Constitutionalism and Pluralism in Global Context*

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1. Three Forms of Scepticism about Constitutional Pluralism

Constitutional pluralism divides opinion. Those features that make it attractive to some in a globally connected world also account for the scepticism it provokes in others. The allure of constitutional pluralism lies in its ambition to square two ideas – 'constitutionalism' and 'pluralism' - that are typically understood as quite distinct and presumptively incompatible, or at least as of limited compatibility. On the one hand, the idea of constitutionalism – of a legal code that supplies a legitimate foundation and framework for our common forms of political life – has been traditionally understood in unitary and hierarchical terms. That is to say, it is taken to refer to a single, bounded, and ultimately indivisible 'unit' - paradigmatically the state – and to do so in terms of an unbroken chain of authority and an encompassing legal ordering.[1] On the other hand, when we speak of pluralism, whether we are concerned with a 'first order' pluralism of social constituencies,[2] or of institutions,[3] or of values,[4] or of

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* This is a somewhat updated version of a paper about to appear in M. Avbelj and J. Komarek *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart).

[1] See e.g. D. Grimm, "The Constitution in the Process of Denationalization", (2005) 12 *Constellations* 447; M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP, 2009) 258-325.

[2] See e.g. R. A. Dahl, "The Concept of Power" (1957) 2 *Behavioural Science* 201-215

[3] See e.g. V. Bader, "Religious Diversity And Democratic Institutional Pluralism (2003) 31 *Political Theory*: 265 - 294.

[4] See e.g. I. Berlin, *Four Essays on Liberalism* (Oxford: OUP, 1969)

value sets and world-views,[5] or - of most direct immediate relevance – with a 'second order' pluralism of legal and political systems as a whole, the emphasis is always upon multiplicity and diversity and upon the non-hierarchical terms of the recognition and accommodation of that multiplicity and diversity. In crude terms, the constitutional pluralist seeks to retain from constitutionalism the idea of a single authorizing register for the political domain as a whole while at the same time retaining from pluralism a sense of the rich and irreducible diversity of that political domain.

For the advocate of constitutional pluralism, moreover, the attraction is a matter both of fact and of value - of the force of circumstance as well as of preference. The fact that the constitutional landscape today - in our post-Westphalian age where globalizing economic, cultural, communicative, political and legal influences have both spread and diluted public power - is no longer organised into mutually exclusive nation state domains but instead occupies much overlapping transnational space, cannot help but alter our understanding of constitutional ordering. It means that, at least as the constitutional pluralist views the world, it becomes increasingly difficult if not impossible *not* to conceive of the environment of constitutionalism in non-unitary terms – as a place of heterarchically interlocking legal and political systems.[6] The dimension of value lies in viewing this changing landscape not as a threat to the maintenance of the traditional template of constitutionalism but as a welcome opportunity to integrate what in conventional constitutional wisdom tend to be treated as contrasting and even opposing modalities of normative thought. The constitutional pluralist, in short, seeks to make a virtue out of necessity

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[5] See e.g. J. Rawls, *Political Liberalism (*New York, Columbia University Press, 1996); R. Bellamy, Liberalism *and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999).

[6] On the descriptive dimension of constitutional pluralism, see N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317.

For the sceptic, on the other hand, any such sense of opportunity can only be the product of wishful thinking. Rather than achieving the reconciliation of opposites, constitutional pluralism is always poised to collapse under the weight of its internal contradictions. And if it does so, this will not signal a new constitutional dawn. Rather, it will imply, at best, a retreat to a state-centred constitutional orthodoxy, and, at worst, the degrading or even the exhaustion of the constitutional paradigm as a whole in the late modern age. More specifically, for the sceptic there are three potential structural weak-points, and so three points of possible implosion, within constitutional pluralism. A consideration of each allows us to introduce three key challenges.

In the first place, constitutional *pluralism* may, on closer inspection, simply mutate and settle into a new form of constitutional *monism* or singularity. That is to say, the tendency towards unity and hierarchy in constitutional logic and in the constitutional mindset may be strong or even incorrigible, and if this is so then new constitutional initiatives, practices or world-views that reach into the transnational sphere will tend to adopt the form of the statist original. Whether we are talking about the constitution of the European Union, or the United Nation's 'world order' constitution,[7] or even the informal 'higher order' constitution suggested by the elevated status of certain contemporary international law norms,[8] what we see wherever and whenever constitutionalism is invoked beyond the state, and whatever its ostensible commitment to openness and sustainable diversity, is a tendency towards a new manifestation of closure and a new reduction to unity; towards the old familiar of everything deemed constitutional being contained - 'constituted' indeed -

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[7] See in particular B. Fassbender 'The United Nations Charter as the Constitution of the International Community', (1998) 36 *Columbia Journal of International Law,* 529.

[8] See e.g. E. De Wet "The International Constitutional Order", (2006) *International and Comparative Law Quarterly*. 55, 51-76

within the one hierarchically layered legal and political system.[9] There is no room in that perspective for the unresolved heterarchical configuration or the open-ended jurisdictional extension of a constitutionalism decoupled from a singular legal and political order.

In the second place, and conversely, traces of constitutionalism beyond the state may be viewed not as an extension and mutation that will ultimately take the form of a new and encompassing unity, but, just as in the classic age of the Westphalian state system, as a series of separate reductions. On this view, constitutional pluralism turns out to be nothing more than constitutional *plurality*. That is to say, the flip-side of the structural tendency of constitutional framing to provide the bounded and hierarchically ordered legal space of the state may be that if anything is to escape such a space but still be considered as properly 'constitutional' in character, it can only do so on the basis of its belonging to a quite distinct and unconnected bounded and hierarchically ordered constitutional entity. For if constitutional norms operate according to a singular and hierarchical regulatory logic, then there is simply no conceptual scope for any heterarchical legal relations that operate between distinct constitutional singularities to possess its own properly and distinctly constitutional character, or at least not from the perspective of these constitutional singularities themselves. In other words, if we seek to distinguish the overlapping and interlocking of constitutional orders from mere constitutional plurality or diversity on the basis that it involves a commitment to the common recognition and accommodation – and to that extent the integrity - of the diverse parts notwithstanding their diversity, then the exhaustiveness of each of the different

[9] See e.g. D. Kennedy, "The Mystery of Global Governance" in Dunoff and Trachtman (eds) *Ruling the World?* 37-68; M. Koskenniemi "The Fate of Public International Law: Between Technique and Politics" (2007) 70 *Modern Law Review* 1; E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society" (2003) 9 *European Law Journal* 401.

constitutional orders in their own terms means that we lack the requisite constitutional code operating independently of the overlapping and interlocking constitutional orders in which any such transversal integrity can be registered.[10] Whether we are dealing with the new type of relations between the constitutional orders of states and that of the supranational EU, or between NAFTA and the states of North America, or the UN and the states of the world, or amongst the various emergent non-state polities, or whether we revert our gaze to the 'old-fashioned' terms of exchange between different states themselves, therefore, on this view the idea of meaningfully *constitutional* relations between distinct constitutional orders is simply incoherent.

