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DIALOGUE AND DEBATE: COMMENT

A reply to Komárek

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Abstract
This is a reply to Komárek's criticism of our article "Europe's political constitution". We address the issues raised by our critic one by one. The topics range from the definition of the public sphere to the role that law blogs and social media play in it. The reply concludes by examining what it means to pursue truth in legal scholarship based on contrasting the views of Hans Kelsen und Stanley Fish.

Keywords: Truth; legal scholarship; public sphere; social media; law blogs

1. Introduction

We should like to express our sincere gratitude to Jan Komárek for engaging so seriously, albeit critically, with the claims we are making about the public sphere of European constitutional law. While there is still room left for disagreement between Komárek and us (see below), it bears emphasis that we ostensibly converge on the significance of pluralism and in our belief that debate over the state of legal scholarship in an increasingly digital and global world is long overdue. Indeed, Komárek deserves credit for being among the first to have introduced the topic.[1] All we did was to reemphasize the urgency of the matter and link it to important traditions of scholarly self-reflection in Europe.

In what follows, we would like to reply very briefly to the three major objections made by Komárek: first, his criticism that we should have relied on Habermas' analysis on the transformation of the public sphere rather than on Arendt's rudimentary concept of the public; second, his claim that we have misapprehended the role of blogs and social media platforms; and, third, his contention that Stanley Fish's "pragmatist" discourse theory is sufficient to underpin the claim that proper legal scholarship is about knowing things and not about lending an academic voice to political activism.

2. A new perspective on pluralism

Komarek's summary of our major argument is so condensed that its connection to our observations concerning the public sphere becomes somewhat eclipsed. This is why we would like to unpack the argument again and to reemphasize its major point.

It may seem as though the European integration process has finally, after a long period of incubation and despite several romances with other ideas, discovered its legal centre of gravity: the

[1]See J Komárek, 'Freedom and Power of European Constitutional Law Scholarship' 71 (2021) European Constitutional Law Review 422.

values enshrined in Article 2 of the Treaty (what else . . . ?).[2] From a formal angle, these values flow from a source of law that has attained increasing prominence in the course of the Europeanisation of public law. Article 2 itself proclaims that these values are 'common' to the Member States. They are primary, possibly even directly effective, European Union law, not least because they represent core commitments shared by the constitutional and legal systems of the Member States. They are, thus understood, borrowing Cassese's phrase, higher law made of lower law.[3] There is other law of this variety in the European legal system: The constitutional traditions 'common to the Member States' and, outside of Union law proper, the 'consensus' among the participants of the Convention systems, as a result of its 'existence' the scope of the margin of appreciation diminishes or disappears altogether.[4] In each of these transformations of lower into higher law, it takes a court to *ascertain* what it is that the participating states share. States are expected to submit to such a finding even if the sharing of normative beliefs is not buttressed by universal agreement. The idea is, apparently, that the convergence on a principle can become so pronounced and predominant that no state can any longer exempt itself from it.[5] Nonetheless, the authority of the ascertaining supranational or international tribunal must not be unlimited. Otherwise, it would have discretion to create transnational constitutional law by fiat. It follows that transnational constitutional law can be had or minted only by conceding the possibility of contestation. Disagreements are usually articulated by national apex courts and addressed, if all goes well, in the context of what is euphemistically called 'judicial dialogue', that is, for the most part, a somewhat protracted process of mutual accommodation.

All of this is, by and large, already well-known. The work that remained to be done was to articulate clearly what the 'pluralistic' structure of European constitutional law entails. It implies, indeed, that anyone asserting its existence or, more precisely, anyone attempting to pin down its content, has to reckon with someone else perceiving the matter differently. The always present possibility of a difference of opinion is built into the very structure of European constitutional law, not least because we lack a supreme authority to settle the issue. This situation matches precisely the situation sketched by Arendt. Sharing a world with others – hence, with people having *different* perspectives on the *same* issues – involves a public sphere in which we not only voice our opinions, but also encounter different views adhered to by others.

