Parchment Barriers: The Constitution as Law

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Backsliding member states – sustaining the authority of the constitution – constitutional courts – court packing – legality – voiding of legal acts – removal of participant from the constitution

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> And therefore this is another Errour of Aristotles Politiques, that in a wel ordered Common-wealth, not Men should govern, but the Laws. What man, that has his naturall Senses, though he can neither write nor read, does not find himself governed by them he fears, and beleeves can kill or hurt him when he obeyeth not? or that beleeves the Law can hurt him; that is, Words, and Paper, without the Hands, and Swords of men?[1]

Giving a voice to the constitution

How do we sustain the authority of the constitution within a constitutional system?

It seems that in Europe the preferred answer to this question is to allocate the task to a court of law, notably, some constitutional tribunal. But not all courts strike us as capable guardians of the constitution. Whether or not they are faithful depositories of legality depends, in our view, on their composition and their relation to other branches. They may turn out to be staffed with political partisans loyal to a rogue 'backsliding' government. This explains why the Constitutional

[1]T. Hobbes, *Leviathan*, C.B. Macpherson (ed.) (Pelican Books 1968) p. 699.

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Tribunal in Poland had to learn from the European Court of Human Rights that owing to an irregularity in the appointment process a bench adjudicating a certain case did not pass the test of a 'tribunal established by law' according to Article 6(1) ECHR.[2] As is well known, the matter concerned the presence of Judge Mariusz Muszyński who had been appointed by President Andrzej Duda after Duda had refused to swear judges into office selected by the Sejm shortly before the new election. The group of judicial appointees of whom the said judge was a part were elected by the new Sejm and sworn into office by the President within hours afterwards. Polish authorities reacted to the ruling of the European Court of Human Rights in a way that suggested it would have no impact at all – effectively 'cancelling' it. The President of the Constitutional Tribunal announced that the judgment will have no effect on the Polish justice system. The Tribunal itself ruled a few weeks later that the judgment was non-existent in Polish law.[3]

Several factors mediate the authority of those we regard as capable sentinels of constitutional legality. The ability to supply legal expertise is one thing, although it may not even be necessary.[4] Of at least equal importance, however, is a high degree of political independence or diversity of backgrounds.[5] Alternatively put,

[2]For a clear account, *see* M. Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers from a Court it Controls', *European Law Blog*, 21 October 2021, https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/, visited 9 February 2024. In ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z* o.o. v *Poland*, paras. 289-291, the court applied a three-pronged 'test' that it had developed earlier in its case law. *See* ibid., paras. 243-251. It is of relevance also for the cases that involve the reorganised National Council of the Judiciary, the composition of which is apparently contrary to the constitution. *See* M. Szwed, 'The ECtHR's Advance Pharma Case and the Polish Judiciary', *Verfassungsblog*, 11 February 2022, https://verfassungsblog.de/when-is-a-court-still-a-court-and-what-makes-a-judge-a-judge/, visited 9 February 2024. On the Polish story, *see* generally, 'Inside the System Ziobro Built', *ESI Background Paper*, 5 August 2021, p. 4, https://www.esiweb.org/pdf/ESI%20-%20Inside%20the%20system%20Ziobro%20built%20-%205%20August%202021.pdf, visited 9 February 2024, which reports that all judges of the Constitutional Tribunal have been selected by the PiS majority.

[3]*See* European Commission 2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland, 722 (final), 20 July 2021, p. 5, fnn. 24 and 26. On the history of the take-over of the Tribunal by the Law and Justice Party, *see*, for example, W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 58-84; M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary in Poland', in A. Sajó and R. Uitz (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021) p. 517 at p. 519-521.

[4]*See* A. Vermeule, *Law and Limits of Reason* (Oxford University Press 2009) p. 85, arguing that professional diversity is an advantage that also ought to be tapped for the composition of courts that decide high-salience political questions.

[5]The major concern raised by the reorganisation of the National Council of the Judiciary in Poland has been that its judicial members are no longer appointed by peers, but by the Sejm (the legislature). The Council proposes candidates for judicial appointment to the President of the Republic. Obviously,

we expect members of a body that adjudicates constitutional questions to reflect, jointly and severally, by virtue of the appointment process, a wide variety of political perspectives. We would find it disturbing, to say the least, if such a body were 'packed' by one political party alone.[6]

This suggests that there are constitutional constraints that need to be observed before tribunals can attain the legitimate and, indeed, legal authority to say what the law is. These constraints are, within our region, manifest in European human rights law (Article 6 ECHR) and derivative of EU law (notably Article 19[1] TEU and Article 47 Charter of Fundamental Rights).[7] They are fleshed out by the European Court of Human Rights and the European Court of Justice,

the selection of its member has been altered in a manner that secures the influence of the ruling political party on judicial appointments. *See* European Commission, *supra* n. 3, fn. 47 p. 7-8.

[6] *See* A. Schedler, 'Democratic Reciprocity', 29 *Journal of Political Philosophy* (2021) p. 252 at p. 267.

[7] *See* L.D. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', 20 *German Law Journal* (2019) p. 1182 at p. 1196. Art. 19 TEU requires that the member states 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The ECJ derives from Art.19(1) TEU the obligation on the part of member states to sustain an independent judicial system (an obligation that it also supports with reference to common constitutional traditions, Art. 6 ECHR and Art. 47 of the European Charter of Fundamental Rights). *See* ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*, ECLI:EU:C:2018:117, para. 41. *See also* ECJ 6 March 2018, Case C-284/16, *Slowakische Republik* v *Achmea BV*, ECLI:EU:C:2018:158, para. 34; ECJ 10 December 2018, Case C-621/18, *Wighman* v *Secretary of State for Exiting the European Union*, EU:C:2018:999, paras. 62-63. Hence, there is some kind of overspill effect with regard to the protection of the rights originating from EU law. They presuppose the existence of an independent judiciary in general. One 'justification' for this appears to be the good old *effet utile*. *See* L.D. Spieker, 'Defending Union Values in Judicial Proceedings: On How to Turn Article 2 TEU into a Judicially Applicable Provision', in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States* (Springer 2021) p. 237 at p. 249. The ECJ demands that the organisation of the judicial system not give rise to doubts, in the minds of subjects of the law, as to the imperviousness of the judges to external factors, such as direct influence of the legislature and the executive, or to doubts concerning their neutrality, impartiality or independence. *See* ECJ 2 March 2021, Case C-824/18, *A.B. and others*, ECLI:EU:C:2021:153, para. 150; ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland*, ECLI:EU:C:2019:531, paras. 111-113. The other justification involves combination and 'mutual amplification' of Art. 2 TEU and other directly effective Treaty provisions whose scope of application is, by virtue of Art. 2, pushed beyond the scope of application of EU law. *See* Spieker, ibid., p. 247, 251. Most recently, the European Commission has ventured into new terrain. The action against Hungary concerning its new restrictive legislation affecting sexual minorities (LGBTIQ) is now also based on Art. 2 TEU as such. *See* L.D. Spieker, 'Berlaymont is Back: The Commission Invokes Article 2 TEU as Self-standing Plea in Infringement Proceedings over Hungarian LGBTIQ Rights Violations', *EU Law Live*, 22 February 2023, https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtiq-rights-violations-by-luke-dimitrios-spieker/, visited 9 February 2024.

respectively.[8] We would, however, cringe if the members of these international guardian institutions turned out to be also merely the obedient agents of the Ziobros of this world.[9] Whom would we then trust to embody and to enact the authoritative voice of constitutional law?

Obviously, the credibility of judicial expositions of constitutional law depends on conditions that are logically prior to adjudication. While the judiciary may on certain occasions be responsible for securing these conditions, the appointment of judges depends on interactions among branches of government that stand behind – or possibly beyond – the constitution *qua* legal construct because they facilitate its proper legal construction.

