

**The *ombre spirituel* of Statehood
in the European Union:
Reflections on Nikos Scandamis' Essay
L'Etat dans l'Union européenne:
*Passion d'un grand acteur***

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Abstract

Nikos Scandamis' essay L'Etat dans l'Union européenne: Passion d'un grand acteur suggests the EU has flayed the Westphalian Leviathan. It has laid its dark insides bare to relentless scrutiny. But perhaps it could only do so by appropriating these dark insides for itself. The ombre spirituel that Schmitt associated with sovereign statehood does not seem to have disappeared like the rest of nationalistic mists before the rising sun of European integration. It has simply shifted along with the pretensions of this rising sun. The market place has in broad daylight become the source of a new shadow. This response to Scandamis argues that the CJEU, the principal agent of EU integration since its decisions in Costa v ENEL and Van Gend & Loos, has simply taken over the many ombres spirituels of the Member States in the form of one cloudy jurisprudence that allows for little democratic transparency. True, the EU does not claim to be a sovereign state as yet and it is often said that its goal is also not to become one. In the meantime, however, it pursues its governmental goals in the manner of a sovereign state under the ombre spirituel offered by the obscure jurisprudence of its highest judiciary.

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I. Introduction

THE demise of the Westphalian state in the European Union is surely the key theme of Nikos Scandamis' essay *L'Etat dans l'Union européenne: Passion d'un grand acteur*. One of the significant results of this demise, argues Scandamis, is the loss of the opacity or invisibility that characterised the Westphalian state. At issue in Scandamis' essay is, in other words, the demise of the state as a person – a *persona* – that can hide as much as and perhaps more than it shows. The compliance of the European Member State with the Kelsenian and Weberian demands of complete normativity and transparency has thus come to deprive the state of the last vestiges of state secrecy which it may have enjoyed under Westphalian conceptions of statehood.

The concern with secrets of state or the secrecy of the state – the so-called *Arcana* – is bound to lead one in the direction of the political thinking of Carl Schmitt. Few modern political or legal theorists stressed the existence and need for the *Arcana* of the state more than Schmitt did¹. It is therefore no surprise

¹ See CARL SCHMITT's evidently sceptical discussion of the liberal dismissal of the *Arcana* in his *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin: Duncker & Humblot, 1996 [1923]) 48. For an illuminating discussion, see OLIVER KOHNS, *Arkan Politik in der Moderne – Der Imperativ der Öffentlichkeit, das Staatsgeheimnis und die politische Paranoia* *Forum für Politik, Gesellschaft und Kultur*, Juni 2013, 4-7. Sovereignty, observes Kohns poignantly, is the essential rest of the pre-modern conceptions of the need for states to sustain a certain secrecy: "*Auch der modern Staat beansprucht, mit anderen Worten, eine – wenn auch limitierte – Aussetzung der juristischen Ordnung, um die staatliche Ordnung als Ganzes gegen innere oder äußere Gegner zu schützen und zu verteidigen. In der Staats-*

that Scandamis would take Schmitt's theory of sovereignty as the polar opposite of the Kelsenian/Weberian concern with the state as a fully transparent and strictly normative entity. Scandamis highlights crucial aspects of the Schmittian concept of state sovereignty in this regard. By reserving the competence or capacity to claim a *potentia absoluta* that exceeds its law, the state also exists outside the legal sphere that it sustains. Its *potentia absoluta* renders it *legibus solutus* and creates a sphere outside itself – *une espace dehors*. This *espace dehors*, which frames the domain of the rule of law inside the state, renders possible an *ombre spirituel de l'Etat*, that is, a spiritual umbrella in the shade of which all state action can be totalised with reference to the term *public interest*².

At issue in this Schmittian conception, in other words, is a state that precedes its own law and the rule of its law. This state that precedes its law would give way in Kelsen's theory of law, to the law that precedes the state, that is, the law that establishes and defines the state with reference to a basic norm or *Grundnorm*. But, the shift from the Schmittian to the Kelsenian state was not just a theoretical development, claims Scandamis. The theoretical development reflected a social development that occurred within the empirical reality of the modern state. According to him, antagonism within the state led to the expulsion of the *arcane* Schmittian state and gave rise to the liberal distinction between state and civil society and the liberal requirement that the state be tied to

theorie wird diese Aussetzung als das Prinzip der Souveränität bezeichnet."

² NIKOS SCANDAMIS, *L'Etat dans l'Union européenne: Passion d'un grand acteur*, *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, 01 Septembre, no. 5, 1335.

transparent norms that civil society can take as guarantees for its liberty. Scandamis invokes here a development that an early work of Luhmann would analyse in a most probing way; we will return to this Luhmannian analysis below.

In the process of European integration, argues Scandamis, the Kelsenian/Weberian state finally comes into its own as a structure of full compliance with norms that are exhaustively scrutinised from *without* and *within*. Not only does the Court of Justice of the European Union (hereafter CJEU) constitute an external control of the state's compliance with EU norms, but also the state's own judiciary constitutes an internal control that extends EU normative surveillance into the deepest recesses of its existence. This internalisation of the scrutiny of its norms completes the destruction of the *person* of the state. It dismantles the last resorts of personhood, that is, the last remains of any kind of mask or *persona* that allows for the acts of an *actor*. From this erasure of personhood also ensues the ultimate Weberian reduction of the state, namely, the reduction of the state to *a system of administrative acts* that are no longer *acts* in the real sense of the word. The "acts" at issue here no longer relate to personal deliberation and decision-making. They are mechanical executions of pre-existing norms that are, in turn, exhaustively reflected in the execution. This, then, is the marriage between Kelsen and Weber that Scandamis invokes with regard to the remains of statehood in the EU.

What is lost in this process? At issue is a loss to which a Greek political theorist may be especially sensitive. Speaking for a moment with Heidegger, one can say it is the quintessentially Greek concern with *aletheia* – with the shadow, shade, veiling or sheltering that allows for a portraying sil-

houette in the midst of the most glaring illuminations – that faces annulation in this depersonification of the state³. A brief Nietzschean recollection of loss is also apposite here: It is in bright daylight that the madman would enter the market place with a lantern to disclose, finally, the vast nothingness that would come to mark the age of nihilism. The dawn – Enlightenment – no longer brings light, only more night, suggested Nietzsche's madman⁴.

The Westphalian state was effectively dismantled in two shifts; the shift from the Schmittian conception of the state as *ombre spirituel* to the Kelsenian conception of the fully normative state; and the shift that would reduce the latter internally to a Weberian residue, namely, a rationalised system of administrative action devoid of human actors. This double movement, argues Scandamis, would ultimately leave to the state only the thin margin of *state action* that it might still enjoy in the context of international law. In the response to Scandamis' essay that follows here, I will reconsider this central thesis of the essay in two steps. The first step is expounded in Section II. It consists in questioning whether Kelsen's conception of the state really plays the role devised

³ Whether this is a truly "Greek" concern or just an invention of Heidegger that he attributed to the Greeks is a question that cannot be addressed here. It is nevertheless worth noting briefly that there is significant support for this attribution among philologists. See for instance PAUL FRIENDLÄNDER, *Plato I: An Introduction* (Princeton: Princeton University Press, 1958), 221-229.

