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**Beyond the Holistic Constitution?**

Neil Walker



# **BEYOND THE HOLISTIC CONSTITUTION?**

**NEIL WALKER**

Regius Professor of Public Law and the Law of Nature and Nations  
School of Law  
University of Edinburgh

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**Abstract:** This paper considers whether, why and to what extent we should conceive of transnational regulation in constitutional terms. It distinguishes between two different candidates for transnational constitutional status. On the one hand, there are various actual or potential 'holistic' transnational constitutions, such as the EU and the WTO. These constitutional orders resemble that of the state to the extent that they involve the framing of a distinct 'body politic'. This 'body politic' may be thinner or thicker, depending on the number and richness of the framing layers involved (legal order, politico-institutional complex, popular self-authorization, distinct society or demos), but the idea of the constitution as a constituent dimension and expression of a broadly encompassing, internally coherent and externally bounded polity is present in all cases. On the other hand, there are also today various international societal actors and functional spheres (e.g internet regulation, sport regulation) that on one view possess their own 'societal constitutions'. Unlike holistic forms of regulation, however, these areas tend to combine very narrow forms of self-regulation with diverse forms of external regulation. The idea of a discrete framing is not present even in legal or institutional terms, still less in popular or social terms. Nevertheless, the paper argues, there may be good normative reasons for continuing to use the language and mindset of constitutionalism in these contexts.

**Keywords:** societal constitutionalism, holistic, transnational, polity regulation



## **Beyond the Holistic Constitution?**

### **I. The Politics of Constitutional Definition**

The modern state, understood as the key unit within the global framework of authority, was for long the undisputed domicile of constitutionalism and the guarantor of its relevance. So what is to become of constitutionalism in the contemporary world, when the configuration of economic, political and cultural forces that produced the state-centred global framework of authority is no longer so securely in place, and where other key sites of authority are emerging? This is an issue both for the old state setting and for the new non-state settings. On what terms, if at all, can constitutionalism remain viable in the old state setting, and on what terms, if at all, can constitutionalism be adapted to new settings?

The direct focus of the present essay is on the latter set of questions, but in order to address these some conceptual ground-clearing is required. In undertaking this initial survey, we encounter an exaggerated version of a familiar problem. As is common when we are dealing with social and political concepts that register both at the 'object' level of everyday use and at the 'observer' level of theoretical inquiry, the answers that many analysts seek or expect when addressing the prospects of constitutionalism seem often to be anticipated in their stipulation of the definitional preliminaries. However, just because so much uncertainty surrounds a conceptual leap of such audacious proportions as is contemplated in taking constitutionalism beyond the state, the absence of agreement over definitional preliminaries is uncommonly pronounced and conspicuous in the instant case. This fractured beginning, in turn, leads to an unusually high level of mutual



disengagement and a general polarization of theoretical positions. We are faced, in fact, with an irony of overproduction. On the one hand, in academic circles at least, the unsettling of old taken-for-granted certainties about the place of constitutionalism within the global scheme means that never has discussion of law and politics so frequently, so explicitly and so self-consciously occurred within a constitutional register, and never has the constitutional idea been so insistently reasserted in its old state setting or so vigorously sponsored in new non-state settings. On the other hand, however, just because the stakes are so high and the value of the currency so volatile, never has discussion of constitutionalism cultivated such little common ground.<sup>1</sup> There is scant cross-fertilization from the different points of departure, and what exchange does take place often appears to be the dialogue of the deaf.

This is not intended as a partisan point. Those who want or expect constitutionalism to travel beyond its state domicile are as likely to load the conceptual dice in favour of their preferred conclusion as those who start from the prejudice that no such mobility is possible or desirable. What is more, each side tends to encourage the other in its conceptual myopia.

On the part of the advocates of post-state constitutionalism we encounter a whole series of conceptual starting points that are in danger of treating constitutionalism in superficial terms, as too easily detached from its statist moorings. This is most evident in the case of what are best described as *nominal* definitions of constitutionalism. Here, constitutionalism is deployed merely as an affirmative label for whatever concept, institution or attitude of governance, wherever situated, that its sponsor endorses or considers pivotal to the regulatory regime in question, whether we are talking about human rights protection, anti-discrimination measures, or even just

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<sup>1</sup> See e.g., N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Rev.* 317-359.

a commitment to ‘the Rule of Law’. The purpose here is ideological; to give the feature(s) of governance to which one is committed or to which one attributes central significance the additional gravitas of affirmation in a powerful and familiar symbolic register, or to deny such affirmation to other approaches that lack the favoured feature(s) or even oppose the priority given to them. Implicit in this ideological agenda stands the conviction, or at least the unexamined premise, that there is simply nothing that privileges the relationship between the state and constitutionalism, and so nothing of special value to be lost in the move beyond that relationship. The point of the nominalist position, in sum, is precisely *not to argue* the case for the mobility of the constitutional idea beyond the state but, by treating constitutionalism as a floating signifier, to elevate the case to the exalted position of the unarguably correct.<sup>2</sup>

A second deracinated version of constitutionalism concentrates on *formal* features. Unlike nominalism, here the state, as the undisputed source of the modern constitutional idea, retains some influence over the destination meaning, if much attenuated. The formalist approach suggests that the very manner in which – the form through which – the political world may be understood and organized from a juridical perspective may borrow from or be inspired by the state constitutional template. This is most obviously the case with regard to the idea of a constitutive juridical instrument, whether or not specifically so-called ‘Constitutional’ (as in the