In the third place, if and to the extent that it *is* nevertheless possible to think of relations between different legal entities as pluralist in quality, and not simply collapsing into either the monolithic discipline of constitutional singularity or the mutual indifference of constitutional plurality, then this may be precisely because the entities in question do *not* possess or claim just such a *constitutional* character. If we want to conceive of different legal entities within the increasingly fragmented global archipelago as connected in ways which remain *legally* meaningful without these legal relations resulting in such entities being ultimately subsumed within a single

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[10] There are in fact two closely related if apparently quite distinct versions of this concern or criticism. One - closely associated with a certain type of approach which remains presumptively sympathetic to constitutional pluralism - raises the prospect that there is simply nothing left to say in constitutional, or indeed in any kind of legal terms, about the relations between constitutional orders which are each already conceived of in a bounded manner. Here, the danger is that constitutional pluralism is left conceptually barren. This so-called radical pluralist approach is further considered in Section 2 of the text below. A second criticism, presumptively unsympathetic to constitutional pluralism, holds that an acceptance of the pluralist scenario is likely to lead not to a conceptual void in the law, and so to a domain of non-law, but to a situation of overabundance. For if constitutional pluralism simply alerts us to a plurality of legal order unities, then rather than an absence of legal answers to difficult questions in areas of overlapping jurisdiction what we have, strictly speaking, are *too many* answers, each valid from its own systemic perspective. Which law happens to prevail in practice becomes a matter of circumstance rather than principle, and the law as a whole in the area of contested overlap may thus come to lack predictability or a coherent framework of justification. See e.g. J. Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement" (2008) 14 *European Law Journal* 389; P. Eletheriadis, "Pluralism and Integrity" (2010) 23 *Ratio Juris* .

legal order, the development of the requisite legal imaginary may only be possible if we dispense with the constraining and increasingly anachronistic language of constitutionalism as an appropriate characterization of such entities.[11]

To recap then, constitutional pluralism may be rejected either on the basis that its pluralist credentials do not add up – that it is ultimately (i) either monism with new and wider horizons or (ii) mere plurality – or on the basis (iii) that if it is genuinely pluralistic then this is at the expense of its specifically constitutional quality. Taken together, these three challenges introduce a formidable range of arguments against constitutional pluralism in the new global context. In what follows, I will examine how different theories of the global regulatory configuration stand in relation to constitutional pluralism and its critique – whether as explicit advocates of one or more of the three key challenges to constitutional pluralism, or at least as assuming a position consistent with such challenges; or, alternatively, as taking a position that invites one or more of such challenges; or as actively addressing and responding to such challenges.

Before doing so, however, I want to say something about the implications of the fact that constitutional pluralism was first developed in the European supranational theatre rather than in the wider global arena. On the one hand, the particular terms of the European debate accounted for much of the early buoyancy of constitutional pluralist thinking and for its readiness to rise to the sceptical challenge. On the other hand, by developing the theoretical perspective of constitutional pluralism in conditions that were unusually favourable, this regional concentration has skewed the terms of debate. And in so doing it has retarded – or at least left untested -

[11] See in particular the work of Nico Krisch; "Global Administrative Law and the Constitutional Ambition" In P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford: OUP, 2010) 245-266; "The Case for Pluralism in Postnational Law" LSE Legal Studies Working Papers 12/2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418707

the capacity of constitutional pluralist thinking to confront the full weight of the sceptical challenge in the wider global context. Nevertheless, I will argue in the concluding sections that, for all its over-reliance on the European context, and for all the difficulties posed by the broader transnational regulatory environment, there remain today good arguments for pursuing the project of adapting the language and mindset of constitutionalism to meet the pluralist imperatives of broader global conditions. In making this argument, I want to stress that what matters is not the label 'constitutional pluralist' – overused and overstretched, and unworthy of its implicit claim to constitute a single School of thought[12] - but the basic intellectual sense that it remains worth thinking and talking about the architecture of global law in constitutional terms.

2. Constitutional Pluralism in Europe

The idea of constitutional pluralism derived a lot of its initial focus and momentum from the circumstances of high-profile constitutional clashes over the implications of Europe's supranational arrangements. The key sites of these clashes were the supreme or constitutional courts of the member states. Faced with issues such as the compatibility of new instruments of supranational authority with national standards of human rights,[13] the reconciliation of a Treaty-by-Treaty expansion of overall supranational jurisdiction into areas of public policy traditionally associated with the nation state with the basic idea of national democratic control,[14] the tension between

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[12] On which see J. Weiler, "Prologue – Constitutionalism – Global and Pluralist" in G de Burca and J. Weiler (eds) *The Worlds of European Constitutionalism* (Cambridge: CUP, 2011) .

[13] See e.g. *Internationae Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel* [1974] 2 CMLR 540

[14] See e.g. *Brunner v. European Union Treaty* [1994] 1 CMLR 57. This landmark case concerned the constitutionality of the Maastricht Treaty, but every subsequent European Treaty, including the

accession to a mature transnational polity and a minimum sense of sovereign self-determination,[15] or the extent to which transnational security concerns may encroach on core national responsibilities in criminal justice,[16] national courts have in a prolonged series of high profile cases been required to adjudicate on the basic source and conditions of final constitutional authority in contexts where the states and the EU palpably possessed overlapping competence. And in so doing, these national courts have tended to affirm or to develop conceptions of constitutionalism which, in stressing or assuming the autochthonous quality of state constitutional authority and the national distinctiveness of its content, have been prepared to countenance the claims to authority emanating from the judicial organs of the EU only on their own nationally conditional terms and not on the absolute terms set or assumed by the EU itself

As an account of these cases and of their context of emergence and reception, constitutional pluralism has an immediate plausibility. If we take the three core challenges in turn, to each of these the European case has offered a strong *prima facie* answer. In the first place, the European example is one where, whatever fears may be expressed in different quarters about the overweening 'constitutional' ambitions either of the member states or of the EU itself, the diversely-sourced and wide-ranging invocation of the language and logic of constitutionalism in the face of legal and political contestation shows no realistic prospect of being resolved in terms of a newly minted, widely accepted and broadly effective constitutional *unity*. The relevant

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abortive Constitutional Treaty and the Lisbon Treaty which succeeded it, has likewise given rise to litigation in national constitutional or supreme courts. For reflection on the decisions of the German and other top courts prior to ratification of the Lisbon Treaty, see, for example, the special issue of the German Law Journal (2009) Vol. 10 No. 8. available at http://www.germanlawjournal.com/index.php?pageID=2&vol=10&no=8

[15] See e.g. *Polish member of the European Union (Accession Treaty)* K18/04, 11th M<ay 2005. see more generally, W. Sadurski "Solange Chapter 3; Constitutional Courts in Central Europe – democracy – European Union" (2008) 14 *European Law Journal* 1-35.

