Developments

Which role for theory in international law? Report on the Workshop "Kelsen – Schmitt – Arendt: Constitutionalism in (International) Law", Leipzig, June 11/12, 2009

By Isabelle Ley[*]

Abstract

Law is a discipline which allows us to combine a high level of doctrinal craftsmanship with an equally high level of theoretical reflection and (re-)construction of legal-political developments. For the academic scholar, law is practice, theory and doctrine, each requiring a distinct set of goals, a distinct set of methods and a distinct level of abstraction. For some time, the international legal discipline has been described as lacking in theoretical development. This consideration may have motivated the conveners of a Kelsen-Schmitt-Arendt conference series when they decided that it was time for a re-engagement with the theories of Kelsen, Schmitt, and Arendt. The first workshop on constitutionalism will be the object of this commentary.

Kelsen, Schmitt and Arendt have experienced unexpected and innovative reception in recent years: Schmitt has contributed to questions such as the problematic role of human rights, the institutionalization of politics as conflict, as well as new applications of the state of exception. Kelsen's international writings as well as his democratic theory have borne a fruitful re-reading, and Arendt, who has been widely read, and written about in the social sciences for several years, has finally reached the law faculties.

The primary interest of this comment lies in the question of how international legal scientific work can make use of legal and political theory. A whole range of politico-legal developments in the European and international arenas are currently creating new forms of institutions, obligations, and types of engagement between legal orders. The velocity and the diversity of these developments are challenging traditional frameworks, paradigms, and analytical tools of the discipline. This task of conceptualization asks for and lends itself to theorization. Which approaches to theory are available for legal scholars, and what kind of insights do they offer? The conference offered the chance to witness

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different examples of how theory can be accessed. What role is there for theory in international law and what is its potential?

A. A theoretical approach on current issues

I. A lack in theory? The workshop series

Law is a wonderful discipline, as it allows us to combine a high level of doctrinal, practical craftsmanship with an equally high level of theoretical reflection and (re-)construction of legal-political developments.[1] For the academic scholar, law is practice, theory and doctrine, each requiring a distinct set of goals, a distinct set of methods and a distinct level of abstraction with which to treat the object of all legal endeavors: social interaction. However, it sometimes seems difficult to find the right balance and a productive relationship between these different levels of engagement at the disposal of the legal academic.

For some time, the international legal discipline has been described as lacking in theoretical development. For the most part, the aim of the international legal science seems to lie in the engagement and solution of topical, practical problems under international law.[2] To achieve this aim, one needs a thorough methodological reflection on legal reasoning, case solution and interpretation of norms. Purely theoretical considerations on fundamental questions such as the deep-structure of international law, its purpose, the nature of its normativity, or its legitimacy do not necessarily lend themselves to practical use or guidance. Seen from such a pragmatic stand, the value of legal and political theory is limited. Considerations like these may have motivated the conveners of a Kelsen-Schmitt-Arendt conference series[3] when they decided that it was

[1] See J. Habermas, *Einige Schwierigkeiten beim Versuch, Theorie und Praxis zu vermitteln*, *in* J. HABERMAS, THEORIE UND PRAXIS, 9 (1978); M. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS. THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, 504 (2002): "Theories may make us see new things and articulate experiences more sharply, and they make us better practicioners."

[2] C. Warbrick, *Introduction*, *in* THEORY AND INTERNATIONAL LAW: AN INTRODUCTION, xi (Allott *et al*. eds., 1991). Pleading for the necessity of a stronger engagement with theory in international law: S. Dellavalle, *Kurzes Plädoyer zugunsten der Notwendigkeit, sich mit theoretischen Fragen im Völkerrecht zu befassen*, 2 Studentische Zeitschrift für Rechtswissenschaft 233 (2006). Exploring the German international legal academia's unwillingness to engage with theoretical issues and the blind spots for the political, prescriptive dimension of doctrinal *handwerk* that goes with it: J. Klabbers, *A German School? Book Review: Ulla Hingst, Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge*, 16 LJIL 201 (2003).

[3] Louise Arimatsu, Jason Beckett, Jochen von Bernstorff, Morag Goodwin, Florian Hofmann, Jörg Kammerhofer, Alexandra Kemmerer and Michael Wilkinson.

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time for a re-engagement with (classical-)modern legal theory. The first workshop on constitutionalism in international law will be the object of this commentary.[4]

II. Why Kelsen, Schmitt and Arendt?

Why Kelsen, Schmitt and Arendt? First, the three have experienced unexpected and innovative reception and interpretation in recent years: Schmitt has contributed to questions such as the problematic role of human rights, the role and institutionalization of politics as conflict, as well as new applications of the state of exception.[5] Kelsen's international writings as well as his democratic theory have borne a fruitful re-reading[6], and Arendt, who has been widely published, read, and written about in the social sciences for several years,[7] has now finally reached the law faculties. Her ideas about legal theory as well as constitutional and international law are being increasingly examined.[8] While Kelsen and Schmitt have been pitched against each other for decades,[9] this *trio* can be read in different ways: Arendt as a synthesizer of the Kelsen-Schmitt dichotomy on issues such as

[4] Three of the contributions have been published in a special issue of the Leiden Journal of International Law: *J. Kammerhofer, Constitutionalism and the myth of practical reason. Kelsenian responses to methodological confusion*; I. Augsberg, *Carl Schmitt's Fear: Nomos – Norm – Network*; C. Volk, *From nomos to lex*. *Hannah Arendt on Law, Politics, and Order,* 23:4 Leiden Journal of International Law (2010).

