University Library



A gateway to Melbourne's research publications

Minerva Access is the Institutional Repository of The University of Melbourne

Author/s:
Stone, A

Title:
A Defence of Scholarly Activism

Date:
2023-12-01

Citation:
Stone, A. (2023). A Defence of Scholarly Activism. Constitutional Court Review, 13 (1), pp.1-15. https://doi.org/10.2989/ccr.2023.0002.

Persistent Link:
https://hdl.handle.net/11343/345669

License:
CC BY

Constitutional Court Review 2023
Volume 13, 1–15
https://doi.org/10.2989/CCR.2023.0002

© The Authors
Open Access article distributed in terms of the
Creative Commons Attribution License [CC BY 4.0]

A Defence of Scholarly Activism

ADRIENNE STONE

ABSTRACT: This article offers a defence of 'activism' by constitutional scholars in the face of critiques that cast activist scholarship as unscholarly or subject to systemic distorting pressures. It seeks, first, to frame the inquiry as one about 'role morality', which is in turn closely related to the nature of academic inquiry in law. Second, relying upon a plural notion of the nature of academic inquiry within law, it shows that scholarly activism poses no special challenge to scholarly integrity. Finally, the article argues that an activist motivation has plausible epistemic benefits for scholarship that critics of scholar-activists overlook.

KEYWORDS: academic freedom, constitutional scholars, universities

AUTHOR: Melbourne Laureate Professor, University of Melbourne, Australia
Email: a.stone@unimelb.edu.au ORCiD: 0000-0003-3981-8208

ACKNOWLEDGEMENTS: This article draws on earlier work published in a blog post, 'A Defence of Scholactivism' *Verfassungsblog* (22 August 2022, available at https://verfassungsblog.de/a-defence-of-scholactivism) and a monograph, *Open Minds: Academic Freedom and Freedom of Speech* with Carolyn Evans (2021). It benefitted from discussions with participants in the *VerfBlog* debate symposium, with colleagues in the Centre for Comparative Constitutional Studies reading group in Melbourne in November 2022, and with participants in a workshop convened by the *Constitutional Court Review* in Johannesburg in December 2022. I am especially grateful to Thomas Bustamente, Patrick Emerton and Lulu Weis for detailed comments on earlier drafts and to Michael Foran and Khomotso Moshikaro for their thoughtful commentary. The work was generously supported by the Australian Research Council through a Discovery Grant and an Australian Laureate Fellowship.

I INTRODUCTION

What are scholars' obligations with respect to the way they perform scholarly work? And what are the risks and tensions that arise when scholars also pursue specific social, political or legal outcomes either in their academic work or in other forms of activity? These questions seem to have arisen particularly often recently, and with particular force, among scholars of constitutional law.[1] This flurry of interest and controversy reflects, no doubt, our turbulent times. As constitutionalism falters globally, it is not surprising that scholars are more and more involved in the politics that surround it, and that in turn the academy is reflecting upon this activity with a critical eye.

A number of sceptical accounts have emerged that raise worries about scholars who are also 'activists',[2] especially if they pursue their activism through scholarly work. Scholars writing in this critical vein have proposed ethical limitations on scholars ranging from a strict duty of neutrality, to a duty to separate the scholar's 'activism' from their scholarship, to contributions that aim to emphasise the importance of scholarly independence and self-awareness.

This article enters this debate for three purposes. First, it seeks to lend some clarity to the debate by framing the inquiry as one about 'role morality' and as intimately related to understandings of the nature of academic inquiry in law, which are both contested and vary across traditions. Second, relying upon a plural notion of the nature of academic inquiry within law, it defends scholars who are engaged in or motivated by activism, including through their scholarship, showing that scholarly activism poses no special challenge to scholarly integrity. Finally, the article will argue that an activist motivation plausibly has epistemic benefits for scholarship that critics of scholar-activists overlook and advances an integrated account of the relationship between scholarship and activism.

I will begin by situating the debate about scholarly activism within a wider set of ideas about role morality: that is, the obligations that follow from the occupation of a 'role', where 'role' refers to 'a social position' that any number of people might take up and includes occupational roles.[3]

II STARTING POINTS

A Scholars and role morality

Who exactly is a 'scholar'? The answer is not obvious. Given the precarious nature of much academic employment and for other reasons as well, individuals may slip in and out

[1] Recent interventions have come from Liora Lazarus 'Constitutional Scholars as Constitutional Actors' (2020) 48 *Federal Law Review* 483; Tarunabh Khaitan 'On Scholactivism in Constitutional Studies: Skeptical Thoughts' (2022) 20 *International Journal of Constitutional Law* 547; Jan Komárek 'Freedom and Power of European Constitutional Scholarship' (2021) 17(3) *European Constitutional Law Review* 422–441. Shorter contributions have come from András Jakab 'Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country' *VerfBlog* (15 July 2020), available at https://verfassungsblog.de/moral-dilemmas-of-teaching-constitutional-law-in-an-autocratizing-country/, with a reply by Wojciech Sadurski 'Are These "Moral Dilemmas" Real?: A Response to András Jakab' *VerfBlog* (16 July 2020), available at https://verfassungsblog.de/are-these-moral-dilemmas-real/, and a Verfassungsblog Debate Symposium exploring Khaitan's editorial, available at https://verfassungsblog.de/category/debates/scholactivism-debates/.

[2] As defined in the text accompanying nn 11–16 below.

