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Review Essay: Tuuli Wohlström's Thesis 'Europe Beyond the Courts. Constitutionalism, Pluralism and Integration in the Nordic Countries'

Abstract

This review essay seeks to invite a wider consideration of Tuuli Wohlström's doctoral thesis 'Europe Beyond the Courts: Constitutionalism, Pluralism and Integration in the Nordic Countries'. Prompted by the observation that the Nordic countries have been overlooked in the EU legal pluralism discourses due to court-centric perspectives, Wohlström documents manifold conflicts with, and limits to, EU law, and argues that to understand these, it is necessary to expand the frame of reference to the broader constitutional cultures. Wohlström shows that in the Nordic countries, limits to EU law have predominantly been set by parliaments and through ex ante constitutional review mechanisms. However, she argues that EU law has brought about 'major shifts' in the institutional configurations, with a reluctant and vexed process of strengthening the power of courts. This culminated with the Ajos case of the Danish Supreme Court where, for the first time, a Nordic court said 'No' to the CJEU. The present reviewer adds broader comments from the point of view of comparative European constitutional law, and suggests that many Nordic constitutional values – especially the social welfare state – ought to be regarded as a model, rather than be replaced by neoliberalism and neofunctionalism through EU governance. The review also calls for a formal acknowledgement of structural problems in EU research, and puts forward a policy proposal to support the international publication of doctoral theses on national and comparative European constitutional law.

1. Introduction: Omission of Nordic countries in the EU legal pluralism discourses due to court-centric perspectives

This review essay seeks to invite wider Nordic and European readerships to consider the profoundly important themes explored in Tuuli Wohlström's doctoral thesis *Europe Beyond the Courts: Constitutionalism, Pluralism and Integration in the Nordic*

Countries.¹ The thesis is an exceptionally comprehensive, insightful and fascinating comparative work, which explores the constitutional law of the three Nordic EU Member States – Denmark, Sweden and Finland – from the perspective of identifying the shared and divergent traits of the Nordic constitutional culture(s), and changes that have occurred in result of EU integration. There are additional references to constitutional law developments in Norway and Iceland. The research questions emanated from Wohlström's observation that as the EU discourses on legal pluralism have focused on judicial dialogues between the EU courts and national apex courts, **the Nordic countries have been overlooked because courts have traditionally had a more limited role in these constitutional cultures.** The thesis rightly notes that the EU pluralist discourses 'more often than not ... did not tend to say much about the Nordic context at all.'²

Before proceeding to an overview of the thesis, it should be noted that as review essays are typically written about published books rather than doctoral theses, this review additionally seeks **to raise a policy issue with regard to European legal publishing.** This was prompted by a concern of the present reviewer that has developed over two decades: whereas doctoral theses on EU, international and global law, as well as on the law of Anglo-American jurisdictions, typically go on to be published as monographs by leading international publishing houses, theses on national legal systems and on comparative European constitutional law are typically published by little-known national publishing houses, and most remain only in the form of a thesis. The vast majority are not written in English, and thus remain entirely inaccessible to foreign readers. This has contributed to **a major structural problem whereby research on national legal systems has been omitted from mainstream European, EU and international law discourses, and has reinforced the prevailing distorted narratives whereby national constitutional matters have generically been reduced to sovereignty and national constitutional identity,** along with assessment of the

¹ T Wohlström, *Europe Beyond the Courts: Constitutionalism, Pluralism and Integration in the Nordic Countries. Dissertations Universitatis Helsinkiensis* 39/2025 (University of Helsinki, 2025, available at <https://helda.helsinki.fi/items/2115dc4f-58ad-41ee-8724-704360da58d9>). The thesis was supervised by Professor Kaarlo Tuori and Professor Tuomas Ojanen, and defended at the University of Helsinki on 31 January 2025; it was awarded a distinction mark. The present writer was invited to act as the Opponent, and earlier, with Dr Anu Mutanen from the University of Tampere, as a preliminary examiner. This review has been developed on the basis of the Opponent Statement (14 February 2025). I would like to thank Tuuli Wohlström, Tuomas Ojanen and Anu Mutanen for their comments on this review; any errors are solely the responsibility of the author. Due to the very extensive scope of the theme and limited space available in the present review, the reader is kindly asked to bear in mind the following note with regard to referencing: where the work of further authors has been cited or summarised in Wohlström's thesis or other publications of the present writer, generally only the names of further authors will be written out. In case of citing, the reader is kindly asked to look up the full publication details from the thesis and from the publications indicated.

² Wohlström (n 1) 6.

eurofriendliness or euroscepticism of courts. On a related note, Daniel Thym, and Janne Salminen and Päivi Leino-Sandberg, have raised the issue of a ‘disconnect’ between the national legal communities and the somewhat closed epistemic community of elite EU lawyers who operate in English and do not read national law journals.³ This review is therefore also written with the aim of seeking to invite consideration on how joined-up scholarly discourses could be developed on EU law and national legal orders.

Returning to Wohlström’s thesis, it sets out the context by outlining the conditions and limits to EU integration established by the German Constitutional Court, especially in the *Solange* and *Maastricht* cases.⁴ The conditions include in particular the respect of fundamental rights, and the *Kompetenz-Kompetenz* rule, ie that it is the Member States who hold the role of the Masters of the Treaties and have the power to decide which competences are delegated to the EU. Wohlström makes the following remark:

Even the story of the Maastricht turn, in which national courts suddenly ‘fight back’, is a story told from the specific perspective of strong legal institutions and an already strong tradition of national constitutionalism. It ... does not properly take into account ... the role of non-judicial constitutional actors or the complex dynamics between European law and changing national constitutionalism ...⁵

In terms of the theoretical framework, the analysis in Wohlström’s thesis is situated in constitutional pluralism, as originally propounded by Professor Neil MacCormick and subsequently widely developed in pluralist scholarship.⁶ However, Wohlström develops a critique of the institutional assumptions of constitutional pluralism, given the reality whereby questions regarding conflicts with, and limits to, EU law – whilst having been present in the Nordic countries in manifold ways – have been omitted in EU pluralist discourses due to court-centric perspectives. From a Nordic viewpoint, the theories of constitutional pluralism ‘can give you the feeling of watching the debate from the sidelines: They are trying to make sense of a legal world that the Nordic countries have never fully embraced, or have been slow to adapt to.’⁷ Wohlström’s thesis challenges the generalisation of country-specific standpoints, and shows that ‘it is indeed possible to tell the story of ‘limits’ through a Nordic lens that differs

³ See Daniel Thym, ‘The Solitude of European Law Made in Germany’, *Verfassungsblog* 29 May 2014; Päivi Leino and Janne Salminen, ‘Languages and EU law discourse: A view from a bilingual periphery’, *Verfassungsblog* 2 April 2014, both available at <<https://verfassungsblog.de>>, accessed 18 June 2025.

⁴ Wohlström (n 1) 2ff.

⁵ Wohlström (n 1) 446.

⁶ For references, see Wohlström (n 1) 2ff.

⁷ Wohlström (n 1) 7.

from classical studies of integration ...'.⁸ Since in the Nordic countries the limits have not mainly been set by courts, it was necessary 'to study the real diversity of constitutional practices', especially by including 'actors within the legislative process and their different practices', as well as scholarly debates. These 'can sometimes be more difficult and often also require ... reference to concepts such as 'doctrine' and 'culture'.⁹

In the above context, Wohlström takes a bottom-up approach and embarks on a highly ambitious process of collating and synthesising an entirely new set of sources – parliamentary and governmental documents, expert opinions, *travaux préparatoires* and scholarly commentary – which formed the basis for the eventual solutions. These documents have been collated from the perspective of seeking to answer the research questions with a focus on the '**problem of limits**', which are addressed in nine settings: (1) Amendment of constitutions on the transfer of powers to international organisations; (2) Accession to the EC/EU; (3) Transfer of powers in connection with treaty amendments; (4) Further regulation of EU membership in the Constitution; (5) Processing of EU legislation by the legislature, including *ex ante* control; (6) Amendment of constitutional provisions on fundamental rights; (7) Development of constitutional review systems; (8) *Ex-post* judicial review of EU legislation; and (9) Other specific court cases.¹⁰ Based on these materials, the thesis seeks to paint a more detailed picture of the people behind the most important decisions. As Wohlström explains,

The role of the preparatory works of legislation means that it is often by comparing the parliamentary documents agreed by the political actors and the documents produced by academics ... that we can get a clearer picture of what really happened What was really on the table, what was rejected, what was intended ... ? While actual political negotiations are not always accessible, complex constitutional issues are difficult to tackle without constitutional experts, and receiving such help leaves a trail. It is also central to the Nordic context that the court rarely comes first in constitutional review. In fact, we may have to wait a long time (and often in vain) for the courts to speak, and when they do, it is only in the light of what has gone before that we are able to see whose voice we are really hearing in the voice of the court.¹¹

⁸ Wohlström (n 1) 43.

⁹ Wohlström (n 1) 44.

¹⁰ Wohlström (n 1) 46; emphasis added.

¹¹ Wohlström (n 1) 48.

The synthesis of the above documents has led to profoundly important research findings. I will summarise some of these in Section 2. In particular, Wohlström draws out the shared and divergent aspects of Nordic constitutional cultures, and articulates key changes that have been happening through EU law, especially the ‘major shifts’ in power from parliaments to courts. Other key findings include that a proactive quest to avoid conflicts with EU law in advance has played a special role in the Nordic countries. However, the downside to this is that the manifold clashes with EU law have not registered as conflicts in EU discourses.

Remarks on methodology will be made in Section 3, where I submit that Wohlström’s thesis has tacitly embedded what I would refer to as the introduction of the bottom-up study of national constitutional cultures and systems into the neofunctionalist research on autonomous, self-referential EU law. In this regard, a brief detour will be made into the epistemology of EU law, and especially the ‘Integration-through-Law’ project, one side-effect of which has been blindness to national constitutional law and legal orders. In relation to this, in Section 4, I will raise as a broader policy issue that perhaps Nordic countries, with their culture of openness, would be well placed to take the lead in creating initiatives to support the international publishing of doctoral theses and other research on national and comparative European constitutional law.

In Section 5, it will be noted that the thesis provides a solid basis for developing proactive suggestions to address challenges posed by EU law to national constitutional law; some examples of possible solutions will also be brought from the work of other scholars.

Throughout this review, I have written up some more in-depth discussion points, as I have been grappling with similar themes in my own research in the aftermath of the European Research Council funded project ‘The Role of National Constitutions in European and Global Governance’ (hereinafter ‘Role of Constitutions’ project). In the framework of the project, a two-volume book *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*¹² (hereinafter the *National Constitutions* book) was published, containing twenty-nine in-depth national reports from the then 28 EU Member States and Switzerland. I have been in a protracted process of writing up two comparative monographs: the first synthesises EU-related constitutional adjudication in the Member States,¹³ the second provides an outline of the classic, comparative European understanding of constitutional law, which

¹² A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*. Volumes I and II (TMC Asser Press and Springer 2019) open access at <<https://www.springer.com/us/book/9789462652729>> accessed 18 June 2025.

¹³ A Albi, *A Comparative Study on National Constitutions in EU Governance* (Springer and Asser Press, forthcoming 2026).

comprises three broader constitutional traditions.¹⁴ In result of the above project, I have postulated an ongoing Kuhnian paradigm shift from classic European constitutional law to autonomous EU governance, which I have explained in a longer article ‘A Paradigm Shift in the Role of Courts?’, published in the Estonian law journal *Juridica International*.¹⁵ Several comments below briefly refer to arguments developed more fully in the above publications. It is hoped that the comments will provide a basis for wider follow-up research with a view to seeking constructive solutions for the future development of the EU legal order in a way that would be more attuned to the co-existence of advanced national constitutional systems in Europe.

In the final section, I will bring the example of a core Nordic constitutional value – the universal social welfare state – as a better model for humanity, rather than something that ought to be replaced by post-national EU governance that is assumed to be normatively superior but, on closer view, represents the entrenchment of neoliberalism and neofunctionalism.

On a practical note, law is close to power. Especially in EU integration and decision-making, legal scholarship has played a crucial role.¹⁶ Therefore, Wohlström’s thesis is not only of scholarly importance, but is of direct relevance to the fundamental questions of how we and future generations in Europe will be governed, and who will decide and how.