[5] E. LACLAU, EMANCIPATION(S) (2007); THE CHALLENGE OF CARL SCHMITT (C. Mouffe, ed., 1999); W. RASCH, SOVEREIGNTY AND ITS DISCONTENTS: ON THE PRIMACY OF CONFLICT AND THE STRUCTURE OF THE POLITICAL (2004); see the review by J. Beckett, *Conflicting Orders: How Peace is Waged*, 20 LJIL 281 (2007). Martti Koskenniemi discussed Schmitt in the context of a call for inter-disciplinarity: M. Koskenniemi, *Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS, 17 (M. Byers ed., 2000); see also the special issue: (2006) 19 LJIL; G. AGAMBEN, STATE OF EXCEPTION (2005).

[6] *J. VON BERNSTORFF, DER GLAUBE AN DAS UNIVERSALE RECHT – ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER (2001); J. VON BERNSTORFF, HANS KELSEN'S INTERNATIONAL LAW THEORY: BELIEVING IN UNIVERSAL LAW, (2010), forthcoming; J. Kammerhofer,* Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law*, 22 LJIL 225 (2009); J. KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW – A KELSENIAN PERSPECTIVE, (2010), forthcoming; LA CONTROVERSE SUR LE GARDIEN DE LA CONSTITUTION ET LA JUSTICE CONSTITUTIONELLE: KELSEN CONTRE SCHMITT (O. Beaud ed., 2007). See the new edition of Kelsen's writings on democracy: VERTEIDIGUNG DER DEMOKRATIE: ABHANDLUNGEN ZUR DEMOKRATIETHEORIE – HANS KELSEN (M. Jestaedt & O. Lepsius eds., 2006); HANS KELSEN: LEBEN – WERK – WIRKSAMKEIT (R. Walter, W. Ogris & T. Olechowski eds., 2009).*

[7] For example S. BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT (2000); H. BRUNKHORST, HANNAH ARENDT (1999); M. CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT (1992); M. PASSERIN D'ENTRÈVES, THE POLITICAL PHILOSOPHY OF HANNAH ARENDT (1994); D. VILLA, POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT (1999); E. YOUNG-BRUEHL, WHY ARENDT MATTERS (2006).

[8] J. Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt*, 20 LJIL 1 (2007); J. WALDRON, LAW AND DISAGREEMENT, 76 (1999); C. VOLK, DIE ORDNUNG DER FREIHEIT: RECHT UND POLITIK IM DENKEN HANNAH ARENDTS (2010); U. Schröder, *Wiedergelesen Hannah Arendt: Macht und Gewalt, 1970*, 65 JuristenZeitung 130 (2010).

[9] For example: HANS KELSEN AND CARL SCHMITT. A JUXTAPOSITION (D. Diner & M. Stolleis, eds., 1999).

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the relationship of law and politics, overcoming the primacy of either politics or law over the other, and arriving at a conception in which both law and politics have their original stand and are equally valid, but mutually related. Or rather: "Kelsen-Schmitt-Arendt", each claiming equal consideration for current topics, each in their own way. During the conference, it became clear that the Kelsen-Schmitt juxtaposition is difficult to escape – however, the dichotomy is realigned by, and thus gains from, the company of a third thinker. On the other hand, it was obvious that Arendt, although having provoked the most detailed interpretation and attention, clearly does not reconcile the other thinkers in a form of synthesis.

The workshop was held in four panels, each centered around different 'in-between spaces': "Between Past and Future: Constitutional Narratives"; "Between Texts and Norms: Reading, Writing and Constitutionalizing (international) law", "Between *pouvoir constituant* and *pouvoir constitué*: Constituencies in Transition", and "Between Law and Politics: Democracy and its Discontents".[10] This report is structured differently, however, with the respective contributions arranged according to the theorist taken into account, in order to answer the question of whether the reference to the three theorists was fruitful, and if so, in which way.

The primary interest of this comment, then, lies not in insights about these three thinkers, or in constitutionalism, but rather in the question of how (international) legal scientific work can make use of legal and political theory. A whole range of politico-legal developments in the European and international arenas are currently creating new forms of institutions, obligations, and types of engagement between legal orders. The velocity and the diversity of these developments are challenging traditional frameworks, paradigms, and analytical tools of the discipline – if only to illustrate that some of them may not be as outdated as they seem. This task of conceptualization asks for and lends itself to theorization and consequently caused a renewed interest in the theoretical instrumentarium available to the international lawyer. In which ways can the legal science relate to theoretical writings? Which approaches to theory are available for legal scholars with various research interests, and what kind of insights do they offer? At the conference, these questions were not addressed as such; the speakers chose their own approach to the theoretical works of Kelsen, Schmitt or Arendt without necessarily making them explicit. At the forefront was the theme of constitutionalism. Implicitly, however, the conference offered the chance to witness different examples of how theory can be accessed and employed to elaborate on a specific legal issue. This comment tries to make this subtext explicit: what role is there for theory in international law and what is its potential?

[10] For the program, see: http://www.dubnow.de/fileadmin/user_upload/PDF/Programm_workshopksa.pdf (last accessed: 3 October 2010).