[16] See e.g. the various decisions on the legality of the European arrest warrant, discussed in Cruz, n10 above.

organs of the EU remain implacable in their own claims to self-standing legal authority and in the invocation of a constitutionally familiar language and ethos of primacy-with-an-integrated-legal-order, but equally, the relevant constitutional organs of the 27 member states continue to make plausible and robust claims to their own original and final constitutional authority for all matters within their national purview, including the jointly designed supranational edifice.[17]

In the second place, however, this does not mean that the European supranational domain is easily categorized merely as a *plurality* of constitutional unities without a plausibly *constitutional* connection. Institutionally, we can point to a number of bridging mechanisms which in the round provide more intimate terms of communication and exchange between the relevant state and the non-state legal entities than is the case in any other postnational setting. If we consider the provisions for the direct domestic applicability (in the case of regulations) or compulsory transposition (in the case of directives) of supranational legislation as well as for its judicial enforcement, for the unmediated implementation of much supranational administration through the Commission and various European agencies, and for the obligatory (preliminary) reference of questions of the authoritative interpretation of supranational law from national to supranational courts, it is clear that both within and across the three key constitutional departments – legislature, executive and judiciary - there is close structural linkage between national and supranational sites of authority. Culturally, too, there is a thick familiarity of national constitutional heritages, one nurtured and reinforced by the gradual development first

[17] In an earlier article I coined the term 'epistemic pluralism' to emphasize the fact that 'descriptive pluralism' in the European context had a deep, hermeneutic quality. That is to say, pluralism is appropriate here not just as an external description of the constitutional landscape, but is corroborated and reinforced by the deepest role self-understanding of the key actors themselves; see N. Walker n6 above.

by judicial and then by statutory means of the idea of the 'common constitutional traditions' of the member states as an active agent of convergence.[18]

Of course, these concurrent structural and cultural forces do not automatically transmute into constitutional matter. Indeed, as we shall see,[19] much of the debate *within* constitutional pluralism has concerned what, if anything is possible, and if anything *is* possible, what is necessary or desirable to complete the process of constitutional alchemy. What is clear, nonetheless, is that the background conditions for communication between different constitutional orders are comparably favourable in supranational Europe.

In the third place, the argument that it is possible to conceive of constitutional relations between the two levels of constitutional order – state and supranational – cannot easily be defeated by the objection that the European level does not bring 'true' constitutional credentials to the table. For sure, the precise constitutional status of the EU is heavily contested, in particular the qualities in which and the degree to which the constitutionalism of the EU resembles that of the state. Indeed, much of the political debate surrounding the eventual failure in 2007 of the EU's first explicit experiment in documentary constitutionalism concerned this very question.[20] Alongside deep disputation of the detailed constitutional credentials of the EU, however, there has in recent years grown up a consensus that the EU does nonetheless possess a constitutional character *of sorts*.[21] In legal terms, with its doctrines of primacy and direct effect and its overall development of an autonomous legal order, and in institutional terms, with its dense and complex governance architecture of

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[18] See e.g. F. Balvesi. "The "Common Constitutional Traditions" and the Integration of the EU"; available at: http://www.dirittoequestionipubbliche.org/page/2006_n6/mono_02_Belvisi.pdf
[19] See Section 3 of the text below.
[20] See e.g., N. Walker, "Reframing EU Constitutionalism" in Dunoff and Trachtman (eds) *Ruling the World?* 149-77.
[21] On some of the reasons for this, see Walker *ibid*, 149-50.

Commission, Council, European Council, Parliament and Court, the EU appears to have a material constitution that is closely analogous to and often draws heavily from the state tradition. It may lack many of the background factors normally associated with a 'thicker' "foundational" Constitutionalism and with a self-conscious political baptism[22] but few today would deny it certain 'thinner' but still highly familiar constitutional credentials.[23] Importantly, then, the sheer constitutional familiarity of the European set-up has diverted attention from what might be regarded as a key question. Especially as supranational Europe has matured as something broadly understood as a distinctive polity rather than as a mere outgrowth and epiphenomenon of other (state) polities, the emphasis has very much been on what kind of constitution it can have – and in particular how close to the state template – rather than whether it can have a constitution at all. In other words, for the most part the focus has come to rest on which of various diverse or graduated *conceptions* of constitutionalism is appropriate rather than on the threshold applicability of very constitutional *concept*.[24]

These various factors have come together to provide a kind of regional comfort zone for the ideas of constitutional pluralism. The co-existence of a number of sites of undeniably significant legal authority making overlapping and inconsistent claims over the nature, scope and implications of their various jurisdictions, and the fact that these different sites are broadly understood by actors and observers alike as 'constitutional' in quality, provides a ready set of answers to the first and third challenges. The second challenge – concerning the prospect of properly constitutional relations between and across constitutional units as opposed to the mere coincidence

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[22] Which, of course, a successful documentary constitutional process would have sought to provide.

[23] Although some who would not deny these credentials would still argue that the best way to understand and augment the relations between the different levels with the EU is by reference to a pluralist perspective which excludes the language of constitutionalism. See, e.g. M. Avbelj, present volume.

[24] On the distinction between a *concept* and its various *conceptions*, see, e.g., R. Dworkin, "The Jurisprudence of Richard Nixon", (1972) 18(8)*The New York Review of Books*, 27-35

and contingent connection of their various and quite separate constitutional identities -- is the most acute one. And, as it raises the question of the normative dividend of constitutional pluralism, it is also, as already noted, the one that has excited most discussion within the field. On the one hand, there are those, often labelled radical pluralists, for whom nothing strictly constitutional can be said about the relations between different constitutional entities, although the fact that they *are* constitutional entities suggests that these relations may be conducted in terms which trade on common sensibilities or a shared understanding of the strategic context of interaction.[25] On the other hand, there are those who try to complete the process of constitutional alchemy, whether by reference to universal constitutional principles and

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[25] See in particular, N. MacCormick, "Beyond the Sovereign State" (1993) 56 *Modern Law Review* 1-18; though he later modified his view, reintroducing public international law as the *tertium quid* to regulate relations between the national and the supranational levels. See his *Questioning Sovereignty* (Oxford: OUP, 1999) ch 7. See also Walker n6 above. And see more recently, Walker, "Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason" (2011) 24(4) *Ratio Juris*.
My position then, as now, was that constitutional pluralism in the European theatre should be conceived of in constructivist terms; as an open-ended normative prospect, but still nevertheless a *normative* prospect. According to this vision, we begin with no set formula for somehow transforming a plurality of overlapping constitutional sites into a 'constitutionally reconciled' legal space. There is no guarantee of such reconciliation, nor are there already-existing general trans-systemic constitutional norms in terms of which we can authorise that reconciliation. Rather, on the basis of certain common normative sensibilities *and* a shared understanding of the strategic context of interaction we can envisage a tentative and iterative convergence (but never a Gadamerian 'fusion') of horizons from different system-specific starting points. This may include (unilateral or multilateral) claims as to the universalizablity of certain norms, but these are only ever more or less persuasive *claims* – capable of being rebutted or refined in the context of ongoing exchange of normative preferences.
Of course, normative open-endedness thus conceived does not necessarily imply normative fragility. If the European documentary constitutional experiment of 2003-5 had been successful, there would have existed – as an institutional fact – a document known as a Constitutional Treaty. In terms of their own criteria of recognition, both European courts (and other European institutional actors) and national courts (and other national institutional actors) would have been bound to recognize this document as normatively significant. Doubtless, the precise authoritative claim and status of such a Constitutional Treaty would still have been much disputed; whether a constitution for the European level alone, and so strongly authoritative only for European institutional actors (as national actors would likely have been inclined to argue), or somehow inhabiting a trans-systemic normative space – and so strongly authoritative at both levels (as European actors would likely have been inclined to argue).
Nevertheless, for all the unresolved questions of authority, a successfully ratified documentary Constitution, which was by no means considered a remote possibility at the time, would have encouraged the development of a 'thicker' sense of trans-systemic constitutional normativity of the sort we seek to identify under the label of constitutional pluralism.
In short, the constructivist message holds that constitutional innovation between systems, whether by reference to a new type of canonical constitutional text and/or the orientation of judges of different systems to common norms and normative interpretations, creates its own (open-ended) dynamic and will succeed or fail in its own terms rather than with reference to some prior model of constitutional coherence.