2. Outline of the main contributions: Exploration of limits to EU law in Nordic constitutionalism, with a tradition of weak courts

In terms of structure, Wohlström’s thesis is divided into five parts. It opens with a chapter outlining the growing tensions with regard to limits to EU law in the Member States, as well as in relation to CJEU judicial activism, and sets out the relevant literatures, with a focus on constitutional pluralism. This is followed by three country-specific parts, starting with Denmark, which was the first to join (at the time) the EC, and moving on to Sweden and Finland. The final chapter draws out the different country-specific and broader conclusions.

The contributions of the thesis to the existing research are very extensive and complex, and will be summarised in the subsequent sections. As an aside, I found Wohlström’s thesis highly interesting and engaging to read, and was keen to find out what the conclusions and suggestions might be.

¹⁴ For a preliminary outline, cf the text accompanying below note 34, along with notes 33 and 36.

¹⁵ A Albi, ‘A Paradigm Shift in the Role of Courts? Disappearance of Judicial Review through Mutual Trust and other Neofunctionalist Tenets of EU Law’ (2022) 31 *Juridica International – Law Review of University of Tartu* (University of Tartu Press) 3 <<https://ssrn.com/abstract=4230871>> accessed 18 June 2025.

¹⁶ See eg Vauchez (n 100).

2.1 Nordic constitutional cultures: Shared values and differences; ‘the whole legal system’

In terms of the central overarching theme, Wohlström’s thesis makes a profoundly important contribution by drawing out and elucidating the manifold shared values and components in the constitutional cultures, substantive constitutional law and institutional configurations in Nordic constitutionalism, as well as the variations between the individual constitutional cultures. On this basis, the thesis articulates differences in comparison to the EU legal order, and shows how Nordic constitutionalism has been changed through EU integration. The thesis additionally identifies similarities and divergences in the paths taken by the three Nordic EU Member States to deal with the EU integration processes.

The shared features of Nordic constitutional culture are explored in the section entitled ‘What is Nordic about Nordic constitutional law’.¹⁷ Wohlström explains that on the one hand, scholars have pointed out that ‘there is no ‘Nordic model’,’¹⁸ and there are ‘the variations of ‘Nordicness’’¹⁹. On the other hand, there are a set of core values and traits which the Nordic countries traditionally share and also defend in the international arena, although many of these are not expressly set out in the constitutions. For example, Helle Krunke and Björg Thorarensen have identified the following core values: a strong welfare state, transparency, public trust in state institutions, consensus-based politics, human rights, democracy, the rule of law, good governance, a clean environment and gender equality.²⁰

For the purposes of the present review, a key feature is parliamentary supremacy and a cautious, deferential role for the courts, which will be explored in the next section. In this regard, Wohlström summarises Jaakko Husa’s list of eleven macro elements common to Nordic constitutionalism, which include the following:

- 1) *A parliamentary system ...*; 2) *consensual democracy* (avoidance of open conflicts in politics, stable multi-party systems); 3) *cautious systems of judicial constitutional review* (... judicial self-restraint, no strong culture of rights); 4) *respect of the will of the legislator* (avoidance of conflicts between Parliaments and Supreme Courts, great significance of travaux as a source of law); ... 7) *no separate constitutional courts*; 8) *combination of written and*

¹⁷ Wohlström (n 1) 30.

¹⁸ H Krunke and B Thorarensen, ‘Concluding thoughts’ in H Krunke and B Thorarensen (eds), *The Nordic constitutions: A Comparative and Contextual Study* (Hart 2018), as cited in Wohlström (n 1) 32.

¹⁹ Wohlström (n 1) 47.

²⁰ Krunke and Thorarensen (n 18), as summarised in Wohlström (n 1) 30.

*unwritten rules and principles; ... 10) pragmatic and practical legal style and 11) flexibility of the constitution.*²¹

Wohlström's explanation of Nordic constitutional cultures is particularly helpful for readers who have a legal grounding in the legal type of constitutionalism, with strong constitutional review, which prevails especially in continental Europe. For example, the thesis helps to clarify the following dimensions: the parliamentary supremacy in the guardianship of the constitution; the weak role of courts and the more recent evolution of judicial review, which continues to be cautious and deferent; and the predominantly *ex ante* nature of constitutional review – along with the terminology of 'legisprudence' and 'judicial preview'. The thesis also elucidates how the social welfare state, while not expressly written in the constitutions, is part of the invisible constitutions and the broader constitutional cultures in the Nordics; this will be explored further in Section 6. One key theme that arises in multiple contexts is the Nordic concept of openness, with its many inter-related dimensions, such as transparency, access to documents and official records, and openness and accountability in public administration. Throughout the thesis, these and further shared values of Nordic constitutionalism are outlined, often in the context of explaining how they have come under strain by virtue of EU law.

A further related contribution in Wohlström's thesis – and one of profound systemic importance – is identification of the lack of attention in EU discourses to the important perspective of the '**whole legal system**'. As Wohlström notes, the stories collated

provide examples of how 'the whole legal system' has an impact on why problems arise and why they do not. This dimension is also easily overlooked when questions of 'limits' are approached only from an *ex post* legal perspective. Indeed, from a Nordic viewpoint, focusing on judicial pluralism alone can appear as a narrow and passive stance, as it risks reducing the other relevant actors and other parts of the constitutional order to static assumptions.²²

This could further be linked to the remark that 'the institutional dimensions of the systems are only the tip of the iceberg'.²³

I share the concerns about the absence of the dimension of the 'whole legal system'. Such concerns were at the origin of my 'Role of Constitutions' project noted above; the project started from an uneasy sense that national constitutions have simplistically been reduced to EU narratives regarding sovereignty and national constitutional identity,

²¹ J Husa, *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective* (Petter Lang 2002), 178–179, as summarised in Wohlström (n 1) 31 (emphases added by Wohlström).

²² Wohlström (n 1) 456.

²³ Wohlström (n 1) 33.

and assessment of the euro-friendliness or euroscepticism of courts. There has been virtually no attention to substantive constitutional law and values in the Member States, such as fundamental rights, the rule of law, separation of powers, and how they have been affected by EU law. In result of the extended comparative research, I have come to be deeply concerned that there has been **a systemic blindness in EU law and discourses to the advanced, carefully fine-tuned constitutional systems** of the Member States. Gradually it has emerged that this broader configuration has not come about by happenstance, but is a hitherto undiscussed side-effect of the ‘Integration-through-Law’ project, as will be explained in Section 3.

Recently, a broadly similar observation was made by Signe Rehling Larsen in the article ‘Varieties of Constitutionalism in the European Union’, noting that ‘the debate on constitutional pluralism is **blind** to the “plurality of constitutionalisms” of the EU Member States’.²⁴ Rehling Larsen adds that the underlying assumption of constitutional pluralism has been that there ‘is a fundamental constitutional homogeneity amongst the EU Member States’;²⁵ that there is ‘only *one* form of “constitutionalism” – *one* constitutional theory – that perceives a constitution as a normative order of universal moral-legal values’.²⁶ Rehling Larsen classifies Denmark and Sweden, as well as the United Kingdom, as ‘[p]aradigmatic examples of ... evolutionary constitutionalism’,²⁷ contrasting these to ‘post-fascist constitutionalism’ and ‘postcommunist constitutionalism’.²⁸

Here it additionally seems apposite to mention the research of Cecilia Bruzelius. Having also noted that constitutions are often treated in EU discourses as relatively monolithic sets of instruments that primarily serve to protect sovereignty, Bruzelius has elucidated fundamental differences between the German legal type of constitutionalism and the Swedish political type of constitutionalism, in the context of exploring the effects of juridification through EU law on social rights.²⁹ Bruzelius argues that EU judicialised modes of developing cross-border rights ‘overlook ... implications for more fundamental norms underpinning national welfare states’, which ‘depend not on a country’s welfare regime but rather follow from its constitutional tradition’.³⁰ One

²⁴ S Rehling Larsen, ‘Varieties of Constitutionalism in the European Union’ (2021) 84(3) MLR 478–479 (emphasis to ‘blind’ added by the present writer; emphasis in ‘constitutionalisms’ original).

²⁵ Rehling Larsen (n 24) 477.

²⁶ Rehling Larsen (n 24) 478–479 (references omitted) (emphasis original).

²⁷ Rehling Larsen (n 24) 488–489ff.

²⁸ Rehling Larsen (n 24) 477, 481.

²⁹ C Bruzelius, ‘How EU Juridification shapes Constitutional Social Rights’ (2020) JCMS 58(6) 1488–1489.

³⁰ Bruzelius (n 29) 1488.

fundamental change has been that the Nordic Member States that have residence-based social insurance have had to reform these schemes towards more contribution-based policy solutions in response to CJEU case law.³¹

Against this background, Wohlström's thesis fills an important gap, by making a systematic comparative analysis of Nordic constitutional cultures and especially substantive constitutional law, along with analysis of how these have changed through EU law, available in English. The thesis offers a joined-up, inter-systemic treatment of both EU law and national constitutional law, which in the existing literature have by and large remained separate.

By way of a broader comment, Wohlström's thesis seems to approach the Nordic constitutional cultures as 'Nordic constitutional exceptionalism',³² this is contrasted to 'Europeanisation', 'European law' and 'the European legal order', where the references to Europe seem to be mainly about EU law and integration, in combination with the ECHR. The constitutional law in Germany and other dominant countries in Europe is also merged in the vocabulary of 'Europeanisation' because of the strong role of courts. Nordic countries are seen as becoming more Europeanised through EU and ECHR law, and through the strengthening of courts. It should be noted that this account is not specific to Wohlström's thesis, but is a standard approach in the Nordic constitutional literatures.

In this regard, it seems important to point out that the Nordic constitutional cultures with strong parliaments and weak courts are not exceptional in the rest of Europe. In result of the 'Role of Constitutions' project, I have classified the Nordic countries as part of the 'political' type of constitutionalism, which is also shared in the UK, Malta, the Netherlands, Luxembourg, Switzerland and beyond.³³ This type of constitutions are also referred to as evolutionary constitutions, as per Rehling Larsen's above-mentioned research.

Furthermore, the juxtaposition of the Nordic or even the wider political constitutional tradition vis-à-vis the EU and the rest of Europe is in need of reconsideration for the reason that – as I argue on the basis of my comparative research – the political

³¹ Bruzelius (n 29) 1490, with reference to the work of A Christensen and M Malmstedt, and T Erhag. I would add that impressionistically, the loss of the universal social welfare state dimension (ie change from social assistance entitlements simply on the basis that the person lives in the country to social assistance entitlements that are based on work or economic activity) is an additional factor that contributes to the shift of the human person to *homo oeconomicus* through EU law – see the text accompanying below note 141, as well as notes 136–138.

³² Wohlström (n 1) 9.

³³ A Albi and S Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in Albi and Bardutzky (n 12) 13.

constitutional tradition is part of what I refer to as classic European constitutional law.³⁴ Dieter Grimm has elucidated the fact that modern constitutionalism is predicated on the constitutional achievements and arrangements which resulted from the French, American and English Revolutions and Enlightenment ideals.³⁵ I would add that the political constitutional tradition is the most widely shared basic template of modern constitutionalism in Europe, and it is part of the broader classic European constitutionalism. In classic European constitutionalism, power is ultimately held by the people, and in everyday operation, by parliaments; courts administer justice, along with different degrees of intensity of the judicial protection of fundamental rights and judicial and constitutional review. The general scheme of classic European constitutional law entails considerable diversity, especially the three broader constitutional traditions in Europe: post-totalitarian and post-authoritarian (both in Western and Central-Eastern Europe), traditional legal, and political constitutions.³⁶ A basic floor in fundamental rights protection is set for all by the ECHR. By contrast, EU law is very different from classic European constitutional law, as it is predicated to a significant extent on neofunctionalism and other new ideologies, where ‘Europeanisation’ is typically used in the meaning of a mechanical shift in law and competences from the national to EU level, without attention to the substantive law or values at stake; this will be explained in more detail below in Section 3.