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B. Kelsen, Schmitt and Arendt on international constitutionalism

I. Kelsen

The jurists Alexander Somek (University of Iowa) and Jörg Kammerhofer (Friedrich-Alexander University, Erlangen-Nuremberg) try to evaluate the current discussion on the constitutionalization of the European and the international order through the eyes of Hans Kelsen – each with a negative result. For Somek, it is clear that Kelsen would have objected to international constitutionalism as natural law in disguise. If constitutionalism seriously postulates the foundation of the international legal order, a proper revolution in and of the international legal order and a whole new system of law-making bodies is required. However, since the political will for such a proper re-foundation of the international order is missing, defenders of constitutionalism in international law count on an implicit reconstruction of certain norms: constitutionalization as an interpretive, incremental and above all academically propelled process of legal change. For Somek, it is clear that constitutionalization is a fruit not of political will, but of wishful academic thinking which cannot, in Kelsen's view, legitimately change the international legal order.

Kammerhofer, going even farther, formulates a fundamental critique of the constitutionalist analysis and thereby demonstrates convincingly how a firm theoretical foundation provides for an instrumentarium of methods which is useful beyond strictly theoretical discourse: He shows that constitutionalism is not so much a theory but a "policy approach" – under the disguise of doctrinal analysis. By way of analyzing texts on constitutionalism by Mattias Kumm, Bardo Fassbender and Brun-Otto Bryde, he shows how the level of argumentation oscillates between the descriptive, purportedly analytical and the political, normativist. "The core problem of constitutionalist scholarship is a form of methodological syncretism"[11], a flaw that Kammerhofer traces back to a characteristically German type of naturalist thinking and cosmopolitan conviction. The aim of constitutionalist discourse is, therefore, much more than descriptive insight into contemporary legal developments and their conceptual elaboration; rather, it is legal change – as Fassbender most openly puts it, there are "legal consequences of a constitutional perception of the Charter"[12]. The legal scholar thus engages in illegitimate lawmaking – something which evidences a hubris of scholarship and seems problematic not only for a strict Kelsenian, but for anyone taking seriously the (political) legitimization of lawmaking.

[11] J. Kammerhofer, *Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems*, 23 Leiden Journal of International Law 723 (2010).

[12] B. FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY, 129 (2009).

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In order to ground his argument, Kammerhofer analyzes not only the argumentative moves of the selected authors, but develops a reflection on the right relationship of practical (jusgenerative, will-forming) and theoretical reasoning. With Kelsen, he ties the (German) tendency of methodological circularity back to Kant: "The Pure Theory of Law can help us in uncovering the problem and criticizing this stream of scholarship, because its consistently legal analysis and ethos of science can uncover such hidden inconsistencies."[13] On the basis of a strict separation of norm-creative will and reason, Kammerhofer reconstructs the Kelsenian critique of Kant's alleged identification of will and reason, norm-creation and norm analysis, both resulting from a concept of practical reason which Kant views as one and the same.

In any case, the certainty with which Kammerhofer follows Kelsen's analysis of Kant shows a pitfall which can come with firm adherence to Kelsen. Kammerhofer's Kelsen-based critique of the argumentative oscillation and illegitimate mixture of normative and descriptive argumentation is clearly to the point. He formulates maybe the most fundamental critique to international constitutionalism there is and achieves this with great rigor and methodological clarity. Notwithstanding the importance and plausibility of this criticism,[14] one can question whether the austerity with which Kelsen postulates the separation of normative reasoning and doctrinal legal analysis holds true: It purports the possibility of pure legal analysis or neutral objectivity without normative obliteration, free of any influence of the author's own normative conviction. However, one does not have to confess to post-modernism to doubt whether it is even possible to take such a strictly analytical and objective stand. As Trachtman puts it in a critical book review on another work written in a constitutionalist mindset:

> Of course, normativity is inescapable, and doctrinal analysis is never wholly separable from normative commitment. The impossibility of complete separation should not be understood, however, as a licence to marry. Scholars make their most valuable contributions when they separate their normative views from their analytical contribution, in cognitive dissonance of the impossibility of this separation.[15]

[13] J. Kammerhofer, *supra*, note 4, at p. 729.

[14] For a similar analysis of international constitutionalism from a critical standpoint, see: E. MacDonald, *Constitutionalising the Globe? The Rhetorical Construction of Community in International Legal Scholarship* (paper presented at the 23rd Annual Conference of the International Association for the Philosophy of Law and Social Philosophy, Krakow, 1-7 August 2007).

[15] J. Trachtman, *Book Review. Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law by Joost Pauwelyn*, 98 AJIL 855 (2004).

This holds true for Kelsen himself. As Jochen von Bernstorff has shown,[16] Kelsen in his own theory was not able to entirely separate his doctrinal analysis of international legal problems such as sovereignty, the relationship of the national towards the international order and others, from his cosmopolitan viewpoint.[17]

All in all, Somek and Kammerhofer's presentations demonstrate the superiority of an analysis which lays open its basic theoretical axioms in comparison with a legal analysis which is unclear about its methodological assumptions. Yet, their presentations also showed something else which can come with deep theoretical convictions: a world view, a pre-determined stand which can render an open-ended engagement with an object dispensable because the results are evident from the beginning. While fixed theoretical groundings certainly provide orientation, their presentations left the listener with the feeling that Kelsenians are hard to puzzle.