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<sup>2</sup> We must be careful not to be too critical of nominalist positions. First, often good arguments are made for this or that aspect of governance from within a nominalist position; it is just that these arguments are not enhanced by the use of constitutional language. Secondly, often nominalism shades into formalism or substantivism (see text below), and indeed formal or substantive borrowing from the state tradition may be the inarticulate premise underlying the nominalist position. Thirdly, nominalism may connect to the vital ‘placeholder’ function of constitutionalism, discussed in Section 5 below, in that through its insistence on a constitutional register it speaks not only to a desire to obtain ideological advantage for one’s position, but also to an awareness of how much continues to be at stake in the very idea of a political framing of our social arrangements. For just one example of a writer who uses the language of transnational constitutionalism in this loose but provocative way, see C. Joerges, ‘“Good Governance” in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann’ *EUI Working Papers*, RSC 2001/29.

case of the abortive EU constitutional text of 2004),<sup>3</sup> that is so familiar from state public law. In the context of non-state legal and institutional orders we may find instruments that are similarly formally constitutive in one or more of various senses; whether with reference to their norm-generative or foundational quality, their assertion of entrenched status, their precedence over other system norms, or their claim to provide an encompassing framework for and measure of the limits of the 'body politic' that they create or recognize.<sup>4</sup> And even where such generative, entrenched, trumping, embracing and delimiting features of a legal and institutional order are independent of a self-styled documentary Constitution, or indeed of a single and unrivalled constitutive instrument of any sort, as we have seen in the case of the advocates of WTO constitutionalism,<sup>5</sup> or of the constitutionalization of the international order,<sup>6</sup> or of the various 'civic' or 'societal' constitutions such as the *lex mercatoria* of the international economy or the *lex digitalis* of the Internet,<sup>7</sup> the mere emergence of some combination of these formal features may still be enough for the juridical initiative in question to be deemed constitutional in kind.

A third form of constitutionalism beyond the state concentrates not on formal matters but on the manifestation of a family resemblance between certain *substantive* features of state constitutionalism and the new transnational legal outgrowth. Aspects of transnational law are deemed to be constitutional not, or not only, because they appear on the commentator's

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<sup>3</sup> Treaty Establishing a Constitution for Europe; OJ 2004, C310.

<sup>4</sup> For a concise statement of the formalist position, see A Stone Sweet, 'Constitutionalism, Legal Pluralism and International Regimes' (2009) *Indiana Jnl. Of Global Legal Studies* (forthcoming).

<sup>5</sup> See e.g. D. Cass, *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005); E-U Petermann, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19-25.

<sup>6</sup> See e.g. E de Wet, 'The International Constitutional Order' (2006) *International and Comparative Law Quarterly*. 55-76, at 51-76; for an approach which, unusually, seeks to locate the constitutionalization of the international order in documentary terms – in the form of the UN Charter, see B. Fassbender, 'The United Nations Charter as the Constitution of the International Community' (1998) 36 *Columbia Journal of International Law* 529-619.

<sup>7</sup> See e.g. G. Teubner, '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; G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999-1045.

approved list, as with nominalism, but because the mechanisms or concepts in question – from general structural formulae such as separation of powers and institutional balance to more specific principles such as subsidiarity or proportionality, were long ago nurtured in the state constitutional context and, indeed, have often been self-consciously received into transnational law from these state sources.<sup>8</sup> As is the case with formalism, however, the connection between the non-state version and the state original from the substantivist perspective is a tenuous one. It is dependent upon analogy, and in some cases conscious imitation. How deep the analogy runs and what is lost - or gained - in translation from one context to another is rarely the subject of sustained analysis.<sup>9</sup>

If we turn, now, to those who would oppose the movement of constitutionalism beyond the state, again they range from the primitive to the more sophisticated. Most basically, and more common within everyday 'object' discourse than in academic 'observer' discourse, there is a position that holds that the category of constitution is necessarily restricted to the state. That position is the negative image of nominalism, and just as impervious to counter-suggestion. Whereas nominalism holds to or simply assumes the solipsistic idea that all meaning is constructed without extra-linguistic check or constraint, *essentialism* holds or more often simply assumes the opposite. It maintains that meaning is fixed and invariable in its correspondence with some extra-linguistic reality, and so it follows that it is simply *meaningless* to conceive of constitutionalism beyond the fixed and invariable limits of the state.

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<sup>8</sup> On the migration of particular constitutional concepts from national to transnational level, see N. Walker, 'The Migration of Constitutional Idea and the Migration of *the* Constitutional Idea' in S. Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), 316-344.

<sup>9</sup> For one attempt, see N. Walker, 'Postnational Constitutionalism and the Problem of Translation' in J. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State*, (Cambridge: Cambridge University Press, 2003), 27-54.

Beyond essentialism, there are at least two positions - or rather a continuum of possibilities framed by two positions - that treat the idea of the constitution as deeply embedded in the state. One position is *culturalist* in nature. It holds the idea of a constitution to be hollow, or at least deficient, in the absence of certain attributes, including the idea of a democratically self-constituting and self-constituted 'people' possessing comprehensive powers of self-determination and self-legislation. These attributes, it is claimed, are ultimately contingent upon certain prior or emergent socio-cultural facts concerning identity, solidarity and allegiance, absent which any self-styled constitutional project is fated to be either a dead letter or a much more modest affair. Since only the modern state has known such a socio-cultural formation, and since even if the modern state is no longer so robust in these terms it still constitutes a standing impediment to the development of similar cultural formations at non-state sites, there can be no real prospect of a full constitutionalism beyond the state.<sup>10</sup>

A second position runs even deeper than the culturalist argument without succumbing to the semantic sting of state-centred essentialism. This approach we may call *epistemic* in that it focuses on the very idea of the modern state and of the political imaginary associated with the idea of the modern state as embracing 'a scheme of intelligibility... a comprehensive way of seeing, understanding and acting in the world'<sup>11</sup> that is prior to and prerequisite to a full, modern articulation of the idea of constitution. The key insight here, and what distinguishes it from the culturalist position, is that the concept of the modern state, understood as a particular type of relationship between territory, ruling authority and people, is not merely the expression and fruit of a prior cultural achievement – an accomplishment of national solidarity that supplies the

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<sup>10</sup> See e.g. D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447-465.

