too, as two of the early contributors became members of the European Court of Justice and one now serves at the Czech Constitutional Court). My perception that 'blogging professors seem to be a matter of the past' can be informed by the fact that I left this blog in 2010, together with many of its early members.

[38]Paar and Somek (n 1) 47, n 16. On my take from those not so recent days, see J Komárek, 'Klepání jinak: blawgová revoluce v Česku 2.0' in M Bobek and J Komárek (eds), *Jiné Právo Offline: co v Učebnicích Nenajdete* (Auditorium 2008) 67–81.

almost complete control of their contents (and visuality) by the blogging professor. For the very few examples of such blogs from the early days, one can take a look at the Yale Law School's Jack Balkin's *Balkinization*,[39] or University of Chicago Brian Leier's *Leiter Reports: A Philosophy Blog*.[40] Compared to these, *Verfassungsblog* (or *EU law live*,[41] for that matter), are much closer to professional media,[42] not providing direct access to professors (and their control over the content) of their writing. For such *seemingly* unconstrained mode of communication,[43] in which they used to engage on their personal blogs, professors now use X (and increasingly, Bluesky).

Secondly, apart from the *Verfassungsblog*, online companions to traditional scholarly journals should be distinguished from the old-time blawgs. The US law reviews paved the way for outlets that Europeans are familiar with, most importantly perhaps *EJIL Talk! Blog of the* European Journal of International Law.[44] Contrary to the professional (or semi-professional) blogs mentioned above, they are closer to the traditional modes of scholarly communication, although they may also suffer from what one of the founders of the *EJIL Talk!* called 'fast food culture' of legal scholarship.[45] They might be less interested in getting readers (or clicks) for their posts compared to the former kinds of blogs.

Now having clarified what sorts of platforms of communication we are taking about, we can move to the analysis in the light of the recent debate on the *Transformation of Public Sphere*. As the editors of a recent special issue devoted to this topic, Philipp Staab and Thorsten Thiel, observe, Habermas's

> theory draws its strength from a combination of three elements: the functional logic of specific forms of media . . . , the subjectivity of the public . . . , and the surrounding structures of accumulation.[46]

Each of these three elements got transformed in the period that culminated in the second half of the 20th century, when Habermas was writing his *Transformation*. The first, which Staab and Thiel call 'mediality', shifted from the late 19th century's literary criticism and print-media conflict over public opinion towards mass-media entertainment; the second, 'subjectivity' from bourgeois self-consciousness towards industrial class polarisation and late capitalist consumerism, and finally, the third element, 'accumulation', transformed from bourgeois entrepreneurship towards industrial monopoly capitalism.

The digital transformation brought changes (and new challenges) in each of these three dimensions. First, regarding *mediality*: most critical social or communication theorists focus on platforms, such as Twitter (and other social media, such as Facebook, Tik Tok or Instagram), as they present the most troubling concerns, expressed, for example, in the influential book by Shoshana Zuboff.[47] Apart from the constant surveillance by platforms of its users (and turning the data thus mined about them into a commodity), they also structure the communication in

[39]Available at <https://balkin.blogspot.com/> accessed 8 February 2024.

[40]Available at <https://leiterreports.typepad.com/blog/> accessed 8 February 2024.

[41]Available at <https://eulawlive.com/> accessed 8 February 2024.

[42]By 'professional' I mean that there is a team of editors, whose main job is to take care of the medium. The blogs from the past were very much DIY creatures, and had that feel as well. Contrary to this, *EU law live* even has a paywall for most of its contents.

[43]I explain why 'seemingly' below.

[44]Available at <https://www.ejiltalk.org/> accessed 8 February 2024.

[45]J Weiler, 'Editorial: The "Lisbon Urteil" and the Fast Food Culture' 20 (2009) European Journal of International Law 505–9, also published on the blog (sic!) <https://www.ejiltalk.org/editorial-vol-20-issue-3/> accessed 8 February 2024.

[46]P Staab and T Thiel, 'Social Media and the Digital Structural Transformation of the Public Sphere' 39 (2022) Theory, Culture & Society 129–43, 130.