II. Schmitt

Ino Augsberg (Ludwig Maximilian University, Munich), in his contribution titled *Carl Schmitt's Fear: Nomos – Norm – Network*[18], is concerned with the insights Schmitt offers for the comprehension and conceptualization of current developments of de-territorialization, de-bordering, and juridification of international and transnational political processes. In order to explore Schmitt's possible contribution in this respect, Augsberg makes use of a Schmittian ambiguity; the fact that Schmitt was both a sharp analyst of his time with an acute sensitivity for historical turns yet to come (and in this respect one of the earliest analysts of modern mass democracy), and at the same time a conservative who – Augsberg's hypothesizes – tried to project his fears of current developments into the past in order to come to terms with them. Augsberg draws on the Freudian method of tracing the sublimated in order to fully comprehend Schmitt's concept of *nomos*: Only by understanding what Schmitt wanted to turn away from – his fear – can we fully comprehend his conception of nomos. Thus, Schmitt rejected the image of law as hierarchical order in which every subsumption, every development has its fixed place (identified at the time largely with Kelsen). By creating a connection from Schmitt through German systems theory to French structuralist thinking and finally back to Schmitt, Augsberg elegantly manages to escape the modernist presetting of the conference's

[16] J. VON BERNSTORFF, DER GLAUBE AN DAS UNIVERSALE RECHT – ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER (2001).

[17] For an enthusiast but methodologically critical review on this point, see: J. Klabbers, von Bernstorff, Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler: Book Review, 14 EJIL 613 (2003).

[18] I. Augsberg, *Carl Schmitt's Fear: Nomos – Norm – Network*, 23 Leiden Journal of International Law 741 (2010),

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framing. He points to inter-relations between themes, concerns, preoccupations not only between different times, but also between different currents of thought, illustrating that of the three Schmitt might be the thinker who is most likely to be received and utilized by postmodernist legal thought.

At the same time, this method of understanding through negation and the dialectical formation of anti-theses corresponds to the concrete kind of normativity of the *nomos* – a form of argumentation which not only characterizes Schmitt's conception of a norm, but also his democratic theory and even his analyses of his time. "Land and Sea"[19] is the title of a book in which Schmitt described developments in the European power constellation. Re-termed "from spatial to functional differentiation" by Augsberg, this title serves as a *topos* which holds true as a description for Schmitt's approach and eventually even the fundamental change in the structure of the legal order more generally. Augsberg seems to follow Schmitt in so far as he, too, chooses to proceed not by way of deductive reasoning, but a more fluid form of argumentation which centers around metaphorical concepts whose dimensions are traced by linguistic exploration: the object of Schmitt's fear is unfolded in a chain of associations starting from the images of network and rhizome.

Such a performative and plastic demonstration of how Schmitt's *nomos* inevitably raises the question of how far one can go with Carl Schmitt and how we can deal with Schmitt's thinking today, given what we know about his engagements with the national socialist regime. This draws upon the more general question of how to take into account the context, the cultural, historical and social background of an author in dealing with his or her theoretical work. Can ideas stand for themselves – in distant separation from their authors? Or do they come as a package – including the baggage of a (hi)story, a context and a political position? Unfortunately, this question was left undiscussed at the conference. Here, however, Augsberg's text offers a convincing answer: in cases like Schmitt's, this issue cannot be left out. It needs to be addressed openly, not least because Schmitt's anti-semitism was more than context. It was part of his theory and maybe part of the reason for Schmitt's rejection of (Kelsenian) positivism and his affirmation of a method of argumentation which is Hegelian rather than Kantian.[20]

In discussing Schmitt's democratic theory, Augsberg points to the fact that Schmitt (at least in the first edition of "The Concept of the Political"[21]) neglects a certain ambiguity in his concept: While putting a lot of emphasis on the absolute reference point of *Artgleichheit* –

[19] SCHMITT, LAND UND MEER (1981 [1942]).

[20] On the methodological ramifications of this juxtaposition, see: M. Reder, *Globale Konflikte und die Heterogenität des Rechts – Rechtsphilosophische Anmerkungen zur kantischen und hegelschen Tradition*, Archiv für Rechts- und Sozialphilosophie, Beiheft, (2010), forthcoming.

[21] C. Schmitt, *Der Begriff des Politischen*, 58 Archiv für Sozialwissenschaft und Sozialpolitik 1 (1927).

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homogeneity as a starting point for democratic politics – Schmitt seems to ignore that the movement of inclusion and exclusion, the (re-)establishment of the distinction between friend and foe is not only an endless dialectical process, but also one which entails a constructivist element. The status of (cultural, social) homogeneity in Schmitt's concept is one which needs to be produced by the act of exclusion: "Homogeneity is made, not given."[22] This ambiguity appears to be the condition for the possibility of the leftist *and* a rightist Schmitt interpretation which we are currently witnessing.[23] While the right focuses on pre-legal presuppositions of the democratic process, the left is inspired by the role conflict and dissent play in Schmitt's theory. This leftist Schmitt reception, however, differs from Schmitt insofar as it conceptualizes conflict and dissent as integrated into the polity as opposed to the excluding mechanism which Schmitt had in mind. Mouffe thus conceives of a procedurally directed form of conflict within a polity as "agonism" instead of "antagonism", trying to capture the element of legitimate, reasonable disagreement as part of any democratic process.[24]

Several contemporary conflict-oriented theorists rely, however, on Arendt instead of Schmitt,[25] elaborating on the way she places legitimate dissent, even civil disobedience at the center of her concept of the political.[26] The reason for this may lie in the role conflict plays for Arendt and Schmitt: While conflict is a constant and inevitable reality for Schmitt, it is something that can be dealt with communally for Arendt. Political action for her is – as Brunkhorst put it pointedly – "acting in concert and in conflict", something which is unthinkable for Schmittians.

