Introduction

Chapter 1: Introduction: The 'Circumstances of Constitutional Pluralism'

1. A Pluralist Tale

In April 1992, a small, recently incorporated Turkish airline charter company entered into an agreement with a Yugoslav-owned airline company to lease two aircraft with a view to operating charter flights to and from Turkey for the upcoming summer holiday season. The ensuing complex legal and institutional web in which this simple commercial leasing agreement became ensnared speaks clearly to the pluralism of our contemporary law and governance.

The company, Bosphorus Hava Yollari Turizm ve Ticaret A. S. ('Bosphorus Airlines') leased two aircraft from JAT (Jugoslovenski Aerotransport - the flag airline carrier of the former Yugoslav state) for the use and control of the aircraft which was registered under Turkish law pursuant to the Chicago Convention on International Civil Aviation of 1944. [1] In 1993, the company entered into an aircraft maintenance agreement with TEAM Aer Lingus, an Irish aircraft maintenance company indirectly owned by the Irish state based in Dublin, Ireland. In May 1993, one of the aircraft operated by *Bosphorus Airlines* arrived in Dublin for maintenance, a service contract

[1] The facts are mainly drawn from Part I of the judgment of the European Court of Human Rights (*Bosphorus Airways v Ireland* [2005] European Court of Human Rights 45036/98.) as well as the Opinion of the Advocate General and the ECJ's decision in the Irish Supreme Court's preliminary reference (Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret A. S. v Minister for Transport, Energy and Communications, Ireland and the Attorney General, [1996] ECR 1-3953).

under Irish law was signed and, by the end of the month, the company had been informed that the aircraft would be released on payment of a service fee due under the contract. Payment was duly made, and the aircraft was released by TEAM Aer Lingus. However, while awaiting air traffic clearance for take-off on the tarmac at Dublin airport, the aircraft was stopped by Dublin airport air traffic control. TEAM Aer Lingus had been advised by the Irish government that allowing the aircraft to leave could constitute a breach of United Nations Security Council Resolution 820 (1993) as interpreted by the UN Sanctions Committee. This was one of a series of sanctions taken by the United Nations Security Council (UNSC) against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) to address the armed conflict and human rights violations there during the Balkan conflict of the early 1990s. The Sanctions Committee itself was established by UNSC Resolution 724 (1991) under Chapter VII of the United Nations Charter to administer the various subsequent resolutions of the UNSC relating to the war in the former Yugoslavia.

The Irish government's notification of Dublin air traffic control was confirmed in a subsequent letter by the Irish Government of June 1993 which stated that in their view, allowing the aircraft to depart would breach UN sanctions as well as Council Regulation (EEC) no. 990/93 of the Council of the European Union aimed at implementing the sanctions of the UN Security Council for Member States of the European Union. In the same month the Irish government adopted regulations pursuant to Irish law authorizing the impounding of the aircraft until further notice.[2] Attempts by the airline and the Turkish government to release the aircraft (including an offer to

[2] The European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (Statutory Instrument no. 144 of 1993).

impound the aircraft in Turkey) were unsuccessful in the light of the direction of the UN Sanctions Committee.

Bosphorus Airlines sought a judicial review in Ireland of the Irish government's decision to impound the aircraft in November 1993. Various actions before the Irish High Court in 1994 and 1995 found that the applicable law to the case was the attempted implementation of the UN sanctions by the EU in the form of EU regulations, rather than the sanction measures under the UN Charter directly which could not, the High Court found, have binding effect on the Irish government unless implemented into Irish law. The first of those decisions was appealed to the Irish Supreme Court in the matter of the interpretation of the EU regulation which implemented the sanctions. The Supreme Court referred the interpretation of the regulation to the European Court of Justice (ECJ)[3] in 1995. The ECJ found that the Irish High Court's interpretation of the EU regulation as not relating specifically to aircraft (thereby making the impounding unlawful) was incorrect and then considered the proportionality of the measure in the light of EU fundamental rights law (which was partly based on the law of the European Convention of Human Rights), concluding that the requirement to sequester the aircraft was a proportionate interference with the right to peaceful possession of property protected by the ECHR.[4] This was remitted to the Irish Supreme Court which ordered that the impounding order be reinstated. Ultimately, the UNSC suspended the regulations pursuant to which the aircraft was impounded in the light of the improving situation and peace negotiations in the FRY and released the aircraft back to the