Here it is further relevant to point out that treating national constitutions as exceptionalism tallies with a pattern that emerged in result of the above-mentioned ‘Role of Constitutions’ project: it is that where problems have been raised in relation to national constitutional law, in each Member State the scholars and experts have typically tended to assume that only their jurisdiction has problems with EU law, which they have regarded as an idiosyncratic matter of national constitutional identity vis-à-vis a presumed ‘European’ standard. There has been very little awareness that the problems are very often widely shared, and affect classic European constitutionalism or one of the three broader constitutional traditions in Europe. Indeed, in the conclusions, Wohlström makes the following remark:

³⁴ For an initial account on classic – especially continental – European constitutional law, see Albi, *A Paradigm Shift*, (n 15) 5, 14ff; this is currently being developed further in a draft monograph. Differences between ‘classic European understanding of constitutionalism’ and the governance paradigm have also been outlined in Albi and Bardutzky, ‘Revisiting the Role and Future of National Constitutions’ (n 33) 24ff and especially at 27.

³⁵ D Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’ in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 3ff; D Grimm, ‘Types of Constitutions’ in M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 101, 104.

³⁶ See Albi and Bardutzky, ‘Revisiting the Role and Future of National Constitutions’ (n 33) 12ff.

From the beginning of this process I felt it was difficult to relate the Nordic experience to anything around me. Especially the role of the national legislatures seemed unexplored That certain features belong to the characteristic features of national constitutionalism in the Nordic countries does of course not exclude the possibility that they can be characteristic features of other constitutional systems as well, but in the end, that is just a comfortable shortcut to 'I don't know'. As I tried to understand why the Nordic countries do not show on the map, I also often wondered what other different kinds of invisibilities there were Towards the end of my project, it finally emerged that others had started to ask similar questions.³⁷

2.2 'Major shifts' in the Nordic institutional balance through EU integration: Ajos as a 'judicial revolution'

Wohlström's thesis elucidates in more detail a key shared institutional configuration in Nordic constitutionalism: majoritarian constitutionalism where parliaments are the supreme guardians of the constitution, with courts traditionally having a limited, comparatively weak role. The keywords that mark Nordic judiciaries include cautiousness, deference and judicial self-restraint.

Against this background, the central overarching argument in Wohlström's thesis is that through EU law, a profound internal reconfiguration and 'major shifts' have occurred in the institutional balance in the Nordic constitutional cultures. The Nordic approach to EU and ECHR influences has been summarised well by the eminent Professor Ulf Bernitz, who in 1991 described accession to the EC as a paradigm shift in relation to the role of law in Sweden. According to Bernitz,

It is my general impression ... that the role of law and of lawyers in the Swedish society ... has probably been weaker than in most Western European countries and definitely weaker than in the EC system. One can point here to such things as the absence of a constitutional court, the limitation of the possibilities to set aside laws and also governmental decrees (!) as unconstitutional to 'manifest' cases In general, ... there has been a strong tendency to see the role of lawyers as more limited and mostly centred on technical legal issues and conflict resolution.³⁸

³⁷ Wohlström (n 1) 459.

³⁸ U Bernitz, 'Inför europeiseringen av svensk rätt', *Juridisk Tidskrift* 1991–92, 29–30, as cited in Wohlström (n 1) 170.

On the basis of the materials collated above, Wohlström documents in slow motion how through EU law, as well as through the ECHR, judicial review has gradually been strengthened, outlining the respective cases and extensive legal, political and scholarly debates, which show that this has been a reluctant, vexed and contested process. In several places ‘reversal of institutional roles’ has been observed, albeit not in the meaning of complete reversal, but a process of change, whereby legislatures have taken on the role of raising issues and conflicts in relation to EU law. It has also entailed a shift from legislatures to courts as regards an increase in the level of involvement of Nordic courts.³⁹ Indeed, several scholars have likened the changes to a ‘judicial revolution’, especially as regards the Danish Supreme Court’s *Ajos* judgment⁴⁰ where, for the first time, a clear ‘No’ was said to the CJEU’s much-contested judicial activism.⁴¹ In all three countries, there has even been discussion about the creation of a constitutional court. At the same time, overall, the role of courts has not been strengthened to the point where they would become regular interlocutors in European judicial dialogues.

By way of a commentary, above it was noted that Wohlström’s thesis regards the strengthening of courts in the Nordic countries as part of ‘Europeanisation’, as something that is mainly about EU law and integration, in combination with the ECHR, as well as a reflection of the strong role of courts in Germany and elsewhere. It should be noted that this is not specific to Wohlström’s thesis, but is a standard approach in Nordic constitutional literature on the ‘Europeanisation’ of courts and increase in judicial activism.

Harking back to the remark about different meanings of Europeanisation in the preceding section, in the above-mentioned article ‘A Paradigm Shift in the Role of Courts’, I explained in more detail that differentiation would seem to be warranted as regards the role of courts in the EU legal order and in German and other post-totalitarian constitutional systems. Some aspects of the above argument would also seem to resonate with issues raised in Wohlström’s thesis, and will be briefly outlined below. It should be emphasised that my concerns do not apply to the European Court of Human Rights, which sets the basic floor for fundamental rights but does not replace national law.

In Wohlström’s thesis, when speaking about national courts in EU integration, a summary of the influential EU law literature is provided on the role of national courts in the success of the EU legal order, which has originated especially from the writings of Joseph Weiler, Karen Alter, Alec Sweet Stone and others.⁴² Some of the key narratives

³⁹ Wohlström (n 1) eg 164, 178.

⁴⁰ UfR 2017.824H, Dansk Industri (*Ajos*).

⁴¹ Wohlström (n 1) 50.

⁴² A summary and references are provided in Wohlström (n 1) 22–25.

have included the theme of competition of courts, the ‘judicial empowerment thesis’, and more generally ‘judicial activism’ of courts.⁴³ Wohlström in particular mentions Karen Alter’s highly popular monograph *Establishing the Supremacy of European Law*, where Alter argues that the EC legal system became the most effective international legal system in the world because of the competition of courts: the lower courts were willing to make use of the preliminary reference system due to the new status that lower national courts were gaining in relation to higher courts or constitutional courts, which was a way of improving their own standing in the national legal hierarchy.⁴⁴ The thesis further notes the key idea in the publications of Karen Alter, Joseph Weiler, and Anne-Marie Burley and Walter Mattli, that courts have become key players in European integration in result of nothing more than pure self-interest.⁴⁵

Crucially, Wohlström’s thesis explains that the above accounts of Alter and other scholars do not fit with the context of courts in the Nordic countries. Wohlström notes that ‘[i]t is no coincidence that it was a Danish scholar, Marlene Wind, who first pointed out the difficulty of applying this kind of theory to the Nordic region.’⁴⁶ Wind has explained that by 2009, the Danish courts had asked for only 104 preliminary rulings since Denmark joined the EC in 1973. The figures for Sweden and Finland were also remarkably low compared to Austria, which joined the EU at the same time. Wind observed that while it was expected in EU discourses that supreme courts would be the least willing to submit to an authority outside the national legal order and that lower courts would make the most referrals as a means of rebelling against the national legal hierarchy, this prediction did not seem to hold true in the case of the Nordic countries, where lower courts left it to the appellate courts and supreme courts to make almost all of the references. In fact, the European Commission issued a complaint against the Swedish Government over the low number of preliminary references, after which in recent years all the Nordic countries have come to rank slightly above average.⁴⁷ I would add that Professor Bernitz has elsewhere clarified that the complaint took the form of a ‘reasoned opinion’, which means that if the national legislation had not been changed rapidly in order to secure better compliance, the European Commission would have started an infringement procedure against Sweden in the CJEU for breach

⁴³ As summarised, with references, in Wohlström (n 1) eg 7, 19, 22–25.

⁴⁴ K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2011), as summarised in Wohlström (n 1) 22.

⁴⁵ As summarised, with references, in Wohlström (n 1) 25.

⁴⁶ Wohlström (n 1) 22–23.

⁴⁷ As summarised in Wohlström (n 1) 22–23, based on M Wind, ‘When Parliament Comes First – The Danish Concept of Democracy Meets the European Union’ (2009) *Nordic Journal of Human Rights*, 27, and M Wind ‘The Nordics, the EU and the Reluctance Towards Supranational Judicial Review’ (2010) *JCMS*, 48.

of its treaty obligations.⁴⁸ This is an important theme to which I will return at the end of this section.

Wohlström concludes that the Nordic judicial dynamics regarding EU law are not about competition within existing court structures, but reflect the broader Nordic judicial culture.⁴⁹ This important explanation regarding the differences in the judicial dynamics regarding EU law in EU and Nordic discourses frames Wohlström's thesis, and merits wider awareness, along with correction of the above EU narratives on competition and self-interest of courts in the mainstream discourses.

Nevertheless, more generally, Wohlström's account on occasions seems to by and large conflate the role of all courts in the broader process of Europeanisation of courts – including in the context of EU law, the ECHR, in German constitutionalism and in the Nordic process of strengthening the courts. As noted, this is also the standard approach in Nordic constitutional discourses. I would point out that in the context of EU law, the understanding of the role of courts is generally different than in classic European constitutionalism. The above EU narratives around competition and self-interest of courts have become widespread in result of the 'Integration-through-Law' project propounded by Joseph Weiler and other scholars, and has been the baseline approach in the understanding of the role of courts in the discourses at the European University Institute in Florence; on a closer look, this is predicated on neofunctionalism and US fiduciary constitutionalism.⁵⁰ Wohlström's thesis also notes Alter's theoretical commitments to American political realism as regards the role of courts.⁵¹

In classic European constitutionalism, courts have a different role and purpose, with variations in the three broader constitutional traditions. In the post-totalitarian and post-authoritarian constitutional traditions, courts operate on the basis and for the protection of the constitution, which also determines the limits of any activism. As per Robert Alexy's seminal book *A Theory of Constitutional Rights* regarding the German legal system, there is no leeway in judicial interpretation in the case of constitutional *rules*, whereas in the case of *principles* there is scope for proportionality balancing.⁵² Notably, however, even proportionality balancing serves the purpose of ensuring the

⁴⁸ See U Bernitz, 'No need for Commission to be heavy-handed over courts' *Politico* 24 November 2004, <<https://www.politico.eu/article/no-need-for-commission-to-be-heavy-handed-over-courts/>> (accessed 15 December 2025). For the stages of EU infringement procedure, see European Commission, 'Infringement procedure', <https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en> (accessed 15 December 2025).

⁴⁹ Wohlström (n 1) 23 (with references).

⁵⁰ See Albi, *A Paradigm Shift* (n 15) 25ff; see also the text accompanying below notes 99–100.

⁵¹ Wohlström (n 1) 25.

⁵² R Alexy, *A Theory of Constitutional Rights* (J Rivers tr OUP 2002) 4ff.

predictability of judicial rulings, and avoiding arbitrary results and an overall situation of an ‘uncontrollable mess’.⁵³

In relation to the CJEU, Gerard Conway was the first to observe that no-one before, even Professor Rasmussen whose critical monograph on the CJEU will be mentioned in Section 3, had asked the question what, in fact, is the normative theory underlying the CJEU’s judicial interpretation.⁵⁴ Conway himself concluded that although very different, the CJEU reasoning is ultimately part of the same paradigm as the Member States’ law.⁵⁵ However, the present writer and a small but growing number of other scholars have come to the view that CJEU case law as well as EU law in general represent a different paradigm, predicated on new ideologies for the exercise of public power, as will be briefly explained in Section 3.

By way of examples of key differences, it is now well-established that the primary mission of the CJEU has been to act as a ‘motor of integration’; there have been long-standing criticisms of the CJEU judicial activism and extensive teleological interpretation.⁵⁶ This has increasingly caused tensions in all Member States, and was also one of the key issues in the debates leading up to Brexit. In a widely cited blog ‘Stop the European Court of Justice’, Roman Herzog, a former President of the German Constitutional Court, raised concerns that the CJEU does not represent Western methods of interpretation, and creates principles out of nowhere.⁵⁷ Additionally, it is now widely acknowledged that CJEU judicial review is intensive in relation to the Member States’ measures and seeks to displace national regulatory autonomy, whereas judicial review has been very lax in relation to measures of EU institutions. I have listed these and further criticisms in the above-mentioned article, where I added my concern that this has also been changing the role of national courts – from providing judicial protection to the prioritisation of trust, efficiency and enforcement. As a practical case to illustrate the paradigm shift – which includes disappearance of judicial review under national constitutions in areas governed by EU law – I brought the example of the case of Neeme Laurits, an Estonian citizen who was extradited to Finland without any judicial review despite compelling evidence of innocence. While the CJEU allows exceptions to extradition on the grounds of prison conditions, this was not the problem here, since Finland probably has some of the best prison conditions in the world. The problem was that human dignity was not respected, as the person in

⁵³ Alexy (n 52) 423.