values of a substantive and structural nature,[26] or by reference to jurisgenerative features of the particular dialogue between the different constitutional actors,[27] or indeed some combination of the two.[28]

Yet the practical importance of this area of difference and disagreement in the European context of debate should not be overstated. The underlying descriptive and explanatory diagnosis is largely shared across the various pluralist perspectives, and given the close cultural and legal—structural ties between the states and the EU, those normative problems of reconciliation of the different orders that remain unanswerable or disputed are treated as of 'manageable' dimensions – centred upon disagreements between 'top courts' - rather than as fault lines affecting the overall configuration of authority in the European legal space. This is not to say that constitutional pluralists analysing the European field have been entirely blind to the fact that, just as there is more to constitutions than constitutional courts, so too there must be more to relations between constitutions than merely judicial difference and dialogue. For all their awareness *in principle* of the involvement of other institutions, however, the majority of commentators have *in fact* homed in on the courts as the most visible arena and the clearest manifestation of the problem - an exotic but essentially treatable symptom which tended to dominate consideration of the ailment as a whole.[29]

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[26] See e.g. M. Kumm , "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty (2005) 11 *European Law Journal* 262; also n1 above

[27] See e.g. M. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 501-38

[28] Arguably, Maduro (n27 above) combines the two approaches. For his more recent views, now extended to the wider global context, see his "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism" in Dunoff and Trachtman (eds) *Ruling the World?*356-80.

[29] This tendency has probably been accentuated by the fact that one of the more influential pluralist thinkers, Miguel Maduro, has served as an Advocate General at the European Court of Justice, and has delivered opinions which seem to reflect some of his academic thinking. See in particular, his opinion in *Kadi v Council of the European Union*; Case C 402/05, delivered on January 18th 2008; available at http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf.

3. Constitutional Pluralism Beyond Europe

If we look at the prospect for the constitutionalisation of transnational sites and relations beyond the EU, the challenges set out above are posed much more sharply and insistently. Faced with the proliferation of global institutions around the permanent framework of the United Nations, of global and regional human rights charters and standard–setting bodies, of new forms of regional economic organisation beyond Europe, of functionally specialist regimes of global public authority in matters such as crime, labour relations and environmental protection, and of private and hybrid public-private forms of self-regulation and administrative capacity in other areas of specialist practical and epistemic authority from global cyberspace to international sport, constitutional pluralism finds itself in a less obviously receptive environment.[30] So much so, indeed, that much of the broader literature on the global legal configuration implicitly or explicitly rejects the ideas of constitutional pluralism, while those approaches which seek to keep faith with constitutional pluralism and adapt it to the global scene struggle to justify their approach and occupy a less confident and secure position within the debate than they do in the European context. Let us again look at each of the three sceptical challenges in turn in order to illustrate these points.

If we begin with the question of the tendency of constitutionalism to embrace all normative phenomena within a singular logic and encompassing framework, this might seem the least likely ground of challenge to the appropriateness of

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To be fair, however, Maduro himself has stressed more than most the need to look beyond the courts to broader institutional structures in order to understand pluralism in the round. See in particular, Maduro, n27 above.

[30] See, for example, N. Walker, "Beyond boundary disputes and basic grids; Mapping the global disorder of normative orders" (2008) 6 *International Journal of Constitutional Law* 373-96; M. Rosenfeld, "Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism" (2008) 6 *International Journal of Constitutional Law* 415-456; P. Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism" Osgoode Hall Law School, Comparative Research in Law and Political Economy Research paper Series 21/2011.

constitutional pluralism within the wider transnational context. After all, are the most obvious features of the global legal landscape not precisely those that are "disorderly"?[31] Rather than as a coherent whole, do we not think of the global legal configuration as fragmentary,[32] as "polycontextual",[33] as embracing a "strange multiplicity",[34] as part of the diverse and sometimes impenetrable "mystery of global governance"?[35] And should we not, therefore, expect constitutionalism conceived of in a global key to match and reflect this underlying deep diversity, thereby adopting a sensibility that is pluralism-friendly?

In some influential quarters of transnational constitutional thinking, however, just the opposite is the case. For some who want to take constitutionalism to the global level, it is precisely as a reaction against and in response to these underlying tendencies toward fragmentation. Constitutionalism is embraced just because it is believed to have the capacity to re-impose order, to re-establish hierarchy, to articulate and apply a comprehensible redesign. This steering ambition comes in different variants. In one version, the singular model of transnational constitutionalism is institutionally located in the United Nations, its Charter functioning as an *ersatz* written Constitution for the post-war world order.[36] In other versions, the basis of constitutional order is lexical rather than institutional. In particular, there are a number of strains of the so-called constitutionalisation of international law, in which 'international law' is itself protected and projected as a single juristic category.[37] Typically under this approach some types of international rules such as customary international law, *ius cogens*, human rights law, 'world order'

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[31] Walker, n30 above.
[32] Koskenniemi, n9 above.
[33] G. Teubner, "Constitutionalising Polycontextuality" (Unpublished paper).
[34] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP, 2005)
[35] Kennedy, n9 above.
[36] See e.g. Fassbender, n7 above.
[37] See e.g. De Wet, n8 above.

treaties and obligations *erga omnes* are deemed to have a special facility to organise the international order in a 'constitution-like' way. Whether due to their generative capacity, or their trumping quality, or their comprehensive reach, they stand apart from and above other international rules and lend some measure of coherence and integrity to the whole.

