

**A LETTER FROM EUROPE:  
EUROPEAN CONSTITUTIONAL LAW AND ITS DIGITAL  
PUBLIC SPHERE**

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*Constitutional law in the European Union has become, in recent years, geared towards the mutual stabilization of liberal democracies. The vigilance required thereto is greatly facilitated by digital media. A major role has come to be played by social media platforms like Twitter and blogs such as the Verfassungsblog. While the rise of authoritarianism is one major concern, public law scholarship becomes increasingly involved in a controversy over its proper task.*

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## INTRODUCTION

The shape of constitutional discourse, and of the law of constitutions, has changed significantly in Europe over the last thirty years.<sup>1</sup> The relevant transformations have as one of their roots the post-war project of stabilizing constitutional democracies in the context of an international human rights regime.<sup>2</sup> The other root reflects the vicissitudes of European integration, as a result of which the Member States of the EU have become part of a *Verfassungsverbund*<sup>3</sup> in the relation of the supranational European Union law and national constitutional law. One consequence of this development is that Member States are now subject to the vigilance that is exercised by the European Commission with an eye to the values enshrined in Article 2 of the Treaty on the European Union.<sup>4</sup> These values—such as democracy, the protection of human rights, and the rule of law<sup>5</sup>—need to be sustained by the Member States severally and, acting through the Union, jointly. This commitment has also given rise to more mutual interest in the evolution of constitutional systems throughout Europe and created awareness that each state is a participant in the joint project of sustaining the values mentioned in Article 2 TEU. Even if one needs to

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<sup>1</sup> See ARMIN VON BOGDANDY, STRUKTURWANDEL DES ÖFFENTLICHEN RECHTS: ENTSTEHUNG UND DEMOKRATISIERUNG DER EUROPÄISCHEN GESELLSCHAFT (2022) for a most recent and comprehensive account.

<sup>2</sup> See Andrew Moravcik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 INTERNATIONAL ORGANIZATION 217–52 (2000).

<sup>3</sup> We owe the term *Verbund*, the meaning of which remains elusive, to the German Constitutional Court that has first used it as part of the compound noun *Staatenverbund* in the reasoning underpinning the so-called *Maastricht* decision. See Gerhard Wegen and Christopher Kuner, *Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty*, 33 INTERNATIONAL LEGAL MATERIALS 388–444 (1994). German legal scholarship has developed it further into the *Verfassungsverbund*. See Ingolf Pernice, *Die dritte Gewalt im europäischen Verfassungsverbund* (1996), in DER EUROPÄISCHE VERFASSUNGSVERBUND: AUSGEWÄHLTE SCHRIFTEN ZUR VERFASSUNGSTHEORETISCHEN BEGRÜNDUNG UND ENTWICKLUNG DER EUROPÄISCHEN UNION 431–454 (2020). The best way of describing a *Verbund* is possibly by calling it a loosely connected union.

<sup>4</sup> See VON BOGDANDY, *supra* note 1, at 209.

<sup>5</sup> J.H.H. Weiler, always fond of theological metaphors, refers to these three ideals as the “Holy Trinity” of the liberal order, pointing out that the three are indeed one: Democracy without human rights and the rule of law would easily amount to majority tyranny; human rights without the rule of law would be empty slogans; the rule of law, devoid of its democratic context, might serve as a convenient tool of legalistic authoritarian rule. See J.H.H. Weiler, *Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 5 (2021).

tread with caution here, it can be said that scholarly debates of constitutional law no longer remain more or less exclusively tied to national jurisdictions. They can easily and quickly spill across boundaries.<sup>6</sup>

Institutionally, these matters have begun as a “dialogue” between supranational and national courts.<sup>7</sup> With the growing awareness that liberal democracy is a fragile achievement and in the face of “backsliding” in some Member States,<sup>8</sup> there is now a much broader vigilance with regard to sustaining Europe’s constitutional core. In this process, the emerging digital public sphere of legal scholars has availed itself of digital media without which, arguably, this sphere would not have come into existence.

## I. A COMMON LANGUAGE AND A COMMON Demeanor

Two conditions are essential for the development of such a sphere: Above all, Europeans are using English as their common language. Even though it is the second language for most, the general proficiency has been greatly enhanced by the availability of student mobility programs, such as “Erasmus”,<sup>9</sup> and access to postgraduate education that is mostly administered in this *lingua franca*.<sup>10</sup> The rise of amazingly powerful translation programs such as DeepL does its bit to further facilitate exchanges across linguistic bounds.<sup>11</sup>

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<sup>6</sup> See also Armin von Bogdandy, *Comparative Public Law for European Society*, 28 MPIL RESEARCH PAPER SERIES 15 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4298016#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298016#).

<sup>7</sup> For an account, see, for example, Anthony Arnall, *Judicial Dialogue in the European Union*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 109-133 (J. Dickinson ed., 2012).

<sup>8</sup> For an introduction, see Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 111-124 (A v. Bogdandy & P. Sonnevend ed., 2015); WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN (2019).

<sup>9</sup> The “Erasmus” program supports the mobility of students and academics throughout Europe. See Erasmus+, EUROPEAN COMMISSION, <https://erasmus-plus.ec.europa.eu> (last visited May 21, 2023). The more ambitious students try to spend at least one semester in a different European country in order to study there.