This is all we attempted to say about Europe's 'political' constitution. All of us need to approach it from within the public spheres of scholars and courts articulating their perspectives and addressing disagreements with little hope that these could ever be overcome. Indeed, the virtue of civility[6] among the participants requires that they take the persistence of dissent for granted and strive to settle on various complicated accommodations or tangled compromises. The real world of European public law matches how citizens get along with one another within the space of public reason. This is the argument we attempted to make in our original article; and if there is something like a principle of 'philosophical parsimony', it suggests that one should not draw on more philosophy than is necessary to get the point across. This is why we abstained, at least this time around, to send Habermas into the ring. We decided against doing so believing that his story about the transformation of the public sphere from a forum for the enlightened civic control of

[2]See A von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (trans. N. & T. Shulman, Oxford University Press 2024).

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

[4]See Angelika Nußberger, *The European Court of Human Rights* (Oxford University Press 2020) 84, 86.

[5]On the peremptory effect of transnational constitutional law, see most recently, Vlad Perju, 'Elements of a Doctrine of Transnational Constitutional Norms' 22 (2024) I• Con 1.

[6]This is, indeed, one of the most intractable topics of political philosophy. For an introduction, see Teresa M. Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (Harvard University Press 2017).

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government[7] to a medium of the manipulation of the masses is not relevant for the idea we wanted to convey.

Komárek nevertheless suggests that we eventually fall prey to a very 'simplistic' claim – the claim that Europe is a 'society' on the mere grounds of the fact that the Treaty says so. Yes, we are playing along with the language of the Treaty. The idea, however, was not that the Treaty possesses the magic power to create this institutional fact by means of using this word, but that we can work with what the law says – and with von Bogdandy's elaboration of it – by accepting the hypothesis in order to see what follows from it. Why not say that Europe is a society, not least because a society reflects upon its own operation within the public sphere? Of course, what we may not have emphasised sufficiently – perhaps too secretly conversing with von Bogdandy, the avowed Hegelian – is that we were using the Hegelian concept of civil society because it fits the contentious structure of European public law so well. Civil society is marked by competition, contestation cleavages and division. A society is not unified. Only the state would unify. But Europe is not a state. Implicitly, we were therewith raising the question whether von Bogdandy would embrace this conclusion.

3. Blogging and other ways of changing the conversation

With that, we turn to Komárek's second major objections, namely his claim that we have misapprehended the role of blogs and other social media platforms.

With regard to our observation suggesting that blogs are 'becoming increasingly popular', it is necessary to consider the temporal context of this claim. By using the term 'becoming' rather than blogging 'is' or even 'was' popular,[8] we intended to juxtapose the rise of blogging against the historical backdrop of legal scholarship as a whole, emphasising the contrast in how legal thought has been articulated over time. Admittedly, blogs in general and legal scholars creating or using them in particular, are not a development of the last couple of months or even of the last few years.[9] Nevertheless, when taking into consideration the history of legal scholarship,[10] any development beyond 2000 seems 'relatively recent' enough to classify it is 'becoming' – regardless of whether we determine 2006 or 2022 as its beginning.

Additionally, it is crucial to distinguish between two related but distinct phenomena: the act of blogging itself and the reception of blog posts as a serious medium for scholarly contributions in law. While blogging (including blogging by legal scholars) has been around for some time, the shift in perception towards accepting blog posts as legitimate vehicles for academic discourse in legal circles seems to us a relatively new trend in legal scholarship.[11]

Komárek then goes on to argue that 'today there [are] very few blogs by individual professors, or at least run at platforms that allow for almost complete control of their contents (and visuality) by the blogging professor'.[12] This perspective primarily views blogs as platforms controlled by individuals or small groups, essentially characterizing them as personal blogs. However, such a

[7]See J Habermas, *The Structural Transformation of the Public Sphere* (Wiley 1992).

[8]Komárek (n 1) 6.

[9]Which we pointed out in our original article in n 16, stressing that even back in 2006, US legal scholars already discussed how legal blogs might transform legal scholarship.

[10]The beginnings of European legal scholarship, for example, are traced back to the late 12th century. See T Wallinga, 'The Common History of European Legal Scholarship' 4 (2011) Erasmus Law Review 3.

[11]See, for example, M Steinbeis, 'Verfassungsblog, Legal Expertise and Why Europe's "Computer Is Not Working As It Should"' in E Korkea-aho and P Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022) 292–304 at 302: 'Generally, the wall between "proper academic publishing" in journals and book chapters on the one hand and blog posts on the other hand seems to have been crumbling in recent years. [. . .] [W]e see a lot less scepticism towards blogs than we saw a few years ago'.