The field of politics

We encounter the core concerning this 'behind' and 'beyond' in its most powerful form in a chapter of *The Federalist Papers,* namely in Federalist No. 51, where Madison presents his own idea of how the authority of law can be sustained in a constitutional setting.[10] Those persuaded by Hamilton's defence of judicial review in Federalist No. 78 may be a little puzzled by the fact that Madison dismisses the idea that the power to sustain constitutional law ought to be put into the hand of one particular institution, that is, some 'least dangerous' branch.[11] For Madison, no 'Council of Censors', which was to be found in the Constitution of Pennsylvania,[12]

[8]Both Courts have accumulated quite a bit of case law on the Polish question. The cases mostly affect undermining the independence of the judiciary through early retirement plans, the reorganisation of judicial appointments, prohibitions on making preliminary references, prohibitions on questioning the independence of other judges, prohibitions for ordinary courts to set aside national laws that conflict with EU law, and the intimidation of judges through the permanent threat of disciplinary measures. These measures are under the control of the Minister of Justice and his subservient acolytes. For useful summaries, *see* European Commission Press Release, *Commission Launches Infringement Procedure against Poland for Violations of EU Law by its Constitutional Tribunal*, IP/21/7070, 22 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070, visited 9 February 2024; European Commission, *supra* n. 3, fn. 2.

[9]For a brief case study comparing Poland, Hungary and Turkey, *see* P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48 at p. 56-60, characterising these courts as effectively 'subjugated' (p. 62) and 'instrumentalised' (p. 68) vis-à-vis the executive and legislative branches. For a more comprehensive study of the fate of the Constitutional Tribunal and the Supreme Court in Poland, *see* A. Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Façade Rhetoric of Political Constitutionalism and Actual Abuse of Apex Courts', 19 *EuConst* (2023) p. 25 at p. 36-56.

[10]*See* A. Hamilton, J. Madison and J. Jay, *The Federalist*, C. Sunstein (ed.) (Harvard University Press 2009) p. 339-345.

[11]Ibid., p. 509.

[12]Section 47 of the Pennsylvania Constitution of 1776.

not even frequent appeals to the people were a reliable means to insulate the authority of law from the maelstrom of passionate political controversy.[13] Just as, in his view, the Council of Censors would end up being composed of the politicians it was supposed to control, appeals to the people would systematically either run the risk of harvesting the echo of successful demagoguery or simply not elicit much attention from the electorate. But what is, then, Madison's alternative vision for sustaining the constitution as law?[14]

Constitutional law, from Madison's perspective, allocates limited powers and permissions. What the constitution thereby establishes is a field to be inhabited by ambitious people who are least interested in playing by the rules.[15] They want to move things, they want to enrich themselves, and most likely they want to do both. If they are told that there are legal rules to observe, they either shrug their shoulders or proceed to bend those rules into a shape that is to their liking.

The question is, therefore, how the authority of the constitution as law can be sustained in a context in which all agents seek ascendancy over others and where everyone must hence watch out for always looming encroachments.

The outside on the inside

The ordinary legal answer to this question is that members of *some* institution located inside the constitutional system can be entrusted with sustaining its rules by speaking as though they were located outside of its eminently political context. Schmitt's rather absurd suggestion aside – that a popularly elected president qua equivalent of a monarchical *pouvoir neutre* could infuse the system with a quasi-celestial view from nowhere or above[16] – we are indeed likely to profess belief in the desirability of disinterested and neutral *judicial* expositions of constitutional law. In our more tender moments, we are disposed to grant that a court is such an external voice, i.e. an umpire, a referee, an impartial adjudicator (if not even a 'spectator'[17]).

From a Madisonian perspective, one may concede that the judiciary is possibly the 'least dangerous' branch, but at the same time insist that it is, nonetheless, dangerous. Stanley Fish reminded us in his somewhat shrewd discussion of

[13] *See* Madison, *supra* n. 10, p. 336-337.

[14] *See* my earlier analysis 'Real Constitutional Law: A Revised Madisonian Perspective', in C. Bezemek et al. (eds.), *Vienna Lectures on Legal Philosophy*, vol. 2 (Hart Publishing 2020) p. 161.

[15] Rules are, nonetheless, important to a democracy, for they constitute and regulate the competition for power, the outcome of which is uncertain. *See* A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge Unversity Press 1991) p. 12-14.

[16] *See* C. Schmitt, *Der Hüter der Verfassung*, 3rd edn. (Duncker and Humblot 1985) p. 132-140.

[17] On the 'impartial spectator' *see* A. Smith, *The Theory of Moral Sentiments*, D.D. Raphel and A.L. Macfie (eds.) (Oxford University Press 1976) p. 83.

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H.L.A. Hart's *The Concept of Law* that we not infrequently encounter something inside the law that is effectively equivalent to extralegal power-play and jostling.[18] We call it 'interpretation'. In particular under current conditions, we must hasten to add to it the cunning ruses with which 'illiberal democrats'[19] have most recently twisted the language of law in order to clothe their schemes in constitutional garb. If this is done systematically, the relevant practice can grow into what András Sajó calls 'ruling by cheating'.[20] Among the repertoire of this type of governance are the systematic circumvention of provisions, the exploitation of loopholes or surprising assertions of constitutional commitments that are inconsistent with, for example, international or supranational obligations.[21] In the terms of Stanley Fish, 'ruling by cheating' is nothing short of force wearing the vestiges of law. A constitutional court, for example, that is exclusively composed of loyal supporters of the government can transform the constitution into a membrane communicating its partisan cause.[22] Interpretation by a 'captured constitutional court' can have an entrenching effect.[23] Legislative entrenchment is a problem that Hungary is facing as regards its relatively recent Fundamental Law and several cardinal laws that no simple majority has the power to amend.[24]

[18] *See* S.L. Fish, 'Force', 45 *Washington and Lee Law Review* (1988) p. 883.

[19] According to prominent observers, the success of governments that endorse this idea is due to popular resentment of the fact that the relevant countries 'spent two decades genuflecting before putatively canonical models'. These models were, of course, of 'Western' origin. *See* I. Krastev and S. Holmes, *The Light that Failed: A Reckoning* (Penguin Books 2020) p. 73. *See also* the very illuminating analysis by T. Drinózi and A. Bień-Kacala, 'Illiberal Constitutionalism: The Case of Hungary and Poland', 20 *German Law Journal* (2019) p. 1140 at p. 1156-1159. *See also* D. Kosar et al., 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15 *EuConst* (2019) p. 427 at p. 430, 449, 446-447.

[20] *See* A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press 2021) p. 265, 285, where such cheating is defined as dishonest 'pretending to be faithful while violating underlying principles'. Toward the end of his book Sajó offers an account of the various techniques used to that end (ibid., p. 300-321).

[21] According to the Polish Constitutional Tribunal the Polish Constitution forbids the imposition of interim measures (Art. 279 TFEU) on the country by the ECJ. It also does not recognise any supranational constraints on the organisation of the judiciary. *See* European Commission, *supra* n. 3, fn. 2, p. 7.

[22] *See* European Commission Press Release, *supra* n. 8. *See also* ECJ 15 July 2021, Case C-791/19, *Commission* v *Poland*, ECLI:EU:C:2021:596, para. 48.

[23] *See* Drinózi and Bień-Kacala, *supra* n. 19, p. 1155.

[24] *See*, for example, G. Halmai, 'How Should Constitution Making Be Different from What Happened in 1989', *Verfassungsblog*, 13 December 2021, https://verfassungsblog.de/restoring-constitutionalism-in-hungary/, visited 9 February 2024; A. Arato and A. Sajó, 'Restoring Constitionalism: An Open Letter', *Verfassungsblog*, 17 November 2021, https://verfassungsblog.de/restoring-constitutionalism/, visited 9 February 2024. A post-Fidesz majority may find itself incapacitated from reversing the arrangements written into higher law by its predecessor. Scholars

A sobering perspective

The current situation in various countries is not directly of concern here. What matters is that both a 'captured court' and constitutional amendments based on transient supermajorities can *de facto* or *de jure* abrogate prior and more equitable constitutional arrangements and thus create huge obstacles to their retrieval.

The emphasis on change by interpretive means points to Madison's core idea. In his view, constitutional texts are, citing his famous words, mere 'parchment barriers against the encroaching spirit of power'.[25] The law that is written on paper does not and cannot bind unless it is supported by agents that 'make it stick'. But who should these agents be, in a field where everyone must suspect that nobody is inclined to play by the rules? Even if it were true that the meaning of the constitution appears on the surface of literal meanings or in politically innocuous ordinary language, it would still be naïve to presume that the political agents inhabiting constitutional space are ready to abide by it.

