



King's Research Portal

Document Version

Publisher's PDF, also known as Version of record

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Harvey, D. (2023). The Role of the Constitutional Scholar in Relation to the Rule of Law Crisis. *Journal of Constitutional History/ Giornale di Storia Costituzionale*, 2023(45), 123-146.

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

Giornale di
Storia
costituzionale

n. 45 / I semestre 2023



eum > edizioni università di macerata

Giornale di Storia costituzionale / Journal of Constitutional History
n. 45 / 1 semestre 2023 Issue n° 45 / 1st semester 2023

Chief Editors

Luigi Lacchè, Roberto Martucci, Luca Succimarra

International Board

Bruce Ackerman (University of Yale), John Allison (Queens' College, University of Cambridge), Vida Azimi (CNRS-Cersa, Paris II), Nick W. Barber (Trinity College, University of Oxford), Olivier Beaud (Université Paris II, Panthéon-Assas), Francis Delperée (University of Leuven), Horst Dippel (Universität Kassel), Alfred Dufour (Université de Genève), Thomas Duve (Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main), Ignacio Fernández Sarasola (Universidad de Oviedo), Dieter Grimm (Wissenschaftskolleg zu Berlin), Jean-Louis Halperin (École normale supérieure, Paris), Jacky Hummel (Université de Rennes 1), Martti Koskeniemi (University of Helsinki), Lucien Jaume (CNRS Cevipof, Paris), Peter L. Lindseth (University of Connecticut), Martin Loughlin (London School of Economics & Political Science), Heinz Mohnhaupt (Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main), Marcel Morabito (SciencesPo, Paris), Ulrike Müßig (Universität Passau), Peter S. Onuf (University of Virginia), Carlos Manuel Petit Calvo (Universidad de Huelva), Michel Pertué (Université d'Orléans), Jack Rakove (University of Stanford), Dian Schefold (Universität zu Bremen), Gunther Teubner (Goethe Universität, Frankfurt am Main), Michel Troper (Université de Paris Ouest-Nanterre-La Défense), H.H. Weiler (New York University), Augusto Zimmermann (Murdoch University).

Board of Editors

Ronald Car, Ninfa Contigiani, Giuseppe Mecca, Monica Stronati

Editors' Assistant

Antonella Bettoni

Address

Giornale di Storia costituzionale, c/o Dr. Antonella Bettoni, Dipartimento di Giurisprudenza, Università di Macerata
Piazzetta dell'Università, 2 - 62100 Macerata, Italy
giornalestoriacostituzionale@unimc.it
www.storiacostituzionale.it

I testi inviati alla redazione sono sottoposti a referaggio anonimo da parte di due esperti selezionati dalla Direzione sulla base delle proprie competenze e interessi di ricerca. Responsabili del processo di valutazione sono i Direttori della rivista.

The papers submitted for publication are passed on two anonymous referees (double-blind paper review), which are chosen by the Chief Editors on the base of their expertise. The Chief Editors are responsible for the peer review process.

I libri per recensione, in copia cartacea o digitale, vanno inviati alla Segreteria di redazione.

Books for review should be submitted (paper or digital version) to the Editors' Assistants.

Il Giornale di Storia costituzionale è indicizzato nelle seguenti banche dati / The Journal of Constitutional History is indexed in the following databases:

Scopus - Elsevier; Heinonline; Historical Abstracts - EBSCO; Summon by Serial Solutions (full-text dal 01.01.2005); Google Scholar; DoGi (Dottrina Giuridica) - ITTIG (Istituto di Teoria e Tecniche dell'Informazione Giuridica)-CNR; BSN (Bibliografia Storica Nazionale); AIDA (Articoli Italiani di Periodici Accademici); Catalogo Italiano dei Periodici - ACNP; Casalini Libri; EUM (Edizioni Università di Macerata).

Il *Giornale di Storia costituzionale* è una rivista inserita dall'ANVUR nella fascia A dell'Area 12/H2 (Scienze giuridiche) e nella fascia A dell'area 14/B1 (Storia delle dottrine e delle istituzioni politiche) / *The Journal of Constitutional History* is in the section A of the Area 12/H2 (Law) and section A of the Area 14/B1 (History of political doctrines and institutions) according to the assessment of the National Agency for the Evaluation of Universities and Research Institutes

Direttore responsabile

Angelo Ventrone

Registrazione al Tribunale di Macerata n. 463 dell'11.07.2001

Editore / Publisher

Edizioni Università di Macerata
Palazzo Ciccolini, via XX settembre, 5 - 62100 Macerata
T (39) 0733 2586080
info.ceum@unimc.it
http://eum.unimc.it

Distributed by Messaggerie

ISBN 978-88-6056-856-4
ISSN 1593-0793

La rivista è pubblicata con fondi dell'Università di Macerata.

In copertina: Pulizie della statua della Giustizia Temi davanti al Old Bailey di Londra, 1930

Finito di stampare nel mese di giugno 2023

Printed in the month of June 2023

Prezzo di un fascicolo / Single issue price

euro 40

Arretrati / Back issues

euro 40

Abbonamento annuo (due fascicoli) / Annual Subscription rates (two issues)

Italy, euro 65; European Union, euro 75; U.S.A. and other countries, euro 100

For further information, please contact:

ceum.riviste@unimc.it
T (+39) 0733-258 6080 (Mon.-Fri.: 10am-1pm)

Gli abbonamenti non vengono rinnovati automaticamente. Per ricevere l'annata successiva a quella in corso occorre inviare una richiesta esplicita all'indirizzo ceum.riviste@unimc.it

Subscriptions are not renewed automatically. To receive subscriptions the next year, please send an explicit request at ceum.riviste@unimc.it

Progetto grafico

+ studio crocevia

Impaginazione

Valeria Nicolosi e Carla Moreschini

Sommario / Contents

GIORNALE DI STORIA COSTITUZIONALE n. 45 / I semestre 2023
JOURNAL OF CONSTITUTIONAL HISTORY n. 45 / I semester 2023

- Rule of Law and *Rechtsstaat*. Historical and Procedural Perspectives (second part) / Rule of Law e *Rechtsstaat*. *Prospettive storiche e procedurali (seconda parte)*
- 5 Introduzione / Introduction
LUIGI LACCHÈ
- Fondamenti
- 11 «EU's legal history in the making». Substantive Rule of Law in the Deep Culture of European Law / «La storia giuridica dell'Unione europea in divenire»: lo Stato di diritto sostanziale nello strato profondo della cultura del diritto europeo
MARTIN SUNNQVIST
- 37 The Concept of the Rule of Law – Just a Political Ideal, or a Binding Principle? / La nozione di Stato di diritto: ideale politico o principio vincolante?
JUHA RAITIO
- 47 Obtaining and Assessing Information about Rule-of-Law Compliance in Member State Courts. Using the European Arrest Warrant as an Illustration / Ottenere e valutare le informazioni sul rispetto del rule of law da parte dei tribunali degli Stati membri. Il ricorso al mandato d'arresto europeo come esempio
LOTTA MAUNSBACH
- 77 The Rule of Law Deficit in EU Competition Law – A Time for Reassessment / Il deficit del rule of law nel diritto della concorrenza dell'Unione europea: tempo di bilanci
CRISTINA TELEKI
- 91 Judicial Review in the Digital Era: Safeguarding the Rule of Law Through Added Safeguards? / Il controllo giurisdizionale nell'era digitale: è possibile preservare lo Stato di diritto tramite garanzie aggiuntive?
ANNEGRET ENGEL
- 103 The Action Brought by European Organisations of Judges against the Council of the European Union over the release of EU Recovery and Resilience Funds to Poland

/ Il ricorso di alcune associazioni europee di magistrati contro il Consiglio dell'Unione europea concernente l'erogazione alla Polonia dei fondi europei del Piano di ripresa e resilienza

DURO SESSA, FILIPE MARQUES, JOHN MORIJN

171 Diciotto proposte di lettura / *Eighteen reading proposals*

195 Autori / *Authors*

123 The Role of the Constitutional Scholar in Relation to the Rule of Law Crisis / *Il ruolo del costituzionalista nella crisi dello Stato di diritto*

DARREN HARVEY

197 Abstracts

Ricordi

147 Bartolomé Clavero e la sua storia critica dell'esperienza costituzionale / *Bartolomé Clavero and his critical history of the constitutional experience*

