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**What Constitutions Can Do (But Courts Sometimes Don't):  
Property, Speech, and The Influence  
of Constitutional Norms on Private Law\***

by

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**Abstract**

Against the background of the ECtHR's recent decision in *Appleby v UK* (a European “counterpart” to the well-known US Supreme Court decision in *Marsh v Alabama*) the paper addresses, first, the issue of the influence, often perceived as dilemmatic, of human rights norms and constitutional norms on private law. In a second step, then, the paper discusses the promise—and a possible dilemma—of “comparative constitutionalism” as an engine of a more denationalized “constitutional patriotism”: the dilemma that we trade the “closure” of domestic exceptionalism against the new, systemic “closure” of “too much” judicial comity and professionalism, the closure of a new *Juristenrecht*.

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## I. The Invisible City<sup>1</sup>

Suppose you want to organize a demonstration in your local town center in order to protest against some local development plans of your municipality. If public officials ban your demonstration, say, because they disagree with your message, you are in a position to invoke against such “state action” the right to freedom of expression – as guaranteed in Europe under Art. 10 ECHR. But suppose that the town center in its entirety has recently been sold by the municipality to a private company, and it is now this company which, as legal owner of the town center, prevents you from speaking, all other things being equal.<sup>2</sup> (The area in question, let’s assume, is huge, with many shops and supermarkets, car parks and walkways: several important public services like the public library, the social service office, the health center and even the police station are located in or adjacent to the center, and there is an active presence of public agencies in the vicinity. But the privatized town center (euphemistically called “the Galleries”) is, nevertheless, not co-extensive with the town itself.) In response to your complaint against the ban (you invoke Art. 10 ECHR and argue that the town center is a “quasi-public forum”), the owners point out to you that the area in question “... is unique in as much as although it is the Town Center, it is also privately owned.” They assure you that their “stance on all political and religious issues is one of strict neutrality” and that they are, in upholding their ban, “applying this philosophy.” In response to your insistence – ultimately before a constitutional court (*in casu*, the ECtHR) – that “the State owe[s] [you] a positive obligation to secure the exercise of [your] rights” within the “Galleries,” the State in question – the British Government – points out (among other things) that “it [is] not for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of ‘quasi-public’ land to which a test of reasonableness can be applied.” (Call this the “hard-nosed claim.”)

In this paper I want to address, against the background of the ECHR’s recent attempt to resolve the clash between property rights and the right to freedom of expression in its decision in *Appleby v. UK*, two questions – both of which I take to be related to the overarching theme of “social democracy” – first, the problem of the influence of “higher law” – of human rights norms and constitutional norms – on private law norms; second, the question of the role of adjudication in “constitutionalizing” private law, in other words, the question of the “judicial cognizability” of constitutional norms within private law.

Start with the question of why there is resistance against the idea that a private party may invoke fundamental rights against another non-state actor. Proponents of the view that the efficacy, or scope of application, of fundamental rights should be confined essentially to the dimension of correcting imbalances between the excesses of state power and individual liberty – of governing the relationship between the individual and the state – argue, on both substantive and non-substantive grounds, that only through such a containment legal implications remain predictable. Any extension of fundamental rights between non-state actors – by requiring the “balancing” between the fundamental rights of individuals as rights-bearers – would

(i) result (if carried to its logical endpoint) in a sweeping judicial usurpation of legislative prerogatives and, concomitantly, in a threat to private law’s libertarian core of liberal autonomy and experimentalism – think of liberal autonomy as a sphere of decision making according to your own criteria of the right and the good, not the public’s (as second-guessed by the courts);

(ii) and would make “private law” – understood as a shorthand for a relatively insulated (against political conflict), freestanding (with regard to moral diversity), insistently analogical and incremental method of reasoning and of doctrinal accretion that avoids abstractions and conflicts between first-order principles – redundant and superfluous.

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<sup>1</sup> With apologies to Italo Calvino.

<sup>2</sup> These were the facts in the European Court of Human Rights’ recent decision in *Case of Appleby and Others v. The United Kingdom* (Application no. 44306/98 [2003]).

The idea of a “constitutionalization of private law,” however attractive looking in a constellation characterized by privatization and denationalization, seems to leave us with a dilemma: on the one hand, if you accept the idea that constitutional rights are *protected liberty- and integrity-interests* and that as such they have the dimensions of magnitude and value,<sup>3</sup> then what matters constitutionally is the menace itself to liberty- and integrity-interests, regardless of its provenance (i.e., of whether it stems from “state action” or “private action,” and of whether it reflects a “vulnerability” [as a consequence of a harmful exposure of yours to society] or a “need” of yours for protection by the State). But on the other hand, the two reasons I mentioned – the concerns with liberal autonomy and with judicial cognizability of open-ended constitutional norms in need of “balancing” – account for the resistance against the collapse of the separation between constitutional law and private law (the concern being that notions of value and magnitude are inherently boundless or without “a logical endpoint”<sup>4</sup>). To the extent that you are under the sway of the resistance-thesis, then, the maintenance of a separation between both orders of norms will appear to you to be constitutionally mandated, however paradoxical that may appear from the internal standpoint that rights are protected interests, and the “constitutionalization of private law” will strike you as a self-defeating enterprise.

This paper’s project is to show, with specific reference to the conflict (underlying *Appleby*) between property rights and rights to freedom of expression, that there is no such dilemma: I will suggest (by way of a largely critical discussion of the ECtHR’s decision in *Appleby*, in which the Court ruled that the owners’ property interests must take precedence over the applicants’ communicative interests) that the expressive liberties at stake give rise to a “protective function”<sup>5</sup> of the state – the United Kingdom – to (re-)design common law rules of private property in such a way that the “fair value” of political speech can be realized in the given setting. I will also suggest that the “constitutionalization” of relevant chunks of property law does not put demands on constitutional adjudication (demands in terms of the judicial cognizability of protection-worthy expressive interests and in terms of the “protective function’s” judicial administrability) that the constitutional adjudication is not in a position to meet – in other words, I will submit that cognizability-problems are less troublesome or intractable than is often claimed by defenders of constitutional neoformalism or constitutional pragmatism.

Generalizing, then, beyond the issues in *Appleby*, and in an attempt to understand the larger lessons with regard to the question “What Constitutions can do,”<sup>6</sup> I will suggest that we can distinguish between three mutually controlling aspects of the role constitutions play with regard to private law. Let’s say, then, that a role of constitutions is

■ not merely to entrench a libertarian core of individual liberty spheres – of “subjective rights” – against the state; nor merely to provide the state with action-guiding “objective principles” or maxims for a “holistic” constitutional ordering of private law relations and of social spheres, but rather to insure that rights (such as, *in casu*, freedom of expression) that can be invoked in order to *disentrench* existing (exclusionary) private-law practices. The emphasis here is on the “unlocking”<sup>7</sup> or transformative and contextualizing role of the Constitution with regard to private law: the role of creating an ongoing “reflective disequilibrium”<sup>8</sup> between private-law norms and constitutional counternorms, and thus of insuring that the state, in defining the situation-specific

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<sup>3</sup> F. Michelman, “Liberties, Fair Values, and Constitutional Method,” in: G. Stone, R. Epstein and C. Sunstein, *The Bill of Rights in the Modern State* (Chicago 1992), with reference to J. Rawls, *A Theory of Justice* (1972).