<sup>11</sup> See M. Loughlin, 'In Defence of *Staatslehre*' (2009) 48 *Der Staat* 1-28.

'battery of power'<sup>12</sup> necessary to run the constitutional machine effectively. More than that, it is a political way of knowing and way of being in the absence of whose emergence the very idea of a constitutional polity is simply unimaginable. In both cases – culturalist and epistemic – the message is strongly conveyed that the modern idea and practice of constitutionalism could not have developed except in the context and through the container of the state, and while this does not, as matter of logical necessity, rule out the possibility of a similar constitutionalism emerging in a context and through a container other than the state, it certainly stacks the odds against such a development and places a heavy burden on the defenders of post-state constitutionalism to explain just how this is possible.

## II. Constitutionalism and Meta-Politics

This brief examination of nominalist, formalist and substantivist positions on the one side of the issue and of essentialist, culturalist and epistemic approaches on the other side of the issue underlines the difficulty in finding common cause in the debate about constitutionalism beyond the state. How, if at all, do we move beyond this divide? Such a possibility would seem to depend upon trying to ascertain what is *most* basically at stake – *more* basically than is revealed in the various debate-closing applications of constitutional language – in the various positions, and upon locating some overlapping ground at this more basic level. Clearly, the extreme positions of nominalism and essentialism are distinguished on the one hand by blindness to any argument that would give any special title to the state and on the other by blindness to any trace of constitutionalism beyond the state. The assumptions and arguments behind this opposition only begin to be made articulate in the other, more moderate positions. On the one hand, the formalist

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<sup>12</sup> M. Canovan, *Nationhood and Political Theory* (Cheltenham: Edward Elgar, 1996), 80.

and the substantivists suggest that something of value may be retained and adapted from the state tradition when we relocate to post-state contexts. In the case of formalism, the key to translation, so to speak, is abstraction, whereas in the case of substantivism, the key is disaggregation. In the former case, the very idea of a cohesive legal and institutional order is seen as the basis of certain constitutional virtues in new contexts as much as in old, whereas in the latter, it is implied that one can pick some features out of the state constitutional mix, such as a Charter of Rights or a system of inter-institutional checks and balances, and these features will remain of significant value despite being deprived of either the fuller legal framework or the deeper socio-cultural context of the state. The culturalist and epistemic arguments, on the other hand, see the same glass as half-empty rather than half-full. For them, the new is an inadequate pastiche of the old rather than a contextually appropriate adaptation. The post-state constitution is a machine that, in the culturalist critique, is deprived of the crude social energy to power itself sufficiently or, in the epistemic critique, lacks the intelligent background software necessary to understand and activate its own operating procedures.

In the final analysis, if we are to overcome this opposition we must look beyond the reductive commitments and self-vindicating judgments of even the more thoughtful of the state-centred and post-state positions. We must ask whether there is something more general at issue that is capable of being acknowledged within both mind-sets, and which can therefore serve as a common point from which to investigate their differences. What we need in methodological terms, therefore, is a way of treating constitutionalism that is alert to this possibility; a split perspective capable of identifying common ground at one level while at another level continuing to acknowledge difference in terms of that common ground. Such a split perspective can be supplied, it is submitted, by recasting the debate in functional terms; no longer as a one-

dimensional contest over diverse and rival conceptions of the ends of constitutionalism understood as ends that either are or are not exclusively associated with the state, but as a debate over diverse and rival conceptions of the constitutional means necessary to ends that would themselves be capable of commanding general agreement across state-centred and post-state positions.

But in order to be genuinely inclusive and not simply to impose an artificial consensus, any such definition of ends must proceed at a very high level of abstraction. At this rarified level, what implicitly unites the two mind-sets is a sense, corroborated both by the etymology of the constitutional idea and by its range of applications prior to the age of the modern state, that constitutionalism serves a deep and abiding function in human affairs, namely the meta-political function of shaping the domain of politics broadly conceived – of literally ‘constituting’ the body politic.<sup>13</sup> More expansively, constitutionalism in this deepest meta-political sense may be understood *as referring to that species of practical reasoning which, in the name of some defensible locus of common interest, concerns itself with the organization and regulation of those spheres of collective decision-making deemed relevant to the common interest in a manner that is adequately informed by the common interest.* Furthermore, if we are to avoid simply repeating the familiar definitional impasse at this more general level, our meta-political sense of the ‘common interest’ underpinning our collective decision-making capacities as understood in each of its three key registers - authoritative (in whose name?), jurisdictional (covering which collective decision-making capacities?) and purposive (to what end, and how?) – must, in addition, be acknowledged as possessing an open, and indeed a reflexive quality. We cannot, therefore, either stipulate in advance or treat as permanently resolved what are the appropriate sites for the

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<sup>13</sup> See e.g. G. Maddox, ‘A Note on the Meaning of ‘Constitution’’ (1982) 76 *American Political Science Review* 805-809. See also N. Walker, ‘Taking Constitutionalism beyond the State’ (2008) 56 *Political Studies* 519-543.



pursuit of the common interest, or what are the appropriate terms of engagement between these sites, or what kinds of things fall within the remit of the common interest, or what is the proper relationship between individual and collective goods or preferences in the identification and pursuit of the common interest. All of these are matters themselves apt for decision in accordance with the common interest, understood as located at the very deepest level of political self-understanding and self-inquiry, and so as necessarily possessing a self-challenging and self-amending quality. Accordingly, if, as I suggest, we equate constitutionalism with the deepest sense of meta-political inquiry, we cannot simply decide *a priori* to equate the common interest with the national or state interest, and so corroborate an initial theoretical preference for state constitutionalism. Equally, we cannot simply assume that post-state sites are as appropriate as are states as authoritative sources of the common interest, as jurisdictional containers of the common interest, or as forums and institutional mechanisms for the specification of the common interest, and thus simply wish away the state legacy.