<sup>10</sup> On the role of languages in the development of the EU in general, see, e.g., RICHARD L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION: THE PARADOX OF A BABEL ‘UNITED IN DIVERSITY’ (2005).

<sup>11</sup> One may add that not using a common language is generally becoming less and less of a limiting factor to access, e.g., a written legal text in times of DeepL and similar programs.

In addition to using a common language, the establishment of a common sphere is also deeply dependent on access to legal data such as court opinions and the possibility for exchanging views on a European-wide scale. Both are greatly facilitated by open access journals, increased electronic access to books and the availability of typically digital media, such as blogs.

Superficially, one may gain the impression that with easier access to digital media, scholars begin to write more like journalists and that the line separating the two roles becomes almost imperceptibly thin. Yet, the development is more complicated. In Europe, at any rate, it has become quite customary for journalists to abdicate much of their responsibility for research and to externalize the generation and dispensation of expertise to members of the academe. In fact, it is rather tiring to see the news transformed into talk shows not least because the coverage of every current issue involves an interview with at least one “expert”. Not infrequently, experts are pit against each other on controversial issues.<sup>12</sup> Both of the roles which experts are expected to play in the media fit the traditional demeanor of legal academics very well. Above all, they are comfortable with speaking about issues in a detached manner. In fact, this is the easiest position to be in, for it permits them to address openly unresolved issues and open questions. In addition, scholars have also been trained to perform the role of an advocate, which they are inclined to adopt when their expertise serves the interest of clients or public institutions.

Unsurprisingly, detached expertise and advocacy are found on the digital media, too. In fact, legal scholars are lured into communicating more and more like advocates,<sup>13</sup> providing crisp answers to an interviewing journalist in order to be seen and heard.

Playing these roles in a digital context, where scholars comment on current events, confronts them with occasionally

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<sup>12</sup> On the role of interviews, see PIERRE BOURDIEU, ON TELEVISION 30-33 (P.P. Ferguson, trans., 1999). Thank you to Sebastián Guidi for inviting our attention to Bourdieu’s text.

<sup>13</sup> Concerns in this regard were recently voiced by Eric Segall. Criticizing the rise in professorial engagement in constitutional politics in light of his fellow law professor colleagues testifying in front of Congress, he writes that “we are supposed to be, I think, primarily academics not advocates, and I’m not sure how often we should blur those roles”. In his view, academics should restrict their engagement to statements within their specific constitutional expertise and stay away from participating in general campaigns of constitutional matters beyond that. Cf. Eric Segall, *What are Law Professors For Anyway*, DORF ON LAW (Dec. 9, 2019), <http://www.dorfonlaw.org/2019/12/what-are-law-professors-for-anyway.html>.

immense time pressure. In order to receive public attention, one should be among the first churning out comments. There is no point in writing something the day after a number of colleagues have voiced their opinion, not least because public attention easily becomes fatigued with issues and is therefore likely to look out for more tickling recent news.

The statements provided by legal scholars need to be short, crisp and somewhat pointed; however, at the same time, they must not be too bold to adversely affect one's standing as a scholar. The analysis should be also easy to digest and—in the best case—attention grabbing and entertaining to read. The combination of these factors explains why public interventions, such as those on blogs, are further removed from the conditions under which Europeans imagine “solid” legal scholarship to flourish. Good legal scholarship requires comprehensive and in-depth research, the peace of mind to think about an issue raised thoroughly and sticking to the common methodological canon of one's discipline, regardless of whether one finds the outcome politically desirable or whether one can join or attract followers.<sup>14</sup>

These conditions for the production of “solid” legal scholarship are, however, being increasingly challenged. With the rise of new digital platforms, the forms and styles to express oneself as a legal scholar are expanding, too. In Europe, two platforms have played a particularly important role in this regard: The *Verfassungsblog*, on the one hand, and Twitter, on the other.

## II. VERFASSUNGSBLOG.DE

Blogging is a distinctive<sup>15</sup> form of sharing one's thoughts online with a potentially unlimited readership. While blogging is

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<sup>14</sup> One prominent scholar who recently pointed towards the shortcomings of these forms of communication is Khaitan (see below note 44). These were and are also objections against blogs like the *Verfassungsblog*. See for example Franz C. Mayer, *Die offene Gemeinschaft des Verfassungsblogs: Zehn Thesen zu zehn Jahren Verfassungsblog*, VERFBLOG (Sept. 02, 2019) <https://verfassungsblog.de/die-offene-gemeinschaft-des-verfassungsblogs/>, DOI: 10.17176/20190902-201540-0.

<sup>15</sup> The general notion in this regard seems to be that social media platforms have surpassed blogs in their popularity. An example for this is Komárek who writes that blogging professors seems to be a matter of the past while tweeting professors are the order of the day. See Jan Komárek, *Freedom and Power of European Constitutional Law Scholarship*, 17 EUR. CONST. L. REV. 434 (2021).

possibly already somewhat eclipsed by social media, this trend is not true for its role in constitutional scholarship. In fact, quite the opposite is the case: In legal scholarship in general, blogs are becoming increasingly popular,<sup>16</sup> leading to a great number of different kinds of blogs.<sup>17</sup> In Europe, numerous blogs in particular on European law exist.<sup>18</sup> The most interesting development of all, however, is the *Verfassungsblog* (its literal translation being “Constitution Blog”).