<sup>4</sup> On the idea of a logical endpoint, cf. Justice Ruth Bader Ginsburg’s concurring opinion in the U.S. Supreme Court’s recent decision *Grutter v Bollinger*, 123 S.Ct. 2325, at 2347 (2003).

<sup>5</sup> On the idea of a protective function, see now F. Michelman, “The Protective Function of the State in Constitutional Law” (Preliminary Draft Aug. 2003). “Protective function” is a direct translation of the *terminus technicus* in German constitutional law of “Schutzfunktion.”

<sup>6</sup> The title of my paper is, of course, prompted by the subtitle of Cass Sunstein’s book: *Designing Democracy. What Constitutions Do* (OUP, 2001).

<sup>7</sup> On “unlocking,” cf. Cass Sunstein, *Designing Democracy* (op. cit.), p. 230 (quoting the South-African Constitutional Court’s important Grootboom case).

<sup>8</sup> On the idea of reflective disequilibrium (which, evidently, draws on Rawls’s notion of a reflective equilibrium), cf. O. Gerstenberg/Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?* [AEL-volume, OUP 2002]

scope and contours of its “protective function,” does not act until diverse people have had an opportunity to consult with each other and to listen to one another's arguments;

■ not, quasi “fatalistically,” to empower the courts at democracy’s expense, but rather (and only *prima facie* surprisingly) to *weaken judicial finality* by providing a framework for a non-court-centric multi-level process of public discussion over constitutional settlements, and, thus, by confining constitutional adjudication to a “subsidiary role”<sup>9</sup> in the process of constitutional ordering: on the one hand, judges must take into account which view of moral rights actually is, as a matter of substance, the better view.<sup>10</sup> (Thus, the recommendation that moral rights that properly are “cognizable” – or may figure – within judicial decisions are those that, as a matter of fact, recognized in a given private law system (facts of authorship or social acceptance as “sources” of law) seems less helpful as a response to the “circumstances of constitutional justice”<sup>11</sup> – the open-endedness of constitutional norms and the fact of reasonable interpretive pluralism.<sup>12</sup>) But on the other hand, the idea of disentanglement implies a role of adjudication as a “trigger” of public deliberation – as a trigger for the process of “reflective disequilibrium” to unfold, and ultimately for the state’s legislative development of its “protective function” with regard to citizens. (Think of this as a “democracy-encouraging” role of the constitution);

■ to lay the ground for a more denationalized “constitutional patriotism” which will lend credibility to the role of the ECtHR bindingly to interpret a Bill of Rights – and, hence, to its moral authority, as a supranational “constitutional court,” to disrupt domestic private-law routines whenever there is reason to fear that these routines lapse into exceptionalism and closure – and to the Court’s capacity to generate, through the respectworthiness, in terms of substantive morality, of its case-law, its own sources of public allegiance.

In a first step, I will discuss the relationship between constitutional law and private law more generally. One aim of mine here is to challenge the related doctrines of *Drittwirkung* and of *inclusive positivism*, which – as I will argue – frame the problem of the interrelation between constitutional law and private law in inadequate terms.

In a second step, I will discuss the Court’s decision in *Appleby*. I will argue that in giving, *in casu*, precedence to the owners’ property rights, the Court (despite some of its formulations in the decision to the contrary) failed to understand the importance and role of political speech as a prerequisite to a “functioning democracy,” and failed to understand the constitutional challenge posed by privatization.

I will conclude with the suggestion to dissociate the analysis of a legal system’s protective function from the broader discussion about social democracy.

## II. Constitutional Law and Private Law

Imagine a constitutional regime which includes a Bill of Rights and which also includes, among its structural provisions, a secondary norm “Z,” according to which the Bill of Rights “shall bind the legislature, the executive, and the judiciary as directly enforceable law.”<sup>13</sup> Proceeding from Z one might argue that, as a matter of simple textual command, constitutional rights have no binding effect on private individuals, but only on the state and its organs: constitutional rights draw a boundary between “state” and “society” – and “around” a sphere of individual sovereignty and integrity of the person; constitutional rights operate as a form of collective self-restriction (or as a “calculus of distrust”) by excluding certain irresolvably contentious and emotionally charged

<sup>9</sup> Thus the ECtHR’s emphasis in *Hatton and Others v The United Kingdom* from the 08. July 2003.

<sup>10</sup> This emphasis is, of course, both Dworkinian and Rawlsian. For a recent restatement by Dworkin, cf. his Response to overseas commentators, in I.CON 651 ff. (2003).

<sup>11</sup> I am here, of course, building on Rawls’s notion of the “circumstances of justice.”

<sup>12</sup> Equally, the familiar idea that all what is required is a “balancing” of rights seems inadequate, as this idea suggests that what is at issue is merely to find a compromise between competing policies (as opposed to rights).

<sup>13</sup> Compare Art. 1 III of the German Grundgesetz (“GG”) with the second sentence of Section 1 of the Fourteenth Amendment of the U.S. Constitution. Cf. also Art. 8 (1) of the Constitution of South Africa (1996): “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.”

issues from the public agenda. By contrast, the relationships between private individuals lie, in this scenario, outside the “normal” purview of constitutionalism; they are governed by “private law” as a conceptually distinct category, and with its own aspiration to coherence.<sup>14</sup>

Of course, private law, if it is to determine the relationship between private individuals, must be compatible with the constitution, but this compatibility-requirement will always already be satisfied, in the scenario I am asking you to imagine, as long as the overall constitutionality of the process, which brought existing private law about (either by explicit legislation or by permitting its evolutionary growth through “practice”), is certain. Thus there is, in this scenario, a clear separation between *legislation* and *adjudication*: problems of constitutional interpretation are part of the former (legislation), but they can’t conceivably arise in the adjudicative process of private law application. Call this the “separability-thesis.”

Notice now that it is, of course, “child’s play” to make the “simple, Hohfeldian point” that “the state, as the sovereign source of the common law, is responsible for every failure of the common law to provide relief against one or another exercise of power by one member of society against another.”<sup>15</sup> In other words, Z can always be taken to imply that (i) private law and the relationships between private individuals do not remain outside the range of constitutional law, but are “always already” determined by underlying constitutional values such as fairness and democracy; and that (ii) all rules and standards of private law must, pervasively and without exception, be interpreted in the light of those values. Thus, the implication of the “simple, Hohfeldian point” is twofold (or “complex”): first, horizontal private-law relationships would, rather than being “exceptionalized,” “continuum-ized” with the constitution (what matters, is the vulnerability itself, not where it comes from, its provenance, in conventional terms of “public” and “private”); second, the clear-cut separation between legislation and adjudication – what I called the “separability-thesis” – collapses: if constitutional rights have a direct binding effect on private individuals, and if constitutional law has an immediate impact on private law, then constitutional courts (“adjudication”) become “fora of principle” in the strongest possible sense. As constitutional rights and essentials take on the practical dimensions of magnitude and value, and as their value is “intrinsic” (i.e. conducive to the fulfillment of certain liberty- and integrity-interests of persons), as opposed to merely “instrumental” (as delimiting state action and casting a constraint over public decision making), adjudication must “harmonize” – construct transitory orders between – highly abstract and open-ended principles in a process which must be continually reviewed. But the collapse of the separability-thesis (because both parties to a conflict can now invoke fundamental rights) immediately gives rise to the concerns (mentioned above): that, first, private autonomy is under menace; second, that private law becomes “superfluous.” If both parties can invoke fundamental rights, then private law’s conventionality unravels and what I’ve dubbed the logics of insulation (of a sphere of private law against “politics”) breaks down. Private law becomes “superfluous.”