However, there are connections between the two thinkers, and current conflict-oriented theories relying on either Arendt or Schmitt are sometimes very close to the other. Maybe these connections can be better understood if one follows what Seyla Benhabib has pointed out very clearly: that the *œuvre* of Arendt needs to be read against and as a reaction to her experience with German national socialism.[27] On a theoretical level, she

[22] I. Augsberg, *supra*, note 19, at p. 745.

[23] For an interpretation from the right, see *e.g.*: H. QUARITSCH, SOUVERÄNITÄT. ENTSTEHUNG UND ENTWICKLUNG DES BEGRIFFS IN FRANKREICH UND DEUTSCHLAND VOM 13. JAHRHUNDERT BIS 1806 (1986); and from the left: THE CHALLENGE OF CARL SCHMITT (C. Mouffe ed., 1999), W. RASCH, SOVEREIGNTY AND ITS DISCONTENTS: ON THE PRIMACY OF CONFLICT AND THE STRUCTURE OF THE POLITICAL (2004).

[24] C. Mouffe, On the Political – Thinking in action, 20 (2005).

[25] J. WALDRON, LAW AND DISAGREEMENT, 108 (1999); S. BESSON, THE MORALITY OF CONFLICT – REASONABLE DISAGREEMENT AND THE LAW, 8, 527 (2005); A. NIEDERBERGER, DEMOKRATIE UNTER BEDINGUNGEN DER WELTGESELLSCHAFT?, 102 (2009).

[26] H. Arendt, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC, 43 (*H. Arendt*, 1973).

[27] S. BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT, x (2003): "It is my thesis that German *Existenz* philosophy, and particularly the thought of Martin Heidegger, inspired some of Arendt's best known categories, such as world, action, and plurality. But what enabled Arendt to transform Heidegger's teachings into an original political philosophy were her experiences as a German Jewish woman in the age of totalitarianism."

traced back the possibility for the fascist perversion of the European nation state to a kind of political thinking which was foremost represented by Schmitt's concept of the political. In reaction, she tried to conceptualize a counter-position to his conception of a polity as unity, and to the current of political theory (from Hobbes, through Rousseau to Hegel and Schmitt) which conceived of the democratic subject and the articulation of the democratic will as unitary.[28] Against this tradition Arendt set the image of the democratic subject and will articulation as plural.[29] Thus, Schmitt may have been to Arendt what Kelsen was to Schmitt – an antipode incorporating what she fought against and thereby presenting an important source of (negative) inspiration. Her strength, however, (and her allure for contemporary theorists) lies in the alternative conception she offers to the monist tradition of political authority which dissolves political action into rational deliberation or instrumental bureaucracy.

Paradoxically, it is precisely this contingency which Augsberg identifies as the object of Schmitt's fear in his close reading of the *Politische Romantik*. He asserts that this element of contingency forms a part of Schmitt's theory and presents the starting point for current Schmittian reconstructions, discontented with technical, instrumental or functional understandings of politics.[30] Inspired by the systemtheoretical exposition of current questions, Augsberg proposes to reread Schmitt in a way which integrates the sensitivity for the conflictual and contingent notion of the political, but replaces the territorial or spatial difference as the main dimension of conflict with a functional notion: "Rather, the differences have to be regarded in the context of modern (world) society characterized by functional differentiation, *i.e.* a society whose main sectors are no longer primarily spatially determined".[31] Thus, he sketches a possible application of Schmitt's concept of the political as antagonistic movement whose aim lies in regaining the political on the level of world society without placing the territorial state as the single category of difference.

With a similar interest in the political quality of judicial constitutionalization and its dangers, Lars Vinx (Bilkent University, Ankara) asks what we can learn from the debate between Schmitt and Kelsen about the role of constitutional courts. His answer is disappointing: not much. Both lack, in different ways, a theory of the legitimate authority of dispute settlement and its limits.[32] Schmitt, who argues against judicial and for executive, *i.e.* sovereign dispute settlement, reveals himself to have no theory of dispute

[28] For a discussion of this phenomenon from an international law perspective, see: M. Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde*?, 11 Constellations 492, 498 (2004).

[29] H. ARENDT, ON REVOLUTION, 167 (2006 [1963]).

[30] The reference to the topicality of the subject is implicit but present in J. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY, especially at 22 (1999).

[31] I. Augsberg, *supra*, note 19, at p. 755.

[32] C. SCHMITT, DER HÜTER DER VERFASSUNG (1931); H. KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN? (1931).

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settlement at all: sovereign settlement of arguments eventually means the elimination of differences – as opposed to a theory which would provide insights on the institutionalization, foundation, and limits of how to deal with disagreement. Thus, the category of legitimately disputable cases remains empty – a dissatisfying result. Kelsen with his claim for ubiquitous judicialization, on the other hand, neglects the limits of dispute settlement through courts. Overestimating the density of the international legal order, his theory does not provide answers about preconditions and limits of judicial dispute settlement in the international sphere.

Detlef Georgia Schulze (Free University, Berlin) similarly discusses and dismisses Schmitt's and Kelsen's estimates of the role of courts as it is now: While Schmitt under-estimated the future momentum which constitutional courts have since gained, Kelsen was overly optimistic in that regard. However, what Schulze tries to retain from Schmitt, is not his evaluation, but his analysis of the *Verwaltungsstaat*[33], the administrative executive state. The anti-parliamentarian conception can potentially be used to analyze current tendencies of executive domination.