Instead, in order to advance the inquiry and find a point of contentious engagement between the two mind-sets, we must turn to second level of inquiry – to the question of adequacy of means. If the common interest conceived of as the ultimate end of the constitutional project sounds at a level of abstraction – and of perpetual contestability – that does not necessarily or even presumptively discriminate between state and post-state sites, is there something about the appropriateness of the means that nevertheless pulls in one direction than another? Is there something about the constitutional method available in and supported by the state context that is more adequate to the pursuit of the common interest than is any constitutional method available

in and supported by post-state contexts? <sup>14</sup> To answer that question we must first ask what, if anything, is distinctive to the constitutional method that has been available in and supported by the state. Then we must inquire whether that method, or any constitutional method or combination of methods that is the instrumental equivalent of the state constitutional method, may also be available or be made available in the post-state context.

### III. Holistic Constitutionalism

There is indeed a constitutional method distinctive to the modern state, and it is best understood as possessing a holistic quality. In a nutshell, the holistic method is a method of constitutional articulation and engagement in which the authority and meaning of the various parts are understood and treated as dependent on the integrity of the whole.<sup>15</sup> As we shall see, this holistic feature is no isolated thread, but something that gives texture to the various different aspects of state constitutionalism.

To appreciate this, however, we must first say something more about the constitutional concept itself. In so doing, we are no longer concerned, as in the first section, with constitutionalism in the abstract – as a theoretical concept for making sense of and evaluating the social world, but with

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<sup>14</sup> Note that this challenge, as well as querying the force of the formalist and substantivist arguments in favour of post-state constitutionalism, also brings back in many of the concerns of the culturalist and epistemic critics of post-state constitutionalism. However, it does so in terms that, by more clearly specifying the distinction between (state) means and (constitutional) ends, are less at risk of reducing the connection between state and constitution to a tautology.

<sup>15</sup> See more generally, N. Walker, 'Out of Time and Out of Place: Law's Fading Co-ordinates' (2010) 14 *Edinburgh Law Review* (forthcoming). For an insightful but rather different treatment of holism, treated not as the basic *organizing method* of modern political life, as in the present case, but as a descriptor of the key *ontological unit* in the ordering of political society (and so considered as equivalent to a fundamentally *pre-modern* idea of indivisible community, and contrasted with modern individualism), see A. von Bogdandy and S. Dellavalle 'Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms' (2009) 10 *German Law Journal* (January) 5-30.

constitutionalism in the concrete – as an ‘object’ already at use ‘in’ the social world, and in the social world of the state in particular. Considered as such an ‘object’ concept, state constitutionalism can be viewed both diachronically and synchronically. Diachronically, state constitutionalism in the modern age describes a particular high point of accumulation of various distinct layers of situated ‘constitutional’ practice that have operated separately or in different combinations in the past. These layers are juridical, politico-institutional, popular and societal.<sup>16</sup> Synchronically, state constitutionalism operates in terms of its own particular formulation of these layers and of their relationship with one another. Constitutionalism in (state) practice behaves, in other words, as a ‘cluster concept’<sup>17</sup>, associated simultaneously with a number of different but themselves interrelated definitive criteria.

It is in each of its four layers – or, if you like, in different parts of the cluster - that we can observe constitutionalism operating holistically, offering an encompassing frame for the ‘constitutive’ representation<sup>18</sup> and regulation of each of the particular dimensions of social ‘reality’ with which it is concerned. What is more, in the constellation of connections made under the sign of modern state constitutionalism between each of these layers we can also discern a further ‘frame of frames,’ or ‘holism of holisms’. Let us look more closely at each of the holistic frames of state constitutionalism separately, and then in combination.

To begin with, the juridical frame refers to an idea of self-contained legal order, complete with rules of self-production, self-organization, self-extension, self-interpretation, self-amendment and

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<sup>16</sup> See Walker, above n.13; and with specific reference to the EU, N. Walker ‘European Constitutionalism in the State Constitutional Tradition’ (2006) 59 *Current Legal Problems* 51-89.

<sup>17</sup> W. E. Connolly, *The Terms of Political Discourse* (Oxford: Blackwell, 3<sup>rd</sup> ed., 1993), 14.

<sup>18</sup> On the ways in which acts of representation of a legal object are routinely (re) constitutive of that legal object, see e.g. H. Lindahl, *Sovereignty and Representation in the European Union* in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003), 87-114.

self-discipline, all of which combine to affirm the autonomous existence and comprehensive authority of the legal order against other internal and external normative forces. The politico-institutional frame refers to a system of institutional specification and differentiation of the sphere of the public and the political. Whereas the idea of autonomous legal order long predates modernity and the modern state, the idea of a secular, specialized and institutionally defined and delimited political realm, free from deference to particular interests or to any idea of transcendental order, is a key emergent feature of modernity. It is marked by a double move away from pre-modern forms of authority, involving both the drawing of a general distinction between public and private spheres of influence domains and the integration of the public into a single and comprehensive political domain. What is more, the creation and sustenance of this singular political domain, and indeed the consolidation of the autonomous legal order, is dependent upon ‘the structural coupling’<sup>19</sup> and mutual support of the two self-contained spheres of the legal and the political.