The simple Hohfeldian point (I drop the quotation marks now) had been at the center of the well-known Lueth-decision<sup>16</sup> of the German *Bundesverfassungsgericht*.

The Lueth case began as a torts case: at issue was the private law rule of section 826 of the German Civil Code (“BGB”) which requires someone who has harmed another person “intentionally and in a manner contrary to good morals” to compensate that person for the damage that results; read together with the injunction in section 1004 of the BGB, this rule grants the person who has suffered harm the right to have the tort-feasor ordered

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<sup>14</sup> Duncan Kennedy on “Classical Legal Thought” and legal formalism: “Legal Formalism,” in N.J. Smelser/P.B. Baltes, eds., *Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2001); idem, “Two Globalizations of Law & Legal Thought: 1850 – 1968,” in: 36 *Suffolk University Law Review* 631 ff. (2003); idem, “The Disenchantment of Logically Formal Legal Rationality or Max Weber’s sociology in the genealogy of the contemporary mode of Western legal thought (Ms. 2002).”

<sup>15</sup> F. Michelman, “W(h)ither the Constitution?” 21 *Cardozo Law Review*, 1063 ff, at 1076 (2000).

<sup>16</sup> BVerfGE 7, 198. There is, of course, more than ample literature on this case. The reconstructions I learned most from are: Friedrich Kuebler, “Lueth: eine sanfte Revolution” (BVerfGE 7, 198 ff), in: *Kritische Vierteljahresschrift fuer Gesetzgebung und Rechtswissenschaft*, p. 313 ff. (2001); Dieter Grimm, “The impact of Fundamental Rights on Private Law” (Ms. 1997, on file with Harvard Law School); idem, “Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts,” 48 *Neue Juristische Wochenschrift*, 1697 ff. (1995).

to refrain from the conduct in question. How does freedom of expression, as guaranteed in Art. 5 of the German Grundgesetz, influence the reading of that private law provision?

In 1950, Erich Lueth, the president of the Hamburg Press Club and a member of the society for German-Jewish reconciliation, repeatedly publicly criticized Veit Harlan, who had, as producer of the anti-semitic film “Jud Süss,” been one of the most influential movie directors during the Third Reich, and who had resumed directing movies in the Federal Republic. Lueth called upon distributors, cinema-owners and the public to boycott Harlan’s new tear-jerker “Immortal Beloved”; the film’s producer and distributor sought an injunction with the ordinary private law courts, effectively forcing Lueth to omit his call for boycott. Lueth was ordered to refrain from calling for a boycott in the future or else face a fine or imprisonment; according to the interpretation of 826 given by the ordinary courts, *any* call for a boycott *ipso facto* violates this rule (because, that’s what the rule clearly says and intends to say). Thus, the conflict (or “clash”) in *Lueth* was one between property interests, on the one hand, and free speech values on the other.

What the Constitutional Court famously did was to explain that the fundamental rights granted by the German Grundgesetz, such as freedom of expression, weren’t only “subjective rights” of the individual *addressed (as barriers) against the state*, but also, and at the same time, “objective principles for the whole legal and social order.” Thus – and the Court explicitly drew this conclusion from the idea of a so-called “objective” character of “subjective” rights – every private law provision, if it limits (or has a limiting effect) on a fundamental right, must be interpreted “in the light” of the fundamental right. What Lueth, then, *discredited* (in the German legal context) was the view that constitutional law governed only the “making” of private law, but not the “application” or “interpretation” of private law; in other words, what Lueth *endorsed* was the idea that there is no clear-cut separability between “justification” and “application”/“interpretation” of private law in a case like *Lueth*. The influence of constitutional law on private law does not “come to an end” with the “making” of private law, but extends into the very process of its interpretation.

On the other hand, however, the Court sought to limit and to discipline the influence of constitutional norms on private law norms and on what it took to be an open-ended process of “balancing” between clashing constitutional values – “open-ended,” because the Court also pointed out that there is no pre-established hierarchy (or harmony) between competing constitutional values and an order between them can only be established with regard to the specifics of context and situation. The self-limiting formula which the Court found (and which was to become highly influential in the international debate) was that the influence of constitutional norms on private law must be “mediated” by the interpretation of private law itself; this was called, in German constitutional lingo, the *mittelbare Drittwirkung*, and has subsequently become known as *indirect application*. Thus, the solution to the problem of the open-endedness, and apparent indeterminacy, of constitutional balancing which the Court sought to develop in *Lueth* was one which would prevent civil courts from “freeing” themselves entirely from the provisions of the Civil Code and from “balancing” competing constitutional values against each other by writing on a clean slate *unconstrained by the provisions of private law*. The Court, therefore, was eager to emphasize that the litigation, even if constitutional norms are invoked, remains one of private law, that the “balancing” between competing constitutional values takes place *within* the “private law framework,” and that it is the task of private law to create a fair balance when rights – such as property rights and freedom of expression – collide.

The balancing between competing constitutional values, then, can occur (in the picture I am describing) only within the framework of private law, and in particular within (or “channelled by”) the general clauses of private law (such as “good morals”).<sup>17</sup> Thus, private law is said to retain some “autonomy” with regard to constitutional law, as a limiting device with regard to constitutional “balancing,” and the problem then becomes, of course, to reconcile this with the idea of the supremacy of the constitution. An answer to the problem of judicial cognizability is attempted through the idea that rights (i) are directly effective as protections against the state, but

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<sup>17</sup> The standard metaphor is that of “permeation.” See Barak, “Constitutional Human Rights and Private Law.” In: Daniel Friedmann/Daphne Barak-Erez, *Human Rights in Private Law* (Oxford: Hart Publishing, 2001), at 29.

do not “directly” apply to private law disputes (and don’t bind “you” directly as a private actor), that (ii) the clash of constitutional values does not affect the character of the dispute as a private-law-dispute, and that (iii) constitutional law has only a “radiant effect” on private law and must be “mediated” through private law so as to become effective in the private sphere.