Matej Avbelj (European University Institute, Florence) criticizes European constitutionalism as a placeholder narrative for European integration. In his attempt to escape a classical analytical method, he introduces the concept of "narrative placeholders" to come to terms with European integration. While classical analytical method defines a certain term before applying it to a situation, and then decides whether its criteria are fulfilled, narrative placeholders, in contrast, argue in a constructivist manner. Taking integration as a narrative constructed in a process of social inter-action and communication about integration, Avbelj's approach tries to capture the narrative of the actors engaged in the process of European integration themselves. Despite this approach, Avbelj dismisses the Schmittian *Bund* (Federation) as unconvincing narrative – not for its lack of narrative plausibility but for conceptual reasons: Schmitt's quest for homogeneity and the pluralist *Bund* are already self-contradictory in Schmitt's *Verfassungslehre*[34] – even more so in the context of pluralist Europe. Constitutionalists misconceive the relationship between European and member state law. In Avbelj's estimate, it is characterized by primacy, not supremacy – *Anwendungsvorrang*, not *Geltungsvorrang*, heterarchy instead of hierarchy. Using this analytical argument, however, Avbelj seems to contradict his own narrative approach. He begins to argue in a conceptual-analytical way instead of listening to the narrative being told. Maybe this illustrates something more general about the appropriateness of a narrative approach in law: Lawyers might simply be better at conceptualizing than at listening to societal narratives. Ultimately, this is what they are trained to do.

[33] C. SCHMITT, LEGALITY AND LEGITIMACY (2004 [1932]).

[34] C. SCHMITT, CONSTITUTIONAL THEORY (2008 [1928]).

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Thus, Schmitt received a mixed welcome: While Ino Augsberg was able to productively relate to Schmitt's writings on *nomos* and the connected methodology, Avbelj and Vinx came to the result that Schmitt's conceptions of their subject matters was not convincing. Schulze, however, made use of a Schmittian concept in order to better understand what he perceives as a dangerous phenomenon to be battled: that of executive domination.

III. Arendt

Arendt was, among the three, the thinker who got the most attention as well as the most positive reception at the workshop. Morag Goodwin, for example, asked whether Arendt's concept of an "in-between space" between people as the location of law and politics can be employed to analyze the Romani claim to nationhood. This European people of 12,000,000 claimed nationhood in 2000 – despite being scattered across the continent without a share of territory.[35] Goodwin therefore drew on Arendt's concept of nationhood in her Eichmann book.[36] With Arendt, she interpreted "nationhood" as a primarily political, not territorial, and thus not border-dependent, notion. What a nation needs for a sense of belonging is something to fill the in-between-space between people. A common territory can help to reach from an imaginary to an imagined community – just as a common culture can. Crucial is not the territorial, but rather the political and cultural aspect, the common "world" between individuals, helping to bridge their plurality – not in order to overcome their differences, but rather to create a common link, a connection between them which allows for communication and political action.

While a clearly defined territory and definite boundaries are central to the classical state concept of constitutionalism, Goodwin's question of how to conceive a political community without a territory is of relevance to the current international legal context: The complaint of juridification, a tendency to "managerialist" forms of administration, and a misrepresentation of the political quality of the procedures of international lawmaking,[37] make the conception of a political community without territory appear as urgent.[38]

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[35] See for the basis of her presentation M. Goodwin, *Romani lessons for European citizenship: from an imaginary community to an imagined citizenship?*, *in* FIFTY YEARS OF EUROPEAN INTEGRATION: FOUNDATIONS AND PERSPECTIVES (A. Ott & E. Vos eds., 2009).

[36] H. ARENDT, EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL (1963).

[37] M. Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 Modern Law Review 1, 29 (2007).

[38] On the issue, also within the context of constitutionalism, see: I. Ley, *Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus*, *in* EUROPA JENSEITS SEINER GRENZEN, 91 (I. Pernice et al. eds., 2009).

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Florian Hoffmann, in his contribution on the "abyss" of law before the political in the precarious moment between revolution and institution, points to the fact that, for Arendt, politics was not instrumental in the same sense as it is in liberal conceptions. The foremost purpose of politics (and law) is not to achieve a specific political purpose such as peace or security, but the liberty and dignity of public action – in common and among equals. Thus, law as instrumentalist tool is always problematic for Arendt's conception of political freedom which reaches its purest realization in the moment when the *pouvoir constituant* has constituted itself, but has not yet institutionalized and ritualized political processes through the *pouvoir constitué*.

Both Brunkhorst and Volk[39] have been working at pointing out Arendt's contribution to issues of law and politics in a more general, systematic way than most contributions in this area so far – an endeavor which is promising while difficult: promising because with Arendt, long-standing dichotomies in the thinking about the way in which (constitutional) law relates to politics can be overcome and seen in a fresh way, which seems to offer theoretical underpinning to current approaches assembling under the label of "(constitutional) pluralism";[40] difficult because Arendt is not only not a very systematic thinker (another parallel to Schmitt) but a thinker who was curiously silent on issues such as European integration and other innovations in international institutional law after the war. Given that she explicitly strove for the kind of political theory which tries to make sense of contemporary events, and given that she lived until 1975, keeping a keen interest in European politics, this silence is hard to understand.