For its part, the popular frame refers to the dimension of ‘we the people’, and so to the idea of the specialized and integrated public institutional realm being underpinned not just by the autonomy of the political but also by its democratic self-constitution and self-authorship. The societal frame, finally, refers to the idea that the constitution pertains to a particular ‘society’ self-understood and self-identified as such. Here the framing work of the constitution is mostly symbolic rather than normative. The Constitution depends for its normative effectiveness as a design for a reasonably cooperative and commonly committed form of common living on the plausibility of the very idea of an integrated society – whether the emphasis is on the thin ‘political society’ of the state or

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<sup>19</sup> N. Luhmann, *Das Recht der Gesellschaft*, (Frankfurt: Suhrkamp, 1993). [ Eng. trans. *Law as a Social System*, K. A. Ziegert (trans.) (Oxford: Oxford University Press, 2008).

the thicker 'cultural society' of the nation – that its very production and perseverance as a Constitution seeks to announce and promote.

If we look more closely at the points of interconnection between the various frames we can see begin to appreciate how a broader 'holism of constitutional holisms' emerges under the template of the modern state. At the juridical and politico-institutional levels, the constitutional order (sometimes in conjunction with self-styled 'organic laws') typically place a mix of *structural* (politico-institutional level) and *substantive* (juridical level) requirements on public actors, which may be either specific functional institutions (e.g. industry-specific regulators) or generic government organs – Parliament, Executive, and Judiciary. The structural requirements are both internal and external. They are concerned with the internal governance system of the institution in question – decision-making procedures, representational rules, internal review and accountability rules etc, as well as with the situation of the institution in question within a wider institutional complex – including all the classic checks we associate with ideas of horizontal separation of powers, of federated vertical division of authorities, and of institutional balance more generally. The substantive requirements include, in positive and constitutive vein, jurisdiction or mandate rules which specify the public purposes of the institutions in question and the boundaries of these purposes, as well as, in negative vein, certain conduct-constraining rules that may take the form of general individual rights catalogues or other more detailed rules which are likewise concerned with trans-sectoral standards (e.g. freedom of information rules, anti-corruption rules).

A number of points may be made about the co-articulation of these different types of rules. First, there is the dependence of the substantive rules on the structural rules. The structural rules provide a general framework of orientation, co-ordination and sanction that undergird the norm-

specific guidelines contained in the substantive rules. Secondly, given their various boundary-setting and transversal qualities, the substantive rules associated with a particular constitutionally recognized function presuppose and are themselves supported and rendered more effective by their situation in a legal order that ranges more broadly than the particular functional specialism in question. That broader framework constrains and informs both by locating issues of the *vires* of particular institutions in a wider context of empowered institutions and by bringing general standards of the 'right' to bear in qualifying the pursuit of the particular 'good'. Thirdly, the content of both the substantive and the structural rules is inscribed in a basic constitutional code that is relatively insulated from the particular institutions that are subject to these very substantive and structural rules. In particular, the combination of the autonomous rules of production of constitutional norms and their settled quality (perhaps entrenched in 'eternity' clauses or protected against simple majoritarian amendment rules, or at least subject to amendment provisions not within the gift of the affected institution itself), provides a form of protection against narrow forms of self-norming. Fourthly, the constitutional code is not only insulated from particular interests, but, more positively, it is receptive at points of origin, amendment and continuing interpretation to notions of common interest informed, one the one hand, by the idea of the constitution as a form of popular self-authorization over the totality of public affairs for a territory, and on the other, by the necessary discipline of ensuring widespread cooperation and compliance within the ambient society. In summary, this combination of structural primacy, institution-transcending substantive rules, insulation of rules of constitutional norm production and maintenance from control by the institutions affected by these norms, and the openness of the same rules to broader forms of public influence and discipline, provide the key ingredients of a holistic method of constitutionalism. The parts are supported by the whole both within and across the various different frames. Particular sector-specific rules and institutions

alike depend for their meaning and authority on their location within broader regulatory and institutional orders, which broader orders are informed by a similarly wide-reaching and holistic conception of the singular public as both the source and the receptive environment of constitutional authority.

#### **IV. Constitutionalism Beyond the State**

If we look beyond the state, what scope is there for the application of the holistic constitutional method? And where it is not available, how else, if at all, might constitutionalism's deep meta-political concern with the source, extent and manner of pursuit of matters of common interest be met?

Clearly, some forms of post-state regimes or polities seem to fit quite well on the 'scale' of constitutionalism considered as a layered set of holistic frames. The recent debate about the adoption of a documentary Constitution for the EU, to take the best known example, eventually crystallized as one about how an entity whose 'thin' credentials as a self-standing juridical and politico-institutional order are unarguable<sup>20</sup> might also be re-imagined and reconstructed in 'thick' terms as a popular and indeed 'political-societal' constitution – one with its own democratically sensitive self-constituting authority and its 'own' transnational society as an object of reference.<sup>21</sup> The EU, in other words, clearly already possessed holistic constitutional qualities in certain layers, and the outstanding question concerned whether this could be extended across all the layers of modern constitutional practice. Once the supporters of the project were no longer satisfied with the documentary constitutional process as an exercise in self-congratulatory consolidation of its

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<sup>20</sup> See e.g. J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), ch.1.

<sup>21</sup> See e.g. Walker, n16 above.

'thin' (juridical and politico-institutional) credentials, or at least once they were no longer permitted by their opponents to treat the question so complacently, the 'thin' versus 'thick' question came more clearly into focus in the constitutional debate. That this ultimately led to the idea of a European Constitutional Treaty being voted down in the key French and Dutch referenda in 2005 neither undermines the relevance of the wide discussion nor, indeed, precludes its being revisited at some future point.<sup>22</sup>

In other cases such as the WTO or the UN, the debate over the nature and limits of constitutional holism is very much more confined to the 'thin' legal and politico-institutional registers, with no pretence of and little ambition towards a popular constituent power or dedicated 'society' at the relevant sites.<sup>23</sup> Even here, however, there is no doubt about the applicability of a holistic method, even if to a truncated conception of constitutionalism. Indeed, it is precisely the well-established quality of a modest constitutional holism in these more limited regimes as much as in the hybrid regime of the EU that feeds much of the argument for post-state constitutionalism, with the formalist approach trading on the holistic quality of the juridical layer and the substantivist approach trading on the holistic quality of the institutional layer.