Of course, it is easy (once again, “child’s play,” you might say) to point out that you can’t have it both ways – constitutional supremacy and the idea that the impact of the constitution on private law is contingent upon private law itself as a self-sufficient, self-programming, “archimedian” set of legal norms and methods of reasoning. The concept of mediated *Drittwirkung*/indirect application is a strategy or method of *avoiding* the first-order conflict between constitutional values through emphasis on the normative coherence of the private law program and on the “autopoietic” character of the private law system which decides of its own – in its own spontaneity, as it were – *when, under what conditions, and to which degree* to “incorporate” constitutional values into its own fabric. But this archimedian view of private law stands in a permanently “conflicted” relationship – if not unresolvable tension – to the role of constitutional law as higher law.<sup>18</sup>

Surprisingly, the idea of indirect application, which originated in Lueth, has set the stage for the contemporary debate. For example, Aharon Barak has advocated a model based on what he calls “strengthened indirect application.” This model has two features. On the one hand, individuals’ rights, such as the right to property, are, as Barak insists, rights of the private individual vis-à-vis both the government and other individuals;<sup>19</sup> the recognition of the human rights of one person vis-à-vis another inevitably involves limitation and narrowing, as a consequence of the regard for the other’s right.<sup>20</sup> On the other hand, this limitation and narrowing must be evaluated within the particular normative framework of private law. Private law is, as he puts it, “the ‘geometric location’ for formulating remedies for an infringement by one private individual on the constitutional right of another individual.” The party must find its relief within the framework of private law. To the extent that private law does not, despite the violation of a constitutional right, grant an appropriate remedy, private law must be revised to provide a remedy as needed. This model is said to differ, first, from traditional indirect application model, which would lead to a denial of remedy in those cases in which private law does not *always already* contain the legal tools and institutions for the absorption of constitutional values; second, it differs from the “direct application” model in that it does not ignore existing private law and does not “create a type of ‘constitutional private law’ that exists alongside regular private law.” But in the end, Barak, too, has to acknowledge, and explicitly does so, that “[w]here the right is recognized (in public law), the remedy must also be recognized (in private law): ubi ius, ibi remedium.”<sup>21</sup>

Notice that the debate on the constitutionalization of private law reverberates the broader debate on the possibility of content-independent conceptions of constitutional bindingness. Consider, on the one hand, a difficulty with H.L.A. Hart’s claim that “the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of law.”<sup>22</sup> According to this thesis, substantive legal argument is normative only insofar as “the social sources of the law” make moral standards part of the law. One of Hart’s underlying concerns is “the degree or extent of uncertainty which a legal system can tolerate if it is to make any significant advance from a decentralized regime of custom-type rules in providing generally reliable and determinate guides to conduct identifiable in advance.”<sup>23</sup> Against Dworkin’s objection that legal argument is “characteristically and pervasively moral argument,” because “[I]awyers must decide which of competing sets of principles provide the best – morally most compelling – justification of legal

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<sup>18</sup> If there’d be a world without principles and constitutional values, we still could, in such a world, have an internally coherent private law system, according to the approach I am describing here.

<sup>19</sup> Barak, *op. cit.* 30.

<sup>20</sup> *Idem*, 29.

<sup>21</sup> Barak, *op. cit.*, at 31. But notice also his retraction in the somewhat dark formulation, at p. 29: “Private law is the expression of restrictions placed on human rights to realize human rights while safeguarding public interest.”

<sup>22</sup> H.L.A. Hart, *The Concept of Law* (Oxford, 1997, 2<sup>nd</sup> Ed.), p. 269

<sup>23</sup> *Ibid.*, at 252.

practice as a whole.”<sup>24</sup> Hart upholds the claim that we can talk about law in a pre-interpretive sense and that “the law may be identified without reference to morality.”<sup>25</sup> But for those who think that a constitution can’t be binding on its addressees for any other reason than the acceptability of its provisions, content-independence remains a puzzle. Consider, on the other hand, the complementary difficulty with Dworkin’s claim that in order to “translate” the abstract intentions of the constitutional legislator “we rely on personification”<sup>26</sup> – that is, on a constraint-providing “communal” (and not a “statistical”) conception of ourselves acting collectively. If a “communal” conception is one in which self-government is premised on certain the morality of self-respect insuring features of the constitution, then it is in virtue of these presuppositional features, not of “personification,” that constitutional provisions (and their applications) are binding.<sup>27</sup> Personification – the idea of a political community personified – can’t have the foundational status which the formula that “we rely on personification” suggests it has.

To conclude: the vocabulary of *Drittwirkung*, indirect application, horizontal effect and incorporation is inadequate and seriously misleading. It is inadequate because whether or not, say, your freedom of expression mandates a specific reading of my property rights is itself a substantive moral claim, to be decided on the merits. We may hope to find, over the course of time, some doctrinal rules of mid-level generality which give us a *prae-sumptio iuris*, a rule of thumb, as to how to deal with future cases – and then call these presumptions “private law.” But these private law rules can’t conceivably take on an archimedian role; they can’t be sealed-off (or canonized) against the practice of interpretive holism – of working out conceptions of the values in play each in the light of the others.<sup>28</sup> Second, the vocabulary of *Drittwirkung* etc. is seriously misleading because it suggests that those other values (such as freedom of speech) in the light of which we have to read the values I may want to protect through private law remedies (such as my property right, in the example) *actually decrease my initial liberty*. Such a view is plainly question-begging, because the meaning and scope of liberty- (or integrity-) interests can’t be fixed in a merely conceptual or descriptive way (as, say, part of a neutral and disengaged first-order discourse), but can only be the *outcome* of a normative interpretive judgment.

### III. Is Talk of Constitutional Values (other than Property Rights) "Ontologically Queer"? The Case of *Appleby and Others v. UK*

I must now connect the critique of constitutional method with the substantive issue I mentioned at the beginning, the concern that the effect of privatization is to “remove” or to “withdraw” constitutionally relevant matters – challenges to protected interests by power – from the purview of constitutional law. Assume that a crucial function of constitutional law is to provide legitimacy to coercive political and legal orders:

“Our exercise of political power” – according to Rawls’s liberal principle of legitimacy – “is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”<sup>29</sup>

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<sup>24</sup> Dworkin, “Hart’s Postscript and the Character of Political Philosophy” (Ms. 2001).

<sup>25</sup> Hart, op. cit., at 270. The backbone of his argument is that “legal systems however evil are law in a preinterpretive sense” (such as Nazi law). Against Dworkin he argues that “principles” (considered necessary both to identify and to justify law) may be simply “iniquitous” and as such carry no justifying force. Dworkin’s rejoinder, of course, is that interpretation itself is a practice shot through with (moral) value.

<sup>26</sup> Dworkin, “Comment,” in Scalia, *A Matter of Interpretation*, p. 117. Cf. also *Law’s Empire*, at 225.

<sup>27</sup> Cf. Michelman, “The Constitution as a Legitimation Contract” (Ms.); but see also, to the same effect, O. Gerstenberg/Ch. F. Sabel, “Directly-Deliberative Polyarchy as an Institutional Ideal for Europe?” In: Joerges/Dehousse, eds., *Good Governance in Europe’s Integrated Market* (Oxford UP 2002), p. 289 ff.

<sup>28</sup> Cf. Tushnet, “The issue of state action/horizontal effect in comparative constitutional law,” in: *1 International Journal of Constitutional Law*, p. 79 ff, at 93. Thus, according to Tushnet, the idea is that the same constitutional norms bind everyone, public and private, but that some additional norms – taking private autonomy into consideration – weigh against full-scale application of the basic norm to private actors; constitutional norms may or may not outweigh private autonomy. On the other hand, Tushnet’s approach remains comfortably internal to the traditional vocabulary. See also *infra*.