LUIGI LACCHÈ

Testi & Pretesti

155 La storia costituzionale e la letteratura italiana / *Constitutional history and Italian literature*

LUIGI LACCHÈ

Librido

Primo piano / *In the foreground*

163 Saverio Gentile legge / *reads* Roberto Calvo, *L'ordinamento criminale della deportazione*

167 Luigi Lacchè legge / *reads* Valdo Spini, *Sul colle più alto*

The Role of the Constitutional Scholar in Relation to the Rule of Law Crisis

DARREN HARVEY

1. *Introduction*

This paper considers recent debates around scholactivism and the proper role of the constitutional scholar¹. The first half of the paper takes stock of differing views that have recently been expressed on this matter (particularly in relation to the unfolding rule-of-law crisis in the EU) and unpacks some of the key points of contention that arise from these differing perspectives. After this survey of the terrain, which yields a series of questions, the second half of the paper seeks to break new ground in this debate by considering the role of the constitutional scholar from the perspective of education. This is prompted by the fact that much of the discussion to date has focused upon the scholarly activities of research and the dissemination of research findings. It is contended that the educational function(s) provided by constitutional scholars must be factored into any analysis of the appropriate role of the constitutional scholar, particularly when it comes to upholding

the rule of law. In making this case, a clear understanding of what the point of the rule of law is, and why the rule of law matters, is articulated. This understanding then forms the vantage point from which the role of the constitutional scholar as educator is examined. It is argued that the educational function(s) of the constitutional scholar can be divided into two domains – one of them is internal and faculty-facing, and the other is external and public-facing. In both domains, the constitutional scholar can play a vital role in defending the rule of law by educating the respective constituency about the fundamental purpose of the rule of law and about its value to a well-functioning legal system.

2. *Legal scholarship in relation to the rule-of-law crisis: an overview in four parts*

2.1. *Sketching the debate*

Judging from the recent debates on scholactivism and the “proper” role of constitutional-law scholars, there appears to be broad agreement on the following points:

- The pursuit of the twin objectives of truth-seeking and knowledge dissemination is central to the scholar’s mission as a scholar².
- Constitutional law is closely linked to politics and to power³.

The key points of contention amongst scholars engaged in this debate may be summarised as follows.

First, should the role of the constitutional-law scholar (and the objectives that she pursues) involve *more* than truth-seeking and knowledge dissemination? In other words, is truth-seeking and knowledge dissemination all that there is to it, or should constitutional-law scholars also be engaged, for example, in the pursuit of justice, or in the bringing about of material change in the law and the wider world, or in the defence of fundamental rights?

Second, given the link between law, politics and power, is it *appropriate* for constitutional-law scholars to contribute their expertise to discussions and debates on current political controversies in their capacity as legal scholars?

In this regard, two separate, yet closely related, questions can be asked.

The first is whether engagement in contemporary political debates and controversies is a proper course of action for the constitutional-law scholar to take, or

whether such activities should be rejected as partisan political activism of a sort that is inappropriate for a scholar. As put by Thomas Bustamante, «[c]an legal scholars act as activists without compromising their institutional role?»⁴. The second is whether a legal scholar should profess her view of what the law is, and of what its correct application requires, in circumstances where such questions are subject to widespread political controversy and debate.

Admittedly, it is very difficult to draw clear dividing lines here – either between what counts as activism and what does not, or between instances where a scholar commenting on current constitutional and political developments is speaking from expertise about what the law is and those where she is expressing what she would like the law to be. Nonetheless, many believe that certain lines can and should be drawn between what constitutes inappropriate political activism on the one hand and “proper” constitutional scholarship on the other.

2.2. *Against scholactivism in constitutional scholarship*

In considering these matters, it is helpful to begin with Tarunabh Khaitan’s recent criticisms of scholactivism in the academy⁵. In his widely-read and much-discussed critique of scholactivism in constitutional studies, he takes issue with scholars whose work is «distinguished by the existence of a *motivation to directly pursue specific material outcomes (i.e. outcomes that are more than merely discursive)* through one’s scholarship»⁶. To illustrate this, he gives exam-

ples from the field of non-discrimination law⁷. In particular, his examples relate to scholars who, through the writing and disseminating of their research, seek to bring about direct material outcomes in relation to the ways in which the law on indirect discrimination operates in a given legal system. In his view, such a course of action is to be resisted on instrumental grounds, which include the fact that activism typically «(i) has shorter time and space horizons, (ii) demands an attitude of certainty, and (iii) celebrates and rewards those who bring about just outcomes. These features are in tension with the academy's need to provide time and distance for research and reflection, inculcate an attitude of scepticism, and reward truth-seekers and knowledge-creators»⁸.

Producing a scholactivist research project quickly in order to respond to a pressing political or legal controversy is associated with a number of risks. For instance, (i) potential unintended consequences of the claims being made may be overlooked; (ii) the scholars involved may be reluctant to revise their position later on, given the supposedly far greater degree of certainty required to campaign for a particular cause than to merely draw up and test a traditional academic hypothesis; and (iii) scholactivists who succeed in bringing about their desired change are likely to double down on their scholactivism, thereby eschewing the necessary disciplinary rigour required of academic scholarship, including thorough literature review, intensive research, a willingness to revise claims, workshoping, blind peer review, and so on⁹.

All of this leads Khaitan to argue against scholarship that is motivated by a desire to directly pursue specific material outcomes.

It is worth pointing out that his critique of scholactivism applies across the board to all aspects of constitutional-law scholarship. For example, he does not engage directly with what the appropriate role for the constitutional scholar should be in relation to the preservation and promotion of the rule of law in times when it is under attack. Nor does he take a view on whether constitutional-law scholars who criticise legal and political developments that threaten the rule of law are to be seen as engaging in inappropriate forms of activism and so abandoning their proper role as scholars.

2.3. *Engagement in political controversies and the role of the constitutional scholar*

There are several points worth considering here in relation to the role of legal scholars and the rule-of-law crisis unfolding in certain EU Member States. First, it is of course necessary to reflect on what (if any) specific material outcomes are being sought by constitutional scholars who research, write, teach and comment on rule-of-law issues in the EU. Second, it is also essential to consider whether there is anything un-scholarly and/or inappropriate per se about constitutional scholars being motivated by a desire to bring about certain direct material outcomes when selecting a topic, conducting research and disseminating knowledge¹⁰. I shall return to these questions in the sections that follow.

For the time being, let us consider the work of several eminent law professors who have put forward views that are related to, yet somewhat distinct from, Khaitan's anti-scholactivism thesis. According to An-

drás Jakab, for example, constitutional-law scholars should refrain from engaging in any direct criticism of legal and political developments that undermine the rule of law, whether that be in the classroom or in the media. To do so, he argues, results in one «leaving the role of a constitutional scholar», since such activities are not in keeping with the expectation that constitutional-law scholars will «behave in a manner that is compatible with being (and looking like being) above everyday party-political conflicts»¹¹.

Similarly, Jan Komárek has recently argued in favour of constitutional scholars imposing self-discipline and restraining themselves from taking clear positions in relation to political controversies: «When teaching, [scholars] must remain as non-partisan as possible and not advocate what they believe to be the right thing»¹². In his view, this is necessary both to benefit from the protections of academic freedom and to preserve such academic freedom. This stems from his view that the role of constitutional scholars and the academy more broadly should be confined to the pursuit of knowledge. In advocating for a narrow conception of the role of the scholar, he submits that the pursuit of knowledge is both worthy for its own sake and is the axiom around which the scope of academic freedom and the authority of science and scholarship should be delineated¹³. It follows from this that free scientific and scholarly enquiry, and the academic freedom to pursue the core task of pursuing knowledge, need not be justified on the grounds that they support other things valued by society, such as freedom, democracy or civic virtues¹⁴. Indeed, it is asserted that the scholar's pursuit of justice can often conflict with her pursuit

of knowledge; in Komárek's view, scholars should care much less about justice than he thinks most of them do today¹⁵. Furthermore, since the pursuit of knowledge is the sole objective of the scholar, academic freedom and the protections which flow from that freedom should be enjoyed only in relation to activities that take place «within academia»¹⁶.

The risks associated with constitutional scholars entering public discourse to comment on pressing issues in their capacity as constitutional scholars are said to be a possible diminution in public trust in the objectivity and impartiality both of the individual scholars and of the academy more broadly¹⁷. It is claimed that, by engaging in political matters outside academia, they have abandoned the core scholarly mission of knowledge-seeking, which entails significant risks to academic integrity and to trust in scientific and scholarly expertise. The core criticism, therefore, appears to be aimed at constitutional-law scholars who take «openly political stances» in response to autocratisation and rule-of-law backsliding in some EU Member States. For instance, Jakab has argued that it is unacceptable to (i) openly and unequivocally criticise constitutional developments in the State, be it in lectures or in media appearances, or to (ii) join a pro-rule-of-law political party and hold speeches in pro-rule-of-law demonstrations – because such actions entail abandoning the role of the constitutional scholar¹⁸. In Jakab's view, one of the core functions of constitutional law is the «softening of political conflicts». To fulfil this function, he argues, constitutional scholars should «behave in a manner that is compatible with being (and looking

like being) above everyday party-political conflicts»¹⁹.