[3] Tim Dare & Christine Swanton (eds) *Perspectives in Role Ethics: Virtues, Reasons, and Obligation* (2019) 12. See also Michael Hardimon 'Roles Obligations' (1994) 91 *The Journal of Philosophy* 333, 334 (roles are 'constellations of institutionally specified rights and duties organized around an institutionally specified social function').

of academia or combine an academic appointment with other types of employment and professional activity. However, there is at least a clear paradigmatic case. A professor or other academic at a research institution who undertakes discipline-based research is certainly a scholar and this idea forms the starting point for my analysis of scholarly ethics.[4] To put the point more generally, 'scholars' pursue 'academic inquiry' as a central vocational purpose and do so in an institutional context that accords them academic freedom.[5] The pursuit of academic inquiry with the benefits of academic freedom distinguishes scholars from others who work in universities and from those who engage in discipline-based research in other contexts (such as think tanks and governmental bodies).[6]

Moving then to the idea of 'role morality', the inquiry is into the obligations that this role confers on its occupants. There is a rich philosophical literature on role morality and its relationship to ordinary morality,[7] but for the purposes of this article let me state some premises. First, a premise of this article is that the role of a scholar gives rise to 'role obligations … whose content is fixed by the function of the role, and whose normative force flows from the role'.[8] Second, on this analysis, the obligations of a scholar are, at least in part, determined by *the justification for the institutional role of a scholar* and specifically the justification for privileges of academic freedom and institutional autonomy that are conferred on scholars and universities as institutions.[9] For this reason, the central obligation of scholars is to pursue and disseminate knowledge through academic inquiry, which in turn requires that scholars pursue knowledge in accordance with and having regard to academic disciplines.[10]

Of course, this does not mean that all of scholars' efforts must be devoted to academic inquiry, but it does mean that they are obliged to act in ways that are *consistent* with the role of scholar. Therefore, if scholars are also to be 'activists' that activity should be conducive to, or at least not interfere with or undermine, this central activity.

---

4 Taking this as my paradigmatic case means that my argument does not extend to scholars operating outside the university context who do not enjoy the benefits of academic freedom.

5 Academic freedom is a claim that academics personally, and some others engaged in academic inquiry, are entitled to certain freedoms and privileges not enjoyed by all employees of the university nor accorded to other professional enterprises. As commonly understood, the core activities to which academic freedom applies are research, publication and teaching. Carolyn Evans & Adrienne Stone *Open Minds: Academic Freedom and Freedom of Speech* (2021) 85–90.

6 On the difference between universities and other research institutions see Evans & Stone (note 5 above) at 80.

7 Among the debates pursued in this literature are disagreements between those who consider roles to be a 'foundational' source of moral obligations and those who consider role morality to be derived from, or otherwise related to, ordinary morality. Dare 'Introduction' and Dare 'Roles All the Way Down' in Dare & Swanton (note 3 above).

8 As Michael Hardimon usefully puts it, a 'role obligation' is a moral requirement, which attaches to an institutional role, whose content is fixed by the function of the role, and whose normative force flows from the role. Hardimon (note 3 above) at 334.

9 In this sense, I accept that the role of a scholar is not necessarily a foundational source of moral obligations but derives from the moral justifications for recognising and supporting scholarly activity. This position leaves open the possibility that ordinary morality might override the role of a scholar at critical times. Questions of this nature have been extensively explored in relation to professional morality arising from circumstances in which a professional obligation (such as a lawyer's duty to represent the guilty or a doctor's duty to treat an evil wrongdoer) might be seen to be contrary to ordinary morality. On lawyers, see David Luban *Lawyers and Justice: An Ethical Study* (1988).

10 Including both interdisciplinary work and work that challenges disciplinary boundaries.

B Scholarly activism

My last remark brings me to a second concept worth considering before launching into this debate: 'activism' and specifically 'scholarly activism' (sometimes abbreviated to scholactivism[11]). These terms have floated around this debate without much explanation and there is a danger that, much like 'judicial activism', they become 'not a description but a denunciation'[12] used to express disapproval, based on rather opaque premises.[13]

'Activism', in ordinary English, it is usually taken to refer to activity undertaken to achieve a social and political outcome of some kind. It often refers to strong or vigorous action or campaigning commonly in response to a strong commitment to *change*,[14] though the concept also covers 'conservative' or 'reactionary' activism that seeks to prevent or reverse such changes.

For legal scholars, activism might consist of activities like advising or lobbying government, engaging in litigation as an advocate, the provision of advice to advocates, preparing and submitting legal briefs, letter writing or other forms of protest. Finally, and a particular focus of this article, activism might be pursued through scholarship that advocates for and justifies a specific social, political or legal change or which challenges the status quo by undermining or discrediting justifications for existing states of affairs. Equally, activist scholarship of a more conservative kind might defend and justify some aspect of the status quo or seek to undermine or discredit arguments for change. So, for the purposes of this article 'scholarly activism' is activism engaged in by a scholar *as a scholar*,[15] rather than in a private and non-scholarly capacity.[16] The term covers a range of activities, but crucially includes activism through the medium of scholarship.

III SCHOLARS AND ACTIVISM: THE ARGUMENTS

Among those who have recently written against scholarly activism, there is considerable variation in reasoning and in the scope and strength of the objection. The principal contributions can be arranged along a spectrum. Among those most sceptical of activist scholars is András Jakab, who draws a sharp distinction between scholarly and non-scholarly roles. In considering the scholar in an autocratising country, he posits that one response is to 'join the fight', to criticise government openly, join a political party or demonstrations but 'by doing so, however, you are leaving the role of a constitutional scholar … In order to fulfil this function, constitutional lawyers (constitutional scholars) should behave in a manner that is compatible with being (and looking like being) above everyday party political.'[17]

[11] Including, I regret, by me. See Adrienne Stone 'A Defence of Scholactivism' *VerfBlog* (22 August 2022), available at https://verfassungsblog.de/a-defence-of-scholactivism.

[12] Tanja Josev *The Campaign Against the Courts: A History of the Judicial Activism Debate* (2017) 1.

[13] On the origin and development of the 'judicial activism' in debates about the judicial role, see Josev (note 12 above).

[14] *Oxford English Dictionary* (3rd Ed, 2010).