<sup>29</sup> John Rawls, *Political Liberalism*, p. 137 (Columbia 1996).

The concern, then, is that through the trend towards privatization, constitutional questions (for example, regarding the meaning, content, importance and scope of expressive liberties) are withdrawn from the agenda of the legitimacy-conferring process of constitutional justification; that, in other words, the privatization-induced expansion of the scope of property rights inappropriately or problematically diminishes and narrows the scope of public constitutional justification. Property rights, in this scenario, would operate as gag-rules that restrict *from without* the process of constitutional justification. Ultimately, privatization would marginalize the constitution, and change our sense of interdependence in society: of the collective conversation about what we owe one another as a matter of justice and fairness.<sup>30</sup>

Consider now, against the background of this scenario, the competing argumentative strands in *Appleby*:

In *Appleby*, the applicants' first line of argument rested on the premise that there are limits to the extent to which the state may escape constitutional constraints through "delegation" to private actors of "public functions." The applicants pointed out that it was a public entity that had built the area in question (the "Galleries") on public land and a government minister who approved the transfer to private ownership. Therefore, so the argument ran, the State (the UK) could be held directly responsible for the interference with their freedom of expression and assembly flowing from Art. 10 and 11 of the Convention. The applicants' second line of argument focused on the intrinsic value of freedom of expression – and on the failure of the state to act in the face of an (alleged) undermining of that value. The applicants argued that, as the ideas which they wished to communicate were of a political nature, their expression was entitled to the highest level of protection. Access to the Galleries was essential for the exercise of those rights, as it was the most effective way of reaching the audience, as was shown by the fact that the local authority itself used the Galleries to advocate political proposals. The State is – according to the plaintiffs – under the obligation to put in place, through carefully drafted legislation, "a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas." Such legislation would have to be built around notions of "'quasi-public'-land" (in order to deal with difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit freedom of access for purposes other than the cultural activities on offer) and of "reasonable access" (with regard to shopping malls and university campuses) in order to give "an indication of how the State could approach the perceived problems."

The British Government challenged both lines of argument. It claimed that it could not be regarded "as bearing direct responsibility for any interference with the applicants' exercise of their rights," as "it was the private company, in the exercise of [its] rights as property owner, which refused the applicants' permission to use the 'Galleries' for their activities." While the British Government admitted that "positive obligations" were, in principle, capable of arising under Articles 10 and 11, such obligations did not arise *in casu*, because "[t]he alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures as a result." Between the property rights of the mall owners and the applicants' expressive liberty, a fair balance had been struck, because "means to exercise those rights [of expression and assembly] were widely available on genuinely public land and in the media." Second, the British Government made the claim that it is not "for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of 'quasi-public' land to which a test of reasonable access could be applied."

The Court's own assessment, adopted by six votes to one, essentially confirmed the British Government's line of argument; the British Government had not, according to the Court, failed in any positive obligation to protect the applicants' freedom of expression in not securing the applicants' access to the area in question. The Court was unpersuaded by the claim that the Government bears a "direct responsibility" for the applicants' restriction of freedom of expression because a public development corporation had transferred the prop-

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<sup>30</sup> Mark H. Moore, "Introduction to Symposium: Public Values in an Era of Privatisation," 116 *Harvard Law Review*, 1212, at 1217 (2003).

erty to a private company. The Court concentrated entirely on the question “whether the Government have failed in any positive obligation to protect the exercise of the applicants’ Art. 10 rights from interference by [...] the owner of the Galleries.” The *rationale* of the Court’s decision was that the “provision [of Art. 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right.” The Court added, with regard to the applicants’ argument that shopping centers are designed increasingly to serve as “public” gathering places, that such changes in the “ways in which people move around and come into contact with each other” do not require “the automatic creation of rights into private property.” The only limit would be, according to the Court, a constellation such as the one decided by the U.S. Supreme Court in *Marsh v. Alabama* where the entire municipality was controlled by a private body and “the essence of the right had been destroyed.”

What the Court in *Appleby* did acknowledge was that this freedom of expression is among “the preconditions for a functioning democracy” and that “[g]enuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.”<sup>31</sup> But at the same time the Court considered itself in a position to make far-reaching and complex factual and normative assessments concerning the “effective exercise of freedom of expression”<sup>32</sup>: The applicants, the Court said, could “employ alternative means, such as calling door-to-door or seeking exposure in the local press, radio, television” or “distributing their leaflets on the public access paths into the area.” At several occasions, as the Court points out, the applicants had been able to obtain individual permission from businesses within the area known as “the Galleries.” The applicants were therefore, according to the Court, not “effectively prevented from communicating their views to their fellow citizens.” As the Court emphasized, some 3,200 people had submitted letters in support of the cause pursued by the applicants. “Whether more would have done so if the [applicants’] stand had remained in the Gallerie” – the Court states – “is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.”<sup>33</sup>

Of course, at this point the concern I mentioned at the beginning with constitutional evacuation – raised in a dissenting opinion by Judge Maruste – is back with us: in a historical context in which many traditionally state-owned services such as post, transport, energy, health and community services, etc. have been, or stand to be, privatized, should, Maruste asks, private owners’ property rights prevail over “other rights” or “does the State retain its responsibility to secure the right balance between private and public interests?” Maruste argued that in *Appleby* the privatized area in its “functional nature” remained a *forum publicum*, and was intended to be used, by the applicants, as a forum to discuss publicly a topic of public, not private, nature and thus to contribute to the debate about the exercise of local government powers. Maruste, thus, puts to the foreground the agent’s liberty interest protected by freedom of expression and, from an interest-sensitive standpoint, argues that “it cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights.” Public authorities continue to bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals’ rights are respected. “The public authorities did not carry out a balancing exercise and did not regulate how the privately-owned *forum publicum* was to be used in the public interest.” The Chamber’s majority opinion thus failed to understand that “[t]he old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions of society.”

As Judge Maruste’s dissenting opinion illustrates, it remains a fair and obvious question *why* the Court concluded that the British Government was not under an obligation to secure the exercise of the applicants’ communicative interests within the privatized town center and to develop the domestic property law in the light of

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<sup>31</sup> at 39.

<sup>32</sup> At 47.

<sup>33</sup> At para. 48.

the importance of Art. 10 ECHR—in other words, why the Court held there was no “protective function” of the State corresponding to the applicants’ freedom of expression.