This traditional, apolitical role for the constitutional scholar is presented by Jakab as the ordinary state of affairs in countries with functioning constitutional democracies. But what about circumstances where the constitutional scholar is researching and teaching in a country where the rule of law is being dismantled and «the precondition of your traditional role as a constitutional law professor, namely the teaching of conceptual-doctrinal legal analysis, is fading away?»²⁰. According to Jakab, it is still not permissible for the scholar to criticise these constitutional developments openly and unequivocally in the classroom or in the media. Nor is it permissible for the scholar who finds herself in such circumstances to hold a speech at a pro-rule-of-law rally. This is because, in his view, such activities entail trying to protect the rule of law and preserve the foundations of doctrinal-legal scholarship «like a political warrior», which results in the scholar «actually contradicting the conventional unwritten rules of your profession»²¹. Jakab's account therefore identifies the criticising of constitutional developments by an academic during a lecture, or the giving of a speech at a pro rule of law rally, as examples of a constitutional scholar «openly act[ing] like a party politician». In a similar vein, Komárek takes aim at the increasing tendency for constitutional scholars to «publish statements where they argue for a particular solution to a public controversy, referring to their academic expertise as a basis of the opinion». With specific reference to constitutional scholars who seek to defend the rule of law and who, by extension, engage in criticism of governments

that undermine the rule of law, it is worth quoting Komárek's views at length:

One may think that defending the rule of law and other liberal values can never be seen as "partisan" – especially if one believes that liberalism is more neutral (or less ideological) than socialism (or conservatism). But if ideology means, among other things, concealing the structures of domination, liberalism is no less ideological than the other two. And its actual force lies in the fact that it is still not perceived as such. So it may help liberal democracy if extramural speeches at least seek to keep an appearance of neutrality and try to see beyond ideology²².

It is unfortunate that Komárek does not expand upon the final point raised here and to enlighten us as to how constitutional-law scholars could «keep an appearance» of neutrality when defending the rule of law through their public interventions. Supposing, not unreasonably, that the concept of rule of law is prone to differing interpretations and applications based on, inter alia, one's ideology, how should scholars go about engaging with public debates and controversies over, say, rule-of-law backsliding in Poland, whilst appearing neutral? However, although we are not told explicitly, the remainder of Komárek's critique gives the impression that scholars should in fact not engage in such public debates and discussions at all. For example, he is critical of groups of constitutional-law scholars writing open letters in support of colleagues who have become the target of criticism and even lawsuits brought by regimes that are currently engaged in dismantling the rule of law in their domestic legal systems. In his view, it makes a «huge difference» whether a scholar undertakes a critical study of the law with the primary objective of «learning something» – that is, when the pursuit of knowledge is the primary aim

of the scholarly enterprise – or whether the rationale for conducting legal scholarship is «reduced to power (and politics)»²³. In a revealing comment, Komárek contends that academics inclined to take part in public debates, protests, demonstrations, and so on, should be reminded that «the academic task is to discover truths rather than adhere to truths already established»²⁴.

In light of these observations, one approach might be to say that constitutional scholars should just stay out of politicised debates and contemporary constitutional controversies (which will inevitably be politically controversial too). Indeed, it could be argued that, by engaging in public debates through traditional and online media, constitutional-law scholars are playing into the hands of those populists who seek to discredit the expertise of the academy by, *inter alia*, portraying them as partisan activists rather than experts in their respective fields of study²⁵. Engagement by academics in matters of political and public controversy can be counterproductive in an era of populist politics. For example, Liora Lazarus has noted that, within a populist political environment, «academic scholarship is interchangeably vilified, discredited or glorified depending on whether it serves its general populist purpose»²⁶. The academy in general, and constitutional or legal expertise in particular, is subject to direct attacks on academic freedom (such as lawsuits being launched against academics) and populist discrediting strategies (such as pushing a narrative about a crisis of free speech on university campuses, or persistently characterising academics as «woke liberal élites») – all of which are «designed to erode the epistemic authority of the academy»²⁷. Recent experiences

show us that the authoritarian and democratic incarnations of populism are similarly suspicious of claims to elite knowledge and readily characterise expertise in a given area as out-of-touch elitism²⁸. Somewhat depressingly, it is asserted by researchers specialising in this field that these populist movements (and the populist discourse that they embrace) are unlikely to change their core approach towards academic knowledge anytime soon²⁹.

2.4. *Responding to the critique – silence as an abnegation of scholarly responsibility?*

Others have put forward views on the “proper” role of the constitutional scholar that are diametrically opposed to those expressed in the works of Khaitan, Komárek, Jakub and others.

For example, Alberto Alemanno conceives of the role that the constitutional-law scholar can (and should) play in contemporary society in very different terms from those cited above. Referring to what Khaitan and others advocate as «academic ivory towerism», he claims that their ideas are predicated on an «old view that the scholar’s role is limited to being a neutral, impartial, and detached generator of knowledge»³⁰. Alemanno speaks of the growing number of scholars who are «moving from publications to public actions to affect [sic] urgent, transformational change in our world on fire»³¹. In his opinion, «outcome-driven research contributions» are «in growing demand and by now inherent to the scholar’s job description»³². On this view, not only is the role of the constitutional scholar perfectly compatible with

outcome-driven research, but a failure to engage with the real world through one's scholarship in fact constitutes an abnegation of the responsibility to take action. A lack of activism or engagement with popular causes amounts to a relinquishment of academic responsibility towards society and «risks condemning [academia] to societal irrelevance»³³. What is more, it is contended that society itself increasingly expects greater and more pertinent contributions from academics, meaning that they will have to go beyond the traditional paradigm of truth-seeking and knowledge dissemination³⁴. This is particularly true of constitutional scholars, who are increasingly expected by those inside and outside the academy to «speak out and take appropriate action in a time of democratic and planetary emergency»³⁵. The challenge, on this account, is not to determine *whether* academics should be pursuing material outcomes through their scholarship, but *how* they could do so while remaining compliant with their scholarly and ethical obligations³⁶. What matters is not the motivation behind the scholarly research project, but whether that project meets the quality and ethical requirements flowing from rigorous academic standards³⁷. With specific regard to the rule of law, John Morijn argues that staying quiet is not a neutral course of action for scholars who, like him, have a platform and have acquired considerable knowledge and expertise about the rule of law. Lawyers have a professional obligation to explain what the law is and to defend it both internally and in public. They should endeavour to explain the relevance of the law to power and politics. Whenever scholars believe that the rule of law is under threat, refusing to engage and taking a hands-off approach

is no less normative, and no more neutral, than engaging pro-actively. Indeed, staying silent will often be taken as an endorsement of the status quo³⁸.

3. *The educational function of the constitutional scholar*

A number of complex and profoundly important questions arise from these debates over the "proper" role of the constitutional-law scholar in general, and in response to rule-of-law backsliding in particular.

First and foremost, it is worth considering whether there is something foundationally important about the rule of law that makes it qualitatively different from other contemporary legal and political issues. To be sure, the constitutional status of, say, non-discrimination norms is important. But is the scholactivist who seeks to bring about specific material outcomes – such as a reform to the law regarding equality and non-discrimination – comparable to those scholars who use their platforms to speak out against and actively oppose the destruction of the rule of law in EU Member States? Is the rule of law so essential to the very functioning of the legal system that the role of scholars seeking to defend it should be viewed differently from that of scholars who criticise and perhaps even advocate for change in other areas of the law? Is there something specific (or special) about the rule-of-law crisis – such as its urgency or its implications for the functioning of the EU legal order – that qualifies it for special treatment?

To answer these questions in the affirmative would of course be to concede

that there is something objectionable *per se* about scholars pursuing direct material outcomes through their research and other activities³⁹. An affirmative answer would further require one to put forward a convincing argument as to why the role of the constitutional-law scholar using her platform to criticise the obliteration of judicial independence in Poland, say, should be viewed differently from the role of other legal scholars campaigning to bring about change in specific fields such as non-discrimination.