We should be careful not to overstate the unifying ambition of any of these brands of global constitutionalism. They are far from suggesting a world state to subsume and replace the category of nation states, and, indeed, rarely propose any kind of top-loaded federal design.[38] As noted, their impulse tends to be reactive rather than proactive, a limited 're-ordering' response to the deepening anarchy of global legal relations in world of ever more divergent and complexly overlapping jurisdictions rather than a new and constitutive set of markings on a legal *tabula rasa*. But these efforts do, nonetheless, continue to display distinct traces of a certain kind of singular and hierarchical strain of juristic thought that is closely associated with the tradition of state constitutionalism. The performative meaning of making a claim about the global regulatory sphere in 'constitutional' terms is one of authorization – indeed *self*-authorization. The language of constitutionalism is resorted to not just as a familiar trope of the legal imagination but as a way to outrank other rules and outflank other ways of conceiving of the global legal order.[39]

Yet a self-defeating irony surely lurks within such a bold discursive move. On the one hand, it is precisely the lack of any agreed and settled overall framework of legal authority for the proliferation of new sites of transnational legal authority in the

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[38] See e.g. J. Habermas, "Does the Constitutionalization of International Law Still have a chance?" in J. Habermas, J. The *Divided West* (Cambridge: Polity, 2008) 115-210. Even though Habermas is unusual in explicitly proposing a multi-level institutional structure, of the three levels he proposes – global, regional and national – he allows the global by far the most limited jurisdiction, restricted to questions of peace and human rights.

[39] See e.g. Koskenniemi n9 above; Kennedy n9 above.

dense mosaic of global regulation that tempts a certain type of singular constitutional discourse to fill the vacuum. On the other hand, if constitutionalism's ambition is to put its own claim to final authority beyond question, then the inherent disputability of any and all "global metaprinciples of legal authority"[40] which underscores the unsettled quality of the transnational legal sphere means that constitutionalism in this singular mode cannot achieve its own ambition. What is more, just because of the underlying lack of settlement or of agreed general grounds for the justification of postnational constellation, any such singular constitutional discourse *deserves* to fail in its presumption of unassailable authority.

In summary, there is a monistic strain in transnational constitutionalism which, for all the comparative (to the state tradition) modesty of its remit, is fated to fall short in its bid to place its own authority beyond question, and justifiably so. Yet it *is* an active, and indeed growing, dimension of the discourse on transnational constitutionalism, one which implicitly or explicitly sets itself at odds with the various strains of constitutional pluralism, and one, therefore, which contributes to the overall hostility of the regulatory environment to the very idea of constitutional pluralism.

This monistic strain, it follows, should be carefully distinguished precisely from those other explicitly constitutional conceptions of the global transnational order that seek to emphasize the diversity of transnational sites of authority. In these cases, the second and opposite challenge – namely the reconciliation of plurality in terms which remain at all constitutionally meaningful - comes into play, although, as we shall see, the first challenge continues to lurk in the near background.

Those who stress the variety of the constitutional register at the global level, in turn, can be further divided fall into different sub-categories. On the one side, there

[40] Walker n30 above, 386.

are those for whom pluralism, including a pluralism of constitutional sites and relations, is an unavoidable and irreversible consequence of the functional differentiation of world society. In a perspective closely associated with contemporary systems theory, the ever increasing autonomy of the globally ramified spheres of economy, ecology, science, education, health, sport, media, virtual communications etc, is postulated as both consequence and reinforcing cause of the decline of the role of the traditional politico-legal constitutionalism of the state as the effective container of the various specialist sub-systems within a particular territorial demarcation. [41] Yet the demise of a comprehensive mode of politico-legal constitutionalism – of a constitutionalism built around an idea of a self-contained community in which all matters of 'public' interest are contested and resolved in common, need not mean the end of constitutionalism *tout court*. Instead, in the systemic pluralist vision we are witnessing the development of new transnational forms of "societal constitutionalism."[42] According to this new global dynamic the "self-constitutionalization"[43] of the various specialist functional sectors is no longer grounded in and reducible to the articulations either of state law or the orthodox treaty regimes of international law, or indeed of any other canonical legal form.[44] The new societal constitutions will continue to draw on these familiar juridical sources in their continuous processes of reflexive self-organisation, but the basic impulse towards self-constitutionalization and its governing logic is provided by the very character and domain concerns of the functional specialism itself; by the methods available within its special medium of practice – and to those actors implicated in that

[41] See in particular the work of Gunther Teubner; e.g. n33 above; See also his "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?" in C. Joerges, I-J Sand and G. Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 3-28;
[42] Teubner, n41 above
[43] Teubner, n33 above
[44] Such as the common-law based *lex mercatoria*. See Teubner, n33 above

medium of practice - of communicating and realizing the forms of social power or influence distinctive to that medium of practice.

A more modest and familiar version of this kind of functionally-driven global constitutional pluralism can be found in the idea of 'sectoral constitutionalization'.[45] Here the focus is upon the institutional centres and their conventional legal foundations rather than the functionally coded sites of practices as a whole. The accent is on the hybrid '"treaty-constitutions" [46] of special international organisations or regimes, such as the International Labour Organisation or the World Trade Organisation. These are constitutive instruments for the legal domains in question, not just in terms of providing an institutional and norm-generating frame and claiming an original juridical authority, but also, and increasingly, in endorsing or encouraging a broader form of *erga omnes* constitutional sensibility in terms of rights protection for the individuals affected by the regimes.[47]

To these positions the second challenge is a clear and pressing one. What makes the basic *plurality* of constitutional orders they describe *pluralistic* in nature? In what does the constitutional coherence between the parts consist? If as, Gunther Teubner, the leading exponent of modern systems theory, declares, "in the sea of globality there are only islands of constitutionality",[48] where are the constitutional causeways that connect these islands? The answer is not clear. If the emphasis is on the specificity of the newly emergent societal or sectoral constitutions in the absence of any corresponding newly emergent legal-political totality, then what, if anything,

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[45] See e.g., A. Peters "Membership in the Global Constitutional Community" in J. Klabbers, A. Peters and G. Ulfstein (eds) *The Constitutionalization of International Law* (Oxford: OUP, 2009) 153-263, 201-3

[46] *Ibid.* 203.

[47] *Ibid.* 212-215.

[48] Teubner, n33 above.

links these constitutionally justified specificities in constitutional terms is problematic.