[3] As it then was.
[4] Case C-85/95, ECR I-3978, Judgment of 30 July 1996.

proprietor of the planes, JAT, in 1997.[5] *Bosphorus Airlines* then launched an action against Ireland before the European Court of Human Rights (ECtHR) in 1997, alleging that it had breached its Convention obligations not to interfere with the peaceful enjoyment of possessions under Article 1 of the 1st Protocol of the Convention. The ECtHR delivered its judgment in 2005, finding that Ireland could not be considered in breach of its Convention obligations where it was acting pursuant to a directive from an organization of which it was a member, provided that the human rights protections provided by that organization were comparable with those under the Convention. In the event, the Court found that EU law contained sufficient rights guarantees such that *Bosphorus Airlines*' rights had not been violated when Ireland followed EU law in this case.

This legal saga, is, perhaps, best remembered for the judgement of the ECtHR which clarified the human rights obligations of Convention states in respect of their membership of international organizations, as well as endorsing a doctrine of 'equivalent protection' in international human rights law more generally.[6] However the fact pattern of the case also provides a particularly graphic example of the pluralistic nature of law and governance in the contemporary world. If we focus on the judgment of the ECtHR, we can see that the case before this particular Court had, by this stage, implicated a variety of distinct legal systems and political institutions. In terms of legal systems, the case had implicated Turkish law, Yugoslav law, elements of conventional

[5] *Bosphorus Airlines* in the interim had shut down due to financial trouble. B. I. Hengi, *Airlines Remembered; Histories and Operations of 204 Airlines of the Last 30 Years* (Midland Publishing 2000).
[6] *Bosphorus Airways v. Ireland* (n 1) paras. 155-156.See Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights Recent Development' (2010) 10 Human Rights Law Review 529.

public international law (the Chicago Civil Aviation Convention 1944, the United Nations Charter and bodies and decisions set-up and taken under its authority), elements of conventional private international law (the leasing agreements between JAT and *Bosphorus Airlines* and the aircraft service maintenance agreements between *Bosphorus Airlines* and TEAM Aer Lingus), as well as supranational law (EU law in the form of the UN sanction-implementing regulations, EU fundamental rights law incorporating, in part, ECHR law, and ECHR law directly) and the national constitutional and administrative law of Ireland. Moreover, the plurality of institutions included judicial institutions — the Irish High Court, the Irish Supreme Court, the ECJ and the ECtHR — as well as political and administrative institutions of the Irish state — the Departments of Transport and Foreign Affairs as well as its Permanent Mission to the UN — the Turkish State — the Turkish Foreign Ministry and Ministry of Transport, the Turkish Central Bank, the Turkish ambassador to Ireland as well as its Permanent Mission to the UN — the United Nations — the Security Council and the Sanctions Committee — and the EU legislature.

Of course, complex transnational litigation is hardly new and legal pluralists have for decades highlighted the complex social realities of law involving various types of norms and authorities.[7] However, this case presents an example of the increasingly complex legal realities involving overlapping legal systems and authority-claims involving *transnational* law and governance that form the focus of this particular book.[8] These

[7] For a comprehensive overview of recent debates, see generally Paul Schiff Berman, *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020).