Maximilian Steinbeis, the founder, former sole-author and now lead-editor and owner, initiated the *Verfassungsblog* in 2009 as a one-journalist project.<sup>19</sup> A driving force to turn the *Verfassungsblog* into something bigger were the momentous and increasingly disconcerting developments in Hungary when Viktor Orbán and his party, Fidesz, enacted a new Constitution in 2011 to instrumentalize it for their political agenda.<sup>20</sup> The *Verfassungsblog* observed this authoritarian (mis)use of

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One may add in a relativizing way that while it is certainly the case that blogging is more and more sidelined by Twitter, using one does not necessarily go hand in hand with giving up using the other. Tweeting vs blogging is not an “either-or-question”. One can (and when considering Twitter as a tool for self-promotion: possibly even should) tweet about something one has already blogged about before. It seems also feasible to spin it the other way around, e.g. by embedding tweets into a blog post and thereby referring to them. Rather telling in this regard is that the *Verfassungsblog* itself has a Twitter account to tweet about the latest publications, see for example @Verfassungsblog, TWITTER (Nov. 28, 2022, 12:29), <https://twitter.com/Verfassungsblog/status/1597251389444526084>.

<sup>16</sup> Even back in 2006, US legal scholars already discussed how legal blogs might transform legal scholarship. Cf., for example, Lawrence B. Solum, *Bloggling and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071 (2006), [https://openscholarship.wustl.edu/law\\_lawreview/vol84/iss5/4](https://openscholarship.wustl.edu/law_lawreview/vol84/iss5/4).

<sup>17</sup> Examples for prominent blogs in legal scholarship are the SCOTUS Blog, Lex Blog, Jurist, Artificial Lawyer, I-CONnect, Verdict Justia, Opinio Juris and the Legal Scholarship Blog. Blogs in law are of such popularity that there even has been a word created to capture this phenomenon, namely “blawg”, a fusing of the words “law” and “blog”. See, e.g., Mayer, *supra* note 13.

<sup>18</sup> One may think, for example, of EUROPP, European Law Blog, UNIO Blog, EU Law Live, European Parliamentary Research Service Blog and EJIL Talk. Compared to the US, however, the “law blog scene” in Europe is still in its earlier stages. See Mayer, *supra* note 13, who cites a statistic of the American Bar Association listing around 4500 “Blawgs”.

<sup>19</sup> Maximilian Steinbeis, *Verfassung schützen, Verfassung missbrauchen, Verfassungsmisbrauch beobachten*, JDÖR 7 (2023).

<sup>20</sup> Maximilian Steinbeis, *Verfassungs-Barbarei in Budapest*, VERFBLOG (Jan. 20, 2011), <https://verfassungsblog.de/verfassungsbarbarei-budapest-2/>, DOI: 10.17176/20181008-125156-0. On the developments in Hungary, see the introduction by Miklós Bánuti, Gábor Halmai & Kim Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, 23 JOURNAL OF DEMOCRACY 138-146 (2012); Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 111-124 (A v. Bogdandy & P. Sonnevend ed., 2015).

constitutional law critically as a mere means to asphyxiate liberal democracy. Experts from Europe and the US, but in particular scholars from the country affected, were using their knowledge to “call out” this dangerous dynamic caused by the developments in Hungary.<sup>21</sup> By doing so, legal scholarship used its power to identify an authoritarian (mis)use of constitutional law without having to observe the constraints of diplomatic courtesy that are faced by politicians.<sup>22</sup>

By now, the *Verfassungsblog* has innumerable contributions, not just on Hungarian constitutional reforms but also on the political tinkering with the Polish court system, starting in 2015.<sup>23</sup> It has thereby achieved, as noted by Franz C. Mayer, three more important things: First, it has made talk of European constitutional law eventually into a matter of course. It is now taken for granted by participants that certain key aspects of primary European Union law are of a constitutional nature. Second, it has put much emphasis on the battles of jurisdiction that are fought out in the relation of the CJEU and national constitutional courts, in particular the German constitutional court. This affects the essence of European constitutionalism,

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<sup>21</sup> Cf., for example, Gábor Halmai, *Scheppele, Kim Lane: Orbán is Still the Sole Judge of his Own Law*, VERFBLOG (Apr. 30, 2020), <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>, DOI: 10.17176/20200501-013725-0; Dániel Karsai, *The Curious and Alarming Story of the City of Göd: How the Hungarian Government misuses its power in their political fight against opposition-led municipalities*, VERFBLOG (May 15, 2020), <https://verfassungsblog.de/the-curious-and-alarming-story-of-the-city-of-goed/>, DOI: 10.17176/20200515-133737-0; Gábor Halmai, *Restoring Constitutionalism in Hungary: How Should Constitution Making Be Different from What Happened in 1989?*, VERFBLOG (December 13, 2021), <https://verfassungsblog.de/restoring-constitutionalism-in-hungary/>, DOI: 10.17176/20211215-142526-0. One of the latest posts in this regard is Kim Lane Scheppele, R. Daniel Kelemen & John Morijn, *The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary*, VERFBLOG (Dec. 01, 2022), <https://verfassungsblog.de/the-good-the-bad-and-the-ugly-2/>, DOI: 10.17176/20221202-001548-0.