[12]Komárek (n 1) 7.

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narrow definition of blogs may be overly restrictive and fails to account for the diverse landscape of legal blogging that has emerged.

The evolution of legal blogging has indeed seen a shift from personal, individually-controlled platforms to more professionalized formats. The proximity to professional media does not, however, seem to be sufficient to fundamentally alter the nature of a blog. Rather, the essence of a blog, as we suggested in our original article, lies more in its style of writing and presentation rather than in its ownership or control structure. Understanding, for example, the motivations behind the creation of legal blogs can provide insight into their function within the broader ecosystem of legal discourse. Examining the structural and stylistic elements that characterise legal blog posts may help further delineate them from other forms of legal writing. Finally, the reception and utilisation of blogs by scholars, practitioners, and students play a crucial role in determining their place within legal academia.

This brings us to a rather general clarification against the backdrop of Komárek's remarks on our threefold division into traditional legal scholarship, legal blogs and legal scholars communicating on platforms like Twitter,[13] and his attempt to recategorize or further divide them. To acknowledge the obvious: Of course, the boundaries between these categories are inherently blurred. The aim of our previous analysis, however, was not to establish rigid classifications. Rather, our primary objective was to highlight the structural differences between traditional legal scholarship, blogging, and social media platforms like Twitter, and to elucidate the implications of these distinct characteristics of each medium.

In doing so, we refer to the *Verfassungsblog* as an instructive 'in-between' example, illustrating what Komárek himself adequately describes as the 'blurred line between scholarship on the one hand, and journalism and political activism on the other'.[14] This hybrid nature underscores the evolving landscape of legal communication in the digital age. It is worth noting, though, that there appears to be a convergence occurring, where blogs are increasingly adopting features of traditional law review formats, and vice versa.[15] This convergence suggests a dynamic interplay between established academic conventions and more contemporary, flexible forms of scholarly expression.

This latter aspect further underlines the most striking contrast emerging from our division when comparing the first two categories (traditional scholarship and blogs) with the third (social media platforms like Twitter): Blogs, while offering greater openness and flexibility in style and format compared to traditional scholarship, still maintain a degree of exclusivity and control. They operate within a relatively closed ecosystem, often curated by legal professionals or academics. Platforms like Twitter, on the other hand, were designed with the intention of being truly open. However, this openness is paradoxically restricted and controlled through technical mechanisms that often lie beyond the influence of scholars.[16] These include shadow banning, algorithmic control of content visibility, and other platform-specific constraints.[17]

In light of these observations, several critical questions emerge which may guide the future debate:

1. To what extent are we examining solely the communication patterns among scholars, and how much are we considering the broader context in which these platforms operate?

[13]Now, of course, 'X', © Elon Musk.

[14]Komárek (n 1) 9.

[15]Komárek points this out in his paper, too: p 7.

[16]Komárek (n 1) 7 et seq.

[17]See, for example, K Jaidka, S Mukerjee and Y Lelkes, 'Silenced on Social Media: The Gatekeeping Functions of Shadowbans in the American Twitterverse' 73 (2023) Journal of Communication 163; Y-S Chen and T Zaman, 'Shaping Opinions in Social Networks with Shadow Banning' 19 (2024) PLOS ONE e0299977, available at <https://doi.org/10.1371/journal.pone.0299977>; P Leerssen, 'An End to Shadow Banning? Transparency Rights in the Digital Services Act Between Content Moderation and Curation' 48 (2023) Computer Law & Security Review 105790, available at <https://doi.org/10.1016/j.clsr.2023.105790>.

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2. How do we delineate the boundaries of relevant discourse? While it may be relatively straightforward to define the scope of a law journal, the same cannot be said for more open platforms like Twitter.
3. What are the implications of these different platforms for the dissemination and reception of legal scholarship?
4. How do these various forms of communication impact the development and evolution of legal thought?
5. What are the potential consequences of scholars engaging in more public-facing, less formal modes of communication?
6. How do the constraints and affordances of each platform shape the nature of legal discourse conducted within them?

These questions invite deeper reflection on the changing nature of legal scholarship in the digital age, the role of scholars in public discourse, and the impact of technological platforms on the development and dissemination of legal ideas. We do not perceive our original paper as a type of 'final response', providing all the answers. The same holds true for this rejoinder. Our aim has been and continues to be to flag structural questions resulting from these new forms of legal scholarship as well as their modes of production, presentation and communication.