[8] Thus, from the perspective of legal pluralism, the focus of the current volume lies in what Michaels' has termed the 'third wave' of legal pluralism. Ralf Michaels, 'Global Legal Pluralism' (2009) 5 Annual Review of Law and Social Science 243. 'Transnational law' here, taking a pluralist ethos, encapsulates the broad range of legal systems captured within Jessup's well-known definition of "all law which regulates actions or events that transcend national frontiers." Philip Jessup, *Transnational Law* (Yale University Press 1956) 1. Each context of

realities have conventionally been captured in terms of a shift from a simple 'Westphalian order' of sovereign states to something altogether more complex, where the state as the supreme (or even exclusive) legal and political actor is demoted from the center of the political and legal universe to one among a number of actors in a broader setting, where suprastate governing and adjudicatory bodies rival states for authority and influence.[9] These 'new constitutional horizons' constitute what, in the present volume, we call the circumstances of constitutional pluralism.

2. The Circumstances of Constitutional Pluralism

The idea of the circumstances of constitutional pluralism draws upon Hume's idea of the conditions for justice, as developed and elaborated by Rawls in terms of the 'circumstances of justice.'[10] Hume first posited the facts about the world which give rise to the need for theories of justice in human relations in terms of individual 'selfishness' and the finitude of 'possessions.'[11] For Hume:[12]

" 'tis only from the selfishness and confin'd generosity of man, along with the scanty provision nature has made for his wants, that justice derives its origin."

legal pluralism raises its own discrete set of questions for theories of law and political authority (for discussion in the transnational context see Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020). However, this does not necessarily imply a methodological 'pluralism of legal pluralisms' where the distinctiveness of each instance of legal pluralism requires entirely novel concepts and methods. For a discussion of this possibility see Cormac Mac Amhlaigh, 'Pluralising Constitutional Pluralism' in Andrew Halpin and Nicole Roughan (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017). Rather, given that our theoretical inquiry remains at a general level – in what we might call a 'general jurisprudence' of constitutional pluralism – the theoretical approach is of relevance to all contexts of legal pluralism.

[9] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 5.

[10] John Rawls, *A Theory of Justice* (Harvard University Press 1973) 109.

[11] David Hume, *A Treatise of Human Nature*, vol I (David Fate Norton and Mary J Norton eds, Clarendon Press 2007) 318.

[12] ibid.

Rawls's development of these ideas in the form of 'limited altruism'[13] and 'moderate scarcity'[14] constituted his 'circumstances of justice', which are the "normal conditions under which human cooperation is both possible and necessary."[15] For Rawls, the circumstances of justice represent 'background conditions' that "define the role of justice", which obtain "whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity".[16] Hume and Rawls's approach to justice, then, involves stipulating the conditions under which a theory of justice is *relevant*. A world without scarcity and limited altruism would not, in Hume and Rawls's view, be justice-apt.[17]

This idea is developed by Weale and Waldron to elaborate on the conditions under which theories of *democratic legitimacy* are necessary.[18] Like the assumptions of Hume and Rawls regarding the circumstances of justice — that humans have, in reality, limited levels of altruism, and that resources are, in fact, finite — Weale and Waldron elaborate the 'circumstances of politics',[19] involving particular facts about the world that become the conditions of their theories of political legitimacy. For Weale, these assumptions are constrained generosity, bounded rationality and path-dependence, and they set feasibility constraints on our accounts of legitimate decision-making.[20] For

[13] Rawls, *A Theory of Justice* (n 10) 146.
[14] ibid 109–110.
[15] ibid 126.
[16] ibid 110.
[17] "Encrease to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings. The selfishness of men is animated by the few possessions we have, in proportion to our wants; and 'tis to restrain this selfishness, that men have been oblig'd to separate themselves from the community, and to distinguish betwixt their own goods and those of others.' Hume (n 11) 317–8.
[18] Albert Weale, *Democracy* (2nd edition, Palgrave Macmillan 2007).; Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).
[19] Weale (n 18) 12–18.; Waldron (n 18) 101–3.
[20] Weale (n 18) 17.