<sup>22</sup> See Steinbeis, *supra* note 18.

<sup>23</sup> The *Verfassungsblog* even features a set of podcasts that provide detailed historical accounts of how both of these crises unfolded (<https://verfassungsblog.de/pod/>). On a side note, it seems worth mentioning that not just podcasts but also videos on constitutional questions form a new dimension of scholarship, too. One recent example with regard to the US Constitution is the weekly podcast “America’s Constitution” by Yale Law Professor Akhil Reed Amar, offering “weekly in-depth discussions on the most urgent and fascinating constitutional issues of our day”. Cf. Akhil Amar, *Amarica’s Constitution*, AKHIL REED AMAR, <https://akhilamar.com/podcast-2/>. It could be considered as a way of not just changing the mode and style of publishing legal texts (in the broader sense) but also to move beyond text altogether. Somewhat skeptical of this development is e.g. Mayer, *supra* note 13.



not least because in this context the room that has to be left for the nation state has become a subject of contention. Finally, the *Verfassungsblog* is clearly a site of “scholactivists” who believe that liberal constitutions are a good thing.<sup>24</sup> The contributors engage in the advocacy of constitutionalism (and do not publish diatribes “against constitutionalism”<sup>25</sup>).

Nevertheless, since the *Verfassungsblog* is a suitable medium for the quick exchange of constitutional ideas across national bounds, it is also a medium to follow constitutional developments, in particular various crises, on a global scale. While, understandably, comments on the Russian war of aggression against the Ukraine recently abound,<sup>26</sup> one also finds entries on Kashmir<sup>27</sup> and the latest developments in Israel.<sup>28</sup> The Blog is therefore growing into an important, if not the most important, element of an international discourse of constitutional scholars. It provides them with an opportunity to present and to discuss their views on topical issues that are likely to attract the attention of people situated at other places of the globe.<sup>29</sup>

### III. TWITTER

The role of Twitter in constitutional legal scholarship is quite different from the one outlined for the *Verfassungsblog*. Most notably, Twitter as a platform does not—contrary to blogs like the *Verfassungsblog*—originate within the legal community and is not specifically tailored to it. While the *Verfassungsblog* has been designed in a way that legal scholars can communicate more briefly their opinions on constitutional matters, opening them up to a wider, also non-legal audience, the starting condition on Twitter is the opposite: Those who speak and those who listen are identical and—at least in theory—unlimited.<sup>30</sup>

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<sup>24</sup> Cf. Mayer, *supra* note 13.

<sup>25</sup> See, recently, MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* (2022).

<sup>26</sup> There are countless articles on that issue, see *Ukraine*, VERFBLOG, <https://verfassungsblog.de/category/regionen/ukraine/>.

<sup>27</sup> See *Casting Light on Kashmir*, VERFBLOG, <https://verfassungsblog.de/category/debates/casting-light-on-kashmir-debates/>.

<sup>28</sup> See Aeyal Gross, *The Populist Constitutional Revolution in Israel: Towards a Constitutional Crisis*, VERFBLOG (Jan. 19, 2023), <https://verfassungsblog.de/populist-const-rev-israel/>.

<sup>29</sup> Coming back to the aforementioned relevance of having a common language, it seems worth pointing out that posts on the *Verfassungsblog* are – despite its German origin – not limited to German but also available in English.

<sup>30</sup> In his most recent work on the current transformation of the public sphere, Jürgen Habermas has pointed out how the existence of online platforms affects public communication. While in former times, the public sphere depended

While the *Verfassungsblog*, to be sure, does not use double blind peer review, it has the editorial team exercising the function of the gate-keeper. By contrast, there are no prerequisites for being allowed to participate actively or passively on Twitter and (again, in principle) no prior restriction of the topics to be discussed.<sup>31</sup> Any community and its members can make use of the platform without restraints, but also without being able to guide and filter the discussion in the way the *Verfassungsblog* enables them to do.<sup>32</sup>

What is characteristic for each social media platform is its own, distinctive formats for the sharing of information.<sup>33</sup> With regard to Twitter, information can be put out into the world by “tweeting”, i.e. producing short messages (with a maximum length of 280 characters each) that are by default public.

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on media, such as the press, that provided quality control by an editorial office, online platforms give everyone more or less unfiltered opportunity to act in the capacity that used to be reserved to trained journalists. Not only is public communication thereby drained of its quality and the reliability of imparted information cast into doubt, it also provides incentives for people of similar opinions to cluster on certain platforms and to stay among themselves. Hence, the old public sphere embraced the principle of inclusion is about to become fragmented into a variety of quasi-private and plebiscitarian spheres. See JÜRGEN HABERMAS, EIN NEUER STRUKTURWANDEL DER ÖFFENTLICHKEIT UND DIE DELIBERATIVE POLITIK 44-47, 53, 56, 61 (2022). While there is much to Habermas’ observation, it does not affect media outlets that are filled with content originating exclusively or predominantly from legal scholars or members of the legal profession. Quality control by an editorial office is replaced, there, with conditions such as earning a degree and occupying some respectable position in a professional context. They are the markers ensuring attention from others.