⁴ FRIEDRICH NIETZSCHE, *Die frohliche Wissenschaft in: Sämtliche Werke, Kritische Studienausgabe*, vol 3 (Berlin: Walter de Gruyter, 1999) 481: "Kommt nicht immerfort die Nacht und mehr Nacht? Müssen nicht Laternen am Vormittage angezündet werden?".

for it in Scandamis' scheme and whether it is not Kelsen's rather than Schmitt's theory of law and the state that provides the state with the *ombre spirituel* that Scandamis invokes. Normative claims themselves become the spiritual shade in which the state can shelter its citizens in Kelsen's theory of the state and of law. This kind of normative sheltering of political concerns can of course not qualify as honest politics in the books of anyone who insists on the existential or concrete nature of the political. Schmitt was therefore only consistent when he called this normative politics "cheating". Section II ultimately dismisses Schmitt's views in this regard. It nevertheless examines them closely, for they do allow a probing perspective on a key element of contemporary EU politics to which Section III turns.

Section III comprises the second step of this response to Scandamis' argument regarding the demise of the *ombre spirituel* of statehood in the EU. It consists in showing how a certain fundamental rights normativity and indeed a Kantian-Kelsenian normativity can indeed be considered an honest or non-cheating *ombre spirituel* under which states can continue to shelter the humanity of their citizens, provided a certain civil societal reduction of this normativity does not come to destroy this sheltering potential while claiming to guarantee it. This is indeed what is going on in the EU today, claims Section III, because of the institutional framework under which the new *ombre spirituel* of the EU presents itself. It is this institutional framework, and not its substantive normativity, that turns the new *ombre spirituel* of the EU into an instance of institutional and political cheating. In other words, in response to Scandamis' claim regarding the expulsion of the *ombre spirituel* of statehood in the EU, I will argue

in what follows that this *ombre spirituel* has actually not been expelled by the EU. The EU has simply appropriated it for itself, and has done so, moreover, in a disingenuous way.

What follows is ultimately an argument for a restoration of parliamentary democracy in the EU by either inaugurating it properly at EU level or restoring it properly at Member State level. The parliamentary democracy argued for will be presented – with reference to Niklas Luhmann, Ernst-Wolfgang Böckenförde and Claude Lefort – as an honest engagement with the abyssal void from which all political existence and all concentrations or exercises of power derive. The void from which politics and power derive constantly exposes them to the mysterious origin or secret of political existence. Democracy is the only political form that consciously takes issue with this secret from which it derives. It does so by accepting that this secret cannot be revealed. No obscurantism will be afoot here, however. The democratic *ombre spirituel* that my response to Scandamis advocates, proposes no retreat from the Enlightenment insistence on public accountability and transparency in politics and government, and no compromise of the Kantian principle of moral autonomy and the human rights culture associated with it. To the contrary, the Enlightenment demands for transparency in politics, moral autonomy and fundamental rights will be raised to a stricter level of scrutiny through which it will become clear that these demands themselves also constitute an *ombre spirituel*, that is, a spiritual shadow that allows for and shelters sovereign concentrations or exercises of power, without providing them with any revealed or clarified foundations. What distinguishes the Enlightenment or Kantian concern with transparent democratic politics from other exercises of power

does therefore not consist in the one being an instance of transparent normative consensus while the others remain opaque deployments of force. It consists in the former remaining a consistent and candid avowal of the irreducible groundlessness that precipitates political existence, while the latter invariably turn into disavowals of this groundlessness that claim to have fathomed their own depths⁵.

II. The Pure Theory of Law: A Source of Sovereign Sheltering

Schmitt would regularly express a sense of dismay and exasperation with regard to Kelsen's legal theoretical insistence that everything begins with a norm. Kelsen's system of

⁵ The concern with that which withdraws from whatever becomes manifest, the concern with "truth" as *that which is never revealed in what appears*, to which the Greeks referred as *aletheia* (see again note 3 above), evidently runs through the whole argument that follows. It should be stressed, however, that the argument dissociates itself from the bizarre obscurantism with which Heidegger would distort and betray this thought after brilliantly bringing it to the attention of twentieth-century philosophy. Of concern is, instead, the raising of this thought to the level of a second-order scrutiny of Enlightenment values and principles as rhetorical organisations of groundless formations of power and not the antithesis of power as they are often presented. The obnoxious and idiotic extremes to which Heidegger's obscurantism would lead have again come to the fore recently with the publication of his *Schwarze Hefte* 1931-1938, 1938-1939 and 1939-1941, *Gesamtausgabe* 94, 95, 96 (Frankfurt a.M: Vittorio Klostermann, 2014). For an incisive discussion of this publication, see *Heidegger: la boîte noire des Cahiers, Critique*, décembre 2014.

law, contended Schmitt, turns on a bottomless positivism in terms of which a norm applies simply because and when it applies – “[e]twas gilt wenn es gilt und weil es gilt[, d]as ist Positivismus”⁶.

Kelsen was surely well aware that the political and the legal does not begin with a norm, and therefore also not with a *Grundnorm*. Kelsen knew, Ernst-Wolfgang Böckenförde observed, that questions regarding the origin and end of legal systems ultimately take one out of the realm of the “ought” and into the realm of the “is”; out of the sphere of normativity and into the sphere of facticity or existence. He referred in this regard to this passage from Kelsen’s *Hauptprobleme der Staatsrechtslehre*:

“It is extraordinarily significant that the question regarding the beginning and end of norms can only be answered by moving from the world of normativity [*Soll*] to the world of existence [*Sein*]. The inverse also applies. The question regarding the beginning and end of existence invariably takes one out of the world of existence and into the world of normativity. That makes clear that the question regarding the beginning and end of normativity exceeds normative observation and the methods of normative knowledge”⁷.

⁶ *Ibid.*

⁷ HANS KELSEN, *Hauptprobleme der Staatsrechtslehre: Entwickelt aus der Lehre vom Rechtssatze* (Aalen: Scientia Verlag, 1984), 9-10: “Es ist außerordentlich bezeichnend, daß man die Frage nach dem Anfange und dem Ende, der Entstehung und Zerstörung des Soll nur insofern beantworten kann, als man aus der Welt des Soll in die des Seins übergeht; und daß man bei derselben Frage in bezug auf das Sein in die Welt des Soll gerät. Daran zeigt sich deutlich, daß die Frage nach Entstehung und Zerstörung des Soll nicht mehr in der nur auf das Soll gerichteten Beobach-

Kelsen's pure theory of law and concomitant normative reduction or definition of the state cannot, in view of this passage, be explained in terms of an inexplicable blindness regarding the existential origins of all normativity. That this cannot be done is also evident from his self-consciously constructionist conception of the *Grundnorm* as something that does not exist, something that for reason of this non-existence can only be presupposed (*vorausgesetzt werden*) and never be posited (*gesetzt werden*)⁸. This constructionist move is the essential step in the pure theory of law through which Kelsen opts to illuminate or highlight only the norm and not its non-normative or existential origins. And, it is with this *illumination of normativity* that Kelsen's pure theory of law allows the existential origins of law and the state to remain a realm of shadows that cannot be brought into the light of the state and state laws. And the question is whether this is not, in the final analysis, a more effective sheltering of the political than Schmitt's relentless insistence to always *expose* the existential foundation of the political as the real and ultimate condition

tungsebene und innerhalb der normativen Erkenntnismethode liegt." On Kelsen's consistent methodological anti-sociological refusal to engage with questions of existence and to restrict jurisprudence to a pure concern with the legal sphere of normativity or "ought", cf. HANS KELSEN, *Über Grenzen zwischen juristischer und soziologischer Methode: Vortrag, gehalten in der Soziologischen Gesellschaft zu Wien* (Aalen: Scientia Verlag, 1970).