One might object[26] that my observations presuppose a commitment to legal realism and version of hermeneutics that disavows all belief in clear and stable meanings. The argument advanced here, however, does not presuppose endorsing any such view. Even a most naïve legal formalist – as described by Stanley Fish (see below) – would have to concede that in the political arena of constitutional interpretation it is reasonable to *expect* that interpreters pursue some more or less 'hidden agenda' and manipulate meanings in their favour. Here is how Fish characterises 'formalism':[27]

> . . . [I]n order to check the imperial ambitions of particular moralities, some point of resistance to interpretation must be found, and that is why the doctrine of formalism has proved so attractive. Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one – no matter what his or her situation or point of view – can ignore . . . .

differ strongly, however, about what could be accomplished by a new government supported by a majority in parliament without having to amend the constitution. *See* A. Jakab, 'How to Return from a Hybrid Regime to Constitutionalism in Hungary', *Verfassungsblog*, 11 December 2021, https://verfassungsblog.de/how-to-return-from-a-hybrid-regime-to-constitutionalism-in-hungary/, visited 9 February 2024.

[25]Madison, *supra* n. 10, p. 325.

[26]As one of the reviewers did.

[27]S. Fish, 'The Law Wishes to Have a Formal Existence', in A. Sarat and T.R. Kearns (eds.), *The Fate of Law* (University of Michigan Press 1991) p. 159 at p. 160-161.

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One can believe in exactly this possibility and still concede that in a constitutional context the political players are not going to adhere faithfully to 'ordinary meanings', not even courts. [28]

But matters are even worse. The relevance of canons of legal interpretation is not, and arguably cannot even be, arranged in a normative sequence. Appeals to ordinary meanings are of no avail where the pragmatic context of an utterance suggests that the speaker intended to say something out of the ordinary.[29] Conversely, having recourse to intentions is an empty gesture where such intentions remain elusive.[30] This strongly suggests that the understanding of utterances and texts is an art,[31] the mastery of which requires the flexible use of various canons in changing constellations.

There is not one but several 'methods' of interpreting the constitution and it is fair to say, following Hans Kelsen, that *prima facie* any one is as good or as bad as any other.[32] What is rendered as the meaning of the constitution is thus bound to be a product of its interpretation (which is not to deny that, in certain contexts, some interpretations may appear to be more plausible than others).

Juxtaposing this insight from hermeneutics with the fact that a constitutional setting is one of political struggle, it makes sense to be mindful of John Marshall's most famous words, which indeed subtly exemplify what Madison sought to convey. According to Marshall we must not forget that it is a 'constitution that we are expounding'.[33] Any approach to sustaining the authority of the constitution that demanded faithfulness to preestablished meanings of utterances would misunderstand what a constitution is about. It establishes the field in which ambitious agents manipulate meanings and suspect others of doing the same. This explains why in the eyes of a dissatisfied beholder a ruling of a court may seem to lend a voice to the ruling class, to a detached supranational elite, a current government or, alternatively, the dead hand of the past. The authority of courts is doomed to be contested.[34] A normative theory of interpretation cannot settle the

[28]That Fish's characterisation of formalism is misleading is a different matter. For a more profound elaboration of the formalist project, *see* the magisterial piece by E. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law', 97 *Yale Law Journal* (1988) p. 949.

[29]*See*, notably, D. Davidson, 'Communication and Convention' in his *Inquiries into Truth and Interpretation* (Oxford University Press 1984) p. 265-280.

[30]*See* R. Dworkin, *A Matter of Principle* (Harvard University Press 1985) p. 38-55.

[31]*See* H.-G. Gadamer, *Truth and Method* (Seabury Press 1975).

[32]*See* H. Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 1992) p. 81-82.

[33]*See McCulloch* v *Maryland* [1819], 17 US 316. The type of interpretation may not take place in the field in which Robert Cover believed all legal interpretation to be set, namely, the field of 'pain and death'. This would amount to a gross overstatement. But *see* R. Cover, 'Violence and the Word', 95 *Yale Law Journal* (1986) p. 1601.

[34]Court-packing plans are usually presented as remedial measures against a purportedly existing ideological bias on the bench. Since they are part of a certain partisan agenda, they are likely to be

issue, for it is invariably suspect of being complicit with some political scheme. The critical perspectives on Scalia's seemingly neutral 'originalism' support this conclusion.[35]

The invisible hand

Against this background, Madison offers an alternative. Paradoxically, it is both straightforward and utopian. It is straightforward, for it appears to offer the only way out; and it is utopian, for one cannot imagine how it could ever attain its supposed effect. In fact, Madison's alternative appears to be hoist with its own petard.

According to Madison, the constitution must be designed in such a way that the strategic interaction among the branches and various officials of government *de facto* sustains what the constitution *de jure* means. The forces notoriously defying the rules must be made to interact in a manner that is, in the final result, externally congruent with these rules. What Madison anticipates here is some invisible-hand effect.[36] It is immaterial that the agents intend to bring it about. Their motives may legitimately be completely detached from any concern with

suspicious of being driven by a like form of bias. There seems to be no way to 'depoliticise' court-packing. *See* Schedler, *supra* n. 6, p. 268-269. Indeed, the court-packing strategies that are considered to be legitimate are in the main remedial with regard to former authoritarian governments, judicial corruption or earlier partisan court packing. For a very illuminating discussion *see* D. Kosar and K. Šipulová, 'Comparative court-packing', 21 *I.CON* (2023) p. 80 at p. 122. *See also* T.G. Daly, '"Good" Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay', 23 *German Law Journal* (2022) p. 1071 at p. 1088, 1094 (emphasising the democratic context and aims of 'good' court-packing with reference to examples from Turkey and Argentina).

[35]This quip requires further elaboration. For another short observation, *see* J. Purdy, 'Scalia's Contradictory Originalism', *The New Yorker*, 16 February 2016, https://www.newyorker.com/news/news-desk/scalias-contradictory-originalism, visited 9 February 2024.

[36]Arguably, the emergence of a convention of constitutional interpretations is an 'invisible hand' effect. It is of human making, but not of human design. *See* E. Ullmann-Margalit, *Normal Rationality: Decisions and Social Order*, A. Margalit and C. Sunstein (eds.) (Oxford University Press 2017) p. 130: 'The basic picture underlying invisible-hand explanations, then, is that of a bird's eye view that encompasses numerous individuals, each busily doing his or her own narrow private bit, such that an overall design, unsought as well as unforeseen by them, is seen to emerge. The point, of course, is that the emergence of the overall design is not left mysteriously unaccounted for, nor, specifically, is it attributed to accident or chance: it is the detailed stages of the invisible-hand process which are meant to supply the mechanism that aggregates the dispersed individual actions into the patterned outcome'. Ullmann-Margalit later (p. 139-140) distinguishes this 'aggregative' account with its 'evolutionary' counterparts without regarding them as mutually exclusive (p. 140). Vermeule points out that Madison's view of the separation of powers – should he have been concerned about aggregate social welfare – cannot rely on prices and fails to explain why an

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constitutional law. Indeed, Madison posits that strong self-interested motives are necessary to create legality as a side-effect of uncoordinated behaviour. This explains why Federalist No. 51 is replete with maxims such as:[37]

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.
>
> [T]he private interest of every individual may be a sentinel over the public rights.

The human self-interest unleashed within the constitutional space must give rise to mutual checking and create a pattern of behaviour that eventually coincides externally with what the constitution requires.

The inside is the outside

This marks the point at which the straightforward element of Madison's alternative falls victim to naïveté. He adds to the invisible-hand effect a claim of convergence. The idea is that the pattern of how powers can be *effectively* exercised by participants in the constitutional system will match what various constitutional provisions prescribe and proscribe as law. This belief rests on a faith for which Madison fails to offer a warrant.[38] One must even be afraid that this faith is utterly optimistic and contrary to Madison's own premises.

First, there is no good reason to believe that what emerges as constitutional law from jockeying over political power within the system is congruent with what various constitutional provisions require independent of requisite struggles.

Second, Madison's faith is, if this predicate can be true of mere faith at all, self-defeating. The convergence presupposes that the constitution means something outside and independent of the constitutional system. But this cannot be the case, since a constitution essentially is a setting in which ambitious agents manipulate meanings. Any extra-systemic or original meaning of the constitution is, therefore, necessarily self-effacing. It must be so for the simple reason that it is 'a constitution that we are expounding';[39] from which we can conclude that the self-effacement of the extra-systemic meaning of the constitution constitutes as exclusively relevant any contingently arrived at intra-systemic meaning. The delimitation of powers are constructs that various agents settle on within the constitutional system. The constitution means what it is taken to mean from within the positions that are set up

invisible-hand effect comes about. *See* A. Vermeule, *The System of the Constitution* (Oxford University Press 2011) p. 17-18, 39. For a further discussion, *see* Somek, *supra* n. 14, p. 168.