[15] Noting that the conception of scholar on which I rely is of a scholar within a research institution who is accorded the benefits of academic freedom. See note 4 above and the accompanying text.

[16] There is a clear conceptual distinction (not always easy to apply in practice) between doing these activities as a private citizen and doing them as a scholar. To count as 'scholarly activism', for the purpose of this article, the activity should be plausibly related to their position as scholars (whether by the scholar identifying themselves as a scholar, because of the reliance upon scholarly expertise, or for some other reason).

[17] András Jakab 'Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country' *VerfBlog* (15 July 2020), available at https://verfassungsblog.de/moral-dilemmas-of-teaching-constitutional-law-in-an-autocratizing-country/.

Although the distinction is sharply drawn, Jakab's concern is specified in two ways. First, he objects to activism *per se* rather than only activism through scholarship and, second, he is addressing his argument to scholars in an autocratising society. However, his conclusions appear generalisable. The inconsistency he sees between the scholar and the activist arises from two features of the scholarly role. First, as he sees it, 'one of the key functions of constitutional law is the softening of political conflicts (i.e., integration, peaceful conflict resolution etc)'[18] and second, his conception of 'a scholar's task' is as the 'teaching of conceptual-doctrinal legal analysis'. Both these purposes are jeopardised by the open pursuit of activist ends. The point seems to be that a scholar who pursues specific social or political change thereby abandons conceptual-doctrinal work and becomes part of the cut and thrust of politics in which conflicts are intensified. He concludes: 'A constitutional law scholar who openly acts like a party politician (either on the side of the government, or on the side of the opposition) is a self-contradiction.'

A cognate view is put by Jan Komerek whose disapproval of political activism by academics is, if anything, even stronger and extends to activism through scholarship. He sets out a strong view of neutrality for constitutional scholars maintaining, for instance, that:

> It is clear that academics cannot say whatever they want, if they want to enjoy the protection of academic freedom. As 'ordinary citizens' they can speak up as much as they deem necessary – but … they should always consider the implications of their free speech for the academic freedom of their colleagues. When teaching, they must remain as nonpartisan as possible and not advocate what they believe to be 'the right thing'.[19]

Among the activities that he singles out for criticism are the signing of letters in support of Wojciech Sadurski during the period in which Sadurski was persecuted in a series of legal actions brought by the Polish government and closely associated entities, and a joint statement issued by a group of predominantly German academics criticising a decision of the German Constitutional Court.

More recently, Tarunabh Khaitan has put a third, and less rigid, position. Khaitan is explicit that he does not think it is possible (much less desirable) for scholars to work with anything approximating a 'neutral' position. On the contrary, it is precisely because of the inevitability that scholarship is inflected with the values and political commitment of the scholar that he counsels such caution.

Nor does he eschew the activist scholar. Rather Khaitan envisages that a scholar can move between scholarly and activist modes. He differentiates three stages. At the beginning of a research project, when a scholar selects a topic for research, he accepts that a scholar may have

[18] This part of the argument sounds especially odd to Anglo-American ears, for whom a more conventional account has it that scholarship is primarily oriented to pursuing the advancement and dissemination of knowledge and a scholar may do so (and may even have an obligation to do so) whether or not this serves to 'soften' political conflict. It is more explicable in the light of Von Bogdandy's description of the evolution of public law in Europe 'as a way of dealing with struggles that religion, civil law, and political philosophy could not subdue sufficiently'. Armin von Bogdandy 'The Past and Promise of Doctrinal Constructivism' (2009) *International Journal of Constitutional Law* 364, 369. For the most part I set this argument aside. This idea does not dominate modern understandings of public law's purpose (as opposed perhaps to its incipient ideology) at least in all places. For an especially vivid contrast, consider the idea of a *transformative* constitutional law, pioneered by South African scholars but by no means limited to South Africa. Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146 (1998). In any event, it is not widely relied upon in the debate about scholarly activism nor do I think that it predominates either in Europe or elsewhere.

[19] Komárek (note 3 above) at 435.

an activist motivation towards the achievement of specific material outcomes in the world. Equally, once the research is complete, a scholar may return to an activist mode with a range of other activities that are designed to translate and disseminate the research to the wider world and into policy debates and legal briefs. Indeed, Khaitan's own academic career has involved considerable activism of this kind.

However, in the middle stage – undertaking research and writing on selected research topics – Khaitan counsels that the activist must retreat to allow scholarly inquiry 'with a deep commitment to intellectual virtues shaped solely by the goal of knowledge creation'.[20] During this stage, the role morality of a scholar requires her not to engage in scholarly work with 'a motivation to directly pursue specific material outcomes (i.e. outcomes that are more than merely discursive)'.

The idea of a 'specific non-discursive outcome' is not further defined but judging from the illustration provided – concerning a scholar who advocates for a parliament to take steps to ensure the immunity of a particular statute from constitutional judicial review[21] – it refers to the pursuit of specific social, political or legal change in the world, rather than only progress in understanding. The focus on 'motivation' suggests that Khaitan is principally interested in the internal mental state of the scholar. The problem lies not in the act of advocating for specific social, political or legal change whether through scholarship or otherwise, but rather in undertaking scholarly work with a motivation to pursue such change. Where this improper motivation is in play, Khaitan maintains there is a risk that academic work will produce unforeseen and undesirable effects while simultaneously undermining scholarly values like perspective, revisability and scepticism, and playing into distorting and unhealthy dynamics of academic celebrity.

Thus, for Khaitan the problem with 'activist' research does not lie in some conceptual distinction between legal research (or academic inquiry) on the one hand and the pursuit of 'activist' goals on the other. Rather, he is concerned that approaching scholarly work with an activist motivation compromises research integrity and poses systemic risks to the health of the academy.