⁸ See HANS KELSEN, *Reine Rechtslehre* (Aalen: Scientia Verlag, 1994) 66-67. For a more extensive discussion of this element of Kelsen's thinking, see JOHAN VAN DER WALT *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin/Boston: Walter de Gruyter, 2014) 315-323.

for and *of* normativity (*for*: no normativity without existential political foundations; *of*: normativity is essentially a reflection or function of political existence and has no significantly separate existence and can be undone at any moment).

Given his conviction that positive normativity only endures at the behest of the political, it is completely consistent of Schmitt to consider invocations of morality or normativity in politics dishonest. The one who takes recourse to the concept of human rights or to humanity in political conflicts, argues Schmitt with reference to Proudhon, wants to cheat – “*Wer Menschheit sagt will betrügen*”⁹. This view is surely consistent with a point of departure that considers the political an existential moment in the life of the people for which normativity may at most be an initial catalyst, but ultimately belongs to a different order of (the assessments of) things that is no longer relevant once the realm of the political moves firmly to the fore¹⁰. It is evidently an unabashed existential realism that is afoot here. When existential concerns of dominance and survival are at stake, morality or normativity becomes a secondary consideration for those who hold this existentialist view. The point of invoking this realism here is neither to endorse, nor to question or dismiss it. The debate whether the foundations of the political are existential or normative can be traced all the way to Thucydides¹¹ and one is surely not going to contribute anything significant to it within the span of the few pages of argument that can be offered here.

⁹ CARL SCHMITT, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1996) 55.

¹⁰ *Ibid.*

¹¹ THUCYDIDES, *History of the Peloponnesian War*, Book V, CV, Cambridge, MA: Harvard University Press, 1938, 166-167.

So why invoke here Schmitt's realist assessment of human rights claims in political conflict as a form of cheating? We invoke it here, in the first place, to show why this assessment is wrong and why the invocation of fundamental rights can constitute an honest political concern. Invocation of human rights claims in political conflict is undoubtedly an essential rhetorical strategy of contemporary sovereigns. And one can add to this that such invocation is *essentially* a rhetorical practice. But, recognising something as a rhetorical practice does not *as such* – that is, for reasons of being recognised as rhetoric – amount to a recognition of cheating, unless subscription to the Platonic separation of truth from rhetoric forces one to take this rather metaphysical stance¹². Schmitt's imputation

¹² The great Humanist tradition of rhetoric and rhetorical studies that would begin after Plato with Aristotle, ascend to prominence in classical Roman culture and sixteenth-century Renaissance Humanism, and receive a significant revival with the hermeneutic turn in twentieth-century humanities and social science, would hold to the contrary that rhetoric is the source and not the distortion of truth. For instructive discussions of this tradition, see ERNESTO GRASSI, *Rhetoric as Philosophy. The Humanist Tradition* (University Park and London: Pennsylvania University Press, 1980) and MICHAEL MOONEY, *Vico in the Tradition of Rhetoric* (Princeton: Princeton University Press, 1985). One of the strongest arguments for rhetoric as the source of normativity would emerge from the work of Hans-Georg Gadamer. See his discussion of the humanist tradition in GADAMER, *Wahrheit und Methode* (Tübingen: JCB Mohr (Paul Siebeck), 1975, 1-39 as well as GADAMER, *Rhetorik und Hermeneutik* (Göttingen: Vandenhoeck & Ruprecht, 2002). The essence of Gadamer's response to Habermas in the "critical theory - hermeneutics debate" also concerned the point that the normative critiques of traditions for which Habermas argued are themselves rhe-

of cheating to all human rights claims in political conflicts would seem to hark back to a bygone age of metaphysical separations between truth and rhetoric. Schmitt's metaphysics may well be more inversely Platonic than Platonic, considering its insistence on the *truth* of the political will that informs all invocations of normativity, but as Heidegger has pointed out masterfully with regard to the inversion of Plato's ideas embodied in the Nietzschean invocation of the will to power, the difference between Platonism and inverse Platonism is less significant than it seems¹³. From a truly post-Platonic (and post-Nietzschean) point of departure, however, more than just rhetoric is required to constitute a case of cheating. Rhetoric can also be employed for purposes of cheating, no doubt, but it is not always employed thus. We shall come back to this point below.

torical traditions. See GADAMER, *Rhetorik, Hermeneutik und Ideologiekritik* and *Replik in: Hermeneutik und Ideologiekritik* (Frankfurt a.M: Suhrkamp, 1971) 57-82 and 283-317, especially at 307. Among contemporary constitutional scholars this understanding of the relation between normative argument and rhetoric is most expressively recognised by Martin Loughlin, considering his forceful arguments regarding historical practices of statecraft as the only viable response to irresolvable normative questions – “questions that have no objective answers,” as he puts it well. It is from this perspective that Loughlin insists, in a manner consistent with the tradition of rhetoric and hermeneutics, that “[the precepts of] the ‘rule of law’ have no transcendental validity.” They too belong to a “wider body of political practices”. See LOUGHLIN, *The Idea of Public Law* (Oxford: Oxford University Press) 156-157.

¹³ Cf. MARTIN HEIDEGGER, *Nietzsche I, II* (Pfullingen: Günther Neske, 1961).

A consistently post-Platonic recognition of the rather atavistic return of Plato in Schmitt's assessment of human rights claims in politics also points one to a second reason for invoking this assessment here. It ultimately exposes Schmitt's assessment as outdated and vacuous as far as contemporary politics are concerned. This is crucial for the argument that follows. To the extent that his views can indeed be dismissed as outdated and vacuous today, his concept of state sovereignty hardly offers the contemporary state any *ombre spirituel* that could render it invisible from the outside and afford it a sheltered internal space from within which it can safeguard the public interest of its citizens in sovereign fashion. Any sovereign that would today enter the stage of conflict under the banner of *raisons d'état* other than fundamental rights concerns is more likely bound to expose its internal space to, rather than sheltering it from, external questioning and, potentially, external threats. This is surely true in the case of conflicts between contemporary constitutional democracies, but it is most likely true today also in conflicts between constitutional democracies and other contemporary forms of statehood. Under these conditions, it is the rhetorical invocation of "relatively persuasive" fundamental rights norms that is bound to stretch the interpretive space – and prolong the diplomatic and juridical exchanges – that warrants invocation of the *ombre spirituel* and internal invisibility or opacity of statehood. Under contemporary conditions, the distinction between political normativity and realistic statecraft no longer holds much water¹⁴. Reasons of state or statecraft are today often more effectively sheltered under the umbrella of human rights norms. Only those who no longer

¹⁴ See note 13.

wish to shelter, but indeed prefer to expose reasons of state – for purposes, perhaps, of raising the potential for conflict – will simply denounce the validity of human rights claims in whatever dispute is at stake. Whatever the strategies or goals behind such exposures of *Realpolitik* may be, the concern with sheltering an *Arcanum* effectively can surely no longer be counted among them.