[37]Madison, *supra* n. 10, p. 341.

[38]For further analyses, *see* Somek, *supra* n. 14, p. 167-169.

[39]*See supra* n. 33.

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by it. Thus understood, the constructed meanings are the original meaning. The political constitution that is manifest in the social interaction among the players of the system[40] would have no signifiers to fill with content if legal provisions did not establish points of reference. The legal constitution composed of these reference points would remain largely indeterminate if political forces did not act upon it.

Attitude and status

Suppose a government, aided and abetted by parliament, would like to have a number of long-serving constitutional court judges replaced with persons whom it believes to adhere loyally to its ideology.[41] It therefore passes a bill generally lowering the retirement age of judges.[42] The term of the disfavoured judges comes to an end. Alternatively, a government may lower the retirement age either for supreme court judges[43] or for judges in general and grant the minister of justice discretion to permit judges, upon their application, to continue their service even after they have reached the new official retirement age.[44]

These examples are, as is well known, not entirely fictitious. The measures in question are clearly targeted at political opponents.[45] But they are cast in a manner that makes them look – from a distance, at any rate – not too terrible. Why should one not occasionally adjust the retirement age? These measures are illustrations of what Sajó calls 'ruling by cheating'. Those who design them obviously take the reactions of potential opponents into account when they try to present them as constitutionally unobjectionable and as normal as possible.

What this simple example indicates, above all, is that the intra-systemic meanings of constitutional law are both attitude- and status-dependent.[46]

[40] *See* Somek, *supra* n. 14, p. 167-169.

[41] ECJ 6 November 2012, Case C-286/12, *Commission* v *Hungary*, ECLI:EU:C:2012:687. For an account, *see* G. Halmai, 'The Early Retirement Age of the Hungarian Judges', in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press 2018) p. 471.

[42] For alternative ways of pursuing the 'swapping strategy', which may include even violence, *see* Kosar and Šipulová, *supra* n. 34, p. 95.

[43] *See* ECJ 11 July 2019, Case C-619/18, *Commission* v *Poland (Independence of Supreme Court)*, ECLI:EU:C:2019:615, para. 11.

[44] *See* ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924, paras. 119-121. The ECJ found that the power on the part of the minister of justice violated the principle of judicial independence. Again, the court found that the imperviousness of judges to all external factors was not guaranteed.

[45] *See*, for example, on the 'emptying' and the 'swapping' strategy in Poland, D. Kosar and K. Šipulová, 'How to Fight Court-Packing?', 6 *Constitutional Studies* (2020) p. 133 at p. 142-145.

[46] *See*, on both, R.B. Brandom, *Reason in Philosophy: Animating Ideas* (Harvard University Press 2009) p. 15; R.B. Brandom, *A Spirit of Trust: A Reading of Hegel's Phenomenology* (Harvard University Press 2019) p. 263-267, 272-275.

Attitude-dependence means that something is valid or meaningful because we regard it as such. The object of our intentions has no axiological or semantic standing in itself, independent of our attitude towards it. A word means what we take it to mean; a norm is binding because we regard it as such.

Status-dependence means that whether your attitudes matter to others – i.e. whether they count or whether you can be made responsible for them – depends on who you are.[47]

Both forms of dependence in combination imply, in our context, that constitutional law is what those with status take it to be and that their attitudes pass as *relevant* (as entitled or responsible to give an account) within a constitutional system. While ordinary people ostensibly lack such status, 'reputed publicists' have quite a bit of it, and some courts usually possess it to the highest degree. Status is a matter of mutual recognition.

The meaning of the constitution is the joint product of those who possess status. There is no monopoly. Status is always shared and depends on being confirmed.[48] If the Pope said that Jesus did not rise from the dead, he would no longer be Pope. If the European Court of Justice overruled *Costa*[49] and renounced the doctrine of supremacy, we would either regard it as captured by hostile forces or suspect its members of suffering from some form of nervous frenzy.[50]

Since status is always shared, all intra-systemic constitutional meanings are, basically, *systemic*. The ascriptions of meaning to the constitution reflect what the speakers expect others who possess status to accept, or at least to understand, even if on occasion merely reluctantly. A defence of an interpretation is an attempt to alter or to confirm the attitudes of others. Emerging common meanings are practised. Their existence is indeed due to mutually relinquishing a quasi 'natural right' to having the constitution mean what one prefers it to mean. The latter would match a situation of completely unilateral attitude-dependence. Yet, for meanings to be possible, attitude-dependence must be mutual.[51] Hence, those

[47]An example might help to clarify the point. What I mean by 'dog' depends not just on what I take to be a dog, but also on my status as a competent speaker of ordinary language. If others with such status deny me mine because they believe that I am bad at using this language, I have no authority in semantic debates over the question of which properties constitute a 'dog'. For a further elaboration of this point in Hegelian terms, *see* R.B. Brandom, *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality* (Harvard University Press 2002) p. 220-221.

[48]*See* the works by Brandom, *supra* n. 46.

[49]ECJ 15 July 1964, Case C-6/64, *Flaminio Costa* v *E.N.E.L.*, ECLI:EU:C:1964:66.

[50]Concededly, these are extreme examples, for which there are not rules of positive law. They suggest, however, that the most elementary conditions of status are similar to moral background principles envisaged by Dworkin. For an elementary statement, *see* R. Dworkin, *Taking Rights Seriously*, 2nd edn. (Harvard University Press 1978).

[51]This is another way of stating the Wittgensteinian point that one person considered in isolation cannot follow a rule. *See* L. Wittgenstein, *Philosophical Investigations: The German Text, with a Revised*

wanting to oust unwanted judges are aware that they would risk their status if they did not pretend to muster a constitutional argument in support of their cause.

Within a system that does not base itself on the rule of law in our contemporary understanding[52] it may remain obvious that constitutional meanings are negotiated and a result of various equilibria[53] between and among contending actors and groups. This, if anything, is the essential idea of 'political constitutionalism'.[54] Its proponents claim the meanings of constitutional arrangement reflect the understandings that players with status attribute to it. Systems that, by contrast, signal faithfulness to a constitutional principal ('we the people') need to present interpretations in impersonal garb and signal attitude-*in*dependence to whoever appraises such interpretations from the principal's point of view. By definition, any such principal is believed to be superior to the players. The constitution is what they have ordained.

English Translation, 3rd edn. (Basil Blackwell 2001) § 202, p. 69: 'And hence also 'obeying a rule' is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule privately: otherwise thinking one was obeying a rule would be the same thing as obeying it'.

[52]The contemporary understanding focuses on courts proper. This may well have been different during the time that Parliament was itself still considered a court. *See* M. Kriele, *Einführung in die Staatslehre: Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaats*, 5th edn. (Westdeutscher Verlag 1994) p. 96-100.

[53]Mere equilibria are, unlike contracts, not externally enforced. *See* Przeworski, *supra* n. 15, p. 23.

[54]*See* R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) p. 4-5. Of course, one should be more precise here. In recent decades, 'political constitutionalism' has been contrasted with its 'legal' counterpart. The major difference, roughly speaking, between the two is whether or not one puts parliament at the centre of constitutional authority and more or less dispenses with judicial review. If one does so, one is alleged to favour the 'political constitution', understood as an alternative to American or German style constitutionalism. As Martin Loughlin pointed out with much circumspection, this contrast is not at all consistent with Griffith's perspective that was decidedly not normativist. He was keenly interested in seeing constitutional routines emerge from the push and shove of political interaction. *See* M. Loughlin, 'The Political Constitution Revisited', 30 *King's Law Journal* (2018) p. 5 (with extensive references to the literature) and, of course, J.A.G. Griffith, 'The Political Constitution', 42 *Modern Law Review* (1979) p. 1 at p. 19. It should be noted, however, that 'political constitutionalism' *qua* conception of constitutional authority that perceives in the legislature the centre of gravity has been ideologically 'hijacked' by the Polish government. *See* Castillio-Oritz, *supra* n. 9, p. 63-67; *see also* Drinózi and Bień-Kacala, *supra* n. 19, p. 1162. As the text between nn. 55 and 62 will argue, 'political constitutionalism' is not a licence for lawlessness; it is an account about how semantic content emerges from interactions between political players within a constitutional system.