IV ACADEMIC INQUIRY AND LEGAL SCHOLARSHIP

Underlying these arguments are differing conceptions of both academic inquiry and, more specifically, of the nature of legal scholarship. Some arguments against scholarly activism are driven by a non-instrumentalist account of academic inquiry. This feature is especially evident in Komárek's argument. As he would have it, the pursuit of knowledge should be valued for its own sake. A scholar who pursues other goals – even lofty ideas like 'freedom, democracy or civic virtues' – risks devaluing academic inquiry as merely instrumental to other goals. An instrumental account 'protects academia only to the extent to which it serves such external values and interests. It seems to be the prevailing approach now, despite the fact that universities (and researchers in certain fields, particularly in arts and humanities) find it hard to justify their existence in such instrumental terms'.[22]

Other aspects of these arguments are premised on a particular understanding of legal scholarship (or even more specifically, constitutional scholarship). A prominent feature of

[20] Khaitan (note 1 above).

[21] Komárek (note 3 above) at 552.

[22] Ibid at 430.

Komárek's argument, shared by Jakab, is the reliance upon an understanding of legal scholarship as an *interpretive* discipline focused on elaborating the law and rendering it coherent. On this understanding:

> Doctrinal legal scholars actually do something different than other scientists dealing with law and legal institutions (such as political scientists or sociologists studying courts). Given the legal doctrine's dual citizenship in law and science, their contributions are accepted by legal (and political) practice as contributions to law, not about law.[23]

This conception of legal scholarship is of a discipline involved in the construction of law rather than providing an external analysis of it. Quoting Finnish legal theorist Kaarlo Tuori, Komárek writes that legal scholars are 'engaged in continuously elaborating doctrinal theories in order to improve their responsiveness to the legal problems of a rapidly changing society'.[24]

If the governing conception of legal scholarship is an interpretive discipline, then some obvious tensions arise with scholarship directed towards specific ends. At a minimum, the pursuit of specific legal, social or political outcomes would appear to be non-scholarly insofar as it aims at something other than elaborating the law and rendering it coherent. Moreover, because in this tradition the scholar is often conceived as an authoritative voice disciplining the development of law through the systematisation of concepts, an activist scholar can be seen to be misusing the position by calling into question the disinterestedness and objectivity on which this authority depends. The misuse of power is a very prominent theme in Komárek's work. He takes the view that the misuse of position by *constitutional* scholars is especially serious because they occupy a particularly powerful position. Because constitutional scholarship (understood as an interpretive discipline) constitutes and structures politics, '[p]ublic pronouncements by constitutional scholars … are therefore *acts of public power* (understood broadly)', which in turn jeopardise the privileges of academic freedom and institutional autonomy that attend the scholarly role.[25]

V A REFRAMED DEFENCE OF SCHOLARLY ACTIVISM

A The value of academic inquiry

One answer to these arguments lies in pushing back against these ideas, at least as an exclusive account of legal scholarship. Let me begin by addressing the pure non-instrumentalism of Komárek's account.[26] This idea that the pursuit of knowledge is to be valued for its own sake is old and has enduring appeal.[27] To a scholar who finds the pursuit of knowledge greatly rewarding, Michael Oakeshott's insistence that intellectual inquiry is 'one of the properties,

[23] Ibid at 429 (footnotes omitted).

[24] Ibid at 429, quoting Kaarlo Tuori *Ratio and Voluntas: The Tension between Reason and Will in Law* (2011) xiii, 11–16.

[25] Komárek (note 3 above) at 426 (footnotes omitted).

[26] Though, as Thomas Bustamente has pointed out, Komarek's concern for the *appearance of neutrality* (Komárek note 3 above at 438) appears to endorse an instrumental strategy to enhance the standing of the academy. Thomas Bustamente 'Can Constitutional Scholars be Politically Active? A Response to Komárek's Scepticism', copy on file with author.

[27] It is central to John Henry Newman's 19th century classic, *The Idea of a University*. See also Michael Oakeshott 'The Idea of a University' in Timothy Fuller (ed) *The Voice of Liberal Learning: Michael Oakeshott on Education* (1989) and Raimond Gaita 'To Civilise the City' (2012) 71(1) *Meanjin* 64, available at https://meanjin.com.au/essays/to-civilise-the-city/

indeed one of the virtues, of a civilized way of living'[28] is highly appealing. It also grates with most scholars to hear that scholarly research is valued *only* for its material contributions or, even worse, purely in terms of *economic* contribution,[29] especially given the worrying growth in emphasis on 'impact' as a measure of research excellence.[30]

But while shallow instrumentalism and a short-term assessment of 'impact' raise the dangers that research is valued in narrow terms, it seems perverse to deny the obvious, manifold material benefits of university research. The value of academic inquiry extends well beyond the direct, obvious and tangible benefits to humanity of research in sciences, engineering technology, mathematics and medicine; to the highly practical improvements to government, economy, social structures arising from the social sciences and the deep understanding of human life, the consequences of scientific progress and fundamental ideas like justice, equality and morality that arise from the humanities. Critically, this understanding of research also requires that we value basic research driven by curiosity and imagination even if it is does not promise immediate practical impact. Provided that we understand the benefits of research in sufficiently capacious terms, and that we are willing to extend our time frame for judging its usefulness to the very long term, the worry that an appeal to the public benefit of research risks undervaluing it disappears (or, at the very least, is highly diminished).[31]

Scholars of an activist kind who pursue specific outcomes in their scholarly or other work are therefore not *necessarily* undermining the value of research, endangering the discipline, or compromising the legal or political protection afforded to academic inquiry.[32] Indeed, to overlook the obvious benefits of academic research for wider social purposes itself threatens to undervalue academic inquiry and to undermine the case for academic freedom. In this respect, it is telling that Komárek's argument relies on Stanley Fish's conception of academic freedom as 'just a job'.[33] On Fish's account, 'although academic freedom is often celebrated in grand, indeed, grandiose, terms, it is at base a guild slogan that speaks to the desire of the academic profession to run its own shop.'[34]

This position arises from Fish's narrow account of academic inquiry, inspired by his anti-foundationalism. To put a complex position briefly, Fish's position is that it is impossible to understand reality directly. Our perceptions are always mediated through a background of socially constructed practices and beliefs. Academic inquiry, and the knowledge it produces, is structured by academic disciplines, and thus although such an academic inquiry may make a contribution to a discipline, it is not of broader significance.[35]

[28] Oakeshott (note 27 above) at 96.