However, I do not believe that these questions must be answered in the affirmative. It seems to me that most constitutional-law scholars will be motivated by a desire to push back against the actions of those in power that seek to undermine or totally obliterate core facets of the rule of law. Utilising one's platform and expertise to criticise the actions of authorities which undermine the rule of law is sure to be motivated by a desire to bring about certain outcomes: namely, that the practices which threaten the rule of law are effectively ended or otherwise remedied. But what matters here, in my opinion, is not so much the motive behind the constitutional scholar's intervention into matters of legal and political controversy as the quality and persuasiveness of her arguments. As Bustamante has put it, «[a] scholar's motivation to achieve a certain political goal does not affect the value, quality, or credibility of the conclusions of her inquiry»⁴⁰. What matters is good scholarship – regardless of whether it manifests itself in researching, writing, and teaching or in utilising one's platform as a scholar to comment on constitutional developments and their implications. In carrying out all of these activi-

ties, constitutional scholars should show «the kind of care, thought, engagement with existing scholarly literature, consideration or awareness of competing views, and independent judgment that good legal scholarship manifests»⁴¹.

We should certainly not be less critical of, or give greater freedom to, those constitutional scholars who utilise their platforms to criticise developments that purportedly undermine the rule of law than we otherwise would to scholars opining on other matters. But rather than lambasting scholars for commenting on and criticising developments that they believe pose a threat to the rule of law (whether that be in the classroom or the wider public sphere), we should concern ourselves with exploring whether those comments and criticisms stand up to robust scrutiny. For this to happen, I think we need more discussion and more disagreement. There is a need for constitutional scholars to debate and counter each other, and to probe whether their colleagues' assertions and criticisms can be sustained in light of academic scrutiny⁴². The constitutional scholar who utilises her platform to comment on developments and their implications for the rule of law is far more likely to withstand such contestation and scrutiny if her comments are the product of thinking, researching and writing in accordance with robust academic standards – meaning that she has taken the time to read, survey the literature, think, discuss, workshop, be peer-reviewed, revise, update, and so on⁴³.

Against this background, the remainder of this paper seeks to break new ground in what has to date been a rather lively debate. It does so by focusing on the role of the constitutional scholar from the perspec-

tive of education. At the core of my argument lies a passionate belief that teaching sits at the very heart of what it means to be a constitutional scholar. Moreover, this understanding of the role of constitutional scholars as educators should not be confined to the university campus. As experts in the field, we constitutional scholars can play a vital role in educating both students and the broader public about the purpose and value of the rule of law. In my opinion, the role of the constitutional scholar as educator has been somewhat overlooked in recent discussions over scholactivism and such like, with much of the debate tending to focus upon academic research and public engagement⁴⁴. However, I believe that any comprehensive examination of what the appropriate role of the constitutional-law scholar is – particularly in relation to the rule of law – must consider the educational function that such scholars perform. While truth-seeking and knowledge dissemination are widely accepted as being the two core functions of the scholar, it must be stressed that these functions (especially the latter) apply just as much to education as to research.

In stating my case, I find it necessary to start by saying something about the rule of law and its importance. After all, it is only by first setting out what one understands the point of the rule of law to be that one can then begin to consider the role of the constitutional scholar in relation to the rule of law. If one accepts that constitutional scholars can play a vital, educational role when commenting on legal and political developments that pose a threat to the rule of law, one must surely expect those same scholars to have clear ideas about what the rule of law is *for*.

3.1. *The two levels of operation for the rule of law*

The stakes are extremely high when it comes to the rule of law. Indeed, the very functioning of a given legal system requires that some of the demands of the rule of law are adhered to. In this context, Nicholas Barber has drawn our attention to the two levels at which the rule of law operates. Some of the demands of the rule of law concern features that are essential to the very existence of the legal order itself. The absence of such features means that the community is not one governed by law – «[t]o some extent, adherence to the rule of law is necessary for a legal order to exist; there are aspects of the principle that must be present in a system if that system is to count as one of law»⁴⁵. However, once we have concluded that it is desirable for a society to be governed by law, and that the creation of law is itself desirable, the demands of the rule of law go beyond the minimum necessary for the existence of the legal system. These requirements «speak to the nourishing [as opposed to the existence] of the legal order» and «relate to elements that are needed for the rule of law, as an ideal, to be fulfilled»⁴⁶. As Barber points out, «there is often a range of ways that these elements might be manifested within a legal order. There are plenty of real-world legal orders that succeed in meeting the minimum demands of the principle but which still fall far short of the ideal»⁴⁷.

With regard to the features of the rule of law that are necessary for the legal order to exist, Barber relies primarily on the work of Joseph Raz, whose account of the rule of law is inextricably linked (like many other accounts) to his understanding of the nature

of law⁴⁸. As is well known, Raz's account of the rule of law demands that laws meet certain formal requirements such as clarity, stability and non-retroactivity. In addition, there are requirements pertaining to the enforcement of said laws, including the need for accessible and independent courts to adjudicate legal disputes⁴⁹. A key concern with this formal conception of the rule of law is that laws promulgated should be capable of guiding people's conduct so that they may plan their lives⁵⁰. On Raz's account, the rule of law is a feature of all legal orders – «it serves to distinguish between societies that are governed by law and those that lack law: a society governed by law must possess the features identified by the rule of law, at least to some minimal degree»⁵¹.

These insights from constitutional and legal theory may well provide sufficient intellectual foundations upon which to engage publicly, as a constitutional scholar, and comment on the merits or flaws of legal and political developments in a legal system. For example, providing the executive with a largely unchecked power to rule by executive decree poses a risk to the clarity and stability of laws that govern people's everyday lives and is thus likely to violate the rule of law⁵². Similarly, legal reforms that undermine judicial independence violate necessary features of the rule of law and, consequently, pose a threat to the very functioning of the legal system⁵³. However, as Barber notes, focusing on the necessary features of a legal order only gets one so far. After all, there are numerous deficiencies that can result in the poor functioning of a legal system, but there are far fewer deficiencies that present a threat to the very existence of the legal order itself. Moreover, identifying what is and is not a necessary

feature of a legal order is no easy task⁵⁴. One need not think very hard before coming up with contemporary examples where legal institutions have been taken over and rendered supine by authoritarian governments which, despite acting through the law (and seemingly in accordance with existing law), nevertheless act in ways that deliberately and comprehensively violate the rule of law⁵⁵. There is a distinction to be made here «between the existence of any particular legal institutions, on the one hand, and closeness to the ideal of the rule of law, on the other»⁵⁶. The better approach, it is suggested by Barber, is to move beyond a focus on the minimal features that the rule of law requires and to instead consider the features needed to help law flourish⁵⁷.

As a constitutional scholar not willing to stay silent, one could build upon Barber's insights and draw up a list of essential and desirable criteria that the rule of law demands of any given legal system. On the strength of that list, one could then "legitimately" comment on contemporary controversies that, in one's view, pose a threat to this more substantive understanding of the rule of law.

However, rather than trying to provide yet another "laundry list" of things that the rule of law requires if a legal system is to flourish, I believe it is more beneficial for present purposes to take a step back and consider what the rule of law is actually for⁵⁸. The reason for this is linked to my conception of the role of the constitutional scholar as educator – before we can consider the solutions that the rule of law purports to provide, we must first consider the problem that it is trying to solve⁵⁹. The work of Martin Krygier is indispensable here⁶⁰. As he notes with regard to the rule of law, «if

you want to explain to non-lawyers why any of this matters, they are unlikely to follow your explications of institutional detail, controversies about legality and constitutionality and so on, or at least they are unlikely to follow you very far without asking: *but what's the point?*»⁶¹.

3.2. *The point of the rule of law*

One can only work out what the rule of law needs to consist of after one has given some thought to what it might be for. Krygier starts by noting that law is, at its core, a vehicle for the exercise of power. The great hope provided by the rule of law is that law can also be a powerful means of ensuring that such power can be channelled, constrained, directed and tempered. The exercise of power is therefore a distinctive domain that has long been closely associated with the ideal of the rule of law⁶². The central question for the rule of law, then, is what difference can the law make to the ways in which power is exercised? According to Krygier, «at the core of the rule of law, understood as a distinctive concept, is and has long and often been a particular concern – namely, the ways power is exercised; and it responds to a specific antipathy – namely, the arbitrary exercise of power»⁶³. It is apparent that people in many different times and many different places have been aware of the commonly experienced phenomenon of arbitrary power and the terrible consequences that may flow from its exercise⁶⁴. «Though rarely uncontested, that has been a central theme – and arbitrary power the central anti-hero – of countless writings in rule of law traditions over millennia»⁶⁵. It

is important to keep in mind that the existence of arrangements ensuring that power is not made routinely available for arbitrary exercise (particularly when the power of some over others is substantial) is not a natural state of affairs⁶⁶. As Krygier points out, «[u]nless something is done to prevent it, arbitrariness is likely where power is concentrated, as it so often is, in the big grasping hands of small numbers»⁶⁷.