Both Brunkhorst and Volk single out the fact that Arendt was deeply ambivalent about the European nation state: She understood both its restrictive and civilizing potential, but also that the idea itself implied an exaggeration of the concepts of nationalism and sovereigntism. Taken together, their contributions illustrate well the way in which the concepts of power, politics and law relate to each other in her work. Brunkhorst focuses on Arendt's different conceptions of political power, pointing out how Arendt conceives of the specifically modern form of communicative power as forcefully dynamic – a dynamic which comes with a two-fold potential: on the one hand, with the permanent danger of turning into a destructive, totalitarian kind of domination; and on the other hand, with the possibility to set free democratic revolutions, new beginnings becoming ever more inclusive. It is the revolutionary element which necessitates constitutional legal structuring in order to transport its dynamics beyond the revolutionary moment and integrate it into

[39] C. Volk, *From nomos to lex. Hannah Arendt on law, politics and order*, 23 Leiden Journal of International Law 759 (2010),

[40] D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNMENT, 326 (D. Jeff & J. Trachtman ed., 2009); N. Krisch, *The Case for Pluralism in International Law*, LSE Legal Studies Working Paper No. 12 (2009); N. KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010); N. Walker, *The Idea of Constitutional Pluralism*, 65 The Modern Law Review 317 (2002).

the everyday life of a constituted polity in a productive way. This is precisely where the question of law comes into Arendt's theory and where she offers a new reading of the role of constitutional law which differs in important ways from classical liberalism.

At this point, Volk picks up and develops the duality of the role of law in Arendt's thinking along the lines of her use of the terms *nomos* and *lex*. Her discussion of these terms shows two different ways to establish the relationship between law and politics and their limitations: In the image of law as *nomos*, law is conceived of as an *aliud* to politics which functions a fence for a political community, restraining it from becoming imperative toward other political communities. While this conception of law as external to politics, restricting the reach of politics from the outside, also forms part of the classical liberal version of constitutionalism, Arendt allows one to see the presuppositions and fallacies of the presumably objective and universal limitations which liberalism brings to politics. Separation of powers and individual rights, popular *topoi* in the current debate on international constitutionalism, may provide limits of political action, but cannot be seen as separate from the political environment in which they are being applied. Recent decisions of the European Court of Human Rights on crucifixes in schools or possibly even minarettes in Switzerland raise the question of whether a human rights court needs to be embedded in a certain legal culture and take into account its democratic emanations. *Lex*, by contrast, is interpreted by Brunkhorst and Volk as providing more potential for the construction of post-national conceptions. While Arendt mainly develops her curious dichotomy on *nomos* and *lex* in her unfinished introduction to politics,[41] Brunkhorst shows that it is ON REVOLUTION where she explicates (with Montesquieu) what the relation-establishing dimension of law can mean institutionally: It is not legal obligations which bind politics, but "only power [that] arrests power, that is, without destroying it, without putting impotence in its place."[42] The function of constitutional law, then, is to establish political power in a way which guards its revolutionary zeal and innovative force while at the same time positing the plurality of powers in such a way that they neither destroy each other nor the rights of individuals. In this construction then, law is not something which is external to politics, but rather forms its internal structure, determining the development of public power and allowing for a continuous actualization of the revolutionary dynamics of change.

The institutional consequence which Arendt herself then discusses in ON REVOLUTION, and which is usually mentioned in this context (as is done by Brunkhorst at this point) is the horizontal and vertical forms of separation of powers. However, one can find another constitutional mechanism of establishing and limiting political power equally important for democratic polities, and possibly even for European and international law: the opposition

[41] H. ARENDT, THE PROMISE OF POLITICS , 187 (2007).

[42] H. ARENDT, ON REVOLUTION, 142 (2006 [1963]).

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or contestability of political power.[43] Arendt considers institutionalized procedures of opposition as equally important as separation of powers, as they contain the possibility for innovation which underlies her entire concept of politics. While the institutionalization of contestation is also currently being acknowledged as an important legitimating factor for lawmaking beyond the state,[44] Arendt's contribution in this regard has not yet been entirely brought to the fore. It is usually Luhmann[45] or Laclau[46] which are being referred to when discussing contestation or opposition in this context. Both Luhmann and Laclau[47], however, have – via the French phenomenologists Claude Lefort and Marcel Gauchet – intellectual roots and connections with Arendt which are usually overlooked and underestimated.[48]

The Arendt-contributions are curious for the way in which they relate to Arendt: while Goodwin confesses to a cherry-picking approach to Arendt's theory, Brunkhorst and Volk share a more author-based interest in Arendt's texts. They represent the type of political philosophers who are interested in an author because they are fascinated by his or her thinking – and then try to understand the author's thinking as fully as possible and attempt to bring to light aspects of the work which have not yet been fully appreciated. It may be no coincidence that they are not lawyers by education, but political theorists.

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[43] On the issue see: H. Arendt, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC, 43 (H. Arendt, 1973).

[44] See the German Federal Constitutional Court in its Lissabon judgment on the missing opposition in the European institutional system: Judgment of 06/30/2009, 2 BvE 2/08, paras. 215, 250, 280 *et seq.*; P. Mair, *Political Opposition and the European Union*, 42 Government and Opposition 1 (2007); J. Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EJIL 307 (2004).

[45] N. Luhmann, *Theorie der politischen Opposition*, 36 Zeitschrift für Politik 13 (1989).

[46] E. Laclau, *Universalism, Particularism and the Question of Identity*, *in* EMANCIPATION(S), 20 (1996); E. Laclau, *Subject of Politics, Politics of Subject*, *in* EMANCIPATION(S), 48 (1996).

[47] Cited by M. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, A CULTURE OF FORMALISM, 494 (2002).