Schmitt's assertion regarding the cheating at issue when human rights claims are raised in politics is surely not meant to apply only to human rights claims as such, but to all instances of normative claims in politics. Any *norm* or *Grundnorm* that invokes expansive or universal validity would constitute cheating from this Schmittian perspective. The crucial move at issue in this "cheating" is to invoke a reason with regard to which obligatory endorsement by an enemy or adversary necessarily follows from the "self-evident" validity of that reason. Schmitt evidently did not pay attention to the fact that this expectation of recognition and endorsement also contaminates any upfront recourse to *Realpolitik*, as Thucydides' portrayal of the demands of the Athenian envoys to the citizens of Melos makes clear¹⁵. Merely uttering a demand in the form of an explication communicates some expectation – however honest or dishonest – that some comprehension is due from the side of the other. But be it as it may, human rights have indeed displaced open recourse to *Realpolitik* in the second half of the twentieth century as far as the rhetorical sheltering of reasons of state is concerned, at least in the West. Had Schmitt been a little more percipient regarding the difference between rhetoric and cheating, he

¹⁵ See again note 11.

may well have been less inclined to simply dismiss all human rights claims in politics as instances of cheating.

The distinction between cheating in the name of human rights, on the one hand, and honest rhetorical employment of human rights, on the other, is crucial for assessing what is really at stake in specific instances of human rights claims in politics. A fictional example of an obvious case of cheating – as distinct from the rhetorical employment of human rights – is useful for showing what is of concern here. Suppose a Christian theocratic state would justify coercive law or legislation that publicly promotes the Christian religion at the expense of other religions with recourse to “the human right of every human being created by God to be guided towards the true religion.” That state would surely be uttering a semantically coherent claim that meets basic requirements of comprehensibility. There is nevertheless no chance that anyone who is familiar with prevalent human rights discourses will consider this a serious let alone plausible human rights claim. Human rights discourses allow for a considerable range of plausible human rights claims that compete with one another – as we shall see below with regard to less fictional examples – but this one is evidently not among them. Should someone raise this claim, it would constitute an obvious case of cheating. The claim simply fails to shield or shelter a material interest behind it and exposes it as something other than that which it pretends to be. And it is with this fictional example of an obviously cheating human rights claim in mind that we can now move on to assess the political contentiousness of human rights claims in contemporary Europe, the very continent on which, according to Scandamis (at least as far as the

European Union is concerned) the spiritual sheltering offered by statehood is no longer possible.

According to Scandamis, the judiciaries of Member States have become the internal x-ray stations of the EU from the vantage points of which Member States can no longer hide anything from close or immediate observation¹⁶. Seen from this perspective, EU Member States surely seem deprived of their capacity to shade and shelter anything from the EU today. But attempts at such sheltering are still afoot in Europe, as a number of decisions of the German Federal Constitutional Court (GFCC) have made clear in recent years¹⁷. In view of these decisions, but also in view of jurisprudence that has come to the fore in the case law of the CJEU in recent years, it seems plausible to assert that human or fundamental rights claims have become key concerns in current defences of, or threats to, state sovereignty in the EU. Recourse to the constitutional duty of Member States to guarantee the human or fundamental rights of their citizens has indeed become the last resort for Member States' endeavours to shelter concerns of "public order" and thus of essential "reasons of state", from EU interference. And denial of such constitutional duties has likewise – that is, also in the name of fundamental rights – become a crucial argument for justifying such EU interference. A certain human rights or fundamental rights argument, we shall see, is currently offered from both sides of this political divide and this indeed raises the question of

¹⁶ See the outline of the argument above.

¹⁷ BVerfG 37, 271 (*Solange I* – 1974); BVerfG 73, 339 (*Solange II* – 1986); BVerfG 89,155 (*Maastricht* – 1993) BVerfG 123, 267 (*Lissabon* – 2009), 2 BvR 1390/12 (*ESM* – 2012).

whether someone is not cheating here. Too many aces seem to be going around this poker table.

III. The Civil Societal Reduction of the *ombre spirituel* of Member States in the European Union

Article 5 TFEU provides the basic criteria in terms of which the delimitation of Member State and EU competences must be assessed in cases of conflicting interpretations of this delimitation. At issue are the principles of conferral, subsidiarity and proportionality respectively stipulated in Articles 5(1), 5(2), 5(3) and 5(4). In view of these provisions, the EU can only exercise power under title of the competences conferred to it by the Member States in the Treaties (Article 5(1)). In areas of exclusive competence, EU power can only be exercised to attain EU objectives (Article 5(2)). In cases of shared competence, EU power can only be exercised if EU objectives cannot be achieved by the exercise of MS powers (Article 5(3)). All exercises of EU power are limited to what is necessary to attain the Treaty objectives (Article 5(4)). These provisions regarding the exercise of shared and exclusive competences are further underpinned by broader principles of mutual respect and cooperation entrenched in Article 4 TFEU. Article 4(2), in particular, stipulates that the EU will respect the “national identities ... inherent in [the] fundamental [political and constitutional] structures of Member States.”

That these principles of conferral, subsidiarity and proportionality, along with the principles of the EU’s respect for national constitutional and political identities and mutual re-

spect between the EU and Member States, could lead to contentious questions regarding the actual exercise of power by the EU, is surprising in view of the further stipulation in Article 2 TFEU that the EU is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...” Considering the categorical negligibility of any likelihood that any Member State may come to assert foundational or constitutional values that cannot be reconciled with the human rights values on which the EU is based according to Article 2, it must strike one as surprising that any significant or serious dispute regarding the limits of EU and Member State powers can arise at all. How can there be grounds for serious disagreement in the EU if everyone involved agrees on the basic principles of cooperation, seems to be a pertinent question. Dieter Grimm surely provides one with the beginning of an answer to this question in the following passage:

“[D]ivergences between EU and national fundamental rights norms increase by the day as integration marches ahead. The tendency of the CJEU is to review national law strictly, while treating EU law generously. Economic freedoms tend to enjoy more weight in the CJEU’s jurisprudence than personal and communication rights. The opposite is the case in the jurisprudence of the GFCC. Whether this will change now that the Charter of Fundamental Rights of the EU has come into force, and with the impending accession of the EU to the European Convention on Human Rights, will have to be seen. In the meantime, however, this will remain a field in which the GFCC has to guard over national concerns”¹⁸.

¹⁸ Translated from DIETER GRIMM, *Prinzipien statt Pragmatismus* *Frankfurter Allgemeine Zeitung*, 6 February 2013.

To be sure, Grimm is not suggesting that the economic freedoms are the only considerations that inform CJEU jurisprudence, but he is suggesting that these freedoms outweigh other considerations: “Economic freedoms tend to enjoy more weight in the CJEU’s jurisprudence than personal and communication rights.” And he is suggesting further that other considerations, namely personal and communication rights, are outweighing the economic freedoms in the jurisprudence of the GFCC: “The opposite is the case in the jurisprudence of the GFCC.” Grimm is evidently suggesting that the EU has not quite yet reached the stage where the economic freedoms to which the CJEU gives precedence in its jurisprudence according to him, have completely dispelled the last vestiges of the *ombre spirituel* under which Member States may still shelter their citizens. But Grimm is not, on the other hand, very confident about the GFCC’s power to retain its capacity to shield its citizens under the *ombre spirituel* embodied in the personal and communication rights to which the GFCC gives precedence in its jurisprudence. The lines of his text that precede the lines quoted above make this very clear:

“Lack of opportunities to turn its principles into concrete decisions could result in the perpetuation of the ‘still acceptable’ findings that the [GFCC has articulated in the series of judgments that started with the Solange cases]. All that would then be left for it to do would be smaller corrections regarding the application of the Treaties in the case of unambiguous competence violations or serious constitutional Fundamental Rights disagreements”¹⁹.