Another type of case, however, stands more clearly detached from the tradition of state constitutionalism. Here we refer to the various other autonomy-assertive transnational societal actors exhibiting normative authority and institutional identity who increasingly claim or are deemed to possess constitutional standing,<sup>24</sup> whether in the field of internet (e.g. ICANN) or

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<sup>22</sup> See e.g. N. Walker, 'Not the European Constitution' (2008) 15 *Maastricht Jnl. Of European and Comparative Law* 115-121

<sup>23</sup> See references at fns 5 and 6 above.

<sup>24</sup> See e.g. Teubner, above n.7, and 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' (present volume)



transnational commercial regulation( e.g. *lex mercatoria*) or the regulation of sports (e.g. International Olympic Committee, World Anti-Doping Agency). In this context, we find a much more comprehensive move away from the holistic method, and so an even starker confrontation of the question of whether and how the broader meta-political end of regulating our common affairs in accordance with considerations of the common interest can survive the erosion of the state-originated holistic constitutional method.

If we look first to the juridical and political-institutional layers, the idea of holistic self-containment fits ill with the combination of site-specific self-regulation and diverse external regulation we tend to find in these sectors. While there is typically a dense network of structural and substantive rules, we will not find the same holistic framework for their co-articulation. Internally, structural rules may be found in autonomous enterprise or organizational laws. Externally, different legislative, executive and judicial bodies at national, international and supranational, level will stand in various structural relationships with the actors. Substantively, again we will find the same complex mixture of self-regulation and uncoordinated external regulation, through for example, horizontal application of human rights rules and the general regimes of international standards bodies (e.g. *Codex Alimentarius*, International Standards Organization). What is lacking in either case is any idea of an integrated and comprehensive legal and institutional design external to the sector in question.

Equally, the idea of the holistic self-constitution of a popular 'subject' or of a societal 'object' does not translate easily to the domain of the new transnational societal actors. In either case – popular and societal - the wider and deeper embeddedness associated with state constitutionalism is lost insofar as there is no sense of an integrated and generic 'public' context which stands beyond the

special institution in question but within which the special institution is fully incorporated. So there may be a significant degree of domain-specific self-authorship, but it neither is identical to nor delegated from any more integrated and generic public. Equally, there may be constituted a 'society' in the sense of a particular epistemic community and/or community of practice associated with the domain in question, but that too is neither identical to nor a subset of any integrated and generic 'public society'.<sup>25</sup>

It follows from this that none of the connecting elements – the 'holism of holisms' – of state constitutionalism can be guaranteed. In the first place, given the diversity of their pedigree (both as separate sets, and, even more so, when considered together), the relationship between the set of structural rules and the set of substantive rules lacks the coherence of the state model. So the structural rules cannot provide the functions of orientation, co-ordination and constraint vis-à-vis the substantive rules in the 'close fit' manner that characterizes their relationship within the holistic state constitution. Secondly, there is no commonly bound general constitutional context to provide the transversal controls upon and wider jurisdictional context for sector-specific substantive rules. Because the transnational societal actor is not located within a wider complex of international societal actors, each subject to the same transversal rules and the same broader jurisdictional frame, the kinds of constraint and direction that a state constitution can provide by ensuring common negative standards and providing for the mutual co-ordination of different jurisdictional horizons cannot apply in the same way. Finally, the absence of any broader, singular

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<sup>25</sup> We should, of course, bear in mind Teubner's qualification that the 'society' of the state constitutional imaginary was always in an important sense a partial vision (fn. 7 above). It was first and foremost a 'political society' – it was about the mutual self-constitution of law and politics and not necessarily concerned with other social sectors or sub-systems (economics, culture etc). But even if we allow this important point of social epistemology, we still have to take seriously the distinctively 'totalizing' ambition contained in the claim of modern political society to constitute a generic and integrated public sphere, and also recognize the powerful historical synergy between this ambition and the development of a deeper 'cultural' nationalism.

and autonomously-conceived transnational constitutional frame as an appropriate point of common reference both reflects and highlights the absence of any integrated and generic sense of the transnational public as the subject and object of any such regulatory field.<sup>26</sup>

## V. Beyond Constitutional Holism?

So the new transnational societal constitutionalism, such as it is, is clearly not simply a more ‘thinly’ layered version of state constitutionalism, with the thicker popular and societal frame absent - as in the EU and in other less well-developed cases - but a constitutionalism that is reconfigured in each of its framing aspects. The idea of a holistic constitution is lacking in each of the four registers. What we have instead is a complex mix of discrete self-constitution and diffuse external constitution across all four registers – legal, politico-institutional, popular and societal.<sup>27</sup> To what extent, if at all, can we nevertheless conceive of this new non-holistic constitutional method as concerned with, and as effectively engaged in, the same meta-political function as holistic state constitutionalism; namely, the reflexive consideration of the proper locus, jurisdiction and content of the common interest in matters concerning the organization and regulation of collective decision-making? On the face of it, absent the anchorage for a working

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<sup>26</sup> On the effect of the decline of holistic constitutionalism on the overall global regulatory field, rather than on the pattern of regulation within particular sectors, see N. Walker ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *International Journal of Constitutional Law* 373-396.