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Seeming attitude-independence: reification

There is, evidently, a circular relation between attitude and status. Status is conferred based on attitudes. Someone is regarded as relevant. Attitudes, in turn, are relevant only if they are attributable to status. Status can be sustained if one does not too frequently come across as having gone bonkers in one's interpretations. Expressed in now customary neoliberal parlance, this means that nobody 'owns' constitutional meanings. Everyone needs to tread with more (attorneys) or less (high courts) caution. The participants will usually seek to speak as others do.[55] The meanings thus become rendered as the meanings of no one in particular. They stand for what 'we' conventionally understand by something. Only a small step needs to be taken to substitute the 'we' with an 'it'. This is how 'the constitution' can come to mean something and not just anything. Its meaning is rendered as attitude-independent.

Not by accident, then, the system envisaged by Madison can claim to sustain the law and encourage its participants to clinch to the idea that conceptual content, i.e. the meaning of constitutional norms, even though attitude-dependent, exists as though it were the opposite. It can be taken as a 'given' and be spoken of with an attitude of respect. After all, it is the word of the principal.

Now, while extra-systemic meaning is in principle impossible and unavailable (see above), the negotiation of constitutional meanings can nonetheless be linked to texts and to rules established in precedents. Speaking with Lukács, the underlying shift of attention from the social interaction to the product that this interaction gives rise to is a paradigmatic instance of reification.[56] The attitudes and statuses are forgotten. The meanings appear to be 'there' as if they were things. We expect later cases to draw out the implications of former cases and interpretations to disinter the latent meaning of norms. Since this is done from one case to the next, purportedly attitude-independent constitutional content becomes tacitly fed into negotiations and renegotiations of what is palatable for those who possess status. The result is a great deal of to and fro. It explains why relatively bold judicial pronouncements are often trailed with more detailed 'qualifications' trimming their scope of application. The question is not only whether results are not met with resistance by others with status, but also whether what a court says today is considered relevant and sound by the same court in the future.[57] It is true, in particular, in a system of constitutional pluralism where the supranational courts had better pay heed to the core constitutional commitments

[55]On the complications inherent in this idea, *see* S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard University Press 1982) p. 101-105.

[56]*See* G. Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press 1971) p. 83-109.

[57]*See* Brandom, *Reason in Philosophy, supra* n. 46, p. 87.

of the member states (Article 4[2] TEU).[58] The limits are to be drawn on a case-by-case basis in a zone of cumbersome mutual engagement. In systems where courts play a major role, a certain 'duplicity' inherent in interpretation sustains the impersonal authority of law and hides underlying motives. Both are essential ingredients of 'legal constitutionalism'.[59]

The triadic rule of recognition

A political constitution that comprises its legal referent can remain in good order so long as the relevant players sustain three internally connected normative commitments.

First, the political players generating intra-systemic meanings need to recognise each other in their respective capacity. They have to attribute 'status' to one another. If they did not, co-operation would break down.[60]

Second, the players must prefer sustaining the constitutional order to its disintegration (see above).[61]

Third, if the players purport allegiance to a principal they need to cast what they do as observing the constitution *qua* the principal's law. Putting the matter

[58]Scholtes has recently offered a spirited, but also very circumspect defence of the concept of constitutional identity in which he attempts to identify three types of abusive employment of this concept. *See* J. Scholtes, 'Abusing Constitutional Identity', 22 *German Law Journal* (2020) p. 534 at p. 548, 551; J. Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023).

[59]The above analysis suggests that 'legal' constitutionalism, while quite real, is merely the 'political' constitutionalism that has forgotten its origin.

[60]In the language of democratic theory that employs the perspective of rational choice, this means that democratic cooperation presupposes reciprocity as its norm. Reciprocity is a social norm of fairness that involves a duty to return favours and the permission to retaliate for injuries. *See* Schedler, *supra* n. 6, p. 252-253. For an elementary exposition, *see* A.W. Gouldner, *For Sociology: Renewal and Critique in Sociology Today* (Basic Books 1973) p. 226-259.

[61]This preference is, as Schedler explains, normatively more sophisticated than a simple application of reciprocity might suggest. While positive reciprocity is about having to return favours, negative reciprocity grants permission to harm those having done harm to oneself. The latter, negative reciprocity is likely to result in a cycle of destruction that disrupts the structure of democratic cooperation. This is the case, in particular, for breaches of fundamental norms of democratic cooperation, such as libellous speech, blackmail, the forging of ballots or vote buying. Meeting such behaviour immediately with behaviour in kind would quickly put an end to a system that is premised in democratic fairness. *See* Schedler, *supra* n. 6, p. 258. Schedler, therefore, rightly suggests that 'democratic reciprocity' needs to rein in the retaliation unleashed by negative reciprocity and to accord priority to the defence and stabilisation of democracy. Hence, sustaining the system loyally requires letting others get away with impunity even if they have committed one or another not too major foul. *See* Schedler, *supra* n. 6, p. 258, p. 261-262 (on the importance of tit for tat, forgiveness and generosity), p. 270, 274.

bluntly, the faithful adherence to the rule of law must be put on display vis-à-vis the people. It is not by accident that regarding the constitution as a norm and linking the pedigree of constitutional law to the first act of a single authority belong together.

Mutual recognition, a preference for order rather than chaos and, possibly, the commitment to legality are conditions for the emergence and continuous existence of constitutional law. This triad is the real rule of recognition[62] of constitutional legal orders.

The relevance of confirmation and contestation by those who possess status implies that the meaning of the constitution emerges from its system *as a whole*.[63] It does not take roots in an order of values awaiting implementation. Indeed, this latter view reflects a rather bureaucratic and apolitical perspective on constitutional law.

Cancel culture

When meanings have emerged, they give rise to routine and can be upheld through appeals to common understandings – precedents, as it were. Such appeals serve as implicit warnings that once an existing equilibrium among political forces becomes upset, the constitutional order will quickly be riven with conflict. The constitutional conventions or settled meanings are nonetheless derivative of the attitudes of the participants of the system. Despite the appearance they are given in judicial expositions of law, they are not 'just there'. They are attitude-dependent. At the same time, in a smoothly working constitutional order this dependence is *masked* by the widespread expectation that precedents ought to be followed. The constitution can become a given by being treated as given.[64]

Agents, however, need to be concerned about their status *qua* purveyors of meanings. Their status is, as adumbrated above, a matter of mutual recognition. The possession of status is, however, a mixed blessing, for it can be met with either support or cancellation. The assertion of constitutional meanings requires coalition-building and reliable backers. Hence, it is important to have allies in order to be able to prevail upon potential dissenters and to bring them on board. Coalition-building is part of the normal predicament faced by member states before the European Court of Justice: if a ruling affects them adversely, it is not likely that other member states will rally to their support and cry out aloud that the ruling was *ultra vires* or in any other form bogus. The reverse side of support is cancellation. If you are a national government, you are likely to find your own

[62]What is said is consistent with Hart's rendering of the 'ultimate rule' of the legal system as a social rule. *See* H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961).

[63]This is also the core message of Vermeule, *supra* n. 36.

[64]*See supra* n. 59.

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appeal to your national constitutional identity (Article 4[2] TEU) of great relevance. If you are the European Court of Justice, you are less so disposed.[65] The supranational court does not listen.

Coalitions and cancellations are a manifestation of the political nature of constitutional law. It prioritises cancellation since invalidation or ignoring a potential stakeholder ultimately creates negative incentives to cooperate. Hence, constitutions create collective power by excluding participants or by offering opportunities to declare certain of their statements or acts as irrelevant. Constitutionalism is essentially like cancel culture.[66] Foreigners have no voice. Elections serve to eliminate parties from the political process. Various legislative procedures, in particular in the European Union, bar from participation some who are believed to be holding a stake on certain issues. Resolutions of one body can be cancelled owing to the veto of another. Decisions of institutions can be overridden. Officeholders can be removed by a vote of no confidence or by manipulating their term limit. Deliberations and negotiation are conducted in the shadow of the ever-looming threat of exclusion (e.g. shift to a different partner) or cancellation (e.g. re-election).