[47]S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2019). I have been also influenced by BE Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (Harvard University Press 2015).

particular ways to generate more traffic on their sites (eg, by suggesting interesting tweets to users based on their previous readings or Twitter accounts they follow) so that more data on user can be scrapped. Staab and Thiel argue that

> [t]his shatters the idea of horizontal or even domination-free communication. Instead, a triadic constellation emerges in which platform providers, which occupy a privileged position, analyse users and seek to influence their behaviour. The democratic promise of bidirectional communication is corrupted; an economic-exploitative dimension is ever present.[48]

There is no reason to think that scholars using Twitter (and other platforms) are less exploited than other users, and we should seriously question various policies introduced at universities that encourage scholars to use social media in order to 'boost their research career'.[49] Or does anybody believe Elon Musk, after all he did to Twitter (including renaming it to 'X'), that he really wants his platform to be 'the digital town square where matters vital to the future of humanity are debated'?[50]

Second, concerning *subjectivity*, social media invite 'singularisation': the 'pursuit of uniqueness and exceptionality, which has not only become a subjective desire but also a paradoxical social expectation'.[51] Here one may wonder whether the general analysis of social media applies to scholars using Twitter, as to me it rather promotes a kind of herd mentality that I criticised in my original article, especially as related to petitions authored and signed *en masse* by scholars.[52] However, it is also true that quite often X encourages publishing strong opinions that can attract readers, rather than analyses, which require time and effort. As Elisabeth Paar herself observed, the logic of the social media forces researchers to report on their research even before it has been actually done.[53] And a good advice one may give to their PhD students is to get off from X for a while, if they ever want to finish their thesis.

Finally, *accumulation*, which relates to both other dimensions mentioned above: in the era of individualised consumption, what is valued most (and how digital platforms make their profit) is the access to consumers. Staab and Thiel then observe that '[t]his structure no longer distinguishes between citizens and consumers or between political public spheres and private worlds of consumption. The public sphere of social media is instead a market privatised by the respective platform providers'.[54] In that respect one must praise the *Verfassungsblog* that despite its limitations (especially the blurred line between scholarship on the one hand, and journalism and political activism on the other), its structure does not support this phenomenon. However, I find it troubling to have universities encouraging their researchers to participate on such platforms rather than trying to find alternative ways. At the time when universities struggle to get their audiences and spend resources on creating attractive brands, it is perhaps not something to expect from them.[55] But at least, one should ask whether this is the only world we now have to live in.

[48]Staab and Thiel (n 46) 135.

[49]See eg, 'Boost your research career with LinkedIn, X, and other social media platforms – course at University of Copenhagen (new date!)', available at <https://mikeyoungacademy.dk/course-at-university-of-copenhagen-boost-your-research-career-with-twitter-and-linkedin/> accessed 8 February 2024.

[50]Quoted in a telling (early) critique of Elon Musk's overtake of Twitter, JC York, 'Elon Musk doesn't know what it takes to make a digital town square' MIT Technology Review of 29 October 2022, available at <https://www.technologyreview.com/2022/10/29/1062417/elon-musk-twitter-takeover-global-democracy-activists/> accessed 9 February 2024.

[51]Staab and Thiel (n 46), 136, quoting A Reckwitz, *The Society of Singularities* (Polity Press 2020) 3.

[52]Komárek (n 2) 439–41.

[53]This remark was made on the podcast series of the Department of Innovation and Digitalisation in Law, University of Vienna, Ars Boni No 426: Trivialization of Legal Knowledge? available at <https://www.youtube.com/live/xaEtsRgBZc8?si=DO2es5-juC4OWsHE> accessed 25 January 2024 at 48:15 of the recording.

[54]Staab and Thiel (n 46) 139.

[55]See G Krücken, 'Imagined Publics – On the Structural Transformation of Higher Education and Science. A Post-Habermas Perspective' 50 (2024) Philosophy and Social Criticism 141–58.

This leaves me to move to the other part of my reply to Somek and Paar, concerning their claim that 'scholactivism is the form of constitutional law of Europe' and that '[t]here is nothing below or above it. It is all there is'.[56] As will become apparent, the answer to my question – is there not an alternative? – depends on what we actually do, as scholars and how we reflect on it.

5. Let Kelsen sleep: why we do not need 'truth' with a capital 'T' to pursue knowledge *as scholars*

Somek and Paar dismissed my critique of scholactivism, as it offered, in their words, 'Kelsen without the intellectual rigor, Kelsen light, as it were'.[57] It hurts to read that my critique lacks intellectual rigor (although the standard – Hans Kelsen – is set very high). Much worse, however, is that my argument was not understood properly. Let's hope this time around I will do a better job.