¹⁹ *Ibid.*

Considered in view of this realistic note regarding the remaining potential of the GFCC to shelter its citizens under its own *ombre spirituel*, Grimm's assessment of the competing or conflicting lights that illuminate the European Union may not be offering much of a challenge to Scandamis' assessment of the loss of this *ombre spirituel* of the Member States of the Union. But the significance of Grimm's observation does not lie in the challenge or lack of challenge that it offers in response to Scandamis. It lies in what it comes to tell us – perhaps unwontedly – about the very discourse of light and shadows that Scandamis' thesis regarding the Weberian-Kelsenian launches. For Grimm is surely not understanding the protection that the GFCC may want to offer German citizens as an opaque or shadowy national or nationalistic realm. He is surely understanding this protection as serving the *Enlightenment* ideals embodied in the personal and communication rights that enjoy priority in the jurisprudence of the GFCC, just like the CJEU does with regard to the guiding lights of freedom of movement and services by which it tends to rule at the expense of other rights or lights, according to Grimm. One can surely assume that the CJEU also regards the economic rights that it is said to prioritise in terms of enlightened and even Enlightenment concerns with personal liberty. The obscurity in which this whole discourse is enveloped should now be manifest. We are confronted by the EU as a legal-political stage, a stage on which light cast from one side of the stage aims to reduce to shadows the light cast from the other side, and *vice versa*.

What emerges in the process is a confusing scene of shades – of “light” and “darkness” – that leaves no or very thin mar-

gins for clear distinctions between them. One feels compelled once more to recall Nietzsche's fool who came to illuminate the broad daylight with a lantern, so as to expose the sheer nothingness or indistinctness of it all²⁰. One can be sure, moreover, that on both sides of this spectrum of lights and shadows, the human rights values embodied in Article 2 TFEU will remain the ultimate foundational values. Neither the CJEU nor the GFCC is going to argue at some point that the values they promote need not be thoroughly reconcilable with these human rights values. They are and will both be relying on the same trumps and the same *Grundnorm* as the game goes on, and the longer it goes on, the more will it become manifest that there are more than four aces going around the table. The one who raises a human rights claim in a political conflict aims to cheat, asserts Schmitt. The claim seems highly pertinent under these circumstances. But here we seem to find ourselves in a doubly confusing situation where everyone seems to be cheating and no distinctions between cheating and not cheating seem possible anymore.

How have we come to lose the distinction between truthfully sheltering shadows, on the one hand, and honest searching lights, on the other; and how might one attempt to restore this distinction? These are questions that one may well want to ask against this confusing background. I shall attempt to answer them with reference to three considerations: 1) The civil societal reduction of liberty in the jurisprudence of the CJEU; 2) The method of this civil societal reduction that the CJEU ironically inherited from one of its main adversaries today in the EU, namely, the GFCC; and 3) The democratic restoration of the *ombre spirituel* of state-

²⁰ See again note 4 above.

hood. All three considerations will be further assessed in view of the distinction between rhetoric and cheating invoked with reference to Schmitt above.

1) The Civil Societal Reduction of Liberty in the Jurisprudence of the CJEU

When the light bulb of pre-modern metaphysics finally blew – the energy saving device called “God” through which pre-modern emperors, monarchs and princes endeavoured to remain splendidly illuminated powers for as long and as securely as possible – modern societies found themselves abandoned to their own power-generating and power-saving devices. Fundamental rights were one of the key inventions through which they sought to generate and salvage power from immanent sources, now that transcendence had finally fizzled out and fused. The invention of fundamental rights allowed them to divide themselves into sources of legitimation and objects of legitimation. The internal division of itself into a source of legitimation – civil society – and an object of legitimation – the state – was the way in which modern society generated power or constituted itself as a source of power. A passage from *Grundrechte als Institution*, an early text of Luhmann, is most significant in this regard:

“The necessity to provide foundations – of which the profound rootedness in the division between thought and existence cannot be discussed here – splits social reality with cleaving force into a sphere of the state and a sphere of society. The state has to justify itself to and in society. (Hegel’s conception, which

takes over this principle of division but inverts the foundational relation, never received a real following)²¹.

In the wake of this division, the fundamental rights of citizens would effectively become the batteries from which the state would draw its power. The rest of the text from the early pages of which this passage is drawn seeks to dispel the idea that civil rights weakened or curbed the power of the state that is often entertained by more facile understanding of civil rights. Civil rights became the source of legitimate state action. They constituted the self-evident parameters between which states could act and act forcefully. Sovereigns could appeal to civil rights – and claim to be acting in honour and pursuit of them – in the same way that they used to be able to appeal to God. Chris Thornhill elaborates this pivotal move in *Grundrechte als Institution* further in a powerful socio-historical narrative of the development of modern constitutionalism²². The intriguing aspect of Luhmann's articulation of the crucial dynamics of modern legitimation is, however, not restricted to the ingenious way in which he portrays civil rights as the sustainable source of modern power that lit-

²¹ NIKLAS LUHMANN, *Grundrechte als Institution* (Berlin: Duncker & Humblott, 1965) 27: “[Es ist] die Notwendigkeit der Begründung, deren tiefe Wurzeln in der Scheidung von Sein und Denken hier nicht freigelegt werden können, die mit bohrender Kraft die soziale Wirklichkeit aufspaltet in eine Sphäre des Staates und eine Sphäre der Gesellschaft. Der Staat hat sich in der Gesellschaft und and der Gesellschaft zu rechtfertigen. (Die Auffassung Hegels, die das Trennschema übernimmt, aber das Begründungsverhältnis umkehrt, blieb ohne reale Folgen.)”

²² See CHRIS THORNHILL, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge: Cambridge University Press, 2011).

erally liberates power from relying on non-sustainable or already-exhausted external or transcendent sources. The other intriguing aspect of the passage consists in the way Luhmann acknowledges that Hegel already articulated this scheme of division (*Trennschema*), but did so in an inverse fashion. Luhmann does not elaborate the point further, but it is important to understand well what he is alluding to. For Hegel, the dynamics of modern legitimation also consisted in the relation between state and civil society, but for him, the state was the source of legitimation and civil society the object of legitimation. At issue here is the thesis that Joachim Ritter articulated brilliantly in his essay on Hegel and the French Revolution²³. Hegel regarded the modern state as the embodiment and guardian of the Kantian ideal of moral autonomy that inspired the French Revolution. For Hegel the state remained responsible for preventing the reduction of Kantian moral autonomy to economic liberty in modern societies, and he masterfully portrayed the potential of civil society to reduce moral autonomy to economic liberty and to ultimately destroy moral autonomy completely. For him it was the duty of the state, as guarantor of Kantian morality, to prevent this from happening²⁴.

Hegel was not followed, observes Luhmann in passing, and here too he is undoubtedly right. The development of nineteenth-century liberal constitutionalism in Germany (but also in the United States) would ultimately end with the triumph of economic liberties over a broader Kantian under-

²³ JOACHIM RITTER, Hegel und die französische Revolution, in: *Metaphysik und Politik* (Frankfurt a.M.: Suhrkamp, 2003) 183-255.