Constitutional interpretation, despite its duplicity (see above), does not rise above the political process. Rather, it is a political process of a second order. Hence, it involves the ability to cancel through the selective use of precedents or overruling; or by declaring certain acts null and void (or by voiding them at the end of procedures). The rampant consequences of this culture are particularly manifest in EU law. The European Court of Justice may find that certain national laws must be disapplied owing to a conflict with EU law or impose interim measures and support them with an order to pay heavy fines.[67] The national

[65]On this asymmetry, *see* D. Fromage and B. de Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives', 27 *European Public Law* (2021) p. 411 at p. 420, 422. *See* ECJ 5 December 2017, Case C-42/17, *M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936.

[66]The classical testament to this elementary feature of constitutionalism is how John Locke deals with people who attack us and governments breaking the law and thereby breaching trust. The first enter in a state of war with us, which means that we can do anything to them, the second 'dissolves' and thus loses its authority. *See* J. Locke, *Two Treatises of Government*, P. Laslett (ed.) (Cambridge University Press 1960) 2nd Treatise, § 16, p. 278, §§ 212, 220, p. 407, 411.

[67]All of these questions have arisen with regard to the operation of the Disciplinary Chamber of the Polish Supreme Court. Art. 19(1) TEU is invoked to support the claim that the independence of the judiciary must be sustained in the member states. Any laws conflicting with this principle must be disapplied, for otherwise the application of Union law in the member states and the system of preliminary references could not be guaranteed. The application of Art. 19(1) TEU is thus extended beyond the scope of application of Union law proper, for it affects the working of the judicial system in general. From the perspective of political morality, one must be sympathetic to this view. At the same time, it could be objected that the stretching of the scope of application of Art. 19(1) might

constitutional tribunal may reply – even if not directly – by saying that the relevant rulings by the European Court of Justice are irrelevant since they are premised on a false teleological interpretation of EU Law[68] – on an absolute primacy of EU law that is inconsistent with the national constitution.[69] The Vice-President of the Court of Justice of the European Union imposes a penalty payment for failure to comply with an interim measure.[70] The national constitutional court rejoins by saying that the European Court of Justice has no power to do so. Nullity is countered with nullity. This is cancel culture in action. It

conflict with, say, Art. 4(2) TEU. This explains why appeals to Art. 19(1) must be trailed with appeals to Art. 2 TEU in order to muster additional support from positive law. A very useful and nuanced discussion of these issues is offered by Spieker, 'Breathing', *supra* n. 7, p. 1203-1205, Spieker, 'Defending', *supra* n. 7, p. 247, 251, who ends up stretching the scope of the more specific Art. 19 by infusing it with the substance of the not directly effective Art. 2. While this is, undoubtedly, imaginative and ingenious, it is not very likely to conquer the hearts and minds of sceptics. *See* P.M. Rodríguez, 'Poland before the Court of Justice: Limitless or Limited Case Law on Article 19 TEU?', 5 *European Papers* (2020) p. 331. One should not be surprised, therefore, to see such a 'stretching' of the scope of Art. 19 challenged by the Polish Constitutional Tribunal. According to Lasek-Markey, *supra* n. 2, the Polish Court argued 'that by deriving a right to examine the organization and structure of a member state's judicial system from Article 19(1) TEU, the Court of Justice of the European Union has essentially granted itself a new competence'.

[68]That was the Constitutional Tribunal's reply to the imposition of penalty payments for interim measures based on Art. 279 TFEU and that such payments could only be imposed based on Art. 260 TFEU. *See* ECJ 17 April 2018, Case C-441/17, *Commission* v *Poland*, ECLI:EU:C:2018:255, paras. 101-102.

[69]The ruling by the Constitutional Tribunal of Poland of 7 October 2021 was preceded by the decision of the Grand Chamber of the ECJ in *A.B. and others*, concerning amendments to the law governing the National Judicial Council, amendments foreclosing avenues of appeal against decisions on the part of the Council not to propose certain persons for judicial appointments. *See* ECJ 2 March 2021, Case C-824/18, *A.B. and others*, ECLI:EU:C:2021:153, para. 33. As Lasek-Markey, *supra* n. 2 reports, the Polish Constitutional Tribunal has since 2005, shortly after Poland's accession, consistently held that EU law is not supreme vis-à-vis Polish constitutional law. In the same judgment, the Tribunal also found no incompatibility of Arts. 1, 2 and 19 TEU with Polish constitutional law, an incompatibility that it began to assert strongly in the judgment of 2021. The Tribunal was, however, smart enough to present its change of opinion as a pushback against the 'competence creep' of the Union through the instrumentality of the ECJ. And, arguably, with respect to Art. 19 TEU and the use of interim measures, the Tribunal may even have a point. But should this even matter when important political values are at stake?

[70]*See*, for example, Order of the Vice-President of the Court in Order of 27 October 2021, Case C-204/21 R, *Commission* v *Poland*, ECLI:EU:C:2021:878, para. 57. Apparently, the European Commission has resolved to subtract penalties from the payments that member states are eligible to receive from the structural cohesion fund. The legality of this move has been doubted. *See* B. Finke and K. M. Beisel, 'Wie die EU Polens Strafgelder eintreiben will', *Süddeutsche Zeitung*, 18 January 2022, https://www.sueddeutsche.de/politik/eu-polen-eugh-zwangsgelder-kommission-1.5509573, visited 9 February 2024. *See also* M. Klamert, 'Die Durchsetzung finanzieller Sanktionen gegenüber den Mitgliedstaaten', *Europarecht* (2018) p. 159 at p. 170-172.

can grow to amazing proportions. Kim Scheppele proposed that a new majority in Hungary not just disapply parts of the Fundamental Law that are inconsistent with Union law and European human rights law precedents, but that questionable appointments of justices of late be disregarded.[71] This is, in a sense, cancel culture on steroids. On the other side of the ideological spectrum, Poland seems to be playing this game very well. Apparently, no fines have been paid for its non-compliance with interim measures,[72] and the respective complaints by the Commission are met, again, by denying EU law its primacy.[73]

The constitutional cancel culture reaches its most fundamental level when it concerns the expulsion of a whole group – be it a social class, a region or a country – from the political body. The relevant instrument, however, needs to make this an option.

This is a matter to which I would like to return in my concluding remarks.

Elementary cancellations

At its most elementary level, the cancel culture of constitutional law operates by either voiding norms or eliminating those who possess status. Substantive meanings and agents are merely two sides of the same coin. Entrenched norms are a means to sustain presence even if one is no longer part of the legislative assembly.[74]

[71] *See* K.L. Scheppele, 'Escaping Orbán's Constitutional Prison', *Verfassungsblog*, 21 December 2021, https://verfassungsblog.de/escaping-orbans-constitutional-prison/, visited 9 February 2024.

[72] *See Commission* v *Poland*, *supra* n. 70, para. 64. *See also* M. Pronczuk, 'Europe Cuts Payments to Poland in Court Dispute over Mine', *New York Times,* 8 February 2022, https://www.nytimes.com/2022/02/08/world/europe/eu-poland-fine.html, visited 9 February 2024. In fact, using Art. 279 TFEU to impose interim measures is one thing; using it again, however, in order to impose a fine for non-compliance with interim measures may come across as a bit cheeky. Why not base the withholding of disbursement of funds on it? Why not next order the invasion of Poland by joint European military forces, possibly with the participation of German soldiers? The position taken by the ECJ in its Order of 20 November 2017, Case C-441/17 R, *Commission* v *Poland*, ECLI:EU:C:2017:877, para. 97, suggests that the Court is indeed of the opinion that it has the power to adopt all interim measures that it considers necessary to secure the effectiveness of the (pending) final decision.

[73] Lasek-Markey, *supra* n. 2. *See also* L. Gall, 'Polen untergräbt Justiz auf nationaler und europäischer Ebene', *Human Rights Watch,* 16 July 2021, https://www.hrw.org/de/news/2021/07/16/polen-untergraebt-justiz-auf-nationaler-und-europaeischer-ebene, visited 9 February 2024. On 15 February 2023, the Commission again decided to refer Poland to the ECJ for violations of EU law by its constitutional tribunal. *See* N. Camut, 'European Commission Sues Poland over EU Law Violations by Top Court', *Politico*, 15 February 2023, https://www.politico.eu/article/rule-of-law-law-and-justice-pis-party-european-commission-takes-poland-to-court-over-eu-law-violations/, visited 9 February 2024.

[74] *See* S. Holmes, 'Precommitment and the Paradox of Democracy', in his *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago University Press 1995) p. 134-177.