Most importantly, Somek and Paar misleadingly claim that I believe that '[g]enuine scholarship is supposed to arrive at *true descriptive statements of the law* and not about doing good or improving the world'.[58] It is true that I believe that it is not scholars' concern to be 'doing good or improving the world', at least not a primary one. However, I have never said that genuine scholarship 'is supposed to arrive at true descriptive statements of the law'. I think it was Somek and Paar's desire to see me as 'Kelsen light' that led them to ascribe me this view:

> 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. 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.[59]

I cannot deny that thanks to Somek and Paar's provocation, I did become more 'learned' – as they ask me to be[60] - and know the Weimar *Methodenstreit*, from which Kelsen's critique of politicized legal scholarship emerged, much better that I had before, when writing the original article.[61] However, I still do not see how (much) Kelsen can enlighten us today. His views on what can 'make the practice of legal scholarship [to] live up to the level of a science' are clearly outdated and not the ones I would find particularly helpful today, almost one hundred years after he published them. When Kelsen defends the 'formalism' of his theory, he quotes neo-Kantian German philosopher Hermann Cohen: 'Only the formal is objective; the more formal a methodology, the more objective it can become. And the more objectively a problem is formulated in all the depths of the issue, the more formally it must be grounded'.[62] Based on this view Kelsen claims, quite forcefully, that 'Those who do not understand this do not know what is essential to scientific knowledge'.[63] One can find more statements of such nature in Kelsen's writings – and

[56]Somek and Paar (n 1) 510.

[57]Ibid., 503.

[58]Ibid., 502, emphasis added.

[59]Ibid., 503.

[60]Ibid., 507, n 185.

[61]See C Möllers, 'Der Methodenstreit als Politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre' 43 (2004) Der Staat 399–423. I deal with the debate – and Kelsen – in more detail in 'What Is EU Constitutional Theory?', draft on file with the author.

[62]H Cohen, *Logik der reinen Erkenntnis* (B. Cassirer 1922), 587, cited from H Kelsen, 'Legal formalism and the pure theory of law', published in English in AJ Jacobson and B Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 76–83 [1929], 77.

[63]Kelsen in Jacobson and Schlink (n 62) 77.

especially Kelsen's belief in the non-ideological character of his own theory is rather self-defeating.[64]

My reliance on Fish (and his pragmatic, anti-foundationalist approach) then makes perfect sense, since I do not endorse Kelsen's views on the foundations of knowledge. It can be due to the lack of intellectual rigor on my part, but I simply find Fish much more persuasive than Kelsen – as I further explain below in the concluding section.

There is one more element which makes Kelsen rather unhelpful for my argument against scholactivism, unless one takes him as a cautionary tale: his belief that legal scholarship dealing with law and state can be separated – and make the 'true' scholarship immune from ideology and politics: 'Doing scholarship does not force us to abandon all political judgment; it merely obligates us to separate the one from the other, cognition from volition'.[65] He concludes his essay thus: 'If there is any point at all upon which one can stand outside the arena of power, then it is science and scholarship. Even the science of power; which is then a pure theory of state and law'.[66]

I hope it is clear from my article that I am concerned with the very opposite: that constitutional scholars, no matter how much they would want it, can never stay outside the realm of power and politics. This is how I introduced my article:

> What is it that European constitutional scholars are, and should be, pursuing? The noble answer would be: knowledge, as all scholars do. However, they do much more, undoubtedly because of the nature of their discipline. Lawyers have always been close to power. This has consequences for the way they conduct their research and teaching and, as I argue in this article, also for their responsibility and the way in which they can combine their academic work with lawyering, business, and public advocacy.[67]

It can be an interesting question whether constitutional scholars can ever escape what Kaarlo Tuori described as 'imposed normativity' of legal scholarship – that whatever they say will have implications for what the law 'is'.[68] The only way for their pronouncements to not have consequences outside the realm of scholarship would be to do 'pure' theory.[69] This is something on what I actually agree with Kelsen – and also Somek and Paar, who observe:

> 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'.[70]

(Pure) theory of constitutional law – if such discipline is even possible, is of course not what constitutional scholars do today (and have ever been doing). And we need an account that helps us better than either Kelsen's implausible view of science or Somek and Paar's 'everything goes'.