²⁴ For a more extensive exposition of Hegel's critique of civil society, see VAN DER WALT, *The Horizontal Effect Revolution* 275-281.

standing of moral liberty²⁵. From this triumph of economic liberty over Kantian moral autonomy at the end of the nineteenth century, it was but a short step to the twentieth-century reduction of constitutional liberty to economic liberty in the conservative ordo-liberal economic thinking of a group of theorists that became known as the Freiburg School. The ordo-liberal turn in constitutional thinking indeed took economic liberty as the deontological or moral base of modern societies and turned it into its sole constitutional principle (thus turning constitutional law into competition law). And it is this ordo-liberalism that became the main framework of thinking embodied in the European Treaties and ultimately informed the privileging of economic liberties in the jurisprudence of the CJEU²⁶.

Does this reduction of Kantian moral autonomy to economic liberty constitute an instance of the cheating that Schmitt imputes to all invocations of human rights, or was it just the outcome of the rhetorical triumph of economic liberties in Western societies, a triumph with which a post-metaphysical society must reconcile itself as one of the many possibilities of privileging of which rhetoric is capable in a godless age? This question cannot be answered with reference to *the contents* of contingent outcomes of normative privileging. The normative scheme of fundamental rights on which modern Western societies would come to turn indeed lends itself to the rhetorical privileging of either economic liberty or broader communicative liberty, to invoke again Grimm's assessment of the respective tendencies in the juris-

²⁵ For a more extensive exposition of this history, see VAN DER WALT, *The Horizontal Effect Revolution* 37-84.

²⁶ See VAN DER WALT, *The Horizontal Effect Revolution* 246-251.

prudence of the CJEU and GFCC. The question of cheating and the distinction between cheating and rhetoric cannot be answered with regard to the normative *content* that happens to triumph in some normative dispute. But it can be answered with regard to the method with which victory is procured. It is therefore to the question of the method by which economic liberties triumph in the jurisprudence of the CJEU that we must turn next.

2) The Method of the CJEU's Civil Societal Reduction of Liberty – A GFCC Legacy

Ernst Wolfgang Böckenförde famously observed that liberal democratic societies turn on foundations that they cannot guarantee²⁷. This observation, now widely known as the Böckenförde *dictum*, re-articulates the point that Claude Lefort also made in masterly fashion:

²⁷ ERNST WOLFGANG BÖCKENFÖRDE, *Staat, Gesellschaft, Freiheit* (Frankfurt a.M.: Suhrkamp, 1976), 60: "Der freiheitliche säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriege herausgeführt hat."

Democracy is of all regimes ... the only one to have represented power in such a way as to show that power is an empty place and to thereby maintain a gap between the symbolic and the real ... by virtue of a discourse which reveals that power belongs to no one²⁸.

The democratic representation of the empty place of power that Lefort invokes here does not concern an arbitrary choice, but a response to a theological or philosophical regard for the reality that the exercise of all power commences in a space that precedes it. Lefort again:

“Every religion states in its own way that human society can only open onto itself by being held in an opening it did not create. Philosophy says the same thing, but religion said it first, albeit in terms that philosophy cannot accept.”

“What philosophical thought strives to preserve is the experience of a difference that goes beyond difference of opinion (and

²⁸ CLAUDE LEFORT, Permanence of the Theological-Political in: HENT DE VRIES / LAWRENCE SULLIVAN (eds) *Political Theologies* (New York: Fordham University Press), 159. The French – CLAUDE LEFORT, Permanence du théologico-politique? in: *Essais sur le politique XIX-XX siècles* (Paris: Editions du Seuil, 1986), 291 – reads: “[D]e tous les régimes que nous nous connaissons, [la démocratie] est le seul dans lequel soit aménagée une représentation du pouvoir qui atteste qu’il est un lieu vide.” Cf. also CLAUDE LEFORT, *L’invention Démocratique: Les Limites de la Domination Totalitaire* (Paris: Fayard, Artheme, Librairie, 1994), 92: “[L]’image de la souveraineté populaire se joint celle d’un lieu vide, impossible à occuper.”

the recognition of the relativity of points of view that this implies)"²⁹.

Democracy can accordingly, with reference to both Böckenförde and Lefort, but also with reference to Luhmann's passage quoted above, be understood as an auto-generative or autopoietic exercise of power that operates in an opening that offers it nothing more than a temporal opportunity or chance. This temporal opportunity allows for autopoietic operations of power, but never for the substantive inclusion of the opening or opportunity itself within the operation of power at issue. Any substantive reference to the opening in which it operates would constitute the end of autopoiesis and the beginning of heteropoiesis. All instances of autopoiesis are subject to this intrinsic restriction, but democracy is unique for reasons of devising a method of decision-making that consistently commits itself to the opening in which it operates without including it as a substantive norm or basis for decision-making. That unique method is the majority decision-making method.

Those who take part in majority decision-making do not and cannot claim an external source of validation for the de-

²⁹ LEFORT, Permanence of the Theological-Political 157. The French text – cf. Permanence du théologico-politique? 287 – reads: "Que la société humaine n'ait une ouverture sur elle-même que prise dans une ouverture qu'elle ne fait pas, cela, justement, toute religion le *dit*, chacune à sa manière, de même que la philosophie, et avant elle, quoique dans un langage que celle-ci ne peut faire sien ... Or, ce que la pensée philosophique veut préserver, c'est l'expérience d'une différence qui, par-delà celle des opinions ... n'est pas à la disposition des hommes."

cisions that will be made in the process. It is neither necessary nor meaningful to vote on propositions with intrinsic validation, that is, propositions that are validated in advance. Recourse to voting and majority outcomes is the way in which democracy acknowledges that the decision-making that it launches cannot be validated. It is because we cannot determine the truth or the validity of a claim that democracy resorts to voting on the matter³⁰. Those who naively believe majorities attain to truth and get decisions right – the belief that Schmitt still imputed to nineteenth-century parliaments³¹ – have a spurious and shallow understanding of democracy that does not grasp its unique concern with the undecidable and with that which will and can never be fully validated or legitimated. But every useful committee member knows that we simply turn to voting on matters with regard to which we know we will never have good grounds or sufficient reason for consensus. Rhetoric plays a crucial role in swaying the vote, but it never pretends to furnish grounds that terminate the need for a decision that remains groundless. It does not render the decision that decides the undecidable obsolete, but in fact sustains it. Truthful rhetoric – rhetoric that does not resort or amount to cheating – remains constantly aware of and consistently acknowledges its truthless condition.

All of this may sound like an anti-normative Schmittian decisionism, but this truthless condition can also be traced to the heart of Kantian morality. The moral imperative that

³⁰ See JEREMY WALDRON, *Law and Disagreement* (Oxford: Oxford University Press, 1999) for a meticulous articulation of this argument.

³¹ SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin: Duncker & Humblot, 1996).

Kant devised turns on a universalizability that remains impossible under finite conditions. Kant understood this well. That is why he postulated the eternal life of the soul for purposes of rendering moral perfection thinkable. Under conditions of finite life, however, moral decisions remain particular decisions that allude to a universality to which it cannot give effect. In this regard, Kant was evidently a forerunner of Lefort and Böckenförde. What ultimately separates Kant from Schmitt is the latter's insistence that any allusion to universality (or normativity) is cheating. Kantian normativity, however, turns on the insight that an impossible universality is the very opening that affords all particular normative claims their groundless opportunity.