[48] Lefort is one of the most important inspirations for Laclau. See: O. Marchart, *Eine demokratische Gegenhegemonie*, *in* HEGEMONIE GEPANZERT MIT ZWANG – ZIVILGESELLSCHAFT UND POLITIK IM STAATSVERSTÄNDNIS ANTONIO GRAMSCIS, 105, 109, 115, 117 (Buckel & Fischer-Lescano eds., 2007); U. Stäheli, *Die politische Theorie der Hegemonie: Ernesto Laclau and Chantal Mouffe*, *in* POLITISCHE THEORIEN DER GEGENWART II, 193, 214 (Brodocz & Schaal eds., 2001); Luhmann refers to the former co-worker of Lefort Marcel Gauchet in his *Die Zukunft der Demokratie*, 4 Soziologische Aufklärung – Beiträge zur funktionalen Differenzierung der Gesellschaft 131, 133 (2005). For the way in which Lefort relates to Arendt, see: C. Lefort, *Hannah Arendt et la question du politique*, *in* ESSAIS SUR LE POLITIQUE – XIXE-XXE SIÈCLES, 64 (C. Lefort, 1986); and for the relation of Gauchet to Lefort see: O. Marchart, *Die politische Theorie des zivilgesellschaftlichen Republikanismus: Claude Lefort und Marcel Gauchet*, *in* POLITISCHE THEORIEN DER GEGENWART II – EINE EINFÜHRUNG, 161 (A. Brodocz / G. Schaal ed.,2001).

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C. Concluding remarks: Why so critical on constitutionalism?

In his concluding remarks, Mattias Kumm (New York University / Wissenschaftszentrum Berlin) tried to explain why most speakers were rather critical towards constitutionalism as a conception of European or international law. In his estimate, the reason lay in the choice of the three theorists: All three of them are inter- and post-war European thinkers for whom the distinction between law and morals was beyond question. As is known, Kelsen aimed at a strict separation and at the elimination of moral elements in his pure theory of law, while Schmitt was convinced that political questions of relevance could not sensibly be solved judicially. Arendt's process-oriented, communicative conception of politics as well as her critique of post-war international human rights policy, made her a thoroughly modern thinker in her embrace of a positivist understanding of law and politics.[49] For Kumm, however, constitutionalism is a concept and a theory with a moral underpinning: It is based on a moral understanding of the freedom and the equality of the individual. After the end of the cold war with the third wave of democratization of many formerly socialist or communist countries, a constitutionalism based on these values gained a hegemonic position in German scholarship and thus paved the way for conceptions which deploy at least in part naturalist patterns of argumentation. By choosing Kelsen, Schmitt and Arendt, the organizers had, in his view, predetermined the conference participants' critical stand on constitutionalism.

Kumm recalls Kammerhofer's remarks about constitutionalism as a German project for specifically German reasons.[50] While the idea of constitutionalism beyond the state certainly is especially successful in Germany, one still needs to note that post-national constitutionalism was invented elsewhere: It started out as a concept to explain European legal integration,[51] and was only later extended to international law.[52] While it is true that the protagonists of international constitutionalism are mainly German, the initiators of the European debate were located in Anglo-Saxon academia and, above all, did not conceive of it as a value-laden concept with a moral dimension but used it to describe Europe's specific type of federalism and specific structure of individual rights protection in order to

[49] Stressing this point: J. Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt*, 20 LJIL 1, 14, 18 (2007).

[50] J. Kammerhofer, *supra*, note 3.

[51] E. Stein, *Lawyers, Judges, and the making of a transnational constitution*, 75 AJIL 1 (1981); J. Weiler, *The Transformation of Europe*, 100 The Yale Law Journal 2403 (1991); K. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 American Journal of Comparative Law 205 (1990).

[52] B. Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Columbia Journal of Transnational Law 529 (1998); C. Tomuschat, *Obligations Arising for States Without or Against their Will*, *in* RECUEIL DES COURS, 195 (1993); THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (J. Klabbers, A. Peters & G. Ulfstein, 2009).

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emphasize how far European integration had evolved from being a classical international organization.[53]

D. Possibilities of the workshop series

The workshop certainly fulfilled its presumptive purpose of showing the value of engaging with these three theorists and the topic of constitutionalism. The workshop series was conceived to bring together these two groups – doctrinally and practically working international lawyers – and those interested in theory as an end in itself. In a way, the workshop series was thus conceptualized to convince the pragmatist of the value of theory for his work. Someone who is concerned with a certain doctrinal problem of international law then might refer to a certain theory or theoretical concept which lends itself to application to his particular problem. What this conception does not allow, though, is the discussion of the question of the value and place of theory in international law in itself, the abstract comparison of different theoretical approaches as such – or even the reversed question of the function of doctrine for theory or in general. With their choice, the organizers must have had an Arendtian ambition in mind: the creation of an in-between space between theory-interested and more practically-interested international academics. Arendt herself always used her philosophical background in order to understand and illuminate the pressing issues of her time since "the task of the mind is to understand what happened, and this understanding, according to Hegel, is man's way of reconciling himself with reality (...)"[54]. While in contrast to Hegel, Arendt remained doubtful about the possibility of reconciliation with reality, we may hope that this conference series advances the reconciliation of doctrinally- and theoretically-oriented international lawyers.

[53] On this: I. Ley, *Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich*, 69 ZaöRV 317, 326, 343 (2009).

[54] H. Arendt, *Preface: The Gap between Past and Future*, *in* BETWEEN PAST AND FUTURE – SIX EXERCISES IN POLITICAL THOUGHT, 3, 8 (H. Arendt, 1961).

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