There is another way how to separate 'useful legal advocacy' (which still may in certain contexts be appropriate for legal academics to engage in), scholactivism (which I consider to be in wrong most, albeit not all, instances) and a reflexive scholarly analysis of various kinds – what I consider to be the realm of proper legal scholarship and the core of what legal scholars should be doing.

[64]See Kelsen in Jacobson and Schlink (n 62) 80, where he refuses accusations that his theory is liberal formalism in disguise.
[65]Ibid., 80.
[66]Ibid., 83.
[67]Komárek (n 2) 422, references omitted.
[68]K Tuori, *Critical Legal Positivism* (Ashgate 2002) 285–93.
[69]On what may count as constitutional theory of the EU see Komárek (n 61).
[70]Somek and Paar (n 1) 508.

And it is Fish (and philosophical pragmatism), not Kelsen (and his neo-Kantianism), that can help us see the difference.

6. What is it, then, to pursue legal scholarship?

As I do not endorse Kelsen's views on legal science, I can fully agree with Somek and Paar when they say that '[t]he "pursuit of knowledge" is merely one practice (or "language game") among others'[71] and that 'there is nothing about this practice that would guarantee its ability to unveil truth with a capital T'.[72] The key is that I do not believe that we, scholars, need 'truth with a capital T' to be able to produce scientific (or as I would prefer calling it), scholarly knowledge.

I hope my explanation of this will not go too far if I say that what we seek is 'scholarly truth', which is a 'truth' established in our system and according to our protocols that pursue this goal as much as for example judicial process is concerned with establishing 'truth' that would enable the court to take a decision (one may complicate things further and say that the legal truth must enable the court to make a 'just' decision).[73] Our goal, *as scholars*, is to expand our *understanding* of the law, not to pursue justice (or the rule of law or any other value one can imagine as falling into the ideology of constitutionalism). That is, in my view, what distinguishes us from legal practitioners or politicians.[74] The rules of our work – our professional practices - should be geared towards this goal.

Our scholarly 'truth' – our understanding – does not need to be absolute so much as the 'truth' established by courts does not need to. Anybody who ever studied courts and judicial process knows that 'judges are liars'[75] and that legal truth is just that: *legal* truth, often based on fictions.[76] And because of the existence of the rules of procedure advocates appealing the original decision can challenge such truth and higher courts – so long as the rules of appeal allow them – can change it. No truth with capital T needs to exist in order to make this social practice possible – and valuable.

The rules and procedures for establishing scholarly 'truth' are not as codified and binding as the rules of judicial process and are therefore open to contestation and change by the very actors who are supposed to be bound by them. But that only calls for more reflection (and possibly restraint) on the part of scholars. These rules include peer review, the existence of scholarly journals concerned with the pursuit of knowledge (and not with expanding their readership so that they are economically viable) etc.[77] It would require much longer text than this Reply to deal with them in necessary detail – and critically.

7. Contingency, irony, and scholarship

I reject Somek and Paar's contention that '[t]he only objection that can be made from this angle – the angle of Fish's rejection of foundationalism – is that those [legal scholars] who pursue political aims are playing a different game and are therefore cheating about what they are really up to'.[78]

[71]Somek and Paar (n 1) 503.

[72]Ibid.

[73]See eg, KS Klein, 'Truth and Legitimacy (In Courts)' 48 (2016) Loyola University Chicago Law Journal 1–79.

[74]On understanding as the key aim of science, see K Kampourakis and K McCain, *Uncertainty: How It Makes Science Advance* (Oxford University Press 2019) Chapter 14, 'Understanding Versus Being Certain'.

[75]M Shapiro, 'Judges as Liars' 17 (1994) Harvard Journal of Law and Public Policy 155–6.

[76]On the many conceptions of truth that may be relevant in legal argument see R Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011) esp. 14–20.

[77]Note in this respect the controversies around open access – 'Open Access: No Closed Matter', *EJIL Talk!* of 13 July 2023, available at <https://www.ejiltalk.org/open-access-no-closed-matter/> accessed 25 February 2024 or the controversies concerning the pressure on editorial boards of some journals exerted by their publisher, namely Wiley: see E Pettit, '"A Catastrophic Mistake": Upheaval at Philosophy Journal Points to Publishing's Conflicting Interests', *The Chronicle of Higher Education* of 1 May 2023, available at <https://www.chronicle.com/article/a-catastrophic-mistake-upheaval-at-philosophy-journal-points-to-publishings-conflicting-interests> accessed 25 February 2024.