[29] In Australia, education is often described in terms of its value as an 'export' (ie for its capacity to attract foreign students who pay tuition and living expenses in Australia) which, in the Australian economy, is second only to the value of mining exports. See Dirk Mulder 'Education: The Most Valuable Export that isn't Dug Up', *Campus Morning Mail* (4 October 2022), available at https://campusmorningmail.com.au/news/education-the-most-valuable-export-that-isnt-dug-up/.

[30] Consider the increasing weight given to 'research impact studies' in the Research Excellence Framework (REF) in the United Kingdom. See 'REF 2021: Impact Scores: Medicine-focused institutions perform strongly on metric given weighting in latest round of Research Excellence Framework' *Times Higher Education Supplement* (12 May 2022), available at https://www.timeshighereducation.com/news/ref-2021-impact-scores.

[31] Discussed further in Evans & Stone (note 5 above) at 74–76.

[32] Ibid at 76–78.

[33] Komárek (note 3 above) at 430–431.

[34] Stanley Fish *Versions of Academic Freedom* (2014) 21.

[35] Ibid at 30–31.

A full interrogation of this view would stray well beyond what is possible here.[36] But for the moment, I will simply note the irony that Fish's view of academic inquiry weakens the case for its protection through academic freedom. If there is no *public* benefit from academic work, then what justifies the special status of academics and academic work and the special freedoms they enjoy? If academic inquiry is, as Fish says, 'just a job' and valuable only to those who engage in it, then the risk is that society will not see any reason to allow academics to work in this peculiarly privileged fashion.[37]

B Beyond interpretivism

Turning next to consider the nature of legal scholarship, I do not accept that the interpretive nature of legal scholarship is inconsistent with all forms of scholarly activism, nor do I consider that legal scholarship should be equated with interpretive forms of scholarship.

Let me begin, however, by acknowledging that interpretive work is an important form of legal research across diverse legal traditions. Armin von Bogdandy's account of European constitutional scholarship as 'doctrinal constructivism' aimed at 'a structuring of the law using autonomous concepts' is one such account. Scholarship of this kind is not devoted to understanding law 'by way of political, historical, or philosophical reflection; but through structure-giving concepts such as "state", a "legal person", "state will", "sovereignty", "individual rights in public law", "person", or "substantive" and "procedural law"'. Its aim is to 'to reconstruct and represent both public and private law as complexes of systematically coordinated concepts'.[38]

Von Bogdandy's account is framed as one about European public law and in much of its detail is highly specific to that tradition. But interpretive accounts of legal scholarship that are broadly interpretive are by no means limited either to public law or to the legal traditions of continental Europe. For example, Jason Varuhas' account of 'doctrinal' legal scholarship in the common-law world, perhaps especially in private law, encompasses the description of legal principles, derivation of generalised propositions and the systematisation of principles by reference to an underlying meta-principle.[39]

But what is the significance of such understandings of legal scholarship for scholarly ethics? There are some superficial tensions. Neither account reduces scholarship to a descriptive enterprise but there is a sharp distinction between legal scholarship as an interpretive enterprise of this kind and the direct pursuit of specific social, legal or political goals. But, at most, the objection grounded in such a conception of legal academic inquiry is limited to scholars working in traditions or sub-traditions – if there are any – where legal scholarship is understood as an *exclusively* interpretive discipline.

[36] But see Michael Robertson 'Book Review' (2015) 65 *Journal of Legal Education* 672, reviewing Fish (note 34 above).

[37] A deflationary consequence that Fish, with his characteristic iconoclasm, appears to accept. Stanley Fish *Save the World on Your Own Time* (2012) 55.

[38] Von Bogdandy (note 18 above) at 373.

[39] Though there are obvious sharp distinctions between his account and Von Bogdandy's. In keeping with the common-law tradition, this description of method is oriented strongly towards the reconstruction of principles from a 'raw mass' of legal material (such as case law) rather than a more abstract focus on 'structure-giving concepts'. Nonetheless, Varuhas' account shares an emphasis on interpretive elaboration and systemisation of the law. JNE Varuhas 'Mapping Doctrinal Methods' in P Daly & J Tomlinson (eds) *Researching Public Law in Common Law Legal Systems* (2023), 70, 80, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4087836.

In many places, however, legal scholarship (including constitutional scholarship) is highly diverse. It varies across traditions, so for instance 'doctrinal constructivism' is contrasted especially strongly with the American academy in which the scholar is not accorded an especially authoritative voice in the construction of law and where scholars are more typically explicitly normative and prescriptive.[40] In other places, and here I include Australia and many other places in the English-speaking world, legal scholarship (including public law scholarship) straddles interpretive work and explicitly prescriptive work oriented towards particular outcomes. Some scholars pursue one or the other and some both, but taken as a whole the academy is diverse. This picture is complicated again by interdisciplinary work. Many legal scholars engage in analysis and critique of law from an external perspective, informed by other disciplines (whether oriented towards 'Large N' quantitative or 'small n' qualitative methods of the social sciences, or to philosophical or historical analyses). In these cases, legal scholars are much like scholars in other disciplines, taking law as their subject but not employing specifically legal methods.