Waldron, the circumstances of politics emerge from the desire to reap the rewards of co-ordinated action while disagreeing, sometimes radically, about how those goods should be achieved.[21] Like the circumstances of justice, the elements of the circumstances of politics come together. If there were no need to act in concert, then disagreement would not matter; similarly, a 'felt need' for concerted action would not give rise to politics if there was no disagreement on how to act.[22]

The 'circumstances' of justice and politics serve a variety of roles in theory-building. They stipulate the conditions under which the theory is necessary. Moreover, they also serve to inject an element of realism into our theorizing by paying attention to feasibility constraints to ensure that our theories adequately explain the world, are not radically counterfactual or utopian depending on the specific purposes of our theorizing.[23] Thus, the various circumstances of justice and politics attempt to set the conditions for theorizing society as it is, as opposed to how it 'might be', to paraphrase Rousseau.[24] Finally, they set the conditions for the development of the normative standards of the particular theory in question. These circumstances provide the basis for theorizing how decisions should be made, for Hume and Rawls justly, or, for Weale and Waldron, legitimately.

Here we draw on these observations regarding the 'background conditions' which give rise to the circumstances of justice and politics to argue for the *circumstances of*

[21] Waldron (n 18) 102.
[22] Waldron (n 18). For a discussion and critique of Waldron's view see Alexander Latham-Gambi, 'Jeremy Waldron and the Circumstances of Politics' (2021) 83 The Review of Politics 242.
[23] Weale (n 18). See further Chapter 7.
[24] "My purpose is to consider if, in political society, there can be any legitimate and sure principle of government, taking men as they are and laws as they might be.'.' J.-J. Rousseau *The Social Contract* as cited in John Rawls, *The Law of Peoples: With, the Idea of Public Reason Revisited* (Harvard University Press 1999) 13. For further discussion see Chapter 7.

constitutional pluralism as establishing the conditions for theorizing contemporary legal and political practices, as exemplified by the *Bosphorus Airlines* case considered above. The circumstances of constitutional pluralism involve an *institutional* and *multilevel plurality* of *applicable law and institutional authority-claims* at different levels of governance, including the transnational level.[25] It is not only the case that law and governance in the contemporary world is made up of different norms, sources of law and institutional actors claiming authority[26] — including, but not limited to, the *trias politica* of states — but also that these diverse sets of norms and authority-claims are applicable to, and made over, the same fact patterns and sets of subjects.[27] Furthermore, these authority-claims elicit, in turn, disagreement as to what legitimate authority requires and what sorts of institutions can make authentic claims to legitimate authority, which is redolent of the reasonable pluralism of philosophical and moral views which Rawls sets as one of his constraints on theories of liberal democracy,[28] and also forms the basis of Weale and Waldron's accounts of the circumstances of politics.[29]

Thus, like the circumstances of justice and the circumstances of politics, the circumstances of constitutional pluralism are made up of the 'background conditions' which inform our understanding of the world as it is which set the conditions for our

[25] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317, 339. See also Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013).
[26] What Roughan calls 'same-domain' plurality. Roughan (n 25) 46.
[27] Building on the accounts of legal pluralism advanced by Griffiths and Engle Merry in terms of the co-existence of two or more legal systems in the same 'social field'. See John Griffiths, 'What Is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law 1, 2. Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869, 870.
[28] John Rawls, *Political Liberalism* (Columbia University Press 1993)., 36; Rawls, *The Law of Peoples: With, the Idea of Public Reason Revisited* (n 24).
[29] Weale (n 18).; Waldron (n 18).

theorizing. In this respect, our 'background conditions' of the circumstances of constitutional pluralism involve a constitutional *plurality* of applicable legal systems and plausible authority-claims over the same sets of facts and norm-subjects, as illustrated by the *Bosphorus Airlines* case, well as disagreement borne of a value pluralism about what legitimate constitutional authority requires and whether we can pick out a 'correct' authority claim among the plurality. Moreover, our normative conclusions regarding what we should do in the face of such plurality is our theory of constitutional *pluralism*.[30] Under the circumstances of constitutional pluralism, then, *plurality* denotes a *descriptive account* of our contemporary world in terms of multiple applicable legal systems and authority-claims alongside a second-order disagreement about which authority-claims are correct which set the 'background conditions' for a normative account of pluralism; while *pluralism* denotes our *normative account* of how we should act in the face of such plurality.[31] Like the circumstances of justice and the circumstances of politics, the circumstances of constitutional pluralism reflect the need for legitimate decision-making in the face of a plurality of values as well as authority claims at different levels of governance over the same set of subjects. In this way, the circumstances of constitutional pluralism force us to think of law and authority in a non-monistic way. That is that our contemporary accounts of law and legitimate authority do not assume that all valid and applicable law belongs to the same legal system, nor that justified political decision-making is reducible to a single ultimate and final form of authority which makes a more 'authentic' or 'correct' claim to legitimate political