⁵⁴ G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 84.

⁵⁵ Conway (n 54) 89–90.

⁵⁶ For an overview, see Conway (n 54) ch 2.

⁵⁷ R Herzog and L Gerken, ‘Stop the European Court of Justice’ *EUobserver* (10 September 2008) <www.euobserver.com> accessed 1 July 2015.

question was not granted any judicial protection due to the near-automatic European Arrest Warrant rules. In a TV documentary, Mr Laurits compared his treatment to the Soviet-type repressive court proceedings.⁵⁸

Against the above background, a more nuanced approach would seem to be warranted when speaking about ‘Europeanisation’ of courts, differentiating between EU law and the broader constitutional traditions in Europe.

I would briefly flag one more issue here – in relation to the above-mentioned European Commission reasoned opinion against Sweden due to low numbers of preliminary ruling references. Wohlström cites Professor Bernitz, who writes that ‘[a]s far as known ... the Commission has never before taken formal action against a member state because its court(s) of last resort have not observed its Treaty obligation to refer cases to the CJEU.’⁵⁹ The Swedish Government firmly rejected any allegations of a breach of the then Article 234(3) EC (now Article 267(3) TFEU) but introduced a respective change in the law. The Supreme Court and the Supreme Administrative Court considered this an unjustified intrusion from the European Commission, and the Law Council also found that this was absolutely unnecessary. However, because the Government decided to proceed with the matter regardless of these objections, we never got to read what would have been a historic judgment from the Court of Justice.⁶⁰ Some concerns about the very far-reaching implications of the ultimate threat of EU enforcement proceedings and fines on the national constitutional and judicial systems – along with the underlying ideational frameworks – will be outlined in Section 5.

2.3. The focus in the Nordic countries on strategies to avoid conflicts in advance

The above broader constitutional configuration leads to a further central finding that is documented by Wohlström throughout the thesis: **a proactive quest to avoid conflicts with EU law in advance has a special role in the Nordics**. Conflict avoidance is one expression of consensual constitutionalism, which is characteristic to Nordic constitutionalism.

⁵⁸ See Albi, A Paradigm Shift (n 15) 25ff, 42ff.

⁵⁹ As cited and summarised, with references to Bernitz, in Wohlström (n 1) 265–266. The present writer would add that in a media article, Bernitz made the following comment: ‘The steps taken by the Commission are far-reaching and easy to criticize from the viewpoint of constitutional principles. In Sweden, as in other member states, the courts are fully independent and the two supreme courts (the Supreme Court for the law in general and the Supreme Administrative Court) enjoy a special position under the constitution.’ Bernitz concluded as follows: ‘There is still a reluctant attitude towards the use of European law among many national judges, not least in Scandinavia. This should be overcome by promoting education, contacts and understanding, not by the Commission starting infringement proceedings against national governments.’ See for a fuller discussion also from the perspective of the EU obligation of co-operation, Bernitz, No need for Commission to be heavy-handed (n 48).

⁶⁰ As cited and summarised, with references to Bernitz and official documents, in Wohlström (n 1) 265–266.

Wohlström shows that in Denmark and Sweden, conflict avoidance has been achieved to a significant extent by virtue of optouts from EU Treaties. In Finland, the Parliament's Constitutional Law Committee has used a number of proactive techniques to avoid conflicts, and has also adopted a general self-imposed 'principle of conflict avoidance'.⁶¹

One complicating factor, which the thesis explains in particular detail on the basis of comments from Swedish negotiators, is that seeking to ensure the compliance of EU measures with the Constitution in advance in the negotiations process is not only time-consuming and resource-intensive, but has also been draining the overall negotiating capital of the state, as well as being costly.⁶² There has been limited understanding on the part of other Member States who often did not quite 'get it', as well as 'a drain on Sweden's general negotiating capital in EU cooperation'.⁶³

As Swedish negotiators have observed in relation to avoiding constitutional conflicts with constitutional Acts on freedom of speech – which is a fundamental right that is valued particularly highly in Sweden – '[t]here is never a point at which the defence ... is 'finished'', rather the questions return again and again in various guises.'⁶⁴ Notably, all this has eventually led to a strong pressure to adjust the constitutional requirements downwards.

A key aspect of the conflict avoidance strategies is 'constitutional preview' (*ex ante* review), which is contrasted to the practices in the other Member States and in the EU where conflicts are typically dealt with after they have occurred.⁶⁵

An internationally influential role in shaping EU measures in line with constitutional requirements in advance has been played by the Constitutional Law Committee of the Finnish Parliament. As a particularly remarkable example, the Finnish Constitutional Law Committee achieved a change in the draft ESM Treaty to ensure the unanimity requirement in the process of EU level negotiations in the event of an increase of the financial liabilities.⁶⁶

Below it will be suggested that elsewhere the Nordics are regarded as 'centre' countries which have considerable leverage to proactively shape EU law, even if perhaps not seen as such within the Nordic countries. From this perspective, I would add that the Finnish Parliament's finding that the ESM Treaty would be unconstitutional in the event of increasing the financial liabilities without unanimity was subsequently raised by the Chancellor of Justice in Estonia in the constitutional challenge brought

⁶¹ Wohlström (n 1) 415, 450.

⁶² Comments by Justice Henrik Jermsten, as summarised (with references) in Wohlström (n 1) 239.

⁶³ Olle Abrahamsson and Henrik Jermsten, as cited (with references) in Wohlström (n 1) 243.

⁶⁴ Olle Abrahamsson and Henrik Jermsten, as cited (with references) in Wohlström (n 1) 243.

⁶⁵ Wohlström (n 1) 183; the English translation 'judicial preview' is explained in footnote 631.

⁶⁶ Wohlström (n 1) 406–407.

to the Estonian Supreme Court in relation to the ratification of the ESM Treaty. Whilst the constitutionality of the ratification was eventually narrowly approved, nine judges wrote dissenting opinions, expressing concerns about the effects of the very large financial liabilities on the social and democratic state based on the rule of law.⁶⁷

2.4. Downsides: Conflicts and tensions overlooked in EU discourses

Following on from the above context, Wohlström articulates a major downside of the strategies of conflict avoidance: **due to the early interventions, the fact that there have been manifold sharp tensions and conflicts in the Nordic countries has not reached the attention of EU pluralist discourses.** As the thesis notes with regard to Sweden, ‘tensions between legal orders can linger on for a long time – and they can be taken out of the system by using multiple methods, by lawyers as well as politicians – without them ever becoming constitutional conflicts proper, ie a problem for the courts’.⁶⁸ Wohlström sums up these issues in the concluding chapter:

While writing this study, I have often debated with myself whether it is right to call a conflict a conflict when it arises during the legislative process. The actors carrying out the constitutional review often see it as a conflict, but this does not have the same impact as it would if it came to the surface in the practice of a court. If a potential conflict is identified and resolved early in the political process ... we tend to think of it as just politics. ... It is only when these problems reach the courts that we know whether they become conflicts – and in the case of Sweden and Finland this has never happened. So, is it not a reasonable assertion that there have never been constitutional conflicts in Sweden and Finland? There have in Denmark ...

The answer this study gives to that question is ... yes and no. The Nordic practices ‘beyond the courts’ may not always be as exciting as the encounters between the great courts of Europe, but in the end, they are just as real. The fact remains that what happens in the Nordic countries is constitutional review nonetheless, and if we look at the pluralist dilemma through the Nordic experience, not only do the actors and their tools change, but the questions themselves change.⁶⁹

Wohlström’s thesis additionally identifies the practical problem of ‘non-judicial actors

⁶⁷ See H Kalmo and A Albi, ‘Estonia: From Rules to Pragmatism’ in S Griller, L Papadopolou and R Puff (eds) *National Constitutions and EU Integration* (Hart Bloomsbury, 2022) <<http://ssrn.com/author=1246144>> accessed 18 June 2025.

⁶⁸ Wohlström (n 1) 253.

⁶⁹ Wohlström (n 1) 453–454.

trying to work their way through the EU legislative process to make their voices heard’;⁷⁰ the Nordic legislatures and non-court actors can never get to the CJEU.⁷¹ For example, the Finnish Parliament’s Constitutional Law Committee ‘cannot communicate directly with the European Court of Justice’, and the related perspectives ‘disappear from view’⁷². One of the conclusions is that whilst ‘the Nordic countries were put on the map of Europe when the Danish Supreme Court introduced *ex post* control, the Finnish and Swedish experiences suggest that the majoritarian approach can be at its strongest when no one is looking.’⁷³ Whereas in a court-centred approach there is a strong idea of how constitutional limits are defended, this is not the case in the Nordics, as illustrated eg by ‘[t]he biggest single Nordic story, the ‘defence of openness’’, which ‘lies entirely outside the realm recognised by contemporary discourse’. The tools of the legislator, such as the ‘building of borders’ and ‘(deliberate) passivity’, ‘do not show up on the map’.⁷⁴

As regards the point that Nordic countries ‘do not show up on the map’ in EU legal pluralism discourses, the present reviewer had also not been aware of many of the constitutional problems in the Nordic countries that were identified in the thesis in relation to EU law, despite extensive comparative reading in the field, and despite having received conference programmes through the Nordic European Law mailing list for many years. There has been wider awareness about some issues, such as the Danish and Swedish EU referendums, the Danish *Ajos* case,⁷⁵ and *Viking* and *Laval*⁷⁶, and the related issue of subjugating fundamental rights and social protections to EU market freedoms through the proportionality test. However, there seems to be limited or no awareness that there have been sharp concerns about EU law amongst Nordic judges and lawyers, both more generally as regards reluctance in relation to strengthening the courts, as well as in relation to many individual areas of constitutional law.

The present writer first read about the fact that the Nordic countries have weak courts, that judicial review is more recent, and that the EU and ECHR systems have brought about greater ‘judicialisation’ in the national reports in the above-mentioned

⁷⁰ Wohlström (n 1) 455.

⁷¹ Wohlström (n 1) 27.

⁷² Wohlström (n 1) 455.

⁷³ Wohlström (n 1) 456.

⁷⁴ Wohlström (n 1) 455.

⁷⁵ Cf n 40.

⁷⁶ Case C-438/05 *Viking Line* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767.

National Constitutions book.⁷⁷ However, up until reading Wohlström's thesis, the present writer had had the impression that greater juridification had by and large been regarded as a positive development, and that conflicts between national constitutions and EU law had in the main arisen in what I have referred to as the post-totalitarian and post-authoritarian constitutional traditions, whereas application of EU law had generally been a smooth process in the Nordic countries. For example, at a joint UK-Finland EU law webinar, the Nordic countries were applauded as a welcome example of smooth application of EU law, in contrast to some other Member States where constitutional courts have shown resistance.⁷⁸

Examples of more specific tensions and conflicts outlined in Wohlström's thesis include the following. The initial Swedish constitutional amendment clause regarding EU integration came to be known as the 'flattening clause', in the aftermath of a 1993 article by Sten Heckscher, who was subsequently the President of the Supreme Administrative Court. Heckscher wrote as follows:

Among other things the Court of Justice sometimes takes itself freedoms of the kind we are not used seeing from the Swedish courts. Why should we encourage such further by entirely unnecessarily laying us flat to the ground and asking the EU institutions to drive over us?⁷⁹

After retiring from his judicial post, Heckscher reiterated in 2011 what Wohlström refers to as 'the revival of one Swedish classic: No, "we should not lay us flat like a doormat"' – this time in relation to the European Court of Human Rights. Wohlström has subsequently clarified that the original debate remains more famous.⁸⁰

Another example is the assessment of the EU Constitutional Treaty by Sweden's Law Council; the Law Council 'did not say no, but ... openly expressed something that was bound to upset almost everybody' and after which 'all hell broke loose' in

⁷⁷ See H Krunke and T Baumbach, 'The Role of the Danish Constitution in European and Transnational Governance'; J Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power', and T Ojanen and J Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism', in Albi and Bardutzky, *National Constitutions* (n 12).

⁷⁸ Joint UKAEL/FIDE Finland Webinar 'The European Court of Justice and National Constitutional Courts: Resistance or Cooperation?' 23 November 2021 <<https://ukael.org/past-events-2020-2023/>> accessed 18 June 2025.