In accordance with this approach, we want to end this part of our response by carving out some further aspects which may not have been considered sufficiently; neither, in our original piece nor in Komárek's response. The underlying motivations for scholarly communication are evolving in the digital age. We must consider how different forms of engagement impact a scholar's success and reputation. What constitutes 'success' within the legal academic community, and how is this changing? The rise of social media metrics raises questions about whether a large online following confers academic prestige, either directly or indirectly. Furthermore, we must grapple with the extent to which universities can or should expect scholars to promote their work online, and whether this falls within the purview of academia's 'third mission' of public engagement.

As the landscape of legal communication changes, so too does the nature of what is considered valid input for legal scholarship. We must critically examine what sources and forms of discourse are entering the realm of legal scholarship and what will be deemed acceptable in the future. This has significant implications for the foundations upon which scholars can build their arguments and research.

Legal scholarship occupies a distinct space in the academic world. While its academic credential as a 'science', it seems, are 'essentially contested', it employs specific methods and structures to formulate legal arguments. This includes a formalised system for producing scholarship and specific approaches to articulating legal thought, both in terms of content and methodology. The advent of generative AI has brought new challenges to this paradigm, raising questions about what constitutes a genuine legal text or argument. Does mere mimicry of legal language suffice, or is there an inherent quality to legal scholarship that AI cannot replicate?

Additionally, we must consider how to effectively communicate the nature and value of legal scholarship to those outside the field. This is crucial for maintaining the discipline's relevance and impact in broader societal discourse. In this context, the intersection of scholarship and activism presents both opportunities and challenges. We must critically examine whether scholars are purposefully engaging in activism or if they are being pressured into such roles. There is also a risk of scholarly views being misappropriated for political agendas. This raises important questions about the role and responsibilities of legal scholars in public discourse and policy-making.

All of these considerations highlight the complex and evolving nature of legal scholarly communication in the digital age. They underscore the need for ongoing reflection and discussion within the legal academic community about the purposes, methods, and impacts of our scholarly

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outputs. As we navigate this changing landscape, we must strive to maintain the integrity and rigor of legal scholarship while adapting to new modes of engagement and dissemination.

4. Kelsen v. Fish

"Kelsen v. Fish", this must be the name of the untimeliest controversy that Komárek set into motion in his rebuttal.

Initially, we were merely struck by the fact that neither he nor Khaitan were discussing how legal scholarship could be rescued from the impetuous vortex of politics without even mentioning Kelsen's project. If anyone, in particular in the context of public law, had the ambition to identify the intellectual space of politically neutral scholarship, it was Hans Kelsen with his 'pure' theory of law.[18] Legal scholarship ought to be in the business of 'describing' the law as it is and abstain from bending it into the shape of one's political liking. For us, Komárek's emphasis on 'knowledge' as the proper business of legal scholarship seemed to strike exactly this cord. What we found then to be all the more puzzling is that he moved on to defend politically unengaged scholarship not from an epistemological perspective congenial to Kelsen, but rather with reference to a theorist who has ridiculed all attempts to define a neutral intellectual space that would not be 'always and already' a manifestation of an interested agenda. This theorist is Stanley Fish.[19]

Making a long story short, the major difference between the two projects is as follows: Whoever claims to produce 'knowledge' must also claim to believe in objectivity. What objectivity means is most easily spelled out with reference to what it is about, namely the object of knowledge. Legal scientists – chiefly, but by no means the only among them, Kelsen – believe that law is an object amendable to description in value-neutral terms. The object of legal knowledge are authoritative legal texts. The meaning of these texts sets limits to what can be known as law. For legal scientists the right to be protected against the adverse effect of global warming on the quality of life does not, decidedly not, follow from the right to privacy. The private sphere is about being able to escape the gaze of the state.