<sup>27</sup> We should also distinguish non-holistic societal constitutionalism from the kind of post-national constitutionalism favoured by writers like Jim Tully. For him and others, the main focus of criticism remains the state form, not from the perspective of a functional differentiation which makes the holistic state constitution inadequate to the range and distribution of *collective practices* but rather from the perspective of a cultural differentiation (first nations, gendered identities etc) which makes the holistic state constitution inadequate to the range and distribution of *collective identities*. His version of non-state constitutionalism, accordingly, is about the re-articulation of a much greater diversity of holistic identities than the state form allows rather than the transcendence of the very idea of holistic constitutionalism, although, as explained in the text below, and as Tully would endorse, any such generously and diversely populated constitutional landscape implies, distinct from the classic (inter) state version, the non-comprehensiveness of each holistic structure and the much greater zone of overlap between each holistic structure, and so the greater scope and need for (non-holistic) legal relations between these holistic structures. See e.g. J. Tully, ‘The Imperialism of Modern Constitutional Democracy’ in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 315-338.

conception of the common interest provided by the coincidence of at least some if not all of the four holistic frames under the same territorial co-ordinates, any prospect of a meaningful investment in these meta-political questions of the common interest would seem distinctly unpromising. Yet, for at least three reasons, we should remain slow to dismiss the possibility of a non-holistic constitutionalism.

In the first place, there is the question of the viability of other possible constitutional worlds. What are the alternatives, and so what can and what should we compare the new non-holistic candidates for constitutional status with? The most telling comparator for current trends towards decisively non-holistic forms of constitutionalism is not, as often seems to be assumed by the advocates of state constitutionalism, the *past* of state constitutionalism, but the form and circumstances of its *present* incarnation. The high-point of the holistic state constitutional method is long gone. In acknowledging this, we must also appreciate that much of what is new in transnational regulatory development, whether in the form of hybrid structures such as the EU or WTO or through the more radical forms of societal constitutionalism, is the result not of inadvertent drift or of so many grabs for power devoid of any public justification, but instead is in some part at least a response to the growing inadequacy of the holistic state model in the face of the emergence of collective action and co-ordination problems that simply do not coincide with the political boundaries of the state. The new world even of the familiar and deeply embedded category of state constitutionalism, it follows, is not the same as the old. The new state constitutionalism may remain holistic in the sense that in each of the four framing registers it continues to emphasize the importance of the integrity of the whole and the interdependence of its parts, but this holism is qualified to the extent that it can no longer aspire to an all-embracing

quality. Rather, state constitutionalism becomes an ‘open’ or ‘relational’ constitutionalism,<sup>28</sup> concerned to engage in accordance with a necessarily non-holistic logic with the very hybrid polities and non-holistic spheres of governance that have been the focus of our attention, and with which the norms, institutions, demoi and societal ‘objects’ of the state constitutional order overlap. In short, by their emergence the non-holistic constitutional forms serve to indicate, and through their regulatory penetration they serve to reinforce the inadequacy of the very model of holistic state constitutionalism with which, ironically enough, they are often unfavourably compared. And to the extent that there remains a point of comparison between old and new constitutional constellations, it is a matter of more or less emphasis upon a now heavily qualified state constitutional holism rather than a stark either/or choice between holism and its opposite.

In the second place, there is the question of (meta-) political morality and prudence. Such important differences of emphasis as do remain between more or less holistic constellations, and the choices associated with these, are not necessarily beyond evaluation in terms that we find constitutionally meaningful. Rather, we remain capable of articulating at least some elements of the common language that would allow us to assess the relative merits and demerits of the holistic and non-holistic approaches to meta-politics, and to do in such a way that suggests that the more holistic solution is not always the better or more ‘constitutionally’ appropriate.

Holistic constitutionalism, even in qualified form, can lay claim to many political virtues; to the formal equality and calculability dividends that may accrue to a legal order with a single all-embracing centre; to reliable juridical transmission of the (democratically formed) political will; to co-ordinated and mutually vigilant forms of institutional balance; to popular collective self-determination, and to a sense of societal solidarity necessary to make that collective self-

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<sup>28</sup> See e.g. Walker, above n.9.

determination effective. But such a model also demonstrates instability at either edge of its precarious accomplishment. On the one side, just because of its all-embracing reach and its exhaustion of the available mechanism of political influence and restraint, holistic constitutionalism is peculiarly prone to capture by powerful special interests and ideologies in any or all of its framing registers. On the other side, the same propensity to stretch across and absorb the entirety of the political sphere may mean that holistic constitutionalism attracts certain disabling tendencies, including a tendency towards inter-institutional stasis and gridlock and towards a thinly spread culture of common commitment. That is to say, comprehensive self-containment of the political sphere may always have been the major strength of holistic constitutionalism, but it also speaks to its irreducible vulnerability and ineradicable sources of danger.

This double-edged concern illustrates and so points us towards certain perennial preoccupations over the best mode of accommodation between certain contrasting but balancing virtues associated with the identification and pursuit of the common interest in constitutional arrangements - between attachment and detachment, the special and the general, the particular and the universal, the passionate and the constraining. Holism in the container of the state seeks ever more regulatory distance and abstraction (in substance, in structure and in pedigree) and ever more investment in a broader scheme of political commitments as a guide to and means of avoiding concentration of power in particular institutions, all the while courting the opposite dangers of more expansive forms of political partiality or the dilution of the capacity for the effective mobilization of political authority.