In addition to clearly articulating a common problem that writing and thinking on the rule of law has been trying to solve for millennia, another great benefit of Krygier's work is that he tackles the meaning of arbitrary power and the reasons why we should reject it head on. This is by no means commonplace⁶⁸. Based upon a thorough examination of the literature, Krygier sets down three types of exercise of power that significant rule-of-law traditions have treated as arbitrary and, for that reason, considered to be objectionable. The first is when those who wield and exercise power are not subject to regular controls or limits or are not accountable to anything other than their own will or pleasure. The second is when power is exercised in unpredictable ways, so that those it affects cannot know, predict or comprehend the ways that power is wielded, nor comply with what is required of them. The third is when power is exercised in circumstances where those affected by it are not afforded means of making themselves heard; that is to say, those impacted are given no opportunity to question, to inform and/or to affect the exercise of power over them. In short, there is no requirement that their voices and interests be considered in the exercise of power⁶⁹.

These three examples of arbitrary power connect most accounts of the rule of law that

one encounters in the literature with compelling teleological foundations⁷⁰. Crucially, rather than starting with a list of the essential or desirable ingredients that the rule of law requires of a well-functioning legal system, Krygier's account forces one to think about the necessarily prior question of what the rule of law is for and what specific problem(s) it is trying to solve.

However, it is not enough to simply identify arbitrary power as the common threat that provides much of the rule-of-law tradition with its core focus and teleological foundations. One must, of course, also tackle the question of why arbitrary power is *per se* a bad thing. Once again, the work of Krygier proves to be indispensable. As he explains, a common thought in the rule-of-law literature is that those who wield power cannot be relied upon to avoid exercising that power arbitrarily if left to their own devices. Those in power will always face temptations and perhaps even incentives to act in their own interest, as opposed to the public's interest (however defined). And even in those rare circumstances where power-wielders do not exercise their powers arbitrarily and direct them solely towards the public good, the possibility of arbitrary exercises of power in the future remains a perennial concern⁷¹: «If we are left merely to the "will" or "pleasure" or "caprice" of the power-holder (to use traditional terms of apprehension), arbitrariness will be a constant possibility, and if so a constant worry»⁷².

Drawing upon many different traditions of thought about the rule of law, Krygier then goes on to provide several reasons as to why arbitrary power is objectionable and should be opposed⁷³. First, as has just been noted, from an empirical perspective, no

matter how "enlightened" despotic rulers may profess or even appear to be, history tells us that they cannot be relied upon to stay that way for long. Second, there is the widely held belief that the arbitrary exercise of power is an immoral way to treat human beings, since it denies them respect, dignity and moral equality. Third, the civic republican tradition contributes the argument that whenever someone has the power to treat one arbitrarily – even if they choose not to – one is in their power, subject to domination by them, whatever they (arbitrarily or otherwise) choose to do. Fourth, there is the long-running strand in liberal thought that points to arbitrary power being a constant source of fear, a constant threat to freedom, which also destroys opportunities for productive co-operation among citizens in complex societies. Fifth, in circumstances where rulers attempt to destroy tempering constraints that are placed upon power by established institutions, laws and practices, a simple, pragmatic and moral objection can be raised: arbitrary power can be a powerful source of craziness in the exercise of power! One need not look far for examples of such craziness, stemming as it does from a lack of means and methods for curtailing the three types of arbitrary exercise of power detailed above.

For all these reasons, it is concluded that arbitrariness, when wedded to power, is a specific and obnoxious vice – «It is a free-standing and toxic vice, that has to do with the *ways* power is exercised. Appeal to the rule of law signals the hope that there may be ways, and that law might contribute, to diminish the kinds and levels of arbitrariness available to those who exercise power»⁷⁴.

The rule of law, then, is fundamentally concerned with the problem of how power is exercised. Tempering the exercise of power and preventing arbitrary rule have been the hallmarks of the rule-of-law tradition over the centuries. Moreover, in circumstances where the practice of those who wield power has (or has been thought to have) betrayed the ideal of the rule of law, a rich critical language in which to condemn arbitrary exercises of power has developed⁷⁵. This last point is often overlooked, but its importance cannot be overestimated. Even in circumstances where those who wield power ignore, reject or mock the ideal of the rule of law through their actions, there nevertheless remain «concepts, values, and ideals available, and so too a language in which they might be condemned»⁷⁶. As a practical ideal, then, the rule of law is of great worth and «should be invoked when the values it endorses are flouted as much as or more than when they are served»⁷⁷.

3.3. *The risks of staying silent*

This idea of the rule of law providing a common language in which to critique actions which undermine the values that it purports to serve brings us back to the main focus of this paper: the “proper” role of the constitutional scholar in relation to the rule-of-law crisis. I believe that possessing a clear understanding of what the point behind the rule of law is makes one much better equipped to explain why certain actions and reforms heighten the risks of arbitrary exercise of power. Indeed, I would go further and say that, as an educator, having a well-thought-out, coherent and compel-

ling account that answers the “what is the point?” question puts one in a position of responsibility to share that understanding. As experts on the subject, we have at our disposal the concepts, values, ideals and language with which to condemn actions that pose a risk to the rule of law. To simply stay silent and refrain from utilising that expertise when faced with arbitrary exercises of power – or actions that significantly increase the risk of such exercises – seems to me to be misguided. Doing nothing cedes the ground to those who would wish to dismantle the rule of law and, crucially, allows those forces to do so in the face of less resistance from those who are best placed to explain what the point of the rule of law is. Moreover, it guarantees that the debate is conducted without the wider public being able to share in our expertise and our (hopefully convincing) arguments as to why the rule of law is of such profound importance to addressing the perennial problem of the arbitrary exercise of power and as to why reforms of one type or another pose threats in this regard. This is all the more important when one considers that those in power who seek to undermine the rule of law through their actions often do so by explicitly invoking the rule-of-law concept. However, they do this to overcome, not empower, the laws and institutions which temper the arbitrary exercise of power. What they engage in is «the hypocritical abuse of the rhetoric of the rule of law, not the thing itself»⁷⁸. In such circumstances, the ideal of the rule of law should be invoked by constitutional scholars to expose the false claims made in its name, to prevent it from being appropriated with impunity by imposters⁷⁹.

To be sure, we must consider the extent to which academic freedom is affected when a constitutional scholar chooses to criticise legal and political developments that she believes pose a threat to the rule of law (whether in writing, in lectures or in the media). We must also consider scenarios in which scholars opt to stay silent and not engage because they believe that doing so would not be in keeping with the proper role of the scholar. In so doing, however, we would do well to remember that freedom of expression (and, I would say, academic freedom) exists not only for the benefit of the speaker. It is also – arguably mainly – intended to be of benefit to the listener. To refrain from criticism and to stay silent in the face of actions that smooth the path towards the arbitrary exercise of power and thereby threaten the rule of law has several consequences. One such consequence is that one’s silence deprives the potential listeners (whether it be students, fellow scholars or the wider public) of the benefit of hearing what one has to say on the matter. I noted above that a body of scholarship has concluded, somewhat depressingly, that populists are unlikely to change their unfavourable view of academic expertise anytime soon. I am willing to accept that conclusion as far as it pertains to those in power. But I steadfastly refuse to accept that the public at large shares that view to an extent that stops them from changing their mind if they have good reason too. And yet, if members of the public are to come to appreciate why the rule of law matters, it is indispensable that those with the ability to explain the concepts, values, and ideals behind that concept do so. What is more, beyond the risks associated with staying silent, I am convinced that the present sit-

uation offers a real opportunity for constitutional-law scholars to play a leading role as educators when it comes to the meaning and importance of the rule of law. This opportunity cannot and should not be missed.

4. *Two aspects of the role of the constitutional scholar as educator*

The role of the constitutional-law scholar as an educator has both an inward-facing, faculty-oriented dimension and an outward-facing, public-oriented dimension.

4.1. *The internal, faculty-facing role of the constitutional scholar as educator*

It is evident that in our university lecture theatres and seminar rooms, we academics are responsible for teaching legal doctrine in the form of relevant statutes, judgments, principles and so on. In addition to transmitting core knowledge about different areas of the law, we are also trying to develop our students’ abilities of rigorous analytical and critical thinking – both about the nature of law and about its application to different economic, political, social and other contexts.