One part of the answer may depend on *structural analogy*. Arguably, a key 'constitutive' puzzle faced by the stakeholders of relatively autonomous global subsectors and by those who occupy their various external environments, namely how to balance the freedom of those most centrally concerned with and affected by a practice to govern that practice against the need to limit its expansion into other spheres and so to curb its tendency to encroach on the autonomy of others sectors of social practice and their key stakeholders, is the functional equivalent under a globally differentiated order of the traditional state constitutionalist concern to safeguard the 'internal sovereignty' of 'the people' while ensuring that their 'external sovereignty' did not compromise the internal sovereignty of others.[49] A second part of the answer may, more straightforwardly, concern *common transversal norms*. In particular, proponents of a differentiated form of global constitutionalism may argue that basic human rights standards should prevail across different societal or institutional sectors regardless of these cleavages. Indeed, on this view, the very proliferation of such cleavages and the problems of achieving 'thicker' forms of democratic constitutionalism in consequence serve to underline the importance of the alternative protection provided by globally guaranteed human rights standards.[50] A third and final part of the answer might concern the *relational dynamics* themselves. If the global constitution is one of multiple and variable sectors, one in which the marginal connections and relations between sites of governance become central rather than peripheral, then perhaps there is some kind of underlying relational logic or, less passively, perhaps there can be developed terms and patterns of constitutional

[49] *Ibid*. See also Krisch, 'The Case for Pluralism" n11 above.
[50] See e.g. Teubner, n33 above; Peters n45 above.

exchange between these various sectors which can be accounted for or justified in terms of some kind of defensible constitutional reason. At a minimum, does the fragmentation of the transnational constitutional order into a heterarchy of sites not permit and even encourage the development of some kind of framework of mutual recognition and contestation, and of checks and balances between sites and their different claims to authority? And does the complex cross-polity institutionalization of a system of countervailing power not provide the basis from which pluralism can be transformed into a recognizable set of constitutional virtues?[51]

Certainly, there is in the approach of the 'systemic' constitutional pluralist some recognition and endorsement of all such solutions. The claim to move beyond a plurality to a pluralism of systems remains a precarious one, however. It stands in sustained tension with the sheer number, diversity, unpredictable emergence and uncontainable evolution of the islands of self-norming and institutional capacity in the new global constitutional archipelago. And it is in response to this and in an attempt to fashion a more systematic and encompassing set of constitutional steering mechanisms that we find another more universalist strain within global constitutional pluralism. This thread of constitutional pluralist thought - closely associated with Mattias Kumm[52] and others[53] - adopts a different and more resolute approach to the tension between the two constitutional imperatives of the postnational constellation – the autonomy of the particular parts and the coherence of the whole.

For Kumm, the modernist past remains the key to the future. The philosophical core of constitutionalism has not changed since the advent of modern constitutionalism through the medium of the maturing state system of late 18th

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[51] See Krisch, n11 above "The Case for Pluralism"; see also Rosenfeld, n29 above
[52] Kumm, n1 above
[53] See in particular D. Halberstam, "Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States" in Dunoff and Trachtman (eds) *Ruling the World?* 326-55.

century Europe and America. Crucially, what is constitutionally basic for him is not a matter of institutional design but of underlying normative principles. These normative principles flow from the basic modernist ambition of persons self-conceived as free and equal individuals to act collectively to deliberate, develop and implement their own conception of the common interest or public good. Such meta-political foundations distinguish the modern age from the traditional hierarchies and the sense of human society as in thrall to a prior order of things which characterize earlier forms of social organisation and their associated social imaginaries.[54] And from these foundations, according to Kumm, we can derive a set of universal constitutional commitments to principles of legality, subsidiarity, adequate participation and accountability, public reason and rights-protection.[55] Against this larger canvas the traditional state-centred constitutional system assumes a more modest significance than is often appreciated within constitutional thought. It is exposed as but one architectural representation of the underlying principles, rather than an exclusive or dominant or even optimal template for constitutional government. Instead, under conditions of intensifying globalization the basically cosmopolitan texture of a constitutionalism committed to universal principles becomes more apparent, and the state is now but one constitutional player on a wider stage. As free and equal persons operating under certain constraints of interest, information, geography and affinity, we continue to respect particular contexts of decision-making and public interest formation, and the principles of subsidiarity, participation and accountability recognize this. However, as free and equal persons we are also categorically committed to acknowledgment of the freedom and equality of all others, and so to the universalisability of our political condition. In this way, we can reconcile our

[54] See e.g. C. Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).
[55] Kumm, n1 above.

commitment to particular polities and sites of authority with a belief in an overarching normative framework which informs the terms of our various particular manifestations of public authority. In the final analysis, the global division of the world into particular polities remains inevitable but the particular form that such a division takes is not so; rather, it is contingent upon shifts in the underlying circuits of social and economic power.

By replacing institutional or lexical hierarchy with normative universalism, Kumm, and those with similar visions, find a more robust answer to the second challenge than is available to the systemic pluralists while avoiding the more obvious dangers of constitutional monism. Inevitably, however, the idea of constitutionalism as a single cloth, however divorced from traditional conceptions of hierarchy, brings the first challenge very much back into the frame. Is such a confident claim on behalf of constitutionalism – even if its focus is on general principles rather than a particular vertical design of rules or institutions, not just one more hegemonic move on behalf of a singular constitutional vision? And how genuinely pluralist can such a vision be if its basic normative contours are settled in advance, even if only at the high level of abstraction proposed by Kumm?

One author who has posed these questions more keenly and insistently than most is Nico Krisch.[56] For him, it seems that constitutionalism in a global age is caught in a Procrustean dilemma. On the one hand, the kind of "foundational constitutionalism"[57] well-known from the state tradition – the 'thick' variant based upon the constituent power of the collective people living in a distinct all-embracing political society – simply does not suit the more fragmented circumstances of the global age. On the other hand, if we try to stretch and adapt constitutionalism to fit

[56] See references at n11 above.
[57] Krisch, n11 above, "Global Administrative Law and the Constitutional Ambition"

these new conditions we are faced with a series of unsatisfactory alternatives. Either, in a first case, we retain something of the monistic legacy of constitutionalism – a holistic architectural or (at least) intellectual vision which, in its excessive ambition and self-assertion, lacks both legitimacy and plausibility in an age of global diversity. Or, in a second case, we are guilty of a kind of constitutional dilution or corruption, retaining the term 'constitutional' as an overstated or inappropriate label for an entirely new type of institutional and normative complex. In particular, if, as is the case with the systemic forms of pluralism, all we retain from the tradition of state constitutionalism is a commitment to various of its 'thin' properties, - juridical autonomy, an institutional framework of checks and balances, and fundamental rights protection - but without any plausible sense of an authoritative frame for locating these within a single constitutional universe, then perhaps the constitutional label becomes a mere placebo or distorting diversion. That is to say, constitutionalism may become a source of complacency – a false promise and false comfort in a world that no longer bends to its design, or a source of confusion – a category mistake in a world that needs new categories. In either event constitutionalism threatens to become an impediment rather than a guide in the search for optimal solutions to the question of governing new configurations of social power.

This takes us directly to the third challenge and the alternative solutions suggested by that third challenge. For pluralism to make sense as a normative register for the contemporary global order – and bearing in mind the extent to which empirical conditions of global regulation militate against anything other than a pluralist understanding - then perhaps the 'constitutional' descriptor just has to be dropped. As Krisch himself suggests, in the last analysis constitutionalism and the scale and quality of the pluralist understanding adequate to the global age may simply be

irreconcilable.[58] Perhaps, the best way of ensuring the pluralist virtues of mutual contestation, recognition and adaptation and a complex framework of checks and balances, conceived of as a modest framework of co-ordination between relatively autonomous polities,[59] is to detach them from a constitutional discourse which is unsympathetic on either side of this delicate ambition; either in the strength of its traditional championing of the autonomy of the parts or in its effort to conceive of the new in terms of an idea of totality and integrity which also borrows from the old.