[30] In adopting the plurality/pluralism distinction as tracking the descriptive and normative dimensions of transnational legal pluralism, I follow Roughan (n 25) 44.
[31] Roughan (n 25).

authority in all cases.[32]

3. New Constitutional Horizons: Between Constitutional Plurality and Constitutional Pluralism

The challenges posed by the circumstances of constitutional pluralism therefore prompt us to think in terms of a pluralist account of legality and legitimacy.[33] In order to explore these questions, then, in the current volume we exploit the field of constitutional theory as a particularly useful "way of world-making"[34] which can serve to capture the descriptive and normative questions which the circumstances of constitutional pluralism pose for our understanding of law and governance in the contemporary world.

In its analytical register, constitutional theory offers a "purely descriptive"[35] account of law where a 'constitution' is a "conceptual necessity of every legal system"[36] whose 'function' is the "grounding of [the] validity"[37] of law. Thus, the idea of a constitution for the descriptive part of our enterprise is equated with the idea of legal system or *legality*,[38] particularly as developed primarily by the 'canon' of analytical legal

[32] See ibid. A similar idea to the circumstances of constitutional pluralism as presented here is captured by Walker's 'epistemic pluralism' which involves acknowledging that "the underlying symbolic work involved in representing each [authority site] as units — and so also as *unities* — requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled." Walker, 'The Idea of Constitutional Pluralism' (n 25) 338.

[33] See generally Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017).

[34] Nelson Goodman, *Ways of Worldmaking* (Hackett Publishing 1978).

[35] Charles McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund 1947)., 26. *Emphasis Added.*

[36] John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 89.

[37] Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 199.

[38] Where 'legality' here equates with the criteria of validity of law as contained within a legal system. See Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2003) Lecture 7. See also Scott J Shapiro, *Legality* (Harvard University Press 2011) ch1.

theory.[39] In this sense, then, a *constitutional* plurality involves a plurality of *constitutions*; that is, a plurality of legal *systems* potentially applicable to the same fact patterns and sets of legal subjects. However, unlike, say, moderate scarcity and limited altruism which give rise to the circumstances of justice, the 'circumstances of constitutional pluralism' raise a series of questions regarding our understanding of the 'background conditions' of our account of constitutional pluralism in terms of our pluralist account of legal systems. These questions primarily relate to the compatibility of our account of legal systems with the constitutional plurality which features in our circumstances of constitutional pluralism. They have been the subject of considerable attention in discourses of legal pluralism in recent decades, and the first part of the book is focused on examining the ways in which constitutional plurality can be theorized as the circumstances of constitutional pluralism. In particular, theorizing the circumstances of constitutional pluralism raises two conceptual questions for an account of constitutional plurality: the first relates to the question of whether our concepts of law and legal system, particularly in the analytical tradition, are apt to theorize non-state forms of law; and secondly, whether the tendency in accounts of legal systems to assume a 'perspectival monism' of valid law[40] — what we call here a 'monist manner' — can be overcome to better capture the circumstances of constitutional pluralism. These questions regarding the theorization of the circumstances of constitutional pluralism itself, that is the conceptual assumptions about a world of constitutional

[39] Paradigmatically that advanced by Raz; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980).; Joseph Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009). Of course, what, precisely, we mean by 'analytical legal theory' and what is included in its 'canon' is something which itself requires further consideration. This is taken up in Chapter 2.
[40] See Kaarlo Tuori, 'Perspectivism in Law' in Rain Liivoja and Jarna Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (Taylor & Francis Group 2013).

plurality, take up the first part of the book.