These moral and prudential concerns are not foreign to the new non-holistic constitutionalism. Rather, it is simply that its institutional logic is such that these concerns present themselves in inverse form. The problem for non-holistic constitutionalism is neither the corruption and capture nor the impotence of the regulatory whole, but precisely the same dangers of over-steering and under-steering under the opposite condition of the *absence* of any such regulatory whole. And the key design puzzle in addressing these dangers of over-steering and under-steering concerns the appropriate mode of articulation of the internal and external elements within the legal and politico-institutional structure (in the first two framing layers), bearing in mind the fundamental irreducibility of the 'constituency' and 'own society' of the relevant community of practice to some integrated and generic notion of the public (in the third and fourth framing layers). It is quite understandable, then, that so much of contemporary transnational 'constitutional' thinking is concerned to develop 'substantive' and 'structural' rules in a manner that seeks to compensate or substitute both for the myopically self-interested tendencies (oversteering) and for the absence of effective leverage over external factors of influence (understeering) that accompany the lack of embedding of narrow self-regulatory spheres in a wider, holistic constitutional framework. So, for example, we find an increasing emphasis on the language of universal human rights,<sup>29</sup> on the widespread franchising of general regulatory standards,<sup>30</sup> and on the promulgation and internalization of codes of corporate responsibility<sup>31</sup> as ways, primarily, of correcting for the sectoral self-interest of particular transnational societal actors, but also of encouraging or facilitating the greater mutual coherence of their regimes. On the structural side, too, we see a number of trends that have the same double purpose and effect of addressing the dangers of

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<sup>29</sup> See e.g., Petersmann, above n.5.

<sup>30</sup> See e.g. H. Schepel *The Constitution of Private Governance - Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2005).

<sup>31</sup> See e.g. D.J. McBarnet, 'Corporate Social Responsibility: beyond law, through law, for law: the new corporate accountability' in D McBarnet, A Voiculescu, T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007), ch.1.

oversteering and understeering. This can be observed, for instance, in attempts to develop new forms of general discipline as well as to trace new ways of joining up connected regulatory concerns through initiatives such as the elaboration of general principles of Global Administrative Law,<sup>32</sup> the replication and refinement of New Modes of Governance,<sup>33</sup> and the 'rolling out' of local or sector-specific forms of democratic experimentation and problem-solving.<sup>34</sup>

In all of this, admittedly, the similarities and continuities in the meta-political concern with the common interest in the organization and regulation of collective decision-making between past and present - and so between more or less holistic constitutional constellations - operate at a high level of abstraction, require careful translation and certainly do not admit of any easy general conclusions. Still, there is something resiliently recognizable at stake between old and new understandings of these deep questions of regulation which may merit our continued use of constitutional language as an analytical and evaluative tool for both.

This brings us, finally, to a third consideration, namely the practical question of the use-value of constitutionalism. It is one thing to argue on the rarified level of theoretical observation that we can trace a connection between the old and the new, and to remind ourselves that in terms of viable political possibilities the difference is no longer one of kind but of degree. If, however, below that rarified theoretical level, there is little actual use of constitutionalism as a common vernacular extending across the two contexts, and if what use there is has instead the divisive and mutually alienating consequences discussed in our opening section, then what is gained by

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<sup>32</sup> See e.g. B. Kingsbury, N. Krisch and R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68(3) *Law & Contemporary Problems* 15-61.

<sup>33</sup> See e.g. G. de Burca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

<sup>34</sup> See e.g. C. F. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271-327.



retaining the constitutional idea for the emerging realm of transnational societal actors? This note of scepticism is deeply underscored, moreover, if we consider the key underlying reason for the scarcity of an inclusive use-language of constitutionalism in the post-state holistic regulatory context. This has to do with the lack of the additional, inclusively reflexive 'fifth layer' of constitutionalism within the non-holistic picture, namely the 'frame of frames' or 'holism or holisms'. Absent the coincidence of the other four frames, not only, as already noted, is it objectively the case that constitutionalism is deprived of the single anchorage of a convergence of sites and frames of common interest. At the intersubjective level, too, participants will lack the common 'we' perspective and point of commitment from which to address all questions of the common interest. Instead, we are bound to accept in a post-holistic context that questions of the common interest in collective decision-making are simply not questions that, at the deepest level of political self-interrogation, we can envisage all interested constituencies affected addressing comprehensively *in common*.

Does this not, at last, provide the decisive argument against the value of retaining the language of constitutionalism in the non-holistic context? I would contend that it does not. The explicit adoption of constitutional language in non-holistic settings may remain largely restricted to theoretical and other elite discourse. But the trend, however hesitant and uneven, is towards wider use, and, as the example of the intermediate cases of the EU, WTO etc. show, there do exist recent precedents for largely theoretical discourses of post-state constitutionalism gradually to 'catch on' at deeper social and political levels. Much more important is what the resilience and resurgence of constitutional language, however patchy on the ground, might signify. Even - indeed especially - where, as compared to the holistic constitutional tradition, the central issues of non-holistic forms of regulation present themselves in such different ways and are offered a quite

distinctive range of regulatory solutions, constitutional language retains a crucial longstop function as a kind of 'placeholder'<sup>35</sup> for certain abiding concerns we have. These concerns are, quite simply, that unless we can address the meta-political framing of politics in a manner that remains wedded to ideas of the common interest, however difficult this may be to conceive and however far we have travelled from our most familiar and perhaps most conducive framework for such a task, something of great and irreplaceable value will have been lost from our resources of common living.

There is one final irony here. It is precisely because the language of constitutionalism, considered as a normative technology, finds it ever more complex and difficult to address the problems of communal living it poses in and for a post-state-world, that it becomes all the more important to retain the language of constitutionalism, considered as a symbolic legacy, as an insistent reminder of what and how much is at stake. The day that constitutionalism's inability to provide stock answers to its abiding questions becomes a settled reason no longer even to ask these questions is the day that constitutionalism, and the vital spirit of meta-political inquiry that it conveys, will indeed have entered the twilight zone.

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<sup>35</sup> The reference is to Martti Koskenniemi, who has made a similar point about the contemporary fate of international law: see M. Koskenniemi 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1-30, 30.