<sup>31</sup> There are, however, general access requirements such as being of a certain age and registering on Twitter by creating an account. Furthermore, Twitter has general rules on what cannot be communicated. See THE TWITTER RULES, TWITTER HELP CENTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules>. It goes without saying, though, that these general guidelines are only the starting point. Questions of content moderation are among the most debated topics when it comes to regulating social media platforms like Twitter.

<sup>32</sup> This, however, does not stop communities from creating their own “bubbles”. The legal community created so-called “law Twitter”. In the literature, specific academic norms have even been suggested by referring to legal scholars using twitter as “#LawProf Twitter”. See Carissa Byrne Hessick, *Towards a Series of Academic Norms for #LawProf Twitter*, 101 MARQ. L. REV. 903 (2018), <https://scholarship.law.marquette.edu/mult/vol101/iss4/4>.

<sup>33</sup> There is, however, a trend among social media platforms to copy the features of one another and thereby becoming more and more similar to one another. Cf. Simona Tolcheva, *Are All Social Media Platforms Becoming the Same?*, MOU (March 9, 2022), <https://www.makeuseof.com/social-media-sites-becoming-the-same/#a-unique-feature-not-for-long>; Arielle Pardes, *All the Social Media Giants Are Becoming the Same*, WIRED (Nov. 30, 2020), <https://www.wired.com/story/social-media-giants-look-the-same-tiktok-twitter-instagram/>.

Thereby, Twitter introduces an even more drastic change in making opinions of legal scholars seen to the general public than the *Verfassungsblog*.<sup>34</sup> Putting it bluntly, Twitter does not even require its users to actively look for content, it delivers it directly to individualized feeds.<sup>35</sup>

#### IV. SPEED KILLS? THE PERKS AND DANGERS OF DIGITAL CONSTITUTIONAL SCHOLARSHIP

Reaching a wider audience, especially beyond one's legal community, and the low threshold for this audience to acknowledge the information shared and engage with it, is a strong incentive for legal scholars to respond quickly to current events, using platforms like Twitter or the *Verfassungsblog*.<sup>36</sup> This can have beneficial effects if constitutional scholars enter into some "dialogue" with the deciding state actors as they add knowledge or voice criticism which could influence the decision.<sup>37</sup> Tweets and blog posts can play the role of abbreviated amicus curiae briefs, so to speak.

The difference such an immediate dialogue could make with regard to the impact of constitutional scholarship on societal developments becomes particularly clear when contrasting it with the impact of traditional media of publication

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<sup>34</sup> The public "consuming" what is being offered on a platform is not only broader but also significantly less specialized with regard to Twitter as it is in the case of *Verfassungsblog*. One may argue against this backdrop that publications on the *Verfassungsblog* involve greater responsibility on the part of the participants, not least because the "comment" section facilitates the debate of ideas which, in turn, directly impacts how one will be perceived by the specialized legal community in which one operates. This does not mean, however, that Twitter in and of itself encourages irresponsible behavior. The degree of responsibility and social accountability simply does not result directly from the medium but rather from what it is used for.

<sup>35</sup> It goes without saying that the way the content is "created" for each feed is a gateway for a great number of consequential problems, especially the danger of manipulation. *See*, for example, Susan T. Fiske, *Twitter manipulates your feed: Ethical considerations*, 119 PNAS (2021), <https://doi.org/10.1073/pnas.2119924119>. Particularly famous by now are discussions around the existence and extent of filter bubbles and echo chambers on platforms like Twitter which are oftentimes pointed out as a consequence of algorithms shaping each feed to provide a personalized experience as undistracted from undesired content as possible. *Cf.* for instance David Lazer, *The Rise of the Social Algorithm*, 348 SCIENCE 1090 (2015).

<sup>36</sup> Twitter builds "broader scholarly communities" and fosters "scholarly interconnectivity that is not present elsewhere." Caprice L. Roberts, *Unpopular Opinions on Legal Scholarship*, 50 LOY. U. CHI. L.J. 365 (2018) 379 et seq.

<sup>37</sup> Steinbeis calls it aiming at "moving targets". *See* Steinbeis, *supra* note 18.

in constitutional scholarship, such as law review articles. It goes without saying that they, too, can be crucial for reconsideration and reevaluation of political decisions with a constitutional dimension.<sup>38</sup> In the long run, they might even trump blog posts, tweets and similar outlets for takes on constitutional questions. However, the downside of traditional publication formats is that they invariably lag behind. Even if a legal scholar manages to react to a contemporary legal debate rather quickly, the publication process is usually much longer than the time available to respond efficiently and effectively to current events.<sup>39</sup>

Abandoning or greatly reducing the time gap between writing a text and publishing it by moving beyond the traditional formats of legal scholarship comes, however, at a price. Quick tweets can attract unfiltered, unqualified and sometimes even offensive comments. Beyond the lack of quality of such comments, they may arise to quantitative proportions that are unmanageable for the scholar concerned (or anyone hoping to follow a constitutional debate on a substantive level).<sup>40</sup>

## V. LOOK AT ME!

These platforms do not, however, only affect the product of legal scholarship, but also the scholars themselves. It is a truism that social media platforms cater to vanity. This adds a new dimension to communicating one's legal scholarship, at least in this immediacy and intensity. Until this day, it is commonly understood that legal scholarship is not presented from the first-person perspective. At least in the European context, legal scholars have been expected to say in a neutral manner what the law is and not to reveal to the public how they

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<sup>38</sup> With a hint of cynicism, Zachary Kramer puts the hope to have an impact with a law review article in the following way: "To write and explore, to fight for justice and right wrongs, to make the world a better place, one measly law review article at a time." Zachary Kramer, *On Being Sued*, PRAWFSBLAWG (Oct. 8, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/10/on-being-sued-1.html>. On the relative hopelessness of this perspective, see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167-191 (1990).