But even for scholars engaged in interpretive work, that inquiry might be combined with, or preparatory to, more prescriptive – even activist – agendas. For one thing, it is widely acknowledged in both traditions that the construction of the law is inescapably normative, reflecting the preferences, or moral and political judgements, of its interpreters. Interpretive work encompasses development of accounts of law that are both explanatory *and explicitly justificatory*.[41] This feature in turn gives rise to forms of legal scholarship – exemplified in the Anglo-American world by critical legal studies – that seek to reveal and critique the law's underlying normative preferences. In this way, interpretive work can be undertaken as a deliberate precursor to normative and prescriptive work. That is, by constructing legal doctrine, the law's embedded assumptions become clearer, *opening the way* for arguments for legal change.[42]

C Activist motivation and the distortion of academic inquiry

In the light of these arguments, Tarunabh Khaitan's objection emerges as the most securely based as it does not depend upon an excessive purism about the value of academic inquiry. Nor is it tied to an insistence that legal research is exclusively an interpretive discipline.

Rather, Khaitan's concern is that scholarly activism undermines the integrity of academic inquiry. To elaborate his point, Khaitan invites us to imagine a scholar – Mridula – who is committed to the advancement of equality. At the behest of an activist group, Mridula writes an article designed to pre-empt constitutional challenge to a law (a hypothetical *Equality Act*) of which she approves. She duly writes a paper and in doing so she is faithful to her scholarly knowledge and beliefs. In other words, Mridula has written a paper seeking a particular outcome of which she approves, while writing in a manner that is entirely consistent with her own understanding of the law. Even in this case, Khaitan insists, 'her actions, motivated

[40] As Robert Post has put it: 'Since the advent of legal realism, American legal scholars have understood the study of law to be the study of the social practice of law. They have sought to clarify the goals of that practice and to explore how those goals can be most effectively achieved.' Robert Post 'Constitutional Scholarship in the United States' (2009) 7 *International Journal of Constitutional Law* 416, 422.

[41] András Jakab 'Seven Role Models of Legal Scholars' (2011) 12 *German Law Journal* 757, 760; Varuhas (note 39 above).

[42] Varuhas (note 39 above).

by a specific practical outcome, are dangerous for her role as a scholar and for the academy more broadly.'

In his imagined case, Mridula fails to understand the longer-term effects of her argument (which turn out to prevent later improvements to the *Equality Act* that she was motivated to protect) and also fails to see the effect of her position on a smaller neighbouring jurisdiction where the limitation on constitutional review undermines an important check on a dominant ruling party. Compounding these problems, Mridula feels unable to disavow her position, even as its deleterious later effects become evident. At the same time, her reputation grows. As she becomes more powerful and celebrated, her activist commitments begin to overwhelm her intellectual integrity. Others, beholden to her fame and power, are also discouraged from criticism, weakening the scrutiny to which her work is subject.

The risks identified here are of two kinds. First, given the narrow and short-term perspective of activist scholars, they may fail to appreciate fully the consequences of the legal, political or social change for which they advocate. Scholars may be too quick to reach a judgment and may advocate for positions without a proper awareness of their long-term effects or effects beyond the immediate case at issue. Second, there is a risk of distorting academic inquiry. As a scholar's recognition and fame increases, it discourages self-reflection and undermines the capacity of the academy to provide effective critical review of their academic work. Moreover, even if one scholar successfully resists these temptations, the distorting dynamics of activism and the lure of academic celebrity will lead others to pursue activist outcomes that do pose risks to the health of the academy.

The sequence of events imagined here is speculative, albeit plausible. But there are equally plausible speculations that can be advanced in relation to all scholarly activity. Let's start with the problem of parochial short-termism and consequent failures to understand the long-term or wider effects of the change for which a scholar advocates. There is no reason to suppose scholars who are also activists will necessarily be prone to take their positions quickly and without reflection about possible unintended consequences. For one thing, there are ways of intervening on public issues that acknowledge the limits of one's academic expertise. A suitably self-aware and cautious scholar may, for instance, avoid activist scholarship early on in their career but engage more fully over time as their expertise grows. Or a scholar may temper early interventions with careful caveats and grow more confident (and insistent in their arguments) over time.

More significantly, contrary to the suggestion that activism is necessarily short term in its focus, specialist scholars who have spent decades working on a problem may be *especially well placed* to advocate for specific material outcomes and to avoid unforeseen consequences. Even scholars working for a shorter time may have access to (and the time and expertise to master) decades of work by other scholars. Indeed, the time, expertise and perspective that scholars have may place them in an especially good position to make well informed and productive contributions to public debate (including by advocating for specific courses of action). Activist scholars may provide an important counterweight to lawmakers, lobbyists, interest groups and other actors who have neither the expertise nor the long-term engagement with a problem necessary to foresee the outcomes of specific laws and policies.

In any event, it hardly seems that an activist motivation is the only risk in this regard. Surely the pressure of publication in pursuit of tenure, promotion or other forms of academic success is at least as powerful a force for quick, superficial and ill-informed scholarship as the pressures

that confront the activist. Indeed, the lure of academic celebrity (and consequent distortion) extends well beyond the context of the activist scholar. It is entirely plausible that scholars who work in non-activist ways might be tempted to shape their research in ways that that are aimed at professional advancement and extending their influence. Institutional context is likely to be especially important here. Academics might publish too quickly to meet institutional demands for promotion or tenure. Equally, the need to demonstrate wide citation and other forms of acclaim may lead scholars to choose fashionable areas of research over equally worthy but non-fashionable ones. Scholars might be tempted to exaggerate their claims or deliberately but unnecessarily provoke disagreements in order to attract attention. Similarly, they might take especially controversial positions without proper reflection, while at the same time taking care to avoid highly unpopular positions that result in 'cancellation'. Put simply, there are many pressures arising from the structure of academic institutions and from the prevailing norms of academic culture that seem equally to risk short-termism and distortion.