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This simple duality reveals that constitutions are composed of two elements. First, they establish principles that participating groups are expected to accept. Such principles are supposed to limit the scope of those reasonable disagreements which may legitimately unfold within the political process. Second, constitutions admit certain groups as active participants and exclude others. The widespread disenfranchisement of foreigners or of criminal convicts is a paradigmatic example. From this it follows that constitutions can be attuned to their elements by either adjusting principles to groups or by selecting groups depending on whether they are amenable to principles.[75]

The two basic elements, then, indicate what – at any rate, from an Aristotelian perspective[76] – the basic problem is that constitutions are designed to solve. Groups should be capable of interacting in a manner that, even if not conducive to the common good, at least sustains the loyalty of those suffering defeat in the political process. What defection may look like became obvious on 6 January 2021, when in a joint session of Congress the electoral victory of Joe Biden was to be acknowledged. This could have been the beginning of the end of the American Republic.[77]

If those who were defeated do in fact lack loyalty, it is essential to disempower them effectively.

Liberal exclusion

The EU is a creature of modern liberalism. Article 2 TEU is an impressive testament to it.[78] On the level of the cancel culture that liberal societies establish

[75]Not by accident, the Copenhagen criteria, relevant for accession, play a role in the genealogy of Art. 2 TEU. *See* M. Klamert and D. Kochenov, Article 2 TEU (manuscript on file with the author) p. 1. *See also* R. Janse, 'Is the European Commission a Credible Guardian in the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement', 17 *I.CON* (2019) p. 43.

[76]*See* Aristotle, *Politics*, S. Everson (ed.) (Cambridge University Press 1996) 1281 b 25-30, 1296 a 9-14.

[77]The German political scientist Philip Manow has recently pointed out that the viability of democracy depends essentially on the acceptance of electoral defeat by the defeated party: *see* P. Manow, (*Ent-)Demokratisierung der Demokratie: Ein Essay* (Suhrkamp 2020) p. 142, 170.

[78]*See* A. von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022) p. 158-162. Art. 2 TEU reads as follows: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' For a more cautionary perspective on Art. 2, *see* recently J. Scholtes, 'Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2 TEU', *19 European Law Review* (2023) p. 59.

in their constitutional law, they endorse an inclusive mode of exclusion. It is manifest in a set of preferences.

Liberal constitutional systems eliminate norms rather than persons. It would not occur to a liberal society to have those who have voted in favour of unconstitutional laws lose their seat in the representative assembly.

Where the elimination of persons seems unavoidable, there is a clear preference for ousting individuals rather than banning whole groups.

And if groups need to be barred from participation, such as the national socialists, this affects the conduct of their members only and never their mere presence. Liberal societies do not relocate their Nazis to camps on forlorn islands; nor do they put them to death. Nazis and other insufferable people may remain in our midst so long as they keep a low profile.

Liberal societies prefer regulating conduct to forcing people to adopt proper attitudes. Therefore, even egregious extremists enjoy freedom of conscience. What is more, liberal societies often demonstrate much patience with 'sovereign citizens'.

No federal execution

But even liberal societies have to bite the bullet at times and to exclude on a larger scale. The need to crush those lacking loyalty to a federal system explains why such systems, even if they are based on international agreements, often admit of some version of 'federal execution'. Even the German Federation of 1815 recognised this instrument.[79] If a government infringed the federal constitution, for example, by failing to oppress democratic forces, the federation could intervene even by military means and take over control exercised by a federal commissioner. While today replacing the Polish government with such a commissioner would resolve the conflict with the Union, introducing such a regime is not an option in the EU. Nobody can seriously support another military invasion of Poland (in particular not if one is German).

Yet, if we cannot either elicit loyalty or contain and defeat the opposition, there is no constitution. There is just a huge mess. The euphemism for this mess goes by the name of 'constitutional pluralism'.[80] Pluralism may be intellectually titillating

[79] *See* Artikel 31 of the Final Act of Vienna and the Regulation on Federal Execution (Exekutionsordnung) of 1820. For a brief introduction, *see* S. Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) p. 153-156.

[80] From the rich literature I would like to mention an article that defends constitutional pluralism in the face of the type of conflicts addressed here. *See* M. Avbelj, 'Constitutional Pluralism and Authoritarianism', 21 *German Law Journal* (2022) p.1023 at p. 1027-1028 (linking constitutional pluralism to pluralism in general and viewing pluralism as a condition for respecting human

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so long as it concerns the Federal Constitutional Court and its assessment of Treaty amendments or of how the European Court of Justice reviews measures adopted by the European Central Bank.[81] It loses its charm, however, once it affects judicial independence.

Scholars sometimes claim that the unavailability of coercive enforcement underscores the legal nature of the EU. At the end of the day, compliance is a voluntary affair.[82] For a description of a *legal* community, this sounds a bit odd.[83]

Concededly, withholding of funds pursuant to the Conditionality Regulation[84] or, what appears to be the more feasible option, based on Article 8 of the Regulation governing the Recovery and Resilience Facility[85] may serve as a means to exercise pressure. Immediately after its adoption the Conditionality Regulation was not to be used, and the Council promised to stand still until the European Court of Justice

autonomy). For a view that is based on the sensibilities of political constitutionalism, *see* O. Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', 11 *Hague Journal on the Rule of Law* (2019) p. 133.

[81]*See* A. Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank', 5 *European Papers* (2020) p. 671 at p. 678-679. The German PPSP (Public Sector Purchase Program) decision by the Federal Constitutional Court declared as *ultra vires* and hence void both a decision by the European Central Bank and the finding by the ECJ that provided this decision legally with a clean Bill of Health. The German Court objected to how deferentially the proportionality principle was applied by its European partner institution (BVerfG, Urteil des Zweiten Senats vom 5 May 2020, 2 BvR 859/15, paras. 112, 163). As always, the concern in the background has been whether the European Central Bank tacitly pursued economic rather than monetary policy. The matter was, however, resolved courteously. Not only did the Federal Constitutional Court grant the Bank a three-month grace period in order to elaborate further the justification underlying its decision, the infringement proceedings initiated against Germany by the Commission were laid to rest after the German government submitted a profession of faith in the primacy of EU law. *See* European Commission, Infringement decisions, INF/21/6201, 2 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201, visited 9 February 2024.

[82]*See* F. Mayer, 'Polen, die EU und das Ende der Welt wie wir sie kennen: ein Interview mit Franz Mayer', *Verfassungsblog*, 26 January 2020, https://verfassungsblog.de/polen-die-eu-und-das-ende-der-welt-wie-wir-sie-kennen-ein-interview-mit-franz-mayer/, visited 9 February 2024.

[83]I concede that Anglo-American legal positivists have delinked law from coercion by regarding the use of coercive force as not a necessary condition for the existence of legal systems. For a powerful critique, *see* C. Kletzer, *The Idea of a Pure Theory of Law* (Hart Publishing 2018).

[84]Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433 I/1. For a first decision, *see* Council of the EU, Press release, 12 December 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/, visited 9 February 2024.

[85]*See* Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility OJ L 57, 18 February 2021, 17–75. Art. 8 of this regulation refers to the Conditionality Regulation.

ruled on its validity.[86] After Advocate General Manuel Campos Sánches-Bordona issued an Opinion on 2 December 2021,[87] in which he dismissed out of hand the challenge posed by the Hungarian and the Polish governments, the Court has handed down its judgment on 16 February 2022. Quite unsurprisingly, it agreed with the Advocate General that the mechanism was adopted by using the appropriate legal base and was compatible with Article 7 TEU.[88] The Court considers it also impeccable in other challenged respects, in particular regarding the challenge to legal certainty. Apparently, the Court did not shy away from appealing to 'the basics', namely to the values enshrined in Article 2 TEU, thereby attributing particular significance not only to the rule of law, but also to solidarity and mutual trust among the member states.[89] The Court also makes clear that Article 7 TEU sweeps much more broadly than the Conditionality Regulation, which is merely intended to protect the Union's budget and is applicable to breaches of the rule of law (and not to other values). While questions of this kind can scarcely ever be resolved by compelling arguments, Madison would have been pleased to see how the ambition to sustain a coherent understanding of the rule of law among the members of a federation has prevailed over the countervailing ambition to hold the judiciary on the tight leash of the government by invoking a particular 'national' understanding of that principle.