Beyond teaching the body of legal doctrine and fostering the skills of analytical and critical thinking, there is a further dimension to legal education that is perhaps less obvious to teachers and students alike. It is what John Cribbet calls «the silent *raison d’être* of legal education» and it involves «the faculty [seeking] to guide the

student toward an understanding of and respect for the rule of law, without which a free society cannot long endure»⁸⁰. It is in relation to this further dimension of legal education that constitutional scholars can make a real difference by inculcating an understanding of, and respect for, the rule of law amongst our students. The stakes involved here are well illustrated by Jakab, who notes that a legal system that is based upon (and continues to respect) the rule of law is a prerequisite for the teaching and learning of legal doctrine:

Traditionally, in continental legal cultures, university education focuses on doctrinal conceptual legal thinking (*Rechtsdogmatik*) which systematizes elements of positive law (legal provisions, judicial decisions) along key concepts, with the help of doctrinal academic writings. All this presupposes a minimum level of the rule of law, and exactly this is fading away in autocratizing countries⁸¹.

Considering this, I submit that equipping students with an in-depth knowledge and understanding of what the rule of law is actually for is not only an essential component of any successful law degree. It is also vital if one wants to properly prepare students for a life in legal practice. This is a point that has not yet been addressed in the discussion about the “proper” role of the constitutional/legal scholar. Given that it sits at the heart of the argument I wish to make in the remainder of this paper, it is worthwhile unpacking its components in greater detail.

Law schools are the institutions entrusted with providing legal education. Future lawyers cannot enter the legal profession without first having learned the law in a university setting. I use the term “legal profession” broadly here, as encompass-

ing not only qualified lawyers working in traditional firms, but also those employed by legislatures, judiciaries, international organisations, ombudsmen, NGOs, and the like. Hence law schools, and the legal academics teaching there, serve as a gateway to the legal profession⁸². This is particularly true when it comes to doctrinal legal scholarship and the teaching of the body of legal doctrine – understood as encompassing «the rules, regulations, principles and concepts set out in law books and authoritatively stated in legislation or deduced from judicial decisions»⁸³. There is a deep-seated assumption that legal expertise can only be obtained through doctrinal training and that law schools are the appropriate places for such training to be undertaken⁸⁴. The dependency relationship actually goes both ways: it has been argued that doctrinal legal scholarship «would not even exist as an academic discipline without its functional ties with the legal profession»⁸⁵.

A core part of our mission as legal scholars, therefore, is to prepare law students for a career in the legal profession⁸⁶. Indeed, much of the legal curriculum is specifically geared towards equipping students with the knowledge and skills necessary to enable them to enter that profession. However, as teachers of law within a university setting, we can do more than merely serving as a gateway to the legal profession; we can also seek to ensure that those entering the legal profession do so with an appreciation of why the rule of law is of primordial importance to a well-functioning legal system. Indeed, I would push this one step further and say that it is imperative that even those of our students who do not go on to careers in the legal profession embark on their respective careers with an in-depth appre-

ciation for the rule of law and its purpose. Does anyone really dispute the need for accountants, or bankers, or fin-tech pioneers to understand and appreciate the need for those wielding public power to do so in accordance with the law?

An analogous argument has been made about the vital role that higher-education institutions can play in sustaining constitutional democracy by «educating young people in the skills of critical inquiry and other habits of mind that are important for citizens in a democracy»⁸⁷. I do not believe that there is any great difficulty in applying the insights offered by such accounts to the rule of law and the role of the constitutional scholar. For example, Vicki Jackson claims that, in addition to their core mission of sustaining and advancing the pursuit of knowledge, law schools and legal academics – in their capacity as «knowledge institutions» – also play a vital role in sustaining constitutional democracy. This is particularly true when one looks at this issue from the perspective of the provision of education. Students who are not only taught substantive knowledge in a given area but also equipped with procedural knowledge in the form of core skills, such as critical thinking and an ability to evaluate competing lines of argumentation, are likely to become citizens capable of participating in the political life of their community in more informed and productive ways⁸⁸. The acquisition of knowledge in both senses of the term is required, *inter alia*, to evaluate the performance of elected officials and those running for elected office, to engage in reasoned argument with fellow voters, to evaluate competing claims made by stakeholders such as interest groups, NGOs and foreign powers, and to scrutinise the ve-

racity and merits of claims made by those wielding public power⁸⁹. In Jackson's words, «[h]igher education institutions play a role in sustaining constitutional democracy [...] through their work educating young people in the skills of critical inquiry and other habits of mind that are important for citizens in a democracy»⁹⁰. For Stone, «universities contribute to a healthy democracy and well-functioning civil society by virtue of their cultivation of informed, engaged and democratically competent citizens and their provision of expert knowledge that in turn informs public discourse and governmental decision-making»⁹¹.

By tying these ideas together, it is possible to offer some idealistic and pragmatic reasons to further support my core proposition that constitutional scholars can play a vital role as educators in relation to the rule of law. First, the extent to which respect for the rule of law will be guaranteed into the future in a given legal system rests, to some extent at least, upon the ability and willingness of the next generation of lawyers to ensure continued adherence to the rule of law. After all, most of the law students that we educate in our classrooms will go on to have careers in the legal profession (broadly conceived). By virtue of their employment in these positions, our students will have the opportunity to contribute to social change⁹². As Mátyás Bódig points out,

in constitutional democracies, we more or less take it for granted that vital institutional decisions are to be made by professional lawyers. [This assumption] is partly based on the idea that the lawyers' professional expertise gives rise to epistemic authority: lawyers are experts of some genuine, specialised knowledge that is indispensable if our key political institutions are to be run properly⁹³.

This places a heavy burden, in the nature of public trust, upon law schools and their staff, since they play a fundamental role not only as the gatekeepers of the legal profession, but also in that they are responsible for a critical formative period in the education of young lawyers, judges, legislators, public servants and others⁹⁴. To quote Cribbet once more, «lawyers, however defined and in whatever role they serve society, are the principal representatives of the rule of law, and law schools, like medical schools, regulate admission to the guild and are responsible for the initiation rites»⁹⁵. It follows that law schools and the future legal professionals that they are responsible for sending out into the world stand shoulder to shoulder at the vanguard of vigilance when it comes to detecting the facilitation of arbitrary exercises of power. To be successful in that role, future legal professionals must surely be made aware of what to be on the lookout for. Moreover, from a more practical or pragmatic perspective, we must also recognise that the body of legal doctrine that we teach our students changes and evolves at a rapid rate. Much of what our students learn in the form of rules, regulations, principles and the like from their study of statutes and judgments is liable to become outdated and even obsolete in the not-too-distant future. Further, a body of sociological research has shown that a surprisingly little amount of the body of doctrine is regularly used in actual legal practice⁹⁶: «The practice of lawyers significantly deviates from the ways of legal thinking taught to them by the doctrinal scholars»⁹⁷. I would also wager a considerable amount of money that most students will remember good lecturers and key insights from their teachers more than they

will remember journal articles, textbook chapters or case notes that they read during law school. It may not be pushing things too far to say, then, that what matters is not so much that students retain knowledge about what the *law* is, but that they develop an in-depth knowledge and understanding of what the *rule of law* is and what it is for. Finally, it goes without saying that the next generation of legal professionals are more likely to have a more uncertain, unstable and, ultimately, unhappy professional future should they practise law in a legal system where the arbitrary exercise of power is commonplace, and the rule of law is consequently under threat.

Now, I do not wish to overstate my case for the importance of law schools here, since respect for the rule of law depends on a broader, societal commitment to upholding the ideal. Lawyers are but a small minority in the total population. Nonetheless, the hope is that we can inculcate our students with respect for the rule of law as a lasting legacy of their legal education. Whereas the combination of transmitting foundational legal knowledge and developing our students' abilities to engage in critical analysis and reflection are unquestionably core aspects of our role as scholars, I believe that, as educators, we can also play a vital role in fostering an appreciation for the rule of law. For that to happen, engaging with real-life examples of exercises of arbitrary power and subjecting them to critique from a rule-of-law perspective is surely vital to the entire educational enterprise.