Perhaps Khaitan imagines that there are special risks of distortion with activist scholars because their influence (and the source of their celebrity) lies outside the academy and in the 'real world', freeing them from the distinctive demands of academic scrutiny. But I am not so confident in the ability of scholars always to retain critical self-reflection in the face of growing fame and power. There is always a risk – whether the scholar is an activist or not – that their fame and power will discourage critical scrutiny. Senior, powerful and prominent scholars, whose acclaim lies largely within the academy, can still build a following of more junior scholars who become 'disciples' rather than critical interlocutors. We cannot assume therefore that activist scholarship – or more specifically an activist motivation for scholarly work – *necessarily* poses risks of unintended consequences or that equivalent risks do not attend scholarship more generally.

Khaitan is at his most powerful in his identification of the scholarly values that temper these distorting effects: self-awareness, humility and independence. Khaitan is right to insist on adherence to scholarly values. They all support the distinctive quality of academic research, essential to the proper pursuit of knowledge and foundational to any argument for academic freedom. But I cannot agree that a motivation to directly pursue a specific non-discursive outcome is disqualifying from the point of view of scholarly ethics. It poses dangers to be sure, but they are neither insurmountable nor unique to the circumstance of scholarly activism.

To restate Khaitan's argument, I would say that the role morality of a scholar requires: holding steadfast to a commitment to the pursuit of knowledge; remaining attentive to academic methods that are the best safeguards for the reliable pursuit of knowledge; and refusing to compromise independence by seeking to serve another's end. The role morality of a scholar also requires self-awareness and examining one's conduct in the light of the risks of compromising these values in pursuit of academic self-promotion. So long as the scholar adheres to these ethical commitments (and this may not be an easy task), a scholar may use their scholarship in pursuit of specific outcomes.

In this respect my position is much closer to that of Liora Lazarus. Lazarus' core claim is that constitutional scholars are constitutional actors whose work ultimately shapes the constitution – an important idea but somewhat tangential to the argument pursued here.[43] Nonetheless, as part of her argument, Lazarus counsels for *academic self-awareness* that requires scholars to render their own value framework transparent and to engage with a diversity of

[43] Lazarus (note 1 above).

claims with intellectual honesty and integrity. Drawing upon Weber's famous essay, *Science as a Vocation*, she develops an account of a scholar's ethics that stresses the need for academic independence formed and exercised independently, both in the subjective sense and in a manner that gives public confidence in scholars' independence.[44]

Whether or not one accepts the claim that *constitutional* scholars have a special status, this characterisation of a scholar's duty is compelling. Indeed, the duties of independence, open-mindedness and self-awareness would seem to follow as a matter of role morality from the status of a scholar. That is, they should be required of *all scholars*, to ensure the effective pursuit of knowledge and by virtue of the privileges extended to them to advance that activity.

VI THE POTENTIAL EPISTEMIC BENEFITS OF AN ACTIVIST MOTIVATION

A final problem with the arguments against scholarly activism is that they overlook the potential epistemic *benefits* of the deliberate pursuit of specific non-discursive outcomes. A scholar motivated to achieve specific outcomes in her lifetime might be reasonably thought to bring a serious-mindedness, persistence and focus that arises from genuinely caring about the real-world effects of her work. The activist's desire to achieve real change in her lifetime may well temper creativity and cleverness with a welcome groundedness. To put it bluntly, if what you want is to be 'cited and invited', it is often more important to be interesting than it is to be right. The passion of 'scholactivists' and their attendant commitment to real change in the world might be a corrective for this.

Arguments against scholarly activism do not necessarily deny that scholars might care about the real-world consequences of their research or that they might at times be motivated by passionate commitment to specific outcomes. But they regard them as improper motivations for scholarly work. Khaitan, for instance, therefore counsels that any motivation to achieve real-world outcomes (and consequently the emotions that give rise to this motivation) must be suspended during the conduct of research, only to be resumed at a later stage. I have my doubts as to whether this suspension of motivation is always possible but, putting that to one side, there are reasons to doubt that it is always productive to do so.

By way of illustration, anger – which scholar activists feel in the face of injustice – could be a productive emotion. The value of anger is a matter on which philosophers sharply divide:

> According to its fans, anger is a refined detector of injustice, and uniquely effective at getting oppressors to yield their evil ways. *Liberté, égalité, fraternité*, insofar as they have been achieved, have only come from the insistent activism of angry souls. Opponents of anger say that anger is undisciplined and sloppy. It is 'greedy for revenge', the unprincipled servant of a rapacious ego, and a miserable detector of the truth.[45]

One argument in favour of anger is that it is *energising*. Anger sustains us in a search for justice and nurtures the kind of commitment needed for the pursuit of more just laws. Among the forms of anger that might be especially motivating for a legal scholar are anger directed at politics and institutions of government or at policies, laws or social structure that are unfair or even dehumanising and anger that motivates us to seek to restore status to those who have

[44] Lazarus (note 1 above) at 493–494.

[45] Owen Flanagan *How to Do Things with Emotions* (2021) 35. Compare Martha Nussbaum *Anger and Forgiveness: Resentment, Generosity and Justice* (2016) 5–6 (arguing that anger is always problematic whether in the personal or public realm).

been unfairly treated or disrespected.[46] Perhaps especially significant for scholars, however, is the idea that anger might bring *insight*. Here the work of black feminist philosophers has been especially important. The idea of anger as intellectually productive is often traced to Audre Lorde, who wrote of anger as 'a liberating and strengthening act of *clarification*', a means to see oppression more clearly.[47]

The ensuing critique of the marginalisation of anger could extend to the separation of emotion and reason more generally. In this vein, philosopher Karen Jones has written of an emerging philosophical and psychological consensus that emotions are 'integral to practical rationality' rather than inimical to it.[48]

Of course, emotions are not the preserve of activist scholars but, by insisting that scholars suspend their interest in outcomes, arguments against scholarly activism risk undervaluing the emotions that our engagement with the real world inspires. Addressing just Khaitan's argument, it is by no means clear that our pursuit of knowledge is best served by the toggling back and forth between activist and scholarly modes that Khaitan recommends. On the contrary, it may be better (or even inevitable) to regard scholarship and activism as integrated activities that we must perform simultaneously without compromising our scholarly values.