<sup>39</sup> Many journals only have specific submission windows paired with long peer review procedures and uncertain outcomes. This endangers a paper to become outdated at the time of its publication. This danger is (in the case of Twitter) practically non-existent or (in the case of blogs like the *Verfassungsblog*) greatly minimized as the time gap between completing a text and publishing it online vanishes.

<sup>40</sup> See Mayer, *supra* note 13 on real-time comments and interaction as well as the ability to handle the "heat" one might face for taking a certain position on a constitutional matter.

personally view an issue. This has dramatically shifted in the age of blogging and tweeting. The descriptive, almost passive, third person is more and more replaced with the first person sharing one's thoughts, feelings, experiences and so forth, and putting the "I" at the very center of the postings.<sup>41</sup>

Of course, it would be naïve to argue that the question of who is speaking has been irrelevant in legal scholarship before blogs and social media. Legal academia is hierarchical and so is legal scholarship.<sup>42</sup> However, the way social media led to a change of narrative in legal scholarship cuts much deeper. Being seen and being heard has become an aim in itself. Even more, staging one's view on social media is oftentimes considered a necessary precondition for rising to the top, especially for more junior scholars.<sup>43</sup> There is a strong career-related incentive to make their work not just accessible to a wider range of people but to also show presence and to be recognizable by presenting themselves on social media platforms.<sup>44</sup> Putting it bluntly, this can lead to constantly talking about one's research instead of actually carrying it out. The general social pressure dimension of social media ("post a picture or it did not happen") has a very distinctive reflex effect on legal scholarship with measurable implications: A paper or book not advertised shamelessly and repeatedly on social media is a work not cited as much and thereby less visible, negatively impacting legal scholar's chance to earn much desired renown.

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<sup>41</sup> See Steinbeis, *supra* note 18. See also Ann Althouse, *Why a Narrowly Defined Legal Scholarship Blog Is Not What I Want: An Argument in Pseudo-Blog Form*, 84 WASH. L. REV. 1221 (2006), [https://openscholarship.wustl.edu/law\\_lawreview/vol84/iss5/19](https://openscholarship.wustl.edu/law_lawreview/vol84/iss5/19). Althouse argues that "blogging has the potential for self-discovery and innovation in a way that legal scholarship might not".

<sup>42</sup> See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

<sup>43</sup> See Jaime A. Santos, *The Perils of Engaging on Social Media for Women Lawyers: Are the Benefits Worth the Risks*, 55 IDAHO L. REV. 233 (2019), on the special toll it takes to have a social media presence on certain parts of the legal community, such as women.

<sup>44</sup> This is not restricted to being present on Twitter but also on platforms like LinkedIn or Facebook. LinkedIn has an even greater "self-cultivation-factor" than Twitter as the platform has the explicit goal for individuals to create the most attractive "professional identity" possible to gain and maintain the attention of potential work partners ("building and engaging with one's professional network").

## VI. SCHOLACTIVISM

These changes in the way scholars communicate have recently given rise to broader, more fundamental reflections on the role they ought to play, particularly in contrast to political activists. One of the first reactions to these newer forms of “real-world” engagement by scholars was formulated by Komárek.<sup>45</sup> His objection to the current trend is at core based on some of the aspects mentioned above. In his view, the swiftness and brevity of internet interventions cannot guarantee that they are right for the proper task of scholars, namely to pursue “knowledge”. In a similar vein, Khaitan<sup>46</sup> has meant to alert scholactivism to its propensity to underachieve its own goals and cautioned against its potential lack of scholarly candor.

Khaitan formulates an “instrumentalist” objection to “scholactivism”.<sup>47</sup> In his view, scholarship that seeks to actively promote a project of social justice—or, in the European Union context, the rule of law—is likely not to achieve its goal.<sup>48</sup> To support his claim, he distinguishes between radical and moderate scholactivism.

Radical scholactivism<sup>49</sup> matches exactly what Vermeule understands as “strategic legalism”.<sup>50</sup> The idea is straightforward: The result of constitutional interpretation that one believes to be correct pursuant to one’s own standard of interpretation needs to be presented in another garb when the dominating method of interpretation is different from one’s own. For example, living constitutionalists need to present their case

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<sup>45</sup> See Komarek, *supra* note 14.

<sup>46</sup> Tarunabh Khaitan, *On scholactivism in constitutional studies: Skeptical thoughts*, 20 I. CON 547-446 (2022). See also his *Facing Up: Impact-Motivated Research Endangers not only Truth, but Justice*, VERFASSUNGSBLOG (Sept. 6, 2022), <https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/>.

<sup>47</sup> Khaitan, however, would not object to publishing simplified versions of one’s own scholarship in order to spread the ideas among a wider public. See also Vikram Amar, *First Monday Musings By Dean Vik Amar: Why We In Legal Academia Should Assist In Legal Journalism, But Do So Carefully*, ABOVE THE LAW (Sept. 5, 2017), <https://abovethelaw.com/2017/09/first-monday-musings-by-dean-vik-amar-why-we-in-legal-academia-should-assist-in-legal-journalism-but-do-so-carefully>.