⁷⁹ S Heckscher, 'Ruins förslag kan skada vår förhandlingsposition (Svenska Dagbladet 28.3.1993)' in Fredrik Sterzel (ed), *EG och den svenska grundlagen: förbundsstat i vardande?* : seminarium 16 april 1993 (Rättsfonden: Stockholm; Uppsala), as translated and cited in Wohlström (n 1) 190.

⁸⁰ As cited, with references, in Wohlström (n 1) 277, and as subsequently clarified in comments on this review.

the *Riksdag* and ... in the leading newspapers’.⁸¹ The remarks of the Law Council included observations that the ‘transfers of legislative and treaty-making powers are so extensive and significant that the position of the Parliament is in fact substantially undermined’, and that ‘the erosion of the Parliament’s status as a norm-setter and the partial abolition of the possibility of accountability’ affect the meaning of Art 10:5 of the Instrument of Government.⁸²

The above quote by Heckscher and many other quotes additionally convey a widely shared disquiet in relation to the judicial activism of the CJEU. For example, in relation to the changes in the mainstream positions in the post-2014 debate, Wohlström notes that ‘[s]uddenly, accusing the Court of Justice of trampling on the will of the Masters of the Treaties was no longer considered the ultimate heresy – neither was it anymore a “Nordic perspective”’.⁸³

I also noted the remarks of Professor Sverker Gustavsson, whose comments with regard to EU law and its claim to primacy have been summarised as follows: it is no longer obvious that we own the question of how the Swedish Constitution should be defined. There are no longer any institutions that would insist that Swedish law and practice take precedence over the interpretation of the principle of free movement by the European Court of Justice.⁸⁴

On occasions, Wohlström’s thesis openly conveys the underlying discontent with regard to CJEU judicial activism in the broader national legal communities. For example, the thesis paraphrases the dynamics of the CJEU response to the Danish Supreme Court in *Ajos* as follows:

A) Ask a silly question like: how about overturning your case law which so many people dislike ...? B) Get a disrespectful answer. C) Then say: ‘Oops! The Constitution came to play so we could not disapply anything after all. Sorry guys, but there is absolutely nothing we can do...’ D) While Danish EU lawyers medicate themselves with red wine, the Supreme Court’s supporters will shrug and say: ‘oh well, we always knew that the Luxembourg Court was arrogant anyway...’.⁸⁵

More generally, it was new to the present writer to read from different parts of Wohlström’s thesis that in general, the Nordic view seems to be that only limited and not all powers can be transferred, that the CJEU does not have *Kompetenz-Kompetenz*,

⁸¹ Wohlström (n 1) 213, 214.

⁸² As cited, with references, in Wohlström (n 1) 213–214.

⁸³ Wohlström (n 1) 281, with references.

⁸⁴ As summarised, with references, in Wohlström (n 1) 239–240.

⁸⁵ Wohlström (n 1) 151.

and that the transfers of powers cannot amount to the point where the respective countries would no longer be independent states, even if the limits have proven hard to police in practice. A limit in the EU clause of the Danish Constitution that frequently arises is '*ved lov i nærmere bestemt omfang*', which means that the powers have been delegated to the EU 'to a specified extent'.⁸⁶ A substantial part of Wohlström's account synthesises the legal and political debates, documents and cases regarding the limit that only certain but not all powers can be transferred. The thesis summarises the different expert and judicial statements, where it has typically been found that yet another EU treaty does not really undermine sovereignty, and therefore does not need a special ratification procedure. Wohlström writes: 'You do feel like you are reading the same statements over and over again, which is essentially what you are doing'.⁸⁷

The growing popular concerns about increasingly extensive transfers of powers to the EU are exemplified well by a quote from Finn Laursen:

those who supported the Lisbon Treaty were usually very happy to learn that it had been concluded that a referendum could be avoided. Those who were against further integration called for a referendum and claimed that the Government was cheating the people.⁸⁸

With regard to the Maastricht Treaty case in Denmark in 1993, Wohlström notes that the action was brought by twelve individuals who cited as their occupation everything from social worker to student and fisherman's wife, the purpose of which was to demonstrate their varying personal interests in the case; the Association Constitution Committee, which altogether represented 777 people, intervened in the case in support of the claim. One of the claims was that the transfer of sovereignty was on such a scale and of such a nature that it was inconsistent with the democratic form of government guaranteed in the Constitution.⁸⁹

The thesis shows that questions about limits have come to be voiced more acutely in relation to the EU-imposed financial commitments, especially as regards the Finnish Parliament's above-mentioned concern about the financial liabilities under the ESM Treaty. More recently, with regard to the EU Corona Reconstruction Fund, the thesis notes that the Finnish Parliament's Constitutional Law Committee steered away from consulting with the familiar names of constitutional law who had offered solutions more or less in line with its previous practice.⁹⁰

⁸⁶ See eg Wohlström (n 1) footnote 187 at p 54, and at 56, 96, 109, 118.

⁸⁷ Wohlström (n 1) 119. I would add that I have had the same impression over twenty-plus years of working in this field, and with regard to the (formerly) twenty-eight Member States.

⁸⁸ F Laursen, 'Denmark and the Ratification of the Lisbon Treaty: How a Referendum was Avoided', Dalhousie EUCE Occasional Paper No. 7, at 15, as cited in Wohlström (n 1) 132.

⁸⁹ Wohlström (n 1) 96.

⁹⁰ Wohlström (n 1) 420–423.

At the end of the thesis, Wohlström briefly mentions the recent rise of populist parties in the Nordic countries. However, the thesis does not seem to link this in any way to the preceding discussions, eg about the growing concerns about the lack of limits to transfers of powers, loss of democracy through EU integration, or the shift from the social welfare state to the EU neoliberal economic order; this last issue will be discussed at the end of this review in Section 6. Indeed, one rarely finds discussion of this type of causalities in mainstream legal discourses. On a related note, Luis Garcia Bouza has elucidated how the EU institutions promote the narratives of populism and nationalism in order to ‘constrain dissensus’.⁹¹

There is a further question which may be worth flagging for consideration in relation to the question of limits to EU integration. In my own work, I have come to a conclusion that the focus on limits is not a fruitful exercise, as what seems to be underway is a more all-encompassing process of a Kuhnian paradigm shift in the operating system of public power from classic European constitutional law to autonomous EU governance; this will briefly be outlined in Section 3. Generally, when reading Wohlström’s account about the legal debates on whether the constitutional provisions and cases regarding EU integration should be more ‘flat’ or protective of constitutions, it seemed rather like a slow-motion narration of a piecemeal playing out of the tensions between the two paradigms.

3. Remarks on the methodology: Introduction of bottom-up research on national constitutional cultures into the neofunctionalist research on autonomous, self-referential EU law

It seems apposite to note that the above and many further important research findings in Wohlström’s thesis are new from the perspective of the established EU discourses, and will not sit easily with these. As Harm Schepel and Rein Wesseling have observed, critical approaches to the CJEU tend to be either denounced or ignored, given also the ‘complex stranglehold’ exercised by the CJEU on the academic literature.⁹²

In this regard, it may be useful to point out that there are a small number of studies that have reached broadly similar conclusions about how EU law has changed Nordic constitutionalism. Some examples include the above-mentioned research of Signe Rehling Larsen and Cecilia Bruzelius.⁹³ Thus, there is something of an emerging ‘canon’, corroborating the validity of the concerns raised.

⁹¹ L Bouza Garcia, ‘The “New Narrative Project” and the Politicisation of the EU’ (2017) 25(3) *Journal of Contemporary European Studies* 347–349.

⁹² H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) 3 *ELJ* 178; this concern has been cited and shared in Conway (n 54) xvi.

⁹³ Cf the text accompanying notes 24–31.

In order to understand why such research has not been available for a long time, it is necessary to make a detour into the literature on the epistemology of EU law, of which national constitutional lawyers typically have not been cognisant of but which is of crucial importance to the methodologies tacitly embedded in Wohlström's thesis, as well as to discussions about the future of national constitutional systems in EU governance.

In Wohlström's thesis, issues relating to difficulties surrounding critical work on EU law have partly been raised when discussing the treatment of Professor Hjalte Rasmussen and his famous monograph *On Law and Policy in the European Court of Justice*.⁹⁴ As Wohlström notes, '[t]he harsh reception that the book received is quite possibly even more famous than its actual content', and Rasmussen was not invited to mainstream Community law conferences for ten years.⁹⁵ Wohlström cites criticisms by Joseph Weiler and Mario Cappelletti, including remarks about 'fresh rudeness',⁹⁶ as well as Toth's remark that 'Rasmussen's book was a dangerous read for young scholars'.⁹⁷ More generally, Wohlström brings a quote from Karen Alter about 'the institutional transformation orchestrated by the ECJ and its supporters'.⁹⁸

The present writer would add that both Weiler and Cappelletti are the key protagonists of the 'Integration-through-Law project', the deep and wide influence of which on reshaping European law has come to be more widely acknowledged in recent years.⁹⁹ Whilst mostly a celebratory approach has been taken, there are also widening critical concerns. Antoine Vauchez has extensively documented that a central element of the 'Integration-through-Law' project has been the European Commission's programme of promoting and funding specialised EU law journals and university centres, with the aim of shifting EU studies away from a comparative analysis of national laws to the study of the 'specificity' of EU law, focusing on the relationships between EU law and national law, and especially on the relations between the CJEU and national courts.¹⁰⁰ Here it may be apposite to remark in relation to the concerns that Wohlström expresses about narrow, court-centric perspectives that the focus on courts has thus not come about by happenstance.

⁹⁴ H Rasmussen, *On law and policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986).

⁹⁵ Wohlström (n 1) 107. See also Conway (n 54) 64ff.

⁹⁶ As cited, with references, in Wohlström (n 1) 306.

⁹⁷ As cited, with references, in Wohlström (n 1) 108.

⁹⁸ As cited, with references, in Wohlström (n 1) 107.

⁹⁹ For an overview, see Albi, *A Paradigm Shift* (n 15) 32ff.

¹⁰⁰ A Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of the EU Polity' (2009) 16(1) *ELJ* 20–21.

The ‘Integration-through-Law’ project has had a particularly far-reaching but hitherto largely undiscussed side-effect: it has led to the disappearance of national constitutional law and the legal systems of the Member States from discourses on ‘European law’. A growing number of scholars have in one or another way voiced concerns in relation to the EU legislative, funding and other programmes that have the aim of a gradual shift to autonomous, self-referential and uniform EU law, with no reference to the national laws of the Member States or their histories, legal cultures and legal languages. This stream of critical scholarship includes especially the work of Anne-Lise Kjaer, Pierre Legrand and Simone Glanert; the present writer has come to acutely share these concerns.¹⁰¹ Anne-Lise Kjaer has expressed concern about ‘the end of ... comparative law in Europe’, and posed the question of what will happen when European lawyers ‘involve themselves in an increasingly self-referential European legal discourse’, in the English language, and where ‘communicating about law ... [is] no longer conducted in divergent national legal languages, but in a Europeanized legal language with no reference to the domestic laws of the Member States’.¹⁰²

The broader dynamics in EU law scholarship have been elucidated well by Harm Schepel and Rein Wesseling, who have documented how articles in the main EU law journals – written by the community of lawyers who move in their career paths between the EU institutions, the Court of Justice and academia – have advanced a shared mindset that seeks to depoliticise European integration ‘by creating an opposition between a realm of European “law” as a rational force towards the inevitable and a realm of national “politics” as the articulation of the illogical, irrational and ideological’.¹⁰³ Päivi Leino-Sandberg has described the broader processes as the ‘enchantment’ of EU legal scholarship with the EU as a ‘legal-political project’.¹⁰⁴ Leino-Sandberg has documented the far-reaching influence of EU institutional officials and judges through their roles in the editorial boards of the main journals.¹⁰⁵ Leino-Sandberg further cites Jo Shaw who, having observed that a critical scholarly stance towards the development of the EU is rare in the academia, notes that ‘the early missionaries unwittingly

¹⁰¹ References to literature are provided Albi, *A Paradigm Shift* (n 15) 10.

¹⁰² A L Kjaer, ‘Theoretical Aspects of Legal Translation in the EU: The Paradoxical Relationship between Language, Translation and the Autonomy of EU Law’ in S Šarčević (ed) *Language and Culture in EU Law: Multidisciplinary Perspectives* (Routledge 2015) 98.

¹⁰³ Schepel and Wesseling (n 92) 186.

¹⁰⁴ P Leino-Sandberg, ‘Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?’ (2022) 1 ELO 231ff, 236.