Nevertheless, pursuant to the Conditionality Regulation, the potential suspension of disbursements is conditional on the fact that breaches of the principles of the rule of law in a member state affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way (Article 4 *leg. cit.*). Owing to this

[86]*See* J. de Zwaan, 'The European Union and the Rule of Law: A New Instrument', *Netherlands Helsinki Committee*, 22 December 2020, https://www.nhc.nl/the-european-union-and-the-rule-of-law-a-new-instrument/, visited 9 February 2024. Pursuant to Art. 6(10) of the Regulation the Council shall adopt an implementing decision that is prepared by the Commission.

[87]Opinion of 2 December 2021, Case C-156/21, *Hungary* v *European Parliament and Council of the European Union*, ECLI:EU:C:2021:974, para. 338 and Opinion of 2 December 2021, Case C-157/21, *Republic of Poland* v *European Parliament and Council of the European Union*, ECLI:EU:C:2021:978, para. 127. One of the charges was that Art. 322(1) TFEU was the false legal basis, for this provision provides the Union only with competence to set financial rules establishing and implementing the Union budget. This legal basis did not extend to introduce sanctions of the Union budgets (para. 124 in C-156/21). Then the issue was raised whether this sanctioning mechanism would undermine the political sanction mechanism for systemic breaches, namely Art. 7 TEU (para. 205 in C-156/21). Other issues concerned equality (use of qualified majority voting to the detriment of smaller member states), national identity (are they not entitled to their own understanding of the rule of law?) and legal certainty.

[88]ECJ 16 February 2022, Case C-156/21, *Hungary* v *European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para. 197.

[89]Ibid., para. 125.

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link between offences to the rule of law and financial management, it seems that only a limited number of breaches of Article 2 TEU might trigger the application of the Conditionality Regulation.[90] These potential obstacles notwithstanding, on 12 December 2022, the Council of the EU decided to suspend approximately €6.3 billion in budgetary commitments vis-à-vis Hungary.[91]

If the defecting members can still not be silenced or contained, the only alternative that is left within the context of a constitutional cancel culture is to show them the door. This should not, of course, be done for light and transient causes. But if it turns out that, even after a number of attempts have been made, a change of attitude cannot be brought about by means of national elections, then the member state ought to be kicked out of the Union.

Exit negotiations

This raises the question whether there is a lacuna in the Treaties regarding the initiation of exit talks with member states. Article 50 TEU leaves the choice to initiate exit proceedings to the member states. The use of the no longer so 'nuclear' Article 7 TEU[92] may only result in the withdrawal of voting rights in the Council as the most severe sanction (this is what the wording seems to suggest). This indicates strongly that the Treaty anticipates that backsliding will amount to a mere temporary aberration. Indeed, considering that any rational government of a member state would choose to leave the Union if it found itself permanently disenfranchised in the Council, it seems as though the Treaty framework does not leave a gap, but is, on the contrary, rather coherent. And since Article 7 TEU can be used only to 'suspend' voting rights, ending the membership is out of reach for this procedure.

Using Article 352 TFEU in order to fill a lacuna in order to 'adopt an act necessary to attain objectives laid down by the treaties, when the necessary powers of action are not provided by the treaties' would be a bit of a stretch, to say the least. Not only would the unanimity requirement in the Treaty have to be modified in light of Article 7 TEU and 354 TFEU, which excludes the vote of the affected member state,[93] one would also have to sort out the relation between Article 48 TEU (governing Treaty amendments) and Article 352 TFEU in such a

[90]Due to corruption concerns Hungary is the first country to face suspension of funding from the Union's budget. *See* Council Decision 2022/2506 of 15 December 2022.

[91]*See* Council of the EU, Press release, *supra* n. 84.

[92]The procedures initiated by Commission and Parliament against Hungary and Poland appear to be currently stalled in the Council. *See* the concerns expressed by the European Parliament in its resolution of 5 May 2022 on ongoing hearings under Art. 7(1) TEU regarding Poland and Hungary (2022/2647(RSP)).

[93]Amazingly, the affected member states participate in the vote in the Council when the withholding of funds is at stake pursuant to the conditionality regulation. *See* P. Leitner and J. Zöchling, 'The Rule of

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fundamental matter. Even though EU law is a field where much can be done by means of legal alchemy,[94] it would be rather bold to suggest that a provision that is explicitly restricted to the 'policies defined by the treaties' may be used to amend effectively the TEU.

The inability on the part of the Union to use existing Treaty law in order to expel a defiant member state does not, however, alter the fact that if the Union fails to sustain constitutional discipline, it is likely to end up being mired in skirmishes with all kinds of member states invoking their national constitutional identity.[95] The Union would be weakened into a Europe *à la carte* and Ferguson's prediction would be proven right that the long-term relevance of the Union might be similar to that of international organisations on the level of the Organization for Economic Cooperation and Development.[96]

In the face of this prospect, one should not dismiss out of hand a recourse to Article 60(2)(a)(i) of the Vienna Convention on the Law of Treaties.[97] It permits other parties to a multilateral treaty by unanimous agreement to suspend or to terminate its operation vis-à-vis a party committing a 'material' treaty breach. As Article 60(3)(b) explains, such a breach may consist of 'violation of a provision essential to the accomplishment of the object or purpose of the treaty'. Since Article 3 TEU explicitly embraces the realisation of the values of Article 2 as an aim of the Union, the member states may want to rely on public international law in order to 'expel' a defaulting party, not least because Article 60(2)(a)(i) makes it possible to sustain the operation of the treaty among themselves.[98]

The return of the people

There is another important lesson to be learned for constitutional law from the encounter with illiberal democracies. So far, the world of contemporary European constitutional law has been built basically against the people. The post-war European attitude towards constitution-making – much to the chagrin of Jed Rubenfeld – was based on the view that a constitution is made for the people and

Law Conditionality Regulation and the Elephant in the Room', *Verfassungsblog*, 7 November 2022, https://verfassungsblog.de/with-or-without-hungary/, visited 9 February 2024.

[94]For example, by means of a 'mutual amplification' of provisions. *See* Spieker, 'Defending', *supra* n. 7, p. 247.

[95]*See* the analyses by Scholtes *supra* n. 58.

[96]*See* N. Ferguson, *Colossus: The Price of America's Empire* (Penguin Press 2004) p. 256.

[97]*See* 1155 UNTS 331.

[98]For a discussion of this option, *see* B. Blagoev, 'Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality', 16 *Tilburg Law Review* (2011) p. 191 at p. 228-231.

not by them.[99] It must be the work of experts, carried out with an eye to containing unruly popular forces.[100]

The current situation in backsliding states such as Hungary explains why European constitutional law needs to reconsider its attitude toward the people. The people must eliminate obnoxious governments and they are needed in their capacity as the ultimate political subject, that is, as those exercising the constituent power.[101] I have mentioned that Scheppele has come up with an amazingly complex construction of how precedent can be used in order to set aside the Hungarian fundamental law, cardinal laws and to ignore recent judicial appointments.[102] It is clear, however, that these ideas would have to be implemented by a parliamentary majority. Since the implementation of such a lofty juridical construct would be met with much opposition by a still sizeable segment of Fidesz supporters, Halmai's[103] and Sajó's[104] proposals – made, however, before the last election in 2022 – seem to make more sense, at any rate from an entirely pragmatic perspective. Whatever will be done by the majority will be regarded as revolution by the minority. So why not declare it a revolution and open the process of reorganisation to a wider group of participants?

European constitutionalism has so far done everything to eliminate the people and stay away from popular sovereignty. The lack of *Bundesexekution* demonstrates why the people may be ever more necessary than before.

Obviously, the last word goes to John Locke, or rather, to the Almighty. The final act to save the rule of law can, for asserting its rightfulness, only appeal to the ultimate umpire who resides in heaven.[105] After people have said their prayers, they are free to resist.

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[99] *See* J. Rubenfeld, 'Unilateralism and Constitutionalism', 79 *New York University Law Review* (2004) p. 1971.

[100] *See also* B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019) p. 6-7.

[101] For a possibly too pessimistic perspective on this prospect, *see* Drinózi and Bień-Kacala, *supra* n. 19, p. 1142.

[102] *See supra* n. 71.

[103] *See* Halmai, *supra* n. 24.

[104] A. Sajó, 'Is There Constitutional Resurrection for Hungary?', *Verfassungsblog*, 9 December 2021, https://verfassungsblog.de/la-legalite-nous-tue/, visited 9 February 2024.

[105] *See* Locke, *supra* n. 66, at § 242, p. 427.

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