4.2. *The external, public-facing role*

These same considerations underpin my conception of the role of the constitutional scholar as educator when viewed from an external, public-facing perspective. In addition to deploying our skills and expertise as teachers towards the education of students on campus, we constitutional-law scholars can (and often do) play a role in educating the wider public about matters of constitutional law. By engaging in public discussion and debates over political and legal changes which impact upon the rule of law, constitutional-law scholars can play an active role as constitutional actors. Disseminating knowledge and facilitating discussion about the purpose behind, and requirements of, the rule of law is «needed in order for the rule of law to be in effect [...] so that laws, how they are enforced, and what their effects are, can be known, and evaluated and, where appropriate, changed»⁹⁸. In a similar way, Lazarus has argued that we should view constitutional scholars as constitutional actors akin to «integrity» or «fourth-branch» institutions such as ombudsmen, auditors and commissions that operate in well-functioning constitutional democracies⁹⁹. These integrity institutions have long been recognised as playing an important role in both protecting and facilitating foundational values such as constitutionalism and democracy¹⁰⁰. Whilst much of what Lazarus says on this score relates to the ideal of constitutionalism, there is very little difficulty in applying her insights to the rule of law, particularly when understood in the terms I have set out above. Lazarus speaks of the «facilitative rôle» that constitutional-law scholars play in relation to well-function-

ing constitutionalism and the «constitutive rôle» that constitutional-law scholarship plays in the shaping of constitutions and constitutional doctrine¹⁰¹. A similar point is made by Komárek (albeit on the way to a different position on what the appropriate role of the constitutional scholar is): «Constitutional law is not only close to public power; it constitutes it and structures the way in which politics is done. Public pronouncements by constitutional scholars, or some of them at least, are therefore acts of public power (understood broadly)»¹⁰². In Lazarus's view, constitutional scholars can act as constitutional actors analogous to integrity-branch institutions, in that they can play a vital role in enhancing the accountability to the law of those who wield public power. Constitutional-law scholars identify the actions taken and the associated modes of reasoning utilised by those exercising public power and evaluate whether they are appropriately oriented towards what the constitution requires. Hence they scrutinise claims as to the constitutionality of political action¹⁰³. At the same time, by engaging with the constitutionality of political actions, constitutional scholars assume the role of constitutional actors for the following reason: «The moment a constitutional scholar expresses her opinion on a constitutional controversy, which is also a political controversy due to the structural coupling between constitutional law and politics, she contributes to how the controversy is going to be approached (and possibly even solved)»¹⁰⁴. It follows from this that the engagement of constitutional scholars with contemporary political debates that touch upon constitutional issues provides an important means of facilitating and informing constitutional debate.

Constitutional scholars can educate and facilitate the dissemination of knowledge and understanding about the constitution: «Education is one part of maintaining a constitution; it helps forge the ideas and practices necessary to sustain the political order»¹⁰⁵. As Lazarus puts it,

[W]hether indirectly – through teaching and training of future lawyers (and politicians), publishing research, writing textbooks, practitioner handbooks and constitutional commentaries – or directly through active public engagement – constitutional scholars facilitate robust constitutional debate and shape the constitution. They are part of the formation and development of constitutional texts, doctrine, interpretations of doctrine and conventions, evaluation of judicial pronouncements on doctrine and constitutional arguments before courts. Their diverse contributions constitute part of the constitutional accountability fabric and shape the environment in which constitutions are formed¹⁰⁶.

The argument in support of categorising constitutional scholars as constitutional actors akin to integrity institutions therefore «flows from their expert and pervasive influence on the shape of the constitution, their accountability role in critiquing and engaging with official assertions regarding constitutional law, their facilitation of robust democratic and constitutional debate, and their contribution to “well-functioning constitutionalism”»¹⁰⁷. Again, this reasoning can easily be applied to the rule of law. As experts in the field, scholars have an opportunity to utilise their platform to disseminate knowledge and understanding about the rule of law and thereby contribute to the education of the public on the matter. By explicating the point behind the rule of law and the perennial problem of the arbitrary exercise of power that it is trying to solve, constitutional scholars can, through

their manifold contributions to public discourse, help to construct and sustain the rule-of-law “accountability fabric” in a legal system. And again, for this ideal to be made into a practical reality, it must surely be the case that the role of the constitutional scholar as educator includes the ability to publicly comment on and critique arbitrary exercises of power.

5. Conclusion

This paper has considered the issue of the appropriate role of the constitutional scholar in light of recent debates around scholactivism and such like. It has argued that any examination of the “proper” role of the constitutional scholar is incomplete if it does not factor in the educational function(s) that scholars perform as part of their everyday duties. When it comes to the role that constitutional scholars can play as educators in upholding the rule of law, matters can be viewed from both an internal, faculty-oriented perspective and from an external, public-oriented one. In both cases, the constitutional scholar can make a significant contribution towards inculcating an understanding of, and respect for, the rule of law. However, this rests, first and foremost, upon being able to effectively articulate and communicate a clear understanding of what the point of the rule of law is and why the rule of law matters. As experts with particular insights and opinions on these questions, we constitutional scholars stand at the vanguard of vigilance when it comes to detecting actual and potential cases of the arbitrary exercise of power. I have argued that, rather than staying silent

whenever the facilitation of the arbitrary exercise of power is on the rise, the proper role of the constitutional scholar as educator is to draw upon the language of the rule of law – its values, concepts and ideals – in order to comment on and critique such developments. By doing nothing, we cede the ground to those who would wish to dismantle the rule of law and, crucially, allow those forces to do so in the face of less resistance from those who are best placed to explain what the point of the rule of law is. Moreover, this guarantees that the debate is conducted without the wider public being able to share in our expertise and arguments as

to why the rule of law is of such profound importance to addressing the perennial problem of the arbitrary exercise of power. When it comes to the rule of law, educating both students and the wider public about the point behind the rule of law seems to me to be perfectly in keeping with the proper role of the constitutional scholar.

¹ In line with the requirements of Riksbankens Jubileumsfond, this article is published in open access under the CC BY licence, as are the other articles produced within the project.

² T. Khaitan, *On Scholactivism in Constitutional Studies: Skeptical Thoughts*, in «International Journal of Constitutional Law», n. 20, 2022, p. 1; J. Komárek, *Freedom and Power of European Constitutional Scholarship*, in «European Constitutional Law Review», n. 17, 2021, p. 422; V. C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, in «Canadian Journal of Comparative and Contemporary Law», n. 7, 2021, p. 156.

³ Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 423; J. Morijn, *The Language of Power*, in «www.verfassungsblog.de», April 2023.

⁴ T. Bustamante, *Reflecting on the Ethical Commitments of Our Role*, in «International Journal of Constitutional Law», n. 20, p. 1.

⁵ At the time of writing, Khaitan's editorial is the most-read piece

in the *International Journal of Constitutional Law*. Further, the *Verfassungsblog* has made his editorial the subject of a dedicated debate section on its website, where several renowned scholars engage with his thesis. It is for these reasons that I propose to begin the consideration of the role of legal scholarship in relation to the rule-of-law crisis with Khaitan's critique of scholactivism.

⁶ Khaitan, *On Scholactivism* cit., p. 2 (italics added); Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 435.

⁷ Khaitan, *On Scholactivism* cit.

⁸ Ivi, p. 5.

⁹ Ivi, pp. 5-9.

¹⁰ T. Bustamante, *Academic Roles, Political Freedoms, and Practical Abilities*, in «verfassungsblog.de», April 2023.

¹¹ A. Jakab, *Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country*, in «verfassungsblog.de», April 2023.

¹² Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 435.

¹³ Ivi, p. 430.

¹⁴ *Ibidem*.

¹⁵ J. Komárek, *Scholarship Is about Knowledge, Not Justice*, in «International Journal of Constitutional Law», n. 20, 2022.

¹⁶ Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 435.

¹⁷ Ivi, pp. 436-437.

¹⁸ A. Jakab, *Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country* *Academic Roles* cit.

¹⁹ *Ibidem*.

²⁰ *Ibidem*.

²¹ *Ibidem*.

²² Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 438.

²³ Komárek, *Scholarship Is about Knowledge* cit.

²⁴ Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 441.

²⁵ L. Lazarus, *Constitutional Scholars as Constitutional Actors*, in «Federal Law Review», n. 48, 2020, pp. 483, 486.

²⁶ Ivi, p. 485.