¹⁰⁵ Leino-Sandberg (n 104) 249ff, 234–236, with references to literature. See also about the ‘complex stranglehold’, in the text accompanying n 92.

created a monster which now dominates its own environment'.¹⁰⁶ Leino-Sandberg raises fundamentally important questions about 'the relationship between institutional loyalty, censorship and academic freedom' and 'the effect of funding structures on academic freedom'.¹⁰⁷

I fully share Leino-Sandberg's concerns about academic freedom, and have added my observation that the above context represents the *systemically neofunctionalist operational setting of EU law research*.¹⁰⁸ For national legal communities this is a much more far-reaching phenomenon, the cumulative effects of which are more like subtle exclusion and suppression of EU-critical research from the perspective of national and comparative European constitutional law. In the field of political science, Ian Manners and Richard Whitman have documented the 'silencing' and 'exclusion' of critical and comparative voices, based on their statistical analysis of high visibility EU studies journals.¹⁰⁹

Indeed, gradually I have come to be deeply concerned that there has been systemic blindness in EU law and discourses to the fact that national constitutions represent advanced, complex and carefully fine-tuned constitutional systems governing the exercise of power. Above I noted a recent, broadly similar concern expressed by Rehling Larsen – that even EU pluralist discourses have been blind to varieties of constitutionalism in the Member States, and have proceeded from the assumption that there is one kind of constitutionalism.¹¹⁰

Against the above background, I would submit that what has tacitly been embedded in Wohlström's thesis is a new and much-needed methodology, which I would tentatively refer to as *the introduction of bottom-up research on national constitutional systems, constitutional cultures and comparative European constitutional law into the neofunctionalist research on autonomous, self-referential EU law*. A more specific dimension of such a methodology is the study of *how the shift to autonomous, uniform EU law has changed national constitutional systems and legal cultures, what problems have been caused, and what aspects may have been lost*. In Wohlström's thesis, this new methodology seems to have been embedded tacitly, and grew out of a practical need, given the omission of the Nordic constitutional debates on conflicts and limits in the EU legal pluralism discourses. As Wohlström notes, she sought to 'understand

¹⁰⁶ J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 (2) OJLS 235, as cited in Leino-Sandberg (n 104) 238.

¹⁰⁷ Leino-Sandberg (n 104) 233, 256.

¹⁰⁸ Albi, A Paradigm Shift (n 15) 19.

¹⁰⁹ I Manners and R Whitman, 'Another Theory is Possible: Dissident Voices in Theorising Europe' (2016) 54(1) JCMS 3, 5–9, 12.

¹¹⁰ Cf the text accompanying above notes 24–28.

why the Nordic countries do not show on the map'.¹¹¹ This methodology is something that hitherto has not been readily possible to use: the need for it emerges only for a limited number of scholars who work simultaneously and in-depth both on EU law as well as on a multiplicity of national constitutional systems and, furthermore, have some familiarity with the literatures on the epistemology of EU law.

A similar approach has been used by Anu Mutanen who, in her doctoral thesis 'Towards A Pluralistic Constitutional Understanding of State Sovereignty in the European Union?', describes her methodology as '[a] bottom-up perspective on European constitutional pluralism'.¹¹² Mutanen writes as follows, based partly on an explication of the bottom-up approach by Olaf Tans, as well as the publications of Tuomas Ojanen, Antero Jyränki and others:

Usually EU law and the effects of the EU are studied from a top-to-bottom or top-down perspective, which looks at states from the point of view of the EU, the starting point being Union law. In contrast, this study offers a *bottom-up approach* to European constitutional pluralism. This means that the focus is on studying state sovereignty from the point of view of national constitutions and national constitutional law within the EU and its pluralistic constitutional context. Indeed, Albi has expressed the concern that European constitutional law has predominantly come to denote the constitutional law of the EU, having moved away from comparative constitutional law in Europe. If constitutional pluralism is to be understood in an inclusive and de-centralised manner, the arguments based on national perspectives are a relevant and even necessary part of the discourse on pluralism.¹¹³

A note of caution should be added to anyone contemplating the use of such a methodology, as they will almost certainly encounter very significant difficulties, challenges and structural problems, which I have sought to outline in the article 'A Paradigm Shift in the Role of Courts'; some issues are summarised below. Indeed, there is a need for a formal acknowledgement that EU law discourses are not normal scholarly discussions where the two sides are on a level playing field; the national and

¹¹¹ Wohlström (n 1) 459.

¹¹² A Mutanen, *Towards A Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain Other EU Member States* PhD thesis (University of Helsinki 2015), 10. For a review in this law journal, see A Albi, 'Opponent's report on Anu Mutanen's doctoral dissertation "Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union?"', *Tidskrift utgiven av Juridiska Föreningen i Finland* 3/2015, 275–286.

¹¹³ Mutanen (n 112), 12, emphasis original; references omitted from the quote. For the bottom-up approach, Mutanen refers to O Tans, C Zoethout and J Peters (eds.): *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (European Law Publishing, Groningen 2007) 6.

classic constitutional side face considerably higher burdens, and even subtle exclusion and suppression.

A key difficulty will be that a scholar embarking on the study of national or comparative constitutional law in the context of EU law will find that it is difficult to get published internationally. I have recommended to transform Wohlström's thesis into a monograph and publish it with a leading international publishing house. Whilst Wohlström's thesis has relatively good prospects to this end due to its regional as well as EU law dimension, in more than twenty years of academic experience, I have observed that doctoral theses on national and comparative European law are typically published by little-known national publishing houses, and most have only ever remained in the format of a thesis published in the *Dissertationes* series of the respective university. The vast majority are only available in inaccessible national languages. Additionally, whilst there are a large number of journals on 'European' law, a very small number of these publish on substantive national and comparative European constitutional law, especially with critical perspectives on EU law.

Furthermore, research on comparative law is extraordinarily difficult, time-consuming and laborious; indeed, Wohlström's work had taken more than ten years to complete. It is praiseworthy that the materials synthesised are in several languages, including Finnish, Swedish, Danish and German. In comparison, a very large proportion of doctoral theses that are subsequently published internationally as leading books tend to focus only on autonomous, self-referential EU law, and are often based exclusively on English-language sources.

There are further extensive practical issues around a situation where complex national constitutional and legal orders increasingly have to be explained, justified and defended vis-à-vis autonomous EU law. For example, it is simply not possible to compress national law, comparative constitutional law and EU law materials into a 10,000-word article or a 20-minute conference presentation.

One significant practical issue is the language barriers and consequent disenfranchisement of national legal communities. Wohlström's thesis stands out by being written at the highest international standards. However, there are only a small number of scholars and lawyers who can write and speak in English as a foreign language at such a high level. This may be worth noting, as I recall that one of the criticisms regarding Professor Rasmussen's monograph was that it was written in poor English language and grammar. Indeed, native English and Anglo-American scholars and officials typically do not realise how difficult it is to explain and defend a complex national constitutional system not only generally, but furthermore in a foreign language.

Moreover, given the dominant influence of British scholars, who remain highly influential even after Brexit (including the publications of Professor MacCormick), it is important to note that British scholars tend to write their EU law commentaries from a background where there is no written constitution and no clear constitutional

constraints on the exercise of power. Therefore, for British scholars, many issues that have been acute for continental European constitutional lawyers and the *Rechtsstaat* tradition of the rule of law simply do not arise at all.

All of the above has very real but largely undiscussed practical effects. Wohlström's thesis mentions the view of Cappelletti that EU law is 'higher law';¹¹⁴ Rehling Larsen has mentioned the assumption of EU law as 'a normatively superior model'.¹¹⁵ In my experience, when I have written and presented about erosion of constitutional rights in EU law in post-authoritarian constitutional jurisdictions,¹¹⁶ I have very often met incredulity that EU law can undermine fundamental rights; this is regarded as very unusual or even somehow nationalistic. Subsequently it has emerged that there is a profound but largely overlooked difference: post-totalitarian and post-authoritarian constitutions typically contain extensive and detailed bills of constitutional fundamental rights, which are protected by strong constitutional courts; in the political type of constitutionalism – including in the Nordic countries and the UK – there is typically an older or more basic national bill of rights, with the ECHR and to some extent the EU Charter in general providing a higher level of protection. Nevertheless, from Wohlström's thesis, it emerges that there are very many areas where EU law has reduced advanced national protections for fundamental rights and other constitutional values in Nordic constitutionalism; this concerns especially the values of open and transparent public administration and the social welfare state. Wohlström's thesis is likely to provide a strong basis for EU discourses to reconsider their dogmatic assumptions that all EU law is inherently more progressive.

A further profound and practical, real-life consequence is that EU law cumulatively has had the very far-reaching but largely undiscussed effect of leading to the hollowing-out and obsolescence of national constitutions.¹¹⁷ This is especially discernible in the case of the post-totalitarian constitutional systems where advanced fundamental rights and rule of law safeguards have been entrenched against arbitrary use of power, especially of coercive power. EU law has gradually dismantled these through prioritisation of effectiveness, the market and wide discretion granted to EU institutions as well as national institutions when implementing EU law.

Furthermore, I have postulated that what has been underway is an ongoing Kuhnian paradigm shift in the operating system of public power from classic European constitutional law to autonomous EU governance, as I explained in more detail in

¹¹⁴ As cited, with references, in Wohlström (n 1) 108.

¹¹⁵ Rehling Larsen (n 24) 478.

¹¹⁶ See the two-part article A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"', Part 1: (2015) 9(2) *Vienna Journal of International Constitutional Law* 151–185; Part 2: (2015) 9(3) 291–343.

¹¹⁷ See Albi, A Paradigm Shift (n 15) 4, 15.

my article ‘A Paradigm Shift in the Role of Courts’.¹¹⁸ By way of a brief summary, autonomous EU governance, contrary to the prevailing assumptions, is predicated on new ideologies for the exercise of public power, such as neofunctionalism, neoliberalism, US federal constitutional law, including fiduciary constitutionalism, as well as international law, including the roots of international law in colonial management. There are two broader parallel epistemic communities – of EU governance and of national and comparative constitutional law – who have by and large been ‘talking past each other’. The former, *inter alia*, has largely been operating with the assumption that EU law is one legal order and where national constitutions already are, or are destined to become, redundant, as anything ‘national’ represents sovereignty, irrationality and obstacles to integration, whereas EU law represents rationality and the path to human progress. I additionally listed growing concerns that what has been gradually imposed through EU law is ‘authoritarian liberalism’ or ‘authoritarian neoliberalism’.¹¹⁹ I cited Michael Wilkinson’s finding that ‘a foundational change’ has occurred from the people to the international creditor communities.¹²⁰ I made a case for staying in the main in the paradigm of classic European constitutional law, and for a reconsideration of the EU legal order which was designed in the 1950s for a single market but which has now expanded to virtually all areas of law.

In relation to functionalism and neofunctionalism, it should be briefly noted that one aspect relevant to the above discussion on the epistemology of EU law is that blindness to national constitutions is inherent in these ideologies, along with omission of other complex national systems, as all these are generically reduced to nationalism, which is seen as the main, generic cause of wars. More generally, Jan Klabbers has elucidated that functionalism, which is the somewhat hidden language of international law, regards international and supranational organisations as inherently benevolent and rational, with nation-states being the problem. Additionally, functionalism has its origins in US colonial administration.¹²¹ In the context of EU neofunctionalism, human progress is expected to take place through Europeanisation – in the meaning of a somewhat mechanical shift of law and powers from the national to the EU level. This meaning of ‘Europeanisation’ is especially used eg in the publications and conferences

¹¹⁸ Albi, *A Paradigm Shift* (n 15) 14ff.

¹¹⁹ A Somek, *Cosmopolitan Constitutionalism* (OUP 2014) 23–24; M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: OUP 2021); see also further publications referred to in Albi, *A Paradigm Shift* (n 15) 29.

¹²⁰ M Wilkinson, ‘The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism’ *LSE Working Paper 05/2016* <<http://www.lse.ac.uk/law/working-paper-series>> (accessed 30 August 2022) 22 and 27ff, with reference to the publications of Chris Bickerton and Wolfgang Streeck. For further references, see Albi, *A Paradigm Shift* (n 15) 18.

¹²¹ J Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ (2014) 25(3) *EJIL* 651, 645, 675.

of ECSA, UACES, FIDE and other EU-funded organisations and networks.