As I mentioned, the Court’s majority opinion concluded that Art. 10 ECHR, despite the importance of freedom of expression in a “functioning democracy,” does not bestow any freedom of forum for the exercise of that right; and to support this conclusion the Court pointed to the availability of what it took to be alternative channels of effective political communication *outside* the town center. But this reasoning betrays a partisan and narrow conception of the value of political speech – indeed, it betrays a non-engagement by the Court with the question *exactly why* freedom of speech is important in a functioning democracy. The Court never addressed the *liberty interest* the applicants had for considering it so important to communicate with their fellow citizens *within the town center* (as opposed to communication through “alternative channels”); the Court never explored the connection between political speech and the role of a town center as an institutional setting; and the Court never explored the idea that the fair value of the right to political speech always depends on the availability of resources which, under conditions of privatization, can become *scarce and precarious*. Freedom of speech is usually associated with a plethora of values, such as the discovery of truth, individual self-expression, a well-functioning democracy (Meiklejohn’s “thinking-process of the community”<sup>34</sup>), the possibility of social change, etc.<sup>35</sup> Suppose now that we value freedom of expression not merely in terms of the chance of “getting through” our messages, but in terms of the likelihood of the coming into existence of a process of citizens reasoning together about the common good – a process which is governed by a requirement of equality among the participants and in which citizens can understand themselves mutually as partners in a shared deliberative practice. The first understanding – call it the “aggregative” approach – abandons the idea of a truth-orientation of political speech and focuses entirely on whether communications have had a fair competitive chance (compared to some benchmark) of receiving their addressees’ attention – of getting heard. The second understanding, by contrast, focuses on the process of argumentative exchange and critical encounter between citizens with diverging standpoints – and, contrary to the aggregative approach, is concerned with the institutional presuppositions of such an undistorted communicative process. The aggregative approach cannot tell us what is *good* about political speech and why it is *inherently valuable* (apart from getting one’s messages through to others). By contrast, a “deliberative” view of political speech envisages political speech as a process in which citizens under conditions of reasonable disagreement can (i) engage in a process of civic conversation over how, with regard to some contentious issue, “society as a fair system of cooperation over time”<sup>36</sup> is possible and over what the *mutually shared* terms of cooperations, from case to case, should be, and can (ii) thereby recognize each other as equals. Proceeding from the baseline of a deliberative approach (the point of which is to shed light on the institutional prerequisites of a successful argumentative practice), the notion of a “quasi-public forum” loses its appearance of ontological queerness which it seemed to have under the aggregative approach; the idea of a quasi-public forum (I am dropping the quotation marks now) simply points out that critical encounters between citizens – the dialogical to-and-fro of competing arguments, of speech and counterspeech, the fallibilistic self-exposure to larger and larger and increasingly diverse audiences – needs an institutional site or arena where it can unfold; that the town center is *paradigmatically* such a site or arena; and that under certain circumstances – those of privatization – critical encounter (preconditional to a “functioning democracy”) can’t unfold without some help from the state and the legal system.

Suppose, then, that the Court, in deciding not to address free speech issues from an internal standpoint, was under the sway of the British Government’s contention that “it [is] not for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of ‘quasi-public’ land to which a test of reasonableness should be applied,” and that the Court out of skepticism with regard to the “cognizability” of the notion of a “quasi-public forum” willy-nilly felt “thrown back” to an emphasis on the property rights of the owner of the “Galleries” as an epistemologically safe harbor, as it were. Let’s – somewhat speculatively, I admit

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<sup>34</sup> A. Meiklejohn, *Political Freedom* (1960).

<sup>35</sup> For discussion, cf. Joshua Cohen, *Freedom of Expression, Philosophy and public affairs*, vol. 22, p. 207 (1993); Lee Bollinger & Geoffrey Stone, eds., *Eternally Vigilant. Free Speech in the Modern Area* (Chicago, 2002).

<sup>36</sup> Rawls, at p. 15, et passim.

– assume that the Court was aware of a phenomenon F. Schauer recently identified as “opportunism” with regard to freedom of speech, “First Amendment Opportunism,” for short. The idea is that all kinds of claims – political, cultural, ideological, economic and moral claims that are far wider than the First Amendment, and that appear to have no special affinity to it, find themselves transmogrified into the political and rhetorical high ground of First Amendment arguments.<sup>37</sup> Opportunism – hovering precariously between the pejorative and the complimentary – is made possible by the “rule-based” view that there is some “situationally antecedent core of the First Amendment,” an “essence” that “precedes application” and that is something “other than the circumstances in which First Amendment arguments may assist one another.”<sup>38</sup> First amendment opportunism can be contrasted, as Schauer says, to the incrementalistic method of common-law decision making, in which the role played by an antecedent essence of ideas is minimal. Maybe, then, the ECHR’s true message in *Appleby* is that the issues of privatization and of state sovereignty should be made to “migrate” into the contentious domain of pervasively (if you like, “essentially”) controversial freedom of speech issues – given the availability to the applicants of other means of communication. The decision’s emphasis on property rights would, thus, be meant to serve irenic purposes – i.e. operate as a method of avoidance – under conditions of pervasive reasonable disagreement over the proper value and scope of freedom of expression.

But property rights aren’t absolutes; if First Amendment opportunism is a problem, then “property rights” opportunism is one, too. Property rights don’t settle the question of how to understand freedom of expression, because what counts, in a specific fact-situation, as a legitimate property interest, can only be the *outcome* (and not the premise) of an argument which takes into account the role and the importance of other protected interests, such as the interest in freedom of expression. In *Marsh v. Alabama* – a case to which the ECHR explicitly refers – Justice Black, writing for the majority, developed the idea that “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>39</sup> Add to this the observation by Justice Marshall in his concurring opinion in *Pruneyard Shopping Center v. Robins at al.*: to suggest that common-law rights (such as those involved in the common law of trespass) are not subject to revision by the State (or the Federal Government) would represent a return to *Lochner* – would “freeze the common law as it has been constructed by the courts [...] would allow no room for change in response to changes in circumstance.” But, on the other hand, the suggestion is not – as Marshall emphasizes – that property rights are defined *solely* by state law or “that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government [...] The constitutional terms ‘life, liberty and property’ do not derive their meaning solely from the provisions of positive law [but] [...] have a normative dimension as well.

My point here is that once we recognize that property rights aren’t absolutes—aren’t *Lochner*-like conversation-stoppers –, then we (including the courts) can’t avoid engaging in controversy over the question why freedom of speech is of value and what good is its point or purpose. Only according to a libertarian approach do property rights retain an epistemological status of “firstness” in the sense that they are thought to pre-exist constitutional provisions and provide a pre-interpretive standard against which to assess constitutional practice. While the libertarian view of property rights is said to flow from skepticism with regard to the very possibility of *practical reason* (and the “cognizability” of notions such as fairness<sup>40</sup>), my argument here has been, first, that property rights are the consequence, not the foundation, of the justice of economic institutions;<sup>41</sup> they are a consequence of legal norms designed to promote other values, such as welfare or secure contractual expect-

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<sup>37</sup> F. Schauer, “First Amendment Opportunism,” In: Bollinger/Stone, eds., op. cit., 174 ff.

<sup>38</sup> *Ibid.*, at 194 f.

<sup>39</sup> 66 S.Ct. 276, at 278.

<sup>40</sup> As a defender of the libertarian approach, Richard Epstein himself acknowledges: to deny the possibility of argument across cultures is to deny them within cultures, or indeed between individual persons. (*Skepticism and Freedom, A Modern Case for Classical Liberalism*, p. 81 [2003]). It is (for me) difficult to see how the sweeping force of this Davidsonian argument, once unleashed, can be reconciled with his case for what he calls classical liberalism.