- ²⁷ Ivi, pp. 485-486.
- ²⁸ R. Brubaker, *Why Populism?*, in «Theory and Society», n. 46, 2017, p. 367.
- ²⁹ Lazarus, *Constitutional Scholars as Constitutional Actors* cit., p. 486.
- ³⁰ *Ibidem*.
- ³¹ A. Alemanno, *Knowledge Comes with Responsibility: Why Academic Ivory Towerism Can't Be the Answer to Legal Scholactivism*, in «International Journal of Constitutional Law», n. 20, 2022, p. 1.
- ³² *Ibidem*.
- ³³ *Ibidem*.
- ³⁴ *Ibidem*.
- ³⁵ *Ibidem*.
- ³⁶ *Ibidem*.
- ³⁷ *Ibidem*. See, similarly, Bustamante, *Academic Roles, Political Freedoms, and Practical Abilities* cit.
- ³⁸ J. Morijn, «Scholars and Rule of Law Backsliding», lecture delivered at University College London, *Human Rights Against Democratic Backsliding in Poland*, 21 October 2022, available at: <<https://www.ucl.ac.uk/ssees/events/2022/oct/human-rights-against-democratic-backsliding-poland>> (last visited on 3 May 2023).
- ³⁹ A. Stone, *A Defence of Scholactivism*, in «www.verfassungsblog.de», April 2023.
- ⁴⁰ Bustamante, *Academic Roles, Political Freedoms, and Practical Abilities* cit.
- ⁴¹ V. C. Jackson, *Integrity and Independence*, in «www.verfassungsblog.de», April 2023.
- ⁴² L. Sirota, *More and Better*, in «www.verfassungsblog.de», April 2023.
- ⁴³ Khaitan, *On Scholactivism* cit.
- ⁴⁴ Indeed, Khaitan's above-mentioned critique is limited to the conducting of academic research and the utilisation of the fruits of that research to pursue direct material outcomes in particular cases. Very little is said about the other core functions of scholars, most notably that of teaching – as he himself acknowledges (Ivi, p. 4).
- ⁴⁵ N.W. Barber, *The Principles of Constitutionalism*, Oxford University Press, 2018, p. 85.
- ⁴⁶ *Ibidem*.
- ⁴⁷ *Ibidem*.
- ⁴⁸ Ivi, p. 96.
- ⁴⁹ Ivi, p. 95.
- ⁵⁰ P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in «Public Law», 1997, p. 469.
- ⁵¹ Barber, *The Principles of Constitutionalism* cit., p. 95.
- ⁵² For example, regarding Hungary, see G. Mészáros, *Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception*, in «EUI Max Weber Programme Working Paper», 2022/01.
- ⁵³ For example, regarding Poland, see L. Pech, P. Wachowicz, D. Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, in «Hague Journal on the Rule of Law», n. 13, 2022, p. 1.
- ⁵⁴ Barber, *The Principles of Constitutionalism* cit., p. 99.
- ⁵⁵ This is the much-discussed problem of the rule of law being subverted in ways that ostensibly conform to existing rules; see K. L. Scheppele, *Autocratic Legalism*, in «University of Chicago Law Review», n. 85, 2018, p. 545.
- ⁵⁶ M. Krygier, *What's the Point of the Rule of Law?*, in «Buffalo Law Review», n. 67, 2019, p. 754.
- ⁵⁷ Barber, *The Principles of Constitutionalism* cit., p. 99.
- ⁵⁸ J. Meierhenrich, *What the Rule of Law Is ... and Is Not*, in J. Meierhenrich, M. Loughlin (edited by), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 2021, pp. 579-582.
- ⁵⁹ It is essential that those utilising their platform as constitutional scholars to comment on developments pertaining to the rule of law begin by clarifying the meaning and utility of the rule of law itself. Taking the "what's the point" question seriously requires one to take the time to read, write, think, discuss, debate, etc., this matter in detail.
- ⁶⁰ Krygier, *What's the Point of the Rule of Law?* cit.; M. Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, in «Annual Review of Law and Social Science», no. 12, 2016, p. 199.
- ⁶¹ Krygier *What's the Point of the Rule of Law?* cit., p. 750 (emphasis added).
- ⁶² Ivi, pp. 761-762.
- ⁶³ Ivi, pp. 760-761; see also A. Sajó, R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, vol. 1, Oxford University Press, 2017, ch. 8.
- ⁶⁴ Montesquieu noted, for example, that «the fear of violence and the threat of arbitrary government provides an essential context in which the rule of law takes its meaning». Quotation taken from the discussion in L. Green, *Law's Rule*, in «Osgoode Hall Law Journal», n. 25, 1986, p. 1026.
- ⁶⁵ Krygier, *What's the Point of the Rule of Law?* cit., p. 761. A similar point is made by Jeremy Waldron when he notes that «[m]ost fundamentally, people value the Rule of Law because it takes some of the edge off the power that is necessarily exercised over them in a political community. In various ways, being ruled through law, means that power is less arbitrary, more predictable, more impersonal, less peremptory, less coercive even.» (Waldron, *The Rule of Law*, in «The Stanford Encyclopedia of Philosophy», 2020, available at: <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>> (last visited in April 2023).
- ⁶⁶ Krygier, *What's the Point of the Rule of Law?* cit., p. 766.
- ⁶⁷ *Ibidem*.
- ⁶⁸ T. Endicott, *Arbitrariness*, in «Oxford Legal Studies Research Paper», n. 2, 2014.
- ⁶⁹ Krygier, *What's the Point of the Rule of Law* cit., pp. 762-763.
- ⁷⁰ Ivi, p. 763.
- ⁷¹ Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures* cit., p. 203.
- ⁷² *Ibidem*.
- ⁷³ The reasons listed in the follow-

- ing are taken from both Krygier, *What's the Point of the Rule of Law?* cit., p. 677, and Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures* cit., p. 203, as well as the works referred to in footnotes there.
- ⁷⁴ Krygier, *What's the Point of the Rule of Law?* cit., p. 768.
- ⁷⁵ Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures* cit., p. 208.
- ⁷⁶ Ivi, p. 209.
- ⁷⁷ *Ibidem*.
- ⁷⁸ Ivi p. 211.
- ⁷⁹ *Ibidem*.
- ⁸⁰ J. E. Cribbet, *Legal Education and the Rule of Law*, in «American Bar Association Journal», n. 60, 1974, p. 1365.
- ⁸¹ A. Jakab, *Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country* Academic Roles cit.
- ⁸² M. Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline*, Edward Elgar Publishing 2021, p. 9.
- ⁸³ R. Cotterrell, *The Sociology of Law: An Introduction*, London, Butterworths, 1992, p. 2.
- ⁸⁴ M. Bódig, *Legal Theory and Legal Doctrinal Scholarship*, in «Canadian Journal of Law and Jurisprudence», n. 23, 2010, p. 496.
- ⁸⁵ Bódig, *Legal Doctrinal Scholarship* cit., p. 9.
- ⁸⁶ While it is true that not all law students go on to be practising lawyers, most students undertaking the study of the law do nonetheless end up pursuing a career in the law (broadly conceived).
- ⁸⁷ Jackson, *Knowledge Institutions in Constitutional Democracies* cit., p. 168 and literature cited therein.
- ⁸⁸ Ivi, pp. 203-206.
- ⁸⁹ *Ibidem*.
- ⁹⁰ Ivi, p. 168.
- ⁹¹ A. Stone, *The Two University Freedoms*, in «Fay Gale Lecture, Academy of Social Sciences in Australia, 2019, available at <<https://socialsciences.org.au/events/2019-fay-gale-lecture/>> (last visited in April 2023).
- ⁹² H. V. Rossum, *Lawyers, Law Schools and Social Change – Defining the Challenges of Academic Legal Education in the Late Modernity*, in «International Journal of the Legal Profession», n. 25, 2018, p. 245.
- ⁹³ Bódig, *Legal Theory and Legal Doctrinal Scholarship* cit., p. 498.
- ⁹⁴ Cribbet, *Legal Education and the Rule of Law* cit., p. 1364.
- ⁹⁵ *Ibidem*.
- ⁹⁶ Bódig, *Legal Theory and Legal Doctrinal Scholarship* cit., p. 497 and literature cited therein.
- ⁹⁷ *Ibidem*.
- ⁹⁸ Jackson, *Knowledge Institutions in Constitutional Democracies* cit., p. 204.
- ⁹⁹ Lazarus, *Constitutional Scholars as Constitutional Actors* cit.
- ¹⁰⁰ P. Kildea, *The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission*, in «Federal Law Review», no 48, 2020, pp. 469-482; M. Tushnet et al., *Comparative Constitutional Law*, Edward Elgar Publishing, 2018², chapter 5.
- ¹⁰¹ Lazarus, *Constitutional Scholars as Constitutional Actors* cit., p. 484.
- ¹⁰² Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 426.
- ¹⁰³ Lazarus, *Constitutional Scholars as Constitutional Actors* cit., pp. 489-490. Lazarus draws an analogy here with the work that legal scholars do in holding judicial authorities to account; see M. Tushnet, *Judicial Accountability in Comparative Perspective*, in N. Bamforth, P. Leyland (edited by), *Accountability in the Contemporary Constitution*, Oxford University Press, 2013, pp. 57, 74.
- ¹⁰⁴ Komárek, *Freedom and Power of European Constitutional Scholarship* cit., p. 423.
- ¹⁰⁵ G. Thomas, *The Founders and the Idea of a National University: Constituting the American Mind*, New York, Cambridge University Press, 2015, p. 2.
- ¹⁰⁶ Lazarus, *Constitutional Scholars as*
- Constitutional Actors* cit., p. 491.
- ¹⁰⁷ Ivi, p. 492.