That the ‘Integration-through Law’ project represents the ‘neo-functionalist paradigm’ has been noted by Antoine Vauchez.¹²²

4. A policy proposal to fund international publication of doctoral theses on national constitutional and legal systems and comparative European law

If the reader finds some of the above concerns justified, then at the very least these issues need to be thoroughly discussed before we definitively settle into a new understanding of ‘European’ law or even into a new paradigm. Additionally, the above issues need addressing because the general public trusts scholarly research on the assumption that it represents objective and neutral study; indeed, there has been a growing mistrust in science and scholarly expertise.

Against the above background, the present writer would like to raise a wider policy issue in relation to publishing doctoral theses and other research on national and comparative European law. Nordic countries with their culture of openness may be particularly well placed to take the lead in addressing these structural problems. Additionally, they are not tainted by the rule of law crises that have spread in many other parts of Europe. A further important dimension is that the Nordic countries are regarded by many as ‘centre’ countries, which do have a lot of leverage in EU discourses.

In the above-mentioned article ‘A Paradigm Shift in the Role of Courts’, I have called on national scientific funding councils and national academies of science to make available co-ordinated funding for joined-up critical and comparative research on EU law and governance. I would add the suggestion that **there is a need to formally acknowledge the existence of deep and long-standing structural problems in EU law and integration research and discourses**, partly in result of what Antoine Vauchez has documented as the European Commission’s programme of funding specialised EU law journals and university centres, with the aim of shifting European law from comparative law to autonomous EU law. There is a need for a formal recognition that EU legal scholarship has become ‘a monster which now dominates its own environment’.¹²³ The decades of distorted narratives embedded in EU discourses cannot realistically be addressed by the very small number of scholars who have sufficient knowledge of EU, national and comparative European law, as well as of the epistemology of EU law, and who at the same time are able to write and speak at a high standard of English, and can spend years collating extensive comparative evidence of problems caused by

¹²² A Vauchez, “‘Integration-through-Law’”. Contribution to a Socio-history of EU Political Commonsense’, EUI Working Paper RSCAS 2008/10, 1ff, especially footnote 4, and 21ff <<http://cadmus.eui.eu>> accessed 18 June 2025.

¹²³ Cf the above-mentioned remark by Shaw, cited by Leino-Sandberg, in the text accompanying note 106.

EU law for the Member States' legal orders. Furthermore, scholars, judges and courts who have sought to protect national constitutions need a good deal of courage and a strong conscience, as they typically come under sharp criticism as Eurosceptic or, in more recent times, as nationalist and populist.¹²⁴

I would put forward the suggestion that there is a need for all Member States to jointly establish and fund a comparative European law journal and book series with leading publishing houses, which would publish research of scholars who work predominantly on national constitutional law and legal systems, comparative law, and in national languages. It is important for the law journals to publish longer articles where national, comparative and EU law could be discussed in a joined-up manner. It is also important to publish translations of doctoral theses, articles and books from national languages, and to provide financial support for translations, linguistic editing and open access fees. There is additionally a pressing need for existing 'European' law journals to start routinely including articles on substantive constitutional law of the Member States, including EU-critical analyses, and to allow for a longer word limit. There is further an acute need for post-doctoral fellowships and research grants for the study of national, regional and comparative European law.

As a practical matter, through the 'Role of Constitutions' project I learnt that subsidies for publishing cannot be provided under EU law, as this would distort the market. However, if these matters are left to the market and EU funding alone, we end up with new generations of lawyers who operate only with autonomous, self-referential, neofunctionalist and neoliberal EU law, and Anglo-American law and legal thinking. Indeed, in the EU and English-language discourses, especially amongst younger generations of lawyers, an alarming degree of knowledge about advanced constitutional and legal systems in Europe has been lost, especially as regards the advanced continental European constitutional *Rechtsstaat* tradition of the rule of law.

Given the above structural problems and their real-life implications, a further policy issue needs to be raised: there is a need for a pause and corrective redirection in EU and national law discourses. There is a need to reverse the burden of justification from national to EU law communities: it may be time to take a look at the problems in the EU legal order, rather than continue to place the entire burden on the (now) twenty-seven Member States to endlessly change and replace their constitutional rules by autonomous EU law. As a parallel important practical issue, I have gradually come to a realisation that very many of the authoritative EU law scholars do not, in fact, have a good level of understanding of comparative European constitutional law; this has contributed to the prevalence of the distorted and reductionist but widely perpetuated narratives about national constitutions. In other words, EU lawyers don't know what

¹²⁴ Cf also the text accompanying above note 91.

they don't know, and therefore, for a long time the respective literatures have by and large been oblivious to the fact that EU law has caused wide-ranging adverse effects and loss of advanced protections 'on the ground' in the Member States.

I would suggest that it is additionally the responsibility of the mainstream scholars, lawyers and politicians to reconsider the above issues, so as to find solutions to the situation where people in more and more Member States find that the only way to make their concerns about the EU heard is to vote for anti-establishment parties. Perhaps the solution may partly lie in the law faculties, with a better communication between scholars working on national constitutional and legal systems, and lawyers working on EU and international law. For example, the widespread assumption in the latter epistemic communities that national law is inherently less progressive or even irrational, and that the solution lies in the gradual expansion of post-national law, would seem to be in need of reconsideration. Without such corrective measures in EU law research and publishing, there is a risk of a widening crisis in constitutionalism and the rule of law, beyond a point of no return.

5. A missed opportunity for proactive suggestions for the future development of EU law?

Returning to Wohlström's thesis, the argument built up an expectation that suggestions would be made in relation to how the manifold and serious problems which Nordic constitutionalism has faced in relation to EU law could be addressed. The accompanying commentary seemed to share the concerns, pointing out where they had been downplayed, 'silenced', hushed, 'brushed aside', '(perhaps deliberately) hidden', etc.¹²⁵ In this light, the conclusions ultimately remained somewhat generic, and in the main explained once more that the conflicts have not been on the radar in EU law discourses because of the constitutional configuration in the Nordic countries. In broad lines, there seem to be three main solutions offered in Wohlström's thesis. The first suggestion seems to be addressed to the EU pluralist discourses, in that it would be helpful if they could start paying more attention to institutions beyond courts, such as parliaments. Secondly, in order to set limits to EU law, continued strengthening of the courts in the Nordic countries could be expected. Thirdly, it may be necessary to devote more attention to the negotiation of EU measures, although the actors involved mention being increasingly drained out. But are not the above types of solutions precisely something along the lines, as per the above-mentioned Swedish quote, of encouraging the usual EU dynamics of 'laying us flat ... and asking the EU institutions to drive over us?'¹²⁶

¹²⁵ Cf quotes eg Wohlström (n 1) at 265, 268, 290, 301.

¹²⁶ Cf the text accompanying n 79.

A growing number of critical EU law scholars have started to take issue with the assumption that '[t]here are no alternatives' in the context of the EU's neoliberal economic governance.¹²⁷ My impression was that the author seems to have found the overall situation troubling, and that reception of EU law in the Nordic countries should not simply be a passive and one-sided process. If this is so, then I would recommend to use this very solidly researched thesis to develop future work with suggestions regarding more constructive practical solutions.

Examples of some more proactive suggestions from other scholarly works include the following. In her thesis, Anu Mutanen puts forward the idea of 'pluralistic state sovereignty', which 'would allow for country to country differences and also the coexistence of national, subnational, regional, international, and supranational competences, institutions, and legal orders without one level gaining the ultimate supremacy in every question'; the related solutions would also gear the EU towards increasing respect of national democratic and constitutional structures in the sense of a two-way process.¹²⁸ Mutanen's thesis more generally draws attention to the fact that in the constitutional clauses, sovereignty, in fact, typically refers to popular sovereignty, ie that power belongs to the people.

Elsewhere, judges from four constitutional courts published a joint manifesto to express concerns about the CJEU, and made a proposal for reverse preliminary rulings in matters of national identity.¹²⁹ The Danish Professor Anne-Lise Kjaer has pointed out that the autonomy and independence of EU law ultimately depend on the co-operation of national lawyers, and references a certain tale about an Emperor by Hans Christian Andersen, which, although it is 'primarily about vanity and pretence, ... also shows how reality is established in the discourse of a group and how the individual group member's beliefs are shaped by what other members say'.¹³⁰ The pre-eminent EU law Professor Jo Shaw, in the *Oxford Encyclopaedia of EU Law*, writes as follows:

It may be that the nature of EU law will end up having to undergo a comprehensive remodelling It may now be argued that the EU has transformed to a substantial degree into a system for differentiated integration, so that the metaphor and practices of the single legal order need to be replaced by a conception of multiple legal orders operating within shifting and sometimes indeterminate spaces.¹³¹

¹²⁷ See eg Somek (n 119) 23–24; Wilkinson (n 119).

¹²⁸ Mutanen (n 112) 392.

¹²⁹ C Grabenwarter, P M Huber, R Knez and I Ziemele, 'The Role of the Constitutional Courts in the European Judicial Network' (2021) 27(1) EPL 43–62, at 44, 55–56, 60.

¹³⁰ Kjaer (n 102) 98–99.

¹³¹ J Shaw, 'European Integration' in *The Oxford Encyclopedia of EU Law*, entry dated June 2022, para 41, <<https://opil.ouplaw.com/display/10.1093/law-oeul/law-oeul-e102>> accessed 18 June 2025.

There is additionally a practical issue which appears in Wohlström's thesis on several occasions: the fines threatened by the European Commission eg in the aftermath of the German *Solange* cases, and the risk of fines implicit in the reasoned opinion against Sweden in relation to the low number of preliminary references, as well as in other instances of national disloyalty. In this regard, it may be of interest to mention an article by Samo Bartuzky – published in the Slovenian law journal *Zbornik znanstvenih razprav* – about the 'unbearable' and 'egregious' results of EU infringement proceedings and fines in relation to non-compliance arising from fundamental rights-based constitutional review of the national legislation implementing the EU Data Retention Directive.¹³² This issue is of direct relevance to Sweden in relation to the 3 million EUR fine imposed by the European Commission due to delays in implementing the EU Data Retention Directive; the delays were caused by public protests prompted by fundamental rights concerns about introduction of what was regarded as a mass surveillance measure. It would seem that Denmark was not threatened with EU fines after the *Ajos* decision. Wohlström mentions that one issue is that '[i]f a parliament knowingly crosses the line ... it can ... be seen as non-compliance'.¹³³ This seems of profound importance given the central role of parliaments in the Nordics in addressing conflicts with EU law. A related issue is the EU law dynamic whereby national fundamental rights are first dismantled by one set of EU measures, followed by a gradual shift to the EU level, which then triggers compliance monitoring through European Commission annual reports, backed up by the threat of EU enforcement proceedings and fines. This dynamic, which has been applied eg to Greece in relation to social rights, would be particularly iniquitous in the case of the Nordic social states. In the light of the above issues, the threat of EU fines – along with their underlying ideological frameworks – would seem to be in need of wider discussion and reconsideration, in order to make possible a meaningful debate and national institutional and judicial scrutiny in relation to adverse effects of EU law on fundamental constitutional rights and other constitutional values.¹³⁴ Otherwise, the overall EU law system would seem authoritarian, and with national parliamentary, judicial and popular contestation pre-empted by the threat of fines, along with the suppression of the consciences of the national judges and officials involved.

¹³² S Bartuzky, 'A Constitutionalist Critique of the Objective Character of the Infringement Proceedings and a Case for a "Constitutional Defence": A Lesson from the Non-Implementation of the Data Retention Directive', in *Zbornik znanstvenih razprav*, (2019) Vol 79 *Perspectives on European Union Law*, <<http://www.pf.uni-lj.si/media/zr.2019.eu.bartuzky.pdf>> accessed 18 June 2025.

¹³³ Wohlström (n 1) 453–454.

¹³⁴ On the underlying ideological frameworks, see Bartuzky (n 132) on the EU 'management-enforcement' approach, and Albi, *A Paradigm Shift*, (n 15) 28, 37, 38, 43 and, on the possible origins in colonial management, p 23.

6. Nordic social state as a better model for humanity, rather than to be replaced by EU neoliberalism?

On a final note, perhaps a core substantive value in Nordic constitutionalism – the Nordic universal social welfare state – is a good example to illustrate the misconceptions in the EU discourses where national constitutions are seen to represent sovereignty and idiosyncrasy, and the path to human progress is assumed to lie in a gradual shift to EU and post-national law.