That authoritative legal texts thus constrain interpretation is exactly what Stanley Fish does not believe. Not by accident, the title of his first widely acclaimed book was *Is There a Text in This Class*,[20] a question that he ventured to answer in the negative. Texts – literary texts just as well as legal texts – have no meaning independent of the interpretations arrived at by members of an interpretative community. The text does not constrain. Peer pressure does. The object of legal discourse is a projection of those who ascribe meaning to it. If there is no object, there is no objectivity. If there is no objectivity, there is no knowledge, but merely belief.[21] Interpretive communities are generative of a variety of beliefs that are invariably – openly or tacitly – tied to a particular agenda, from the grip of which nobody can escape. We are the puppets on the strings of beliefs that have been inculcated in us. They exercise force over us similar to a man pointing a gun at us. The gun is in our head, what is more, it *is* our head.[22]

This is what Fish claims to know about how we acquire and reproduce beliefs.

We sense that owing to his commitment to 'knowledge' Komárek may have wanted to characterise the discipline of scholarship differently; not as ambitious and perhaps frenzied as Kelsen with his 'transcendental' project, but more modestly with reference to rules commonly practiced to arrive at legal statements passing muster within the discipline. The discipline of

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

[19]See, in particular, S Fish, 'Force' in his *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford University Press 1989) 503–24.

[20]See S Fish, *Is There A Text in This Class? The Authority of Interpretive Communities* (Harvard University Press 1980).

[21]For a wonderful exploration of this topic, see KM Vogt, *Belief and Truth: A Skeptic Reading of Plato* (Oxford University Press 2012).

[22]See Fish (n 19) at 520.

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knowing the law would thus be constituted by the appropriate disciplinary rules. Owen Fiss defended this view in the 1980s.[23] The belief that what scholars do is subject to a rulebook-like discipline, however, ignited a strident diatribe by Stanley Fish who denied fervently that what legal scholars do can be made explicit in the form of rules. The discipline is based on knowing *how* and not on knowing *that*.[24] Only 'doing law' and being *recognized* as doing law by others whom one regards as the relevant group of peers is what matters. The reaction by the interpretive community matters. A community of this type is, however, always constituted by a partial agenda serving as the gun at and in the head of its members. Knowledge is an expression and extension of power. Indeed, there is a Foucauldian ring to this contention (OMG!).[25]

We are afraid, therefore, that Komárek may in Fish not have chosen his best ally.

But did Kelsen fare any better? No, he did not, for two reasons:

First, Kelsen failed to arrive at an account of legal interpretation that would have demonstrated how objective knowledge is possible. Instead, he resigned himself to saying that any method of interpretation is as good as any other, and choice of one method over another may well be informed by political preferences (think of the conservative uses of 'originalism' in US constitutional law[26]). This was the beginning of the end of his project that was intellectually crushed by his renegade disciple Fritz Sander, resulting in a controversy from which the project of the pure theory never really recovered.[27] Hence, Kelsen himself never made it beyond 'Kelsen light' either. But that's a different matter.

Second, Kelsen did not realise that appeals to objectivity will be necessarily met with scornful derision in the treacherous space of constitutional interpretation. People with ambition occupy this place. Kelsen desperately tried to defend the objectivity of the pure theory by pointing out that it was hated by proponents of both the political right and left.[28] Did not the unanimous rejection from all sides demonstrate its neutrality? But this fact could not prove Kelsen's point. The reference to rejection by partisans proved the opposite, namely, that it is hopeless, at any rate when it comes to constitutional law, to attempt to extricate legal interpretation from politics. You can try to be as neutral as you will, others are invariably going to attribute an agenda to you. This indicates that scholarship is embedded in – and neither above nor below – the public sphere. This realisation matches with how we concluded our original article: 'scholactivism' is all there is. It is the form of European public law.

[23]See O Fiss, 'Objectivity and Interpretation' 34 (1982) Stanford Law Review 739–63.

[24]See S Fish, 'Fish v. Fiss' 36 (1984) Stanford Law Review 1325–47.

[25]See M Foucault, 'Truth and Power' in JD Faubion, trans. R Hurley (eds), *Power* (New Press 1994) 111–33.

[26]For a discussion, see DA Strauss, 'Originalism, Conservatism, and Judicial Restraint' 34 (2011) Harvard Journal of Law and Public Policy 137–46.

[27]For a highly elaborate account of this story, see the pathbreaking work by RG Cadore, '*Rechtswidriges Recht*': *Die Merkl-Sander-Kontroverse innerhalb der Wiener Schule der Rechtstheorie* (Mohr 2024).

[28]See Kelsen (n 18) at 2–3.

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