<sup>48</sup> See Khaitan, *supra* note 44, at 548.

<sup>49</sup> *Id.* at 550-551.

<sup>50</sup> See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 135 (2011). Interestingly, Khaitan does not mention Vermeule’s book. Most interestingly, Khaitan does not even mention Hans Kelsen’s project of a legal science that draws as sharp line to legal policy. See HANS KELSEN, *AN INTRODUCTION TO THE PROBLEM OF LEGAL THEORY* (B Litchevski Paulson & S.L. Paulson, trans. 1991).

in the format in which it appeals to original understandings of the constitution if the jurisdiction is dominated by originalists.

It is difficult to see why one should find this objectionable, in particular, as is claimed by Khaitan, on purely instrumentalist grounds. Why should one rob oneself of an opportunity to have an impact by fudging an originalist argument if its conclusion is sound pursuant to what one takes to be the most persuasive method of interpretation? Khaitan appears to be concerned that such dishonest behavior harms the pursuit of truth because what one takes to be a false approach is left unchallenged. But this fear is not well-founded, for it rests on a misapprehension of the social constitution of what is to be known as “law”.<sup>51</sup> Legal scholarship is invariably intellectually enslaving. Not only, quoting Robert Cover’s memorable phrase, is knowledge of the law obtained “in a field of pain and death”,<sup>52</sup> it also has to take place subject to conditions under which the participants necessarily have to take debatable premises for granted.<sup>53</sup> If courts jauntily develop mind-boggling doctrines and routinely decide cases on their basis, the doctrines are part of the law *as it exists*. Legal scholars need to put up with it. That is the intellectually enslaving part of “doing law”. Are therefore all those conducting legal scholarship in the shadow of outlandish precedents and peculiar judicial doctrines radical scholactivists? Scarcely so, for legal scholarship is not based on eternal principles, but rather on what Edward Coke memorably called “artificial reason”.<sup>54</sup> Even the reasoning modes inherent in doctrines, and not just their normative premises, are at times a matter of mindless conventions, and one has to avail oneself of the ropes in order to present an argument that will pass as skillfully presented and appropriate in the doctrinal context.

But Khaitan’s objection not only misapprehends the intellectual inclemency of doctrinal scholarship, it also rests on a fallacy of which *both* legal positivists and moralists are guilty. He seems to suggest that legal statements are statements about something and, therefore, in one sense or another, detached

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<sup>51</sup> See TERRY PINKARD, *HEGEL’S PHENOMENOLOGY: THE SOCIALITY OF REASON* 52-54 (1994) for a lucid account of the master-slave dialectic.

<sup>52</sup> Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

<sup>53</sup> This, if anything, is the perennially relevant observation made by Hart about the constitutive rule of conventions for the existence of valid laws (i.e., rule of recognition). See H.L.A. HART, *THE CONCEPT OF LAW* 110-117 (1994).

<sup>54</sup> Edward Coke, *Prohibitions del Roy* (1607) 12 *Co. Rep.* 63, cited after Jerome E. Bickenbach, *The ‘Artificial Reason’ of the Law*, 41 *INFORMAL LOGIC* 23 (1990). See also, even if from a critical perspective, THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAW OF ENGLAND* 54-55 (1971).

propositions.<sup>55</sup> But this perspective is misleading owing to its disregard that doctrinal legal knowledge exists in the two states of either expertise or advocacy. In none of these states is it merely “about” something. While expertise makes explicit the vagaries of legal arguments, advocacy must seek to suppress them. In both forms, however, legal knowledge is formulated with what Habermas would call a performative attitude and, hence, not only “about” something as it implicitly or explicitly takes into account the views of actual or potential adversaries. In the form of advocacy, legal statements are *actually* normative, while in the form of expertise, they are only *potentially* so. In the first form, they say what ought to be done or what may permissibly happen or what can be ordered. By saying what ought to be done, one commits oneself to seeing it happen.<sup>56</sup> By saying what *may* be right—*ceteris paribus* or subject to further conditions—one retracts the normative into the subjunctive mood, which is the trademark of expertise. Viewed from that angle, radical scholactivism is more congenial to the normativity of law than the communication of expert scholars dropping hesitantly from the sideline a few cautionary remarks. Indeed, within the larger public sphere of European constitutional law, the reasoning offered in support of genuine normative statements will often appear as adversarial, which is, after all, part of the type of skill that the study of law imparts on its students.<sup>57</sup> It is even part of a legal scholars’ skill to argue a point while knowing, when wearing the hat of an expert, that there is merit to the other side. There is a deeply oratory element in legal scholarship that eludes Khaitan’s analysis.

Even more difficult to accept than Khaitan’s rejection of “radical scholactivism” is the one regarding “moderate scholactivism”.<sup>58</sup> In his view, this type of activism subordinates the actual and sincerely articulated beliefs of scholars to a particular political purpose. Khaitan believes moderate

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<sup>55</sup> This becomes particularly obvious when he presses the point that interpretation is also about truth, thereby not taking into account that hermeneutics has developed a concept of truth that does not at all appeal to some form of “correspondence” between legal facts and statements. *See*, for an introduction, CRISTINA LAFONT, *THE LINGUISTIC TURN IN HERMENEUTIC PHILOSOPHY* 102-107 (J. Medina trans., 1999).