Classical modes of constitutional review employed a three-pronged proportionality test that endorsed and promoted the understanding of democracy that Böckenförde and Lefort articulate. Classical proportionality review procedures by and large endorsed the right or freedom of majorities to decide the undecidable. For the most part (there is an exception with which we cannot deal here³²), all it did was to ensure that majority decisions in the face of the undecidable remain true to their irreducible undecidability by not imposing themselves in unnecessary ways on minorities who would have decided them differently had they been able to do so. This "lack of necessity test" was embodied in the second and third

³² There are exceptional cases in which a judiciary can dismiss legislation as patently inappropriate (falling foul of the first leg of the proportionality test), but such cases should be extremely rare in any well-functioning democracy. For a more extensive exposition of this point, see VAN DER WALT, *The Horizontal Effect Revolution* 374-379.

legs of the classical proportionality test, namely, in the requirements that majority decisions remain rational (the means must serve the end) and as little intrusive as possible (the same end must not be reachable by less intrusive means). For the rest, the classical proportionality test, through its first leg – the simple requirement that the ends pursued by legislation must just be “appropriate”, that is, reconcilable with that which we normally understand under “an open democratic society” – was quite content to let democracy have its free day in parliament.

Let us now consider the civil societal reduction of fundamental rights to economic liberties discussed above from the perspective of this understanding of the classical proportionality test in judicial review. The series of CJEU judgments that came to be known as the *Laval* and *Viking* quartet – *Laval*, *Viking*, *Rüffert* and *Luxembourg* – can be singled out as the apex of this civil societal reduction of the broad scope of fundamental rights to a narrow set of economic freedoms in the EU today³³. To be sure, these cases were decided before Article 4(2) TFEU came into force. The principle of respecting “national identities ... inherent in [the] fundamental [political and constitutional] structures of Member States,” was thus not yet a positive Treaty provision at the time and could at best have been a jurisprudential principle. But, this jurisprudential principle can surely be said to have been implied by the positive subsidiarity and proportionality provisions that had already been in place in Article 5 TEC at the time these cases were decided (2007/2008). Moreover, even before the

³³ EU: Case C-341/05 [2007] (*Laval*); EU: Case C-438/05 [2007] (*Viking*); EU: Case C-346/06 [2008] (*Rüffert*); EU: Case C-319/06 [2008] (*Luxembourg*).

TFEU came into force, the CJEU had already passed judgments under the TEC in which economic freedoms were duly subordinated to personal and communication rights. Notable among them were the judgments in *Schmidberger* (2003) and *Omega* (2004)³⁴. One therefore has no or little ground to simply impute unabashed CJEU bias in favour of economic freedoms and against other fundamental rights that may constitute crucial concerns of “national identities ... inherent in [the] fundamental [political and constitutional] structures of Member States.”

The questions at stake here, however, are far from answered by invoking cases in which the Court subordinated economic freedoms to other fundamental rights and by suggesting the Court is evidently searching for the right balance between fundamental rights and economic freedoms³⁵. No one who wishes to cheat will cheat conspicuously. But, the absence of conspicuous cheating is for the same reason no ground for believing no cheating is afoot. There is wide scope for insisting plausibly that the Court has feigned just enough balancing in the overall course plotted in its decisions to obfuscate a subtle but crucial reduction of the broad scope of fundamental rights to economic freedoms in the long run. Playing the hands that the Court played in *Schmidberger* and *Omega* was just good poker that set up the big hauls in the *Laval* and *Viking* series of cases, would be the skeptical sug-

³⁴ *Omega* Case C-36/02 (CJEU) [2004]; *Schmidberger v. Austria* C-112/00 (CJEU) [2003].

³⁵ See CHARLES F. SABEL / OLIVER H. GERSTENBERG, Constitution-alising an Overlapping Consensus: The CJEU and the Emergence of a Coordinate Constitutional Order. *European Law Journal* 16, no. 5 (2010): 511-550.

gestion that one could plausibly put forward here. It is also against this background that one must understand Catherine Barnard's observation that the balancing procedures in *Laval* and *Viking* afforded only rhetorical value to the right to strike³⁶. This is another way of saying that the Court only paid "lip service" to the right to strike, and "lip service" goes down as a subtle form of cheating in most people's dictionaries. My aim here is nevertheless not to repeat direct accusations of cheating that will surely be met with endless refutations and will ultimately surely merit being dismissed as "groundless" (just as the insistence that no cheating but proper balancing prevails here ultimately merits being dismissed as groundless). If there is deliberate cheating going on here, the one who is cheating is most likely going to get away with it. My point is much rather to explain a situation that exposes the court to an accusation of an *institutional cheating* that is, I believe, irrefutable. At issue is the jurisprudential position into which the CJEU has manoeuvred itself, a position from where it can act like a sovereign government while pretending to be bound to explaining and applying existing law. And it is this *institutional cheating* that the understanding of the classical proportionality outlined above allows us to see clearly.

³⁶ CATHERINE BARNARD, *Employment Rights, Free Movement under the EC Treaty and the Services Directive*, in: *EU Industrial Relations v. National Industrial Relations* (Alphen aan den Rijn: Kluwer Law International, 2008), 137-168, especially at 151: "It could be argued that this is, in fact, balance in name, not substance.... Community law automatically puts the 'social' on the back-foot.... Despite the recognition of the right to strike as a fundamental right ... this recognition has little more than rhetorical value."

Had the classical proportionality test been employed in the *Laval* and *Viking* series of cases, the CJEU would have had to defer to law and legislation in Member States, considering the absence of *relevant* legislation at EU level that changed Member State law³⁷. And the relative Member State law and legislation that applied in these cases would surely have had to be recognised as perfectly reconcilable with the constitutional democracy for which both the EU and its Member States stand³⁸. The court did not use the classical proportionality test, but it might be argued at first glance that these cases ultimately turned on the third leg of the classical proportionality test. The court indeed argued that the strikes in *Laval* and *Viking* – and by consequence the law that allowed for these strikes – were disproportionate for practically putting a factory owner and ferry owner completely out of business everywhere in the European Union, thus rendering their economic freedom meaningless. The facilitative law and legislation at stake here go too far, goes this argument. They did not constitute or ensure the least intrusive way of resolving the conflicts at stake in the disputes. The lack of substance of this argument becomes evident, however, when one

³⁷ As I argue elsewhere, the invocation of the completely irrelevant Directive 96/71 in *Laval*, *Viking* and *Rüffert*, either transgressed the boundaries of the concept of disingenuousness, or shifted them significantly.

³⁸ For fuller articulations of this point, see VAN DER WALT, *The Horizontal Effect Revolution* 334-352; VAN DER WALT, *Timeo Danais Dona Ferre* and the Constitution that Europeans may one day have given themselves in: JOHAN VAN DER WALT / JEFFREY ELLSWORTH (eds) *Constitutional Sovereignty and Social Solidarity in Europe* (Baden Baden: Nomos, 2015) 304 fn. 76.

considers how often democratic governments pass legislation and budgets that put thousands of citizens out of employment. Now, one may think *politically* that such employment-destroying legislation or law is disproportionate. One can for this reason engage in *political action* in pursuit of legislative change. But, one cannot in this case claim disproportionality as a matter of *legal principle*, without depriving a majority government of a decision that no one can decide with sufficient grounds. All the arguments for and against that might possibly be raised in a court of law and many more will be raised with much more expertise and much more time and space for debate in parliaments, and in the end the ultimate groundlessness of all arguments will have to give way to a simple majority vote on a bill that will forever remain contingent upon the sustenance of that majority. By deciding just the opposite, that is, that law and legislation cannot put an employer out of business (by allowing for strikes that have this effect), the CJEU effectively did the very same thing. It deprived the legislators involved of the power to take the surely groundless but democratically perfectly acceptable political decision that such regulation of business and entrepreneurship is quite in order. And it thus transformed the political opposition to such strikes into a legal principle which a court *must* uphold.