<sup>41</sup> For this – Rawlsian – point, cf. Thomas Nagel, “Rawls and Liberalism,” in: Samuel Freeman, ed., *The Cambridge Companion to Rawls*, p. 62 ff., at 68 (2003).

tations; they are conventional in this sense that they depend on the legal system.<sup>42</sup> Secondly, my argument here is that ongoing and, in this sense, “undecidable,”<sup>43</sup> controversy over rights and over what Rawls has called their “fair value” – such as, *in casu*, of expressive liberties—is not a threat to the legal system, i.e., something to be contained (and to be controlled *from without*) by recourse to conventionalism, but *constitutive* of the legal system. If legal argument is characteristically and pervasively moral argument, then the “point” and “bindingness” of a legal system are less well captured by the idea of a “distancing device”<sup>44</sup> with regard to controversy – to be brought into play once moral resources have been exhausted –, but rather by its capacity for “reflexivity” in the sense that law provides both a framework and a trigger for debate (e.g. over the scope of the interests protected by freedom of expression) under conditions of irresolvable reasonable interpretive disagreement – debate which is itself “jurisgenerative” and lawmaking.

Now, I am offering these observations not in order to replace conventionalism with some idealistic-unworldly moral and rhetorical high-ground, but simply to make plausible why – given the twin pitfalls of “opportunistic” essentialism and conventionalism (or pragmatism) – rights-talk is likely to continue to play a role: to invoke a right is the way of bringing dialogue and controversy back into exclusory, entrenched and *marginalizing* social settings; “rights,” then, are argumentative vehicles for publicly expressing demands for equality of attention and recognition – and for thereby *uno actu* bringing about a public sphere in which controversy can unfold. As Martha Minow nicely puts it, the language of rights is nuanced enough to express, ‘I am connected to you in my very willingness to observe your boundaries,’ or ‘I do not belong to your community, but I lay claim to some shared terms in demanding that you respect my separateness.’<sup>45</sup> Rights, then, are devices for joining discussion; they affirm a commitment to live together under mutually shared and acceptable terms of cooperation; rather than merely being devices of privatization of value judgments – of boundary-drawing to set us apart –, their “dialectics” is that they, once invoked, have the force to bring about an agenda and a forum that parties to a conflict *cannot avoid* (as part of their commitment to *reasonable* disagreement and commitment to understanding themselves mutually as “parties to a conflict” at all – rather than reacting to conflict either by walking away [exit]<sup>46</sup> or by resorting to murder), and that is in this unreduceable (and *irenic*) sense *public*.<sup>47</sup> (Full privatization of value determinations – in other words, elevation of property rights into a kind of *grundnorm* from which to judge all the rest of the norms – would have something *dehumanizing* in that it would deny the possibility of moral perception.)

#### IV. Comparative Constitutionalism: A Guide of the Perplexed?

If these arguments about property and freedom of speech are so easily available “to us” (and there was nothing original in what I have said), why, then, were they not available to the Court? Assume that one possible (if somewhat charitable) explanation is this: that the Court’s *obéissance* to the British Government’s hard-nosed

<sup>42</sup> Cf., from respectively different perspectives, Duncan Kennedy, in: *The New Palgrave of Economics and the Law* (entry: law-and-economics from the perspective of critical legal studies), p. 465 ff. (1998); Liam Murphy/Thomas Nagel, *The Myth of Ownership. Taxes and Justice*, p. 44 f. (Oxford, 2002); Cass Sunstein, “State Action is Always Present,” 3 *Chicago Journal of Int’l Law* 465 ff. (2002); see also generally: Stephen Holmes/Cass Sunstein, *The Costs of Rights. Why Liberty Depends on Taxes* (Norton 1999).

<sup>43</sup> Duncan Kennedy, *The Disenchantment ...* cf. footnote 6.

<sup>44</sup> On the idea of institutions as distancing device, cf. J. Raz, “On the Authority and Interpretation of Constitutions,” in: L. Alexander, ed., *Constitutionalism. Philosophical Foundations*, p. 152 ff., at 190 f. (Cambridge Studies in Law and Philosophy 1998). But see also, in Germany, Helmut Schelsky’s sociological conception of institutions.

<sup>45</sup> M. Minow, *Making All the Difference. Inclusion, Exclusion, and American Law*, p. 310 (Cornell 1990).

<sup>46</sup> Cf. the observation by Kant (*Metaphysische Anfangsgründe der Rechtslehre*, par. 62) that, given the spherical form of the world, the “possibility of exit” is limited, and we are ultimately forced to cooperate. For a related point, cf. Rawls’s insistence on the “closedness” of society.

<sup>47</sup> For similar intuitions, cf., despite some difference between the positions, Ch. F. Sabel/B. Simon, “Destabilizing Rights. How Public Law Litigation Succeeds,” *Harv L. Rev.* (forthcoming) (idea that rights “destabilize” entrenched routines); G. Teubner, “Contracting Worlds: The Many Autonomies of Private Law,” in: 9 *Social and Legal Studies*, p. 399 ff. (2000) (idea that rights are irritants that perturb “discourses” get “translation” going between social systems), and my response to Teubner in the same issue; cf. also O. Gerstenberg, “Private Law, Constitutionalism and the Limits of the Judicial Role,” in: C. Scott, ed., *Torture as Tort* (Hart 2001) (idea that rights are stakes in a conflict-overarching argumentative game). But cf. also F. Michelman, “Justification (and Justifiability) in a Contradictory World,” *NOMOS XVIII*, p. 71 ff. (1986) (idea that rights are neither a “gun” nor a “one-man-show,” but relational).

claim was due to intimidation, to which the Court was particularly vulnerable as a supranational human-rights court, and that the Court's vulnerability to intimidation, in turn, has to do with the absence (or, at least, structural weakness) of a Convention-wide "constitutional patriotism" as a formative context<sup>48</sup> or empirical contingency<sup>49</sup> underlying the constitutionalist justification of politics.

To what extent, then, might we say that constitutional interpretation does not simply rely on constitutional patriotism as a premise, but no less supports its emergence and can, by way of non-tautological circularity, bring it about?<sup>50</sup> Moral perception, tolerance for conflict, willingness to make yourself vulnerable, etc. always depend on a motivational (or ethical) endorsement of the idea of dialogic self-exposure to others, and a confidence that if I do so, you will in all likelihood reciprocate – anticipating that I will do the same; call this action-enabling web or chain of mutual reciprocity-anticipations "constitutional patriotism," "democratic partnership," or "public reason."<sup>51</sup> To what extent can "comparative constitutionalism" become an engine of a more denationalized, more inter-translatable, more validity-oriented – and, at the same time, more context-sensitive and inclusory constitutional patriotism? To what extent could the workings of "comparative constitutionalism," if suitably routinized within our local adjudicative practices, offer a safeguard against false insularity – against the legal system lapsing (back) into the "wrong" kind of justificatory closure?