[78]Somek and Paar (n 1) 503.

As any game, also the pursuit of scholarly knowledge has its rules and therefore it is not true that 'nothing can be said, from Fish's perspective, against playing at the game one plays'.[79] To understand this, one needs to better appreciate what Fish was after: he was primarily against those who claimed to have access to some undeniably objective position, or to have found some 'true' 'foundations' of human knowledge.[80]

As a pragmatist, he did not claim that no rules exist: the difference he has had with lots of (legal) philosophers consisted in his understanding of the nature of such rules. It follows from the situatedness of (legal) actors, their education, socialisation in and exposure to practice. In other words, they are determined by the "community of interpreters".[81] This notion is notoriously elusive and does not allow, according to some critics, discerning various relations of power inside and between such communities.[82] However, it is enough at this point to refer to it as an argument why no foundational principle (be it truth with capital T or 'scientific objectivity') needs to exist so that scholarly pursuit of knowledge can occur and its rules be formulated (and reformulated) by the very participants in the 'game', who can criticize other for violating them.[83]

Whatever I say, either here or in my other articles engaging with this topic,[84] is therefore how I see these rules as a member of such community without believing in their undeniable foundations. To the contrary, I am aware of their contingency, which is the reason why I care. Perhaps, I am an ironist:

> the sort of person who faces up to the contingency of his or her own most central beliefs and desires – someone sufficiently historicist and nominalist to have abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance.[85]

This irony however does not make me a cynic: to the contrary, I believe it is important not to give up the achievements of the past to the contingencies of the present, be it the rise of neoliberal university with all its demands on academics to have immediate impact, or the advent of the digital public sphere, which can make the old ways of scholarly communication appear outdated if not even inappropriate.

Pragmatism and especially the awareness of contingency also excludes 'performative contradiction' of which Somek and Paar accuse those who want to engage in scholarship and stay outside politics at the same time. In their view, '[o]ne 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'.[86] There is nothing in the pursuit of scholarly knowledge that forces academics to use all opportunities to promote their preferred normative (and political)

[79] Ibid.

[80] M Robertson, *Stanley Fish on Philosophy, Politics and Law: How Fish Works* (Cambridge University Press 2014) provides an excellent introduction to the many debates in which Fish participated.

[81] The answer provided by Fish to the question posed by M Robertson, 'Does the Unconstrained Legal Actor Exist?' 20 (2007) Ratio Juris 258–79, was therefore 'NO'.

[82] See AC Hutchinson, 'Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)' 60 (1985) New York University Law Review 850–86.

[83] For a similarly pragmatic approach to legal scholarship see R Van Gestel, 'Quality, Methodology, and Politics in Doctrinal Legal Scholarship' Law and Method, January 2023, available at <https://www.lawandmethod.nl/tijdschrift/lawandmethod/2023/01/lawandmethod-D-22-00004> accessed 25 February 2024.

[84] Besides Komárek (2021) and (2022), n 2, see also my forthcoming contribution to the *Verfassungsblog*, 'Becoming a (critical) EU law scholar – today' and 'Imagining European constitutionalism: As a constitutional scholar', forthcoming in European Journal of Legal Studies.

[85] R Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989) xv. I owe this point to Jacob van de Beeten.

[86] Somek and Paar (n 1) 506, emphasis added.

positions. To the contrary, as scholars they always need to consider whether what they do promotes understanding (and reflexivity – which can mean, yes, to 'sit still' – and away from Twitter), or whether it is legal advocacy or politics – something to be left to others in most instances.

8. Conclusion

Our scholarly protocols also concern how we behave as scholars among ourselves. So for example, our understanding of the stakes in this debate would have been significantly improved, if Somek and Paar followed a 'particular intellectual routine' of a scholarly exchange, and sought to present my views in the best light: which is, not to try to make me a Kelsen (light'), but try to realise how my position can be made consistent with my invocation of Fish (and ignorance of Kelsen).

It is with this overarching goal – expanding our understanding – that this Reply has been written. However, I am equally eager to read their Rejoinder, also regarding the 'infrastructure of the digital public sphere'.

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