<sup>56</sup> This statement would require further elaboration, for it presupposes viewing law as the field of genuine volition. If I will something, I am therewith transforming myself into a means to realize an end. *See* CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* 84-90 (2009).

<sup>57</sup> On the close connection between the profession of the lawyer and the prerequisites necessary for participation in politics, *see* MAX WEBER, *GESAMMELTE LAFONT, THE LINGUISTIC TURN IN HERMENEUTIC POLITISCHE SCHRIFTEN* 260-261, 512 (2nd ed., 1958).

<sup>58</sup> *See* Khaitan, *supra* note 44, at 551-555.



scholasticism is compromised owing to the following factors: It is—as pointed out above—often produced quickly and cannot be tested in the academic environment before publication. Hence, there is no opportunity for an extended discussion of pros and cons. Authors who have taken a stand on an issue of public policy come under pressure to dig in their heels in the face of opposition. Moreover, scholars may be myopic and easily flattered by the attention they receive and fail to take long-term consequences and unintended side-effects of their position into account.<sup>59</sup> But one must wonder whether this could ever be done. How should even the most reclusive scholars, spending most of their life in an academic environment, ever anticipate the effects of the application of some of their conclusions? It is, thus, in the course of the discussion of moderate scholasticism that the normative vision of scholarship underlying Khaitan’s intervention is emerging more clearly. It seems to be at home in the world of theoretical discourse<sup>60</sup> and thereby avoiding the world of action altogether.<sup>61</sup> One is inclined to conclude that Khaitan defends the world of legal academics against the always present lure of yielding to the desire to change the world for the better through one’s own interventions. This would, again, match Kelsen’s project but one cannot help but have the impression that Khaitan takes the most academic part of legal scholarship for the whole. What drops out of the picture, however, is the *real* normative orientation of legal expertise. Once one has formed an opinion about what the law is, then one commits oneself to having it applied or implemented. One cannot make normative statements and sit still if one has opportunities to help to give effect to the stated normative views. This would amount to a performative contradiction.<sup>62</sup>

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<sup>59</sup> *Id.* at 553.

<sup>60</sup> See Karl-Otto Apel, *Die Kommunikationsgemeinschaft als transzendente Voraussetzung der Sozialwissenschaften*, 2 TRANSFORMATIONEN DER PHILOSOPHIE 220-263 (1973); Jürgen Habermas, *Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz*, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE: WAS LEISTET DIE SYSTEMFORSCHUNG? 101-141 (1971).

<sup>61</sup> In all fairness, it needs to be conceded that *within the world of theoretical discourse* supposedly better and more reliable knowledge is produced than on the battlefields of scholasticism. Khaitan believes that such knowledge will benefit the projects of professional activists better. See Khaitan, *supra* note 45.

<sup>62</sup> We sense that our ideas would be supported by those advocating the “moral impact” theory of law, according to which legal facts alter moral facts, such as our moral obligations. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L. J. 1290-1342 (2014). For a useful critical introduction, see Ezequiel H. Monti, *On the Moral Impact Theory of Law*, 42 OXF. J. LEG. STU. 298-324 (2022).

## CONCLUDING THOUGHTS: WHAT IS REALLY AT STAKE

At the same time, however, it cannot be denied that Khaitan's text identifies an impending loss. Digital public law is cast in a quickly digestible presentation. It needs to be brief. It also must be produced instantaneously – at the spur of the moment, as it were. Modulating the early Wittgenstein who stated famously that everything that can be said can be said clearly,<sup>63</sup> digital public law is based on the premise that everything that can be said can be said right away and must not exceed the limit of, say, 1000 words or even only 280 characters. This is, indeed, one of the directions into which transnational public law is currently heading.

This format of legal knowledge is quite different from the type of knowledge that needs to be produced in order to make it to the front-row of legal knowers in the first place. It is manifest in what German-speaking countries call *Qualifikationsarbeiten*,<sup>64</sup> such as a PhD thesis and a *Habilitation* (“second book”). In the ideal case, such works put legal phenomena into a larger perspective, for example, by accounting for their proper “legal construction”. The works need to be thorough, comprehensive and systematic. They represent the type of works which are supposed to help us find our way in the legal system and not be better at pleading in a court of law. They are about drawing an intellectual map and not about using it in order to get from A to B.

*Qualifikationsarbeiten* will still be necessary, yet the disconnect between them and the routine publication of expertise will be greater in the age of digital public law. Possibly Khaitan had something similar in mind when he contrasted the world of scholasticism with the world of workshops, discussion groups and peer reviewed journals.<sup>65</sup> The slowly moving map-drawing exercise is very much an academic pursuit. The danger of losing it increasingly urges public law scholars to reflect on their identity and proper task by asking, e.g., how politically committed their work may be and what shall serve as the relevant canon of methods. Europe's digital public sphere is also the breeding ground of a new European discipline of public law.

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<sup>63</sup> LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 7 (1976).

<sup>64</sup> These are works written to obtain a degree, such as doctoral dissertations or LLM papers.

<sup>65</sup> See Khaitan, *supra* note 44, at 553.