Consider, to begin with, Anne-Marie Slaughter's contention that, to the extent to which we focus on law's "persuasive authority" (as opposed to questions of mere pedigree), this comparative dimension, becomes *constitutive* of legal justification (rather than remaining marginal and supplementary to it) – and, as she says, a "family affair."<sup>52</sup> What she observes is an "underlying shift from two systems – international and domestic – to one; from international and national judges to judges applying international law, national law, or a mixture of both." The focus, she says, "shifts from the dispute resolvers to the disputes themselves, and to the common values that all judges share in guaranteeing litigant rights and safeguarding an efficient and effective system."<sup>53</sup> This shift of focus and perspective will raise tolerance for conflict, since judges now understand each other not as a group of strangers (bound together by norms of politeness), but as contenders in a "common judicial enterprise," with "deep respect for each other's competences," and "driven by the expression of a deeper common identity." In a similar vein, Frank Michelman says, against the background of U.S. constitutionalism, that breaking away from "exceptionalism" is "'only' [...] about joining discussion" – "[...] about plugging American debates about the basic rights of people here, under our practices and laws, into a parallel global conversation."<sup>54</sup> Entering full-scale into "open, visible, robust colloquy with transnational discourse of human rights" would not diminish, but strengthen domestic law's integrity by roping domestic judges into the discipline of justifying their

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<sup>48</sup> On this idea, cf. R. Unger, *False Necessity* (CUP, 1987).

<sup>49</sup> On this idea, cf. F. Michelman, "Morality, Identity and 'Constitutional' Patriotism," in 14 *Ratio Juris* 253 ff. (2001).

<sup>50</sup> Notice the difference of this question to the question Mark Tushnet is asking: According to Tushnet, the issue of "horizontal effect" can be seen as a benchmark of a country's commitment to social democracy; we may even compare legal systems over the world along that axis. He takes as starting point the idea that constitutional norms bind everyone, public and private, but that some additional norms, reflecting, weigh against the full-scale application of the basic norm to private actors. A constitutional norm's horizontal effect, Tushnet says, is thus always controlled by counternorms which reflect the value of private autonomy, the force of which stands in an inverse relationship to the commitment to social democracy. The upshot of his proposed solution to the problem is that "[t]he weaker a system's commitment to social democratic norms, the more expansive can the counternorms that weigh against the full direct horizontal effect." While I agree with much of what Tushnet says on liberal autonomy as a counternorm, I confess that I am not entirely convinced by this somewhat "mechanical" and sociological picture, and my suggestion is that we should disentangle the issue of the effect of constitutional norms on private law from the issue of social democracy altogether. A modern constitutional regime will – as I argue here – give rise to a "protective function" of the legal system to develop private law norms in the light of constitutional and human rights norms as context-sensitive pacemakers of reform. The addressee of, and agent, behind, this protective function may be the (nation-) state, or, as increasingly so in Europe, new, network-like forms of governance. The current debate on the Europeanization of private law is a highly illustrative example for the (re-)modelling of the protective function beyond the nation state. We should not obscure freestanding and problem-specific analysis of the protective function by premising that analysis on the theory-laden question of whether or not a country's scheme of statutory norms and of constitutional theories expresses a commitment to social democracy.

<sup>51</sup> Respectively, Michelman (following J. Habermas), 14 *Ratio Juris*, p. 253 (2001); Dworkin, "The Partnership Conception of Democracy," 86 *Cal. L. Rev.* 453 (1998); Rawls, *Political Liberalism* (1996).

<sup>52</sup> Anne-Marie Slaughter, "A Global Community of Courts," in 44 *Harvard International Law Journal*, 191 ff. (2003).

<sup>53</sup> P. 218.

<sup>54</sup> Frank Michelman, "Integrity-Anxiety" (manuscript, Carr Center, 2002).

takes on specific problems before the forum of an emergent world legal opinion (thus, “integrity-anxiety” and domestic lawyers’ concern with losing control are unfounded); indeed, joining discussion could become a catalyst for an “emergent ... world legal opinion,” a “speculation” he calls “utopian, and Habermasian.”

Let me, then, call it *universalistic* and *pragmatic*<sup>55</sup>: underlying this “speculation” is the idea that we cannot know what a constitutional norm means until we apply it; that to *apply* an (open-ended constitutional) norm always involves critical self-exposure by the interpreter to an ever widening and increasingly diverse audience of other interlocutors/interpreters to mutual criticism and dialogue across the boundaries of your “self” and of your “vocabulary”; in other words, that presuppositional to successful constitutional-norm interpretation are notions of justifiability (meanings and justifications *can* be shared, however fallibilistically, across contexts) and of mutual recognition as equals (common membership to a consensus) – notions which account for the orientation towards both widening and ever more heterogenous audiences. (Think here, if you like, of Wittgenstein’s private language argument.<sup>56</sup>) Comparative constitutionalism, then, from the vantage-point of this “speculation,” is not external to (and not a threat to), but an internal or endemic to the very concept of constitutional-norm application.

Of course, the “speculation” (into which I am joining here) always comes with a sting<sup>57</sup>: the risk of ending up trading one kind of closure (or “bad coherence”) against another one – the self-conscious, exceptionalistic closure of the domestic national legalism against the new systems-theoretical closure of legal discourse and of legal professionalism (“Juristenrecht”). The sting is that of too much “family” or “familiarity,” of too much judicial (and professional and professorial) comity and complicity; and ultimately, of law turning into an autopoietically closed, self-referential, self-programming subsystem among others, hived-off – and estranged from – “profane” political contention and input; and, ultimately and somewhat paradoxically, of the rationalizing legalist-formalist dream (and the separability-thesis) having a strange “re-entry” under conditions of legal globalization.<sup>58</sup>

Now, I am pointing at this sting not in order to discredit the universalistic-pragmatic aspiration behind the notion of “persuasive authority.” Comparative constitutionalism, rather than contracting and receding into a purely jurists’ law, can become a vehicle for widening (and deepening) the pool of (constitutional) arguments available; and of shifting the burden of proof on those who proclaim to have reasons to depart from a shared understanding. *In casu*, a more straightforward and constitutionally adequate course for the ECtHR would have been to insist on the centrality of town centers for a functioning democracy especially in a context of ongoing privatization – and to leave the more detailed policy-balancing between norm and exception to the British legislative process.

## V. Brief Conclusion

What remains puzzling in the *Appleby*-case I reported here, then, is the Court’s complete indifference, despite its many comparative references to “foreign” case law, to *why* freedom of political speech is so important and *how* mutual persuasion depends on a structure and climate that encourages attention to the merits of what others say. But maybe this absence just faithfully mirrors a reality of new European governance.

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<sup>55</sup> I am, of course, aware of the allusion to Habermas’s and Apel’s concept of “Universalpragmatik” (perhaps not fully adequately rendered by “universal pragmatics”).

<sup>56</sup> Cf. Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard UP, 2002); and also his earlier work, in particular, *Reason, Truth, and History* (1981).

<sup>57</sup> Cf. also R. Unger’s notion of the “dirty little secret of jurisprudence,” in: *What Should Legal Analysis Become?* P. 72 f. (Verso 1996).

<sup>58</sup> Cf. also the “short list” of “some of the questions” pulled together by David Kennedy, “Boundaries in the Fields of Human Rights: The International Human Rights Movement: Part of the Problem?” In: *15 Harvard Human Rights J'l*, 101 ff. (2002).