4. Pluralism and the Constitutional Legacy

So, what, if anything, does constitutional pluralism under conditions of globalization have left to offer in the light of these challenges? This question is most profitably addressed by adjusting our lens slightly and by approaching the constitutional predicament from a somewhat different angle than above, and by taking note of a clear bifurcation that has emerged in the use and treatment of constitutional ideas in the global age.

On the one hand, as a source of doctrine the accumulated arsenal of constitutional thought is treated in an ever more eclectic manner in the global age. Constitutional doctrine is drawn upon for both epistemic and symbolic reasons – as a rich resource of resilient ideas of good governance couched in a language which also happens to carry a distinguished and potentially authority-inspiring legacy. The spread and adaptation well beyond the traditional container of the nation state of tried and tested aspects of constitutional doctrine such as fundamental rights protection, separation of powers and institutional balance, federalism and subsidiarity, due process and natural justice, proportionality and balancing, or 'hard look' doctrines and

[58] *Ibid.*
[59] Krisch, n11 above, "The Case for Pluralism"

requirements to give good reasons, speaks to a process of widespread "low intensity"[60] dissemination. Constitutionalism becomes a mobile resource, a 'thin' and footloose structure and stylization of norms used to qualify and dignify the emergent sites of a new global regulatory structure of authority without being constitutive of these sites in the 'thick' manner redolent of the nation state. Constitutionalism on this view is a matter of detail, adding an older texture to new governance forms rather than providing a formative inspiration.

On the other hand, we also find constitutionalism used as reference point for the most encompassing (re)imagination of the global body politic. Whether in the work of Habermas, or Teubner, or Kumm, or – even if he ultimately rejects the constitutional label – of Krisch, constitutionalism provides a point of departure for the broadest consideration of the nature and resilience of the modernist settlement in legal and political thought. Again, as with *constitutionalism as doctrine*, *constitutionalism as imagination* sends a reasonably coherent message – certainly at the highest levels of abstraction reached by this broader mode of thought. Recall that, for Kumm, constitutionalism is about the political promise of an unprecedented epoch in which free and equal individuals make over society in their own terms;[61] or, as Habermas or Krisch would have it, constitutionalism is about the development of the very idea of public autonomy – about how individuals constitute themselves in public *as* a public and with due regard to and in symbiotic relationship with their equal freedom in the sphere of private autonomy;[62] or as Teubner would argue, constitutionalism is about

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[60] M. Maduro, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism" (2005) 3 *International Journal of Constitutional Law* 332, 340.
[61] Kumm, n1 above. See also the exchange between Kumm and Krisch on *EJIL: Talk!* in 2009, following the publication of Dunoff and Trachtman (eds) *Ruling the World?* ; available at http://www.ejiltalk.org/author/mkumm/
[62] See e.g. J. Habermas "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" (2001) 28, *Political Theory* 766-781. Krisch n11 above, "The Case for Pluralism", and his *EJIL: Talk!* exchange with Krisch, n60 above.

the balance between the autonomy and self-limitation of different functional sectors *inter se* in a differentiated order – with autonomy retained as a deep freedom and equality-respecting ideal even as its emergent forms escape our received modern distinction between a generically public and a generically private sphere.[63] In all cases, constitutionalism serves as a reminder of modernity's resilient ambition for the collective self-constitution of the social and political world in a moral universe in which the individual is the basic unit

Where constitutionalism as doctrine is about detail, constitutionalism as imagination, by contrast, sets the broadest of horizons. *Crucially, however, for all their contrasting features, the two levels of constitutional discourse for a global age share a common absence.* Where constitutionalism as doctrine is too specific in its various remits and too past-derivative to provide a key formative influence for the new post-Westphalian sites of authority, constitutionalism as imagination for its part is both too general in scope and substantive ambition *and* too dependent upon the dominant procedural heritage of state constitution-making to provide a formative influence for these new constitutional sites.

In other words, we are faced in a post-Westphalian world with a situation in which constitutionalism arguably flies too low or too high, either too dependent on other forms or too independent of any particular forms. Why this is so is both consequence and reinforcing cause of the changing structure of constitutional authority in a post-state world. In the state tradition, the imaginative and the doctrinal dimensions of constitutionalism tended to be closely aligned through the dimension of constituent power. For constitutionalism in this mode was concerned as much with formative influence – with the particular *pouvoir constituant* and the ideas of guiding

[63] Teubner, n32 above.

purpose and ultimate justification associated with the making of political community - as with the tool-kit of mechanisms through which the duly formed and constituted authority - the *pouvoir constitué* – seeks through doctrine to express and represent its constitutive source. State constitutionalism, in other words, was concerned both with the framing of the particular sites of authority and with the detail of what was framed. Constitutionalism in the state tradition, therefore, was always about treating the 'spirit' and the 'letter' of the law within a single frame of reference, about background culture as well as foreground text, about the regulative ideal as well as the regulated practice, about deep 'second order' justification as well as immediate 'first order' validity and technique. In short, it was about both imagination and doctrine, and about how the imaginative and the doctrinal were closely joined and mutually nourished through the container of the self-constituting and self-constituted polity. Certainly, there was also a dimension to the constitutional imagination which was prepared to reach beyond the state, which treated the constitutions of different and other free and equal peoples as morally comparable and ethically associated units. But this global dimension remained parasitic upon the more basic connection between the imaginative and the doctrinal dimensions in the context of the state.[64]

Crucially, the post-Westphalian world of constitutionalism severs this basic connection between the doctrinal and the imaginative while often remaining in retrospective thrall to the significance of such a connection in the high modern era of state-centred constitutionalism. An appreciation of this point allows us to reconceptualise and restate the various dilemmas of constitutional pluralism in global context as flowing from the expectation to do too much with too few resources. The low-flying constitutionalism-as-doctrine seems to claim too much, at least by

[64] See N. Walker. "Out of Time and Out of Place: Law's Fading Co-ordinates" (2010) 14 *Edinburgh Law Review*, 13-46.

implication, in using the historically formative register of constitutionalism to account for a regulatory context in which such constitutionalism as is available is no longer doing and can no longer do that formative work, but is instead merely supplying the regulatory technology for an already and otherwise formed site of authority. Hence the criticism that constitutionalism is tendentially but inappropriately inclined to monism, and the related claim that the language of global regulatory pluralism finds a more becoming modesty if the descriptor 'constitutional' is removed from the units we seek to conceive of within the pluralist structure. Equally, however, the high-flying constitutionalism-as-imagination presumes too much if it treats itself as an encompassing meta-authoritative normative frame for the plurality of sites of global constitutional authority. Rather, its claim and message *is prior to* the particular forms of constitutionalism and the particular norms associated with these forms. What it can offer is precisely not a higher-order or framing legal normativity – a kind of constitutional super-doctrine - for that would presuppose a formative and framing role which it does not possess and which it could not posses without claiming new constitutional unity; instead, all it can offer is a deeper and normatively unrealized form of constitutional pre-orientation.