How did we arrive at the kind of decision-making that prevailed, not only in the *Laval* and *Viking* decisions, but also in *Omega* and *Schmidberger*? In the course of the twentieth century, the GFCC began to generate its own "legislation" by moving to decide undecidable matters in court. It did so by introducing a new proportionality test. It developed this new test in the horizontal effect jurisprudence that it articulated

most famously in its celebrated *Lüth* decision of 1957. This new test turned on an abstract *judicial* balancing of competing constitutional values. From the results of this balancing test, the GFCC came to believe, since *Lüth*, that a judiciary could *generate new legal norms* on the basis of which unprecedented cases could be decided with sufficient precision and legitimacy. Böckenförde observed clearly how this *jurisgenerative* conception of judicial balancing widens judicial powers and narrows the scope of democratic politics in legal cultures where it takes hold³⁹. The difference between this *jurisgenerative* balancing and the balancing that takes place under the third leg of the classical proportionality test is significant. The latter has to turn on hard and specific evidence that a parliamentary decision already taken can be less intrusive. The one who brings the constitutional objection must offer this evidence clearly and precisely enough to restrict the judicial decision to a relatively simple fact finding. And no new juridical norm is created in the process. All that happens is that a very specific interpretation of a norm is disallowed and sent back to parliament for amendment. The former – *jurisgenerative* judicial balancing – invariably turns on considerations that emanate from a broad judicial hermeneutics, the hard evidence of which is not only invariably lacking, but in principle also impossible, considering the institutional restrictions that define the judicial forum and judicial reasoning. What happens in this balancing remains obscure. It remains enveloped in darkness, as Matthias Ruffert puts it well with reference to the jurisprudence that the GFCC launched in *Lüth* –

³⁹ BÖCKENFÖRDE, Grundrechte als Grundsatznormen, *Der Staat* (1990): 25: “Es vollzieht sich ein gleitender Übergang vom parlamentarischen Gesetzgebungsstaat zum verfassungsrechtlichen Jurisdiktionstaat.”

[w]ie es zur Rückumwandlung der objektivrechtlichen Ausstrahlungswirkung in ein subjektives, verfassungsbeschwerdefähiges Grundrecht kommt ... bleibt im Dunkeln⁴⁰.

It is under the dark cloud of this new kind of judicial balancing that real scope opens up for a distinction between cheating and rhetoric. Judges may and do resort to all kinds of rhetorical devices in their decisions, but they cannot own up to the sheer rhetorical status of their normative deliberations. They cannot offer their decisions as groundless attempts to decide the undecidable in a way that leaves the fundamental temporal opportunity for decision-making decidedly open, as democratic majorities do by definition when legislation is passed in parliament. The whole institutional setting in which judges are required to perform their task calls for accurate deference to existing law, that is, deference to an evident closure – a *numerus clausus* of norms – that is already in place before they enter the scene. The more they engage in unconstrained deliberation of undecidable questions under the guise of merely identifying existing law, the more will and *can* they be perceived to be cheating, irrespective of the fact that they may never do so deliberately or intentionally.

The balancing procedures that the CJEU basically inherited from the jurisprudence that the GFCC launched in *Lüth* commit them to an institutional lie. The civil societal reduction of the undecidability of Kantian moral autonomy to economic liberty cannot constitute cheating in the rhetorical practices of parliament, for parliamentary practices and procedures attest

⁴⁰ MATTHIAS RUFFERT, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (Tübingen: Mohr Siebeck, 2001), 67.

to their own groundlessness. But the civil societal reduction of the undecidability of Kantian morality to economic liberty does constitute a manner of cheating when it happens in a court of law, for judicial practices and procedures do pretend to resolve questions in a principled and well-founded way that merits full consensus and endorsement.

3) The Democratic Restoration of the *ombre spirituel* of Statehood

Scandamis' essay *L'Etat dans l'Union européenne: Passion d'un grand acteur* suggests the EU has flayed the Westphalian Leviathan. It has laid its dark insides bare to relentless scrutiny. Perhaps. But perhaps it could only do so by appropriating these dark insides for itself. The *ombre spirituel* that Schmitt associated with sovereign statehood does not seem to have disappeared like the rest of nationalistic mists before the rising sun of European integration. It has simply shifted along with the pretensions of this rising sun. The market place has in broad daylight become the source of a new shadow. The CJEU, the principal agent of EU integration since its decisions in the *Costa v ENEL* and *Van Gend & Loos* cases⁴¹, has simply taken over the many *ombres spirituels* of the Member States in the form of one cloudy jurisprudence

⁴¹ Case 6/64, *Costa v ENEL*, (1964) ECR 585; Case 26/62, *Van Gend & Loos*, (1963) ECR 1. For an incisive discussion of the "sovereignty usurping" effect of these decisions and the historical background behind them, see ANNA KATHARINA MANGOLD, *Democratic Legitimacy of EU Law: Two proposals to Strengthen Democracy in the European Union* in: VAN DER WALT / ELLSWORTH, *Constitutional Sovereignty and Social Solidarity in Europe*, 165-192.

that allows for no or little democratic scrutiny. Ironically, this *ombre spirituel* was first wrested from Member State parliamentary majorities by Member State judiciaries. And then it was wrested from these judiciaries by another judiciary with recourse to the same ploy. The European Union does not claim to be a sovereign state as yet and it is often said that its goal is also not to become one. In the meantime, however, it pursues its goals in the manner of a state under the *ombre spirituel* offered by an obscure jurisprudence. It also does this in collaboration with a dubious theological mind-set that renders its modern status suspect⁴².

This is the bottom line of the gigantic institutional cheating that is currently afoot in the EU: sovereign government by a sovereign that is not claiming to be sovereign nor recognised as one. The way out of this institutional lie is probably not backward into the past, but forward into an unknown future. And if the way forward is also to promise a way out of the obscurantism of the present, it will have to consist in more than recognition and acknowledgment of EU sovereignty. It will have to comprise the inauguration of adequate parliamentary sovereignty in the EU. The same would apply if the road ahead should turn out to be backward, that is, towards proper restoration of Member State sovereignty. Here too will Member State judiciaries have to give back the *ombre spirituel* that attaches to sovereign statehood to their parliaments. For it is only in the context of open parliamentary debates that the ultimately groundless decisions through which we eventually terminate irreducible dissent – and through which all normativity retains its irreducible link with the

⁴² See PHILLIP MANOW, *Ordoliberalismus als ökonomische Ordnungstheologie*. *Leviathan* 29, no. 2 (2001): 179-198.

groundless exercise of power or *Herrschaft* – can be advocated vociferously and with rhetorical acumen without constant exposure to cogent accusations or suspicions of cheating. This is so because *truthful* democratic argument does not aim or claim to dispel the irreducible openness or groundlessness – the *truthlessness* – that affords it its very opportunity. It guards its own secret through the very way in which it honestly seeks to respond to it.