VII CONCLUSION

The demands on scholars are complex. We must be humble, disciplined, self-aware and independent, but at the same time we must write productively and influentially and, increasingly, show real-world 'impact'. We need to make these contributions without falling prey to the potentially distorting structures of the academy or to the temptations of acclaim in the world beyond. Given the complexity of our role, a clear sense of the ethics of scholarship is essential. To that end, the questions pursued in this recent debate are very important and the counsel toward the faithful pursuit of knowledge is very welcome. But let me conclude with a plea for some attention to important matters of context.

I will begin with institutional structure. Much of the debate so far has focused on an individual scholarly ethics, but the institutional pressures noted here[49] are not likely to be addressed only by counselling individual scholars. Matters like how we reward publication, count citations and measure impact are strongly determinative of academic behaviour. The unhealthy power dynamics that Khaitan so clearly identifies are difficult, especially for a junior scholar acting alone, to resist. Beyond clarifying our ethical commitments, we need to ensure the conditions in which scholars can thrive.

In this respect the mindset of constitutional scholars is especially useful. As Vicki Jackson has shown, we can think of universities in constitutional terms: as 'knowledge institutions'

[46] On the forms of anger and their possible effects, see Myisha Cherry *The Case for Rage: Why Anger is Essential to Anti-racist Struggle* (2021) 12–14.

[47] Audre Lorde 'The Uses of Anger: Women Responding to Racism' in *Sister Outsider: Essays and Speeches* (1984) 125 (emphasis added). Myisha Cherry writes of 'Lordean rage' as a productive form of anger (note 47 above at 5).

[48] Karen Jones 'Quick and Smart? Modularity and the Pro-Emotion Consensus' (2006) 32 *Canadian Journal of Philosophy Supplementary Volume* 3, 4. See also Alison Jaggar 'Love and Knowledge: Emotion in Feminist Epistemology' (1989) 32 *Inquiry* 151. I owe particular thanks to Patrick Emerton for pointing me in the direction of this literature.

[49] And beyond those briefly discussed one could add many others. See, for instance, those discussed in Evans & Stone (note 5 above) at 122ff.

providing knowledge essential for effective government and proper democratic accountability.[50] Equally, academic freedom has clear constitutional significance as a principle of democracy.[51] As constitutionalists, then, we should be attentive to the place of universities within the democratic order *and* to structures and incentives within the academy that preserve the independence of scholars.

Lastly, drawing also on the insights of our field, let me introduce a comparative dimension. Even in the best institutional conditions, the obligation to show humility and self-awareness may remain largely in the hands of scholars. In the field of constitutional law, the obligation to attend to context looms very large. As is widely understood, scholarly work in constitutional law globally is dominated by a relatively small number of Global North countries, with the attendant risks of generalising from a small set of cases.[52] The risk is exacerbated by inequalities of power that may give scholars from the Global North, with little understanding of context, outsized influence.[53] The risks extend as well to engagements within Global North countries as well, especially with indigenous peoples.[54]

Finally, it may be that context itself requires a rethinking of role morality. As I have argued, a scholar's obligations derive from the justifications for the institutional role of a scholar. It is entirely plausible that those justifications might be different in different contexts, where the role of scholarship is understood differently. Writing for a South African journal perhaps means it is not necessary to repeat that South Africa's continuing constitutional transition has relied upon scholars and activists who have pioneered the idea of a transformative constitutionalism.[55] In circumstances where the very point of constitutionalism is to effect social transformation, a different role morality might arise. In these circumstances, a sharp distinction between scholarship and activism seems very odd and may even be unsustainable.

[50] Vicki Jackson 'Knowledge Institutions in Constitutional Democracies: Preliminary Reflections' (2021) 7 *Canadian Journal of Comparative & Contemporary Law* 156.

[51] Robert Post *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (2013).

[52] See Ran Hirschl 'How Universal is Comparative Constitutional Law?' in *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014) 192.

[53] It is no accident that Khaitan's critique of scholarly activism appears to have been inspired by his concerns about ill-informed interventions by prominent US scholars in rapidly democratising Eastern European countries in the 1990s. See Tarunabh Khaitan 'The Role of the Legal Scholar in the World: The Promises and Pitfalls of Legal Activism' (The Letten Seminar, 2021), available at https://www.youtube.com/watch?v=gQ6nDrioCbA.

[54] For the last decade there has been a movement to recognise the First Peoples of Australia in the Australian Constitution. Scholars have been deeply engaged with these events both in activist and scholarly modes. For some scholarly writing see Shireen Morris 'An Australian Declaration of Recognition: The Case for Semi-Entrenched Symbolism' (2020) 44 *Melbourne University Law Review* 267; Anne Twomey 'An Indigenous Advisory Body: Addressing the Concerns about Justiciability and Parliamentary Sovereignty' (2015) 19 *Indigenous Law Bulletin* 6; Cheryl Saunders 'Indigenous Constitutional Recognition: The Concept of Consultation' (2015) 19 *Indigenous Law Bulletin* 35. Political leadership of the movement has, however, largely and appropriately been the preserve of First People notably through regional dialogues (for a brief history see *Aboriginal and Torres Strait Islander Voice* https://voice.niaa.gov.au/about) and subsequently by the First Nations Referendum Working Group (https://voice.niaa.gov.au/who-involved).

[55] Klare (note 18 above).