If we return briefly to the special case of the European Union and its inappropriateness as a paradigm for postnational constitutionalism more generally, we may observe how the severing of the two registers of constitutionalism is here less evident, and less evidently problematic. Constitutionalism-as-doctrine in the European Union bears such a close resemblance to many state forms and remains so closely connected to its statist roots that, as we have seen, its 'thin' credentials are widely respected, and also treated by many as a sound basis on which a pluralist connection between the national and the supranational spheres of influence might be forged. And

while there has been much controversy over just how much legitimacy this 'thin' constitutionalism supplies, and also about whether it can or should be supplemented by a 'thick' foundational constitutionalism, at least the EU has developed in a sufficiently state-like direction that the linking of the supranational constitutional imagination to a recognizable politically constituent process has remained a viable ambition for many – or at least did so until the demise of the Constitutional Treaty in 2007. In short, neither constitutionalism-as-doctrine nor constitutionalism-as-imagination seem to be as disconnected from their traditional basis of support as they do in the wider global sphere. Constitutional pluralism appears more plausible, as, too, in some measure does the alternative of a new constitutional unity.

In the global context, in the absence of the lock of constituent power the two levels of constitutional discourse are more clearly stratified and more palpably incomplete in the absence of the other. Yet just as postnational constitutionalism in general is not best understood in the paradigm of the European Union, postnational constitutionalism beyond the European Union should not be discounted just because in some respects its development compares unfavourably with that of the European Union. For it does not follow from the misalignment of the two constitutional discourses – constitutionalism-as-doctrine and constitutionalism-as-imagination - that there is no value in seeking to preserve and develop the modern constitutional legacy at either or both levels under conditions of contemporary global pluralism. Rather, it seems that the continuing value of constitutionalism, and the basis for believing that any such value outweighs its disadvantages, lies precisely in the combination of those answers it does still provide and those questions it raises in lieu of the answers it can no longer provide.

If we first consider constitutionalism-as-doctrine, as already noted we cannot deny the value of the constitutional normative resource-set accumulated over the period of political modernity, or its continuing applicability to non-state sites, however partial, fragmented and "non-holistic"[65] many of these site are. The various functionally specific and/or institutionally clustered points of non-state authority may have come to resemble nodes in a global network, each made up of a complex mix of internal self-regulation and diverse external regulation, rather than each providing a self-contained regulatory universe of its own, as in the state tradition.[66] Yet many of the same basic puzzles of governance are being addressed, and so much of the same technology of governance remains appropriate.

This point is placed in sharp and reinforcing perspective when we turn to reconsider constitutionalism-as-imagination. In one respect, this serves as an orientating reminder of what should underscore and inform our puzzles of governance in state or state-like holistic settings and non-holistic settings alike. The constitutionalist vision recalls the abiding importance of the meta-political question of how to generate, adjudicate and apply our common interest in accordance with our common standing as free and equal persons, even in a post-state world in which the subject, mechanisms and object of common interest are out of kilter, and where, accordingly, 'we' increasingly do not get to address the common interest question in its entirety *in common*. However, this paradoxical feature of the common interest should not defeat but should guide our efforts to interpret the 'letter' of constitutional doctrine in light of the 'spirit' of constitutionalism. The contextual appropriateness and refinement of all of our particular inherited constitutional techniques, from rights protection through doctrines of consultation and due process to our manifold methods

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[65] See N. Walker, "Beyond the Holistic Constitution?" in Dobner and Loughlin (eds) 291-308.
[66] *I bid.* 297-303.

for the devolution of legal power, should be informed by our adjusted sense of the elusive but still vital centrality of the idea of common interests amongst equals in a multi-centred world of overlapping and partial authorities.

Yet constitutionalism-as-imagination, as well as showing us how to keep the cup of self-government half-full, is also salutary in underlining our sense that it is half-empty. As well as serving as an important reminder of the deeper purpose of particular constitutional doctrines and the flexibility of their application, it also highlights what we no longer have or can guarantee to preserve. Constitutionalism-as-imagination recalls to us that in a context of constitutional foundationalism our sense of the political realm, of constituent power and of constituted power, were linked together in a continuous framing logic, but that the sorts of constitutional questions we once posed and addressed within a joined-up political container now increasingly arise in a manner so fragmented and loosely coupled that they threaten the very promise of 'the political' as embodying our capacity to make over the world in our own terms. Constitutionalism-as-imagination thus also functions as a kind of "placeholder"[67] for what is in danger of being lost if we abandon our commitment to think and act as authors of the constitutive conditions of political society - however diverse and complexly intermingled the transnational societal reference of that political society might be - and acts as a continual prompt for us to seek to retain that aspiration, however formidable, and fashion its pursuit to our new circumstances.

5. **Constitutional Pluralism?**

[67] Koskenniemi, n9 above, 30.

But even if in these ways constitutionalism in general does remain relevant to the global conditions of late modernity, one last important question of language remains. Does the kind of loosely aligned dual-pronged approach to the sustenance of a constitutional discourse suggested here fit well with the particular perspective of *constitutional pluralism* which provided the starting point for our analysis?

The answer is a mixed one. In one sense constitutional pluralism is a product of the very structure of state-centred political modernity we are trying to look and think beyond. It is an attempt to solve a problem that is becoming outmoded. Constitutional pluralism, conceived of as idea of a constitutionally relevant connection between self-authorizing constitutional sites, silently assumes something like the statist template of constituent power as the legitimate basis for the self-authorization of the post-national constitutional sites. If self-authorization increasingly lacks that legitimation, however, the focus of our concern shifts to the broader question of what form of legitimation is possible in place of or in supplementation of site-specific self-authorization.[68] At the same time, with the weakening of the sources of internal, site-specific legitimation, our sense of the constitutional 'closure' of the various sites is reduced, and so, in consequence, is the puzzle of how such increasingly 'open' sites can relate to each other constitutionally. In other words, the less site-specific we understand constitutional authority to be, the less problematic we conceive constitutional movement *across* boundaries, and the less sharply framed the original definitive questions of constitutional pluralism appear.

On the other hand, if we think of constitutional pluralism not as a series of doctrinal or otherwise constitutionally relevant answers to the puzzle of how different constitutions connect, but simply as referring to the continuing relevance of

[68] See e.g. S. Besson, "Whose Constitution(s)? International Law, Constitutionalism, and Democracy" in Dunoff and Trachtman (eds) *Ruling the World?* 381-408.

constitutionalism in locating and addressing the mix of empirical and normative factors which contribute to the deep pluralism of the emerging global order, then it certainly remains a relevant conceptual point of departure. Our understanding of constitutionalism may have been unbundled to a degree that make the original Europe-centred debate about the constitutional "plurality of unities"[69] less paradigmatic. Yet that very process of unbundling, and the new horizons of meta-political debate it opens up, are strikingly indicative of the ways in which the constitutional legacy remains relevant both as a path-dependent influence upon and as a means of collective sensitization towards our complexly differentiated and interconnected global order.

[69] H. Lindahl, "Sovereignty and Representation in the European Union" in N.Walker (ed) *Sovereignty in Transition* 87-114.