As regards Finland, I noted from Wohlström's thesis that early on, Antero Jyränki had been one of the very few scholars to express serious concerns that the creation of the primacy of EC law was something akin to a '*juridical coup d'état*', and that EU super freedoms and entry into the euro area 'tied Finland to a social policy that is more in line with a fairly unconditional market liberalism than even Keynesian economic policy ... The surrender to economic globalisation has complemented this effect'.¹³⁵

I would add that a very helpful panoramic account of how the Nordic social states have been changed through EU law has been provided by Fritz Scharpf. Noting that 'EU member states differ greatly in the ... normative premises of their existing economic and social systems', Scharpf points out that '[t]hese differences ... have been all but ignored in legal discourses on European integration'.¹³⁶ Scharpf outlines three broader approaches to the social state in Europe. The most generous is the Nordic universal social welfare state model, which aims to ensure a high level of social equality for all citizens by providing universal public services. At the opposite end is the 'liberal' or 'Anglo-Saxon' model, where the role of the state is reduced to the minimum, and the state provides basic social and health services to those in need, but the rest is left to private investment, insurance, pension and service markets.¹³⁷ Scharpf shows that the so-called 'negative integration' approach, whereby the CJEU has systematically dismantled national protections and autonomy, is similar to the Anglo-Saxon model, and has led to the destruction of the more advanced social systems.¹³⁸

The shift from the social welfare state to EU neoliberalism is also related to the concern mentioned earlier in Section 2.4 about the absence of discussion in Wohlström's thesis – and in much of the mainstream discourses – about the causalities regarding the rise of the anti-establishment parties. There is a growing scholarly literature that sees the EU neoliberal economic ideology as a key cause of the rise of extreme parties.

¹³⁵ As cited, with references, in Wohlström (n 1) at 311 and in footnote 1148.

¹³⁶ F Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' *MPIfG Working Paper* 09/12 (2009) 24 <<http://www.mpifg.de/pu/workpap/wp09-12.pdf>> accessed 17 April 2015.

¹³⁷ See Scharpf (n 136) 24–25.

¹³⁸ Scharpf (n 136) 25, 26, 34.

A helpful overview of this literature has been provided by Philipp Kender, who has developed the argument that Hayekian neoliberalism has been entrenched in the EU legal order from the outset and, after the 2008 financial crisis, became one of the main causes of the populist and authoritarian turn in Europe.¹³⁹ With remarkable insight, Kender has additionally posited several ‘inversions’ in constitutionalism, which I had struggled to articulate for a long time when synthesising the national adjudication related to EU economic governance measures. On the basis of Foucault, Kender explains that neoliberalism ‘inverts the hierarchy between the juridical and the economic’ and renders ‘the former instrumentally subordinate to the latter.’¹⁴⁰ Kender further explains how neoliberalism has changed the human person, with a shift from the *homo juridicus* to *homo oeconomicus* – a market actor who competitively pursues narrow self-interests and passively submits to the authority of the market.¹⁴¹ Further inversions, explained by Kender with reference to Wendy Brown’s monograph *Undoing the Demos*, include the shift in the political discourse to phrases like the ‘jumpiness,’ ‘calmness,’ ‘happiness,’ or ‘unhappiness’ of the markets, which have become the indices of good or bad government in neoliberal governmentality. In result of this, governance based on market metrics began to supplant classical liberal political criteria, such as justice and citizen protection.¹⁴²

There is something profoundly important at stake here. By way of a somewhat digressive note, I am writing this review on a thesis about the Nordic countries as a native of Estonia – Finland’s southern neighbouring country, which has a similar language as part of the Finno-Ugric language group and aspires to be Nordic. However, since the restoration of independence after the fall of the Iron Curtain, Estonia’s social and economic policy has been a mix of the initial IMF neoliberal ‘shock therapy’ measures and subsequent continuation of Hayekian and Friedmanian ultra-liberal economic policies, even though Art. 10 of the Estonian Constitution mentions human dignity and the principles of a social and democratic state based on the rule of law.

In hindsight, I wish that Estonia and perhaps also the other countries in Central and Eastern Europe – instead of the IMF neoliberal shock therapy policies – would have followed the Nordic social state model, or at least a more affordable variation of it. The experience with the Soviet Union was that communism and the centrally planned economy did not work. However, this has widely come to be presented in

¹³⁹ P Kender, *Authoritarian government in early twenty-first century Europe: elements of a genealogy*, PhD thesis defended at the University of Birkbeck (2020) <<https://eprints.bbk.ac.uk/id/eprint/48940/>> accessed on 18 June 2025. The thesis is being prepared for publication with Routledge.

¹⁴⁰ Kender (n 139) 80.

¹⁴¹ Kender (n 139) 174ff. See also the text accompanying above n 120.

¹⁴² Kender (n 139) 75, summarising W Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books 2015) 82, 110.

global discourses as the only and failed alternative to unbridled market liberalism. Yet there is the Nordic social state model, as well as the German social-democratic *Rechtsstaat* noted below, which have worked supremely well. Indeed, in various world league tables, the Nordic countries typically rank at the top as regards personal security, trust, happiness, health, wellbeing, life expectancy and other markers of quality of life.¹⁴³ I have always felt that there has been something very special and precious about the Nordic societies, in the way in which each person is valued and cared about, in the quality of interpersonal relationships, and with highly well-functioning societies. The people are well educated and there is a high level of social equality.

Whilst Estonia has not had a rule of law crisis and was ranked 10th in the World Justice Project Rule of Law Index in 2025,¹⁴⁴ over the years the country has seen a high level of emigration, especially to Finland, and there has been a rise of the more extreme EKRE Party. Elsewhere in Central and Eastern Europe, there has been a widening rule of law crisis. Many scholars, most prominently Joanna Kusiak – in her award-winning book written as part of the competition ‘Why has the rule of law become so fragile?’ – finds that the turn to anti-establishment parties in Hungary and Poland was because of the unaffordable cost of housing and public services, which resulted from a combination of the IMF ‘shock therapy’ measures and EU neoliberal policies.¹⁴⁵ Kusiak notes that these policies, and especially housing that became unaffordable, were also a key cause of mass emigration from Poland. I share this concern regarding emigration from the Baltic states, and would add that herein may also lie the broader reasons why cases such as *Viking* and *Laval* have arisen at all.

Regarding housing, Kusiak’s book elucidates how residential flats have come to be owned by large multinational investment corporations; I would add that the impact of the underlying CJEU case law on market freedoms would need greater attention in this regard. Furthermore, as an example from the Nordic context of the complex but largely undiscussed ways in which EU law has contributed to the unaffordability of housing, I would flag for awareness a Swedish housing dispute with the EU. The European Commission had required Sweden and some other Member States to dismantle their universal, subsidised rental housing policies as incompatible with EU state aid law due to distortion of competition on the market, beyond means-tested, British style ‘residual’ social housing measures to those in need. The European Commission had

¹⁴³ A wealth of relevant tables have been collated by Wilkinson and Pickett; see with the accompanying text below n 151.

¹⁴⁴ See data at <<https://worldjusticeproject.org/rule-of-law-index/global>> (accessed 9 December 2025).

¹⁴⁵ Joanna Kusiak, *Radically Legal: Berlin Constitutes the Future* (CUP 2024), 144ff. On the award, see <<https://ninedotsprize.org/winners/joanna-kusiak/>>. See also M A Orenstein and B Bugarič, ‘Work, family, Fatherland: the political economy of populism in central and Eastern Europe’ (2022) 29 (2) JEPP 176–195.

rejected the Swedish Government's arguments that '[t]he goal of housing policy is to create conditions for everyone to live in good housing at reasonable cost and in a safe and stimulating environment', that the policy also has 'a social integration function', and that the right to a home is protected in the Swedish Constitution and 'has long been an important part of Swedish welfare policy'.¹⁴⁶

More generally, the Nordic model is the opposite of the conditions described by Alexander Somek, which were regarded as being amongst the reasons that had led to the rise of authoritarian parties in German history:

People who struggle with economic necessity remain formally free. ... Their choices, however, are driven by their needs and their fear of losing their livelihood. They take on any job they can find. ... They run through this world with a servile posture. They do not lead their lives. ... Theirs are not lives lived in dignity. ... [I]t is important to view human dignity as intrinsically associated with the whole package of rights that are characteristic to constitutionalism 2.0.¹⁴⁷

With lessons learnt from history, a strong social state to ensure material conditions for life lived in dignity became a core element of the German post-WWII social-democratic constitutional *Rechtsstaat*.

Given the war in Ukraine and the increasingly acute geopolitical situation, it may be worth noting that there is a well-consolidated stream of literature in which concerns have been expressed that the roots of Russia's turn to authoritarianism partly lie in the IMF 'shock therapy' administered in the 1990s. In particular, Nobel Prize winner and former Chief Economist of the World Bank, Joseph Stiglitz, has documented how the neoliberal policies and the general dismantling of the role of the state and of social protections have been a cause of structural poverty, inequality and non-emergence of a strong middle class which would uphold a strong democracy and civil society.¹⁴⁸ More recently, several eminent professors in law and economics, including Katarina Pistor, Professor of Comparative Law at Columbia Law School, have argued that the roots of Russia's war partly lie in the IMF 'shock therapy'.¹⁴⁹

¹⁴⁶ See Swedish Ministry of Sustainable Development, 'Response to complaint from European Property Federation' (CP 115/02) (8 November 2005), cited in – and with an outline of respective EU and comparative rules – Alexis Mundt, 'EU-Legislation and Social Housing – An Overview'. Paper presented at the ENHR conference 'Housing in Expanding Europe: Theory, Policy, Participation and Implementation' (Ljubljana, 2–5 July 2006) pp 13ff, on file with the author and cited with the permission of Alexis Mundt.

¹⁴⁷ Somek (n 119) 12–13.

¹⁴⁸ Joseph Stiglitz, *Globalization and its Discontents* (Penguin 2002) 167, 141, 162, and 133ff.

¹⁴⁹ See eg K Pistor, 'From Shock Therapy to Putin's War', Project Syndicate, 28 February 2022, <<https://www.project-syndicate.org/commentary/1990s-shock-therapy-set-stage-for-russian-authoritarianism-by-katharina-pistor-2022-02>> accessed 18 June 2025.

In looking for ways to reform global financial governance, Joseph Stiglitz has noted that the Swedish model, with Government taking on far greater responsibilities in promoting social welfare, is better than the US model.¹⁵⁰ Social scientists Richard Wilkinson and Kate Pickett in their world-renowned book *Spirit Level: Why Equality is Better for Everyone* have brought Nordic countries as an example for their conclusion that '[t]here can be no doubt whatsoever that human beings are capable of living well' in societies where inequalities are small. They have collated extensive scientific research which shows that 'reducing inequality leads to a very much better society', and that this is attainable rather than about utopias, as demonstrated by their findings that are based on 'comparisons of existing societies'.¹⁵¹

In the article 'A Paradigm Shift in the Role of Courts', I have suggested that the social states in the Nordic countries, Germany and in much of continental Europe are part of the uniquely high quality and achievements of classic European constitutionalism. In my view, they should be an example of aspirations towards a more human- and people-centric constitutionalism. The present direction of travel has been to gradually dismantle the nation-state and national constitutionalism and replace these with a universal marketplace, in a somewhat dogmatic pursuit of progress through a mechanical shift to EU and global governance, as well as in the pursuit of endless economic growth – even despite increasingly acute climate change.

Harking back to the earlier points about the need to address structural problems in EU research and discourses, the introduction of initiatives to support joined-up discussion on national legal orders and EU law, along with further exploration of the Nordic, post-WWII German and other national constitutional models that have led to well-functioning societies, could contribute towards finding better ways forward. Concerns are being expressed that the reconstruction of Ukraine after the war will resemble 'shock therapy 2.0'.¹⁵² I would end this review with a call for a wider consideration of a shift from shock therapy to a variation of Nordic social state therapy, as a better model for humanity.

¹⁵⁰ Stiglitz (n 148) 217–18.

¹⁵¹ R Wilkinson and K Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin 2009) 197.

¹⁵² See eg L Lynch, 'The neoliberal battle for Ukraine's reconstruction', 24 August 2024, *The New Statesman*, <https://www.newstatesman.com/the-weekend-essay/2024/08/the-neoliberal-battle-for-ukraines-reconstruction> (accessed 12 November 2025).