Our normative theory of *pluralism* draws on the idea of *constitutionalism* which has a particular storied "tradition"[41] as a "standard"[42], "touchstone"[43] or "code"[44] of political legitimacy. Here our circumstances of constitutional pluralism loom large in terms of disagreements about the relationship between the concept of constitutionalism and legitimate authority as well as whether the diverse authority-claims within the constitutional plurality can be organized into 'true' or 'false' authority-claims, or more or less authentic claims to legitimate authority depending on the level at which it is made. In particular, the circumstances of pluralism elicit considerable disagreement as to whether non-state sites can make claims to legitimate constitutional authority, a disagreement which is exemplified by the 'no-demos' thesis which attaches itself to non-state constitutional authority claims.[45] In this part we explore the ways in which we can develop a normative theory of constitutional pluralism by addressing these questions.

In constitutional theoretical terms, then, the book approaches the circumstances of constitutional pluralism in terms of a constitutional 'plurality', a pluralist theorization of the concept of law and legal system and authority claims,[46] as well as a constitutional 'pluralism' which looks at the ways in which the constitutional tradition can be pluralized to provide a normative standard of legitimate decision-making under the

[41] Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 158.
[42] Gordon J Schochet, 'Introduction: Constitutionalism, Liberalism and the Study of Politics' in James R Pennock and John W Chapman (eds), *Constitutionalism* (New York University Press 1979) 2.
[43] Daniel Bodansky, 'Is There an International Environmental Constitution?' (2009) 16 Indiana Journal of Global Legal Studies 565, 583.
[44] Neil Walker, 'Postnational Constitutionalism and the Problem of Translation' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press 2003) 38.
[45]For discussion see Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) ch2. See further Chapter 7.
[46] Roughan (n 25) 44.

circumstances of constitutional pluralism.[47]

In this respect, the focus of the current volume is primarily a theoretical one, examining the methodological and other questions which the circumstances of constitutional pluralism pose for our mainly state-based toolkit of constitutional theory.[48] Our conceptual tools of law and authority, particularly the ways in which we understand law as a systemic form of normative social practice, and our disagreements about what legitimate constitutional authority requires have tended towards monism both in terms of adopting a singular view on law and authority,[49] as well as basing that singular view on a particular historic instance of law and authority: the legal systems and authority claims of states.[50] Whether this was ever warranted, as Raz has argued on the grounds that that state was the "most comprehensive legally based social organization of the day"[51], or not, as legal pluralists such as Griffiths have argued,[52] is not of immediate interest to us here.[53] Rather, our interest lies in what challenges must be overcome to convert our monistic accounts of legal system and normative accounts of legitimate constitutional authority into pluralist ones.

The analysis in each part of the book is not, then, oriented towards predetermined conclusions that constitutional plurality and constitutional pluralism are "oxymoronic"[54] based on an unalloyed monistic (in both senses) view of legal and political ordering. It is not clear what kind of contribution to the puzzles of the

[47] See for example, Krisch (n 45).
[48] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (2016).
[49] Neil Walker, 'Constitutional Pluralism Revisited' (2016) 22 European Law Journal 333, 337.
[50] Joseph Raz, 'Why the State?' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017).
[51] ibid 137.
[52] Griffiths (n 27). See further Chapter 3.
[53] But see the discussion in Chapter 2.
[54] Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 Global Constitutionalism 9.

circumstances of constitutional pluralism such an attempt would make. Rather, the ensuing chapters are aimed at exploring the pluralist potential of constitutional theory, clarifying more precisely the particular puzzles which the circumstances of constitutional pluralism raise, as well as offering potential solutions to these puzzles in the 'pursuit',[55] more broadly, of a pluralist constitutional theory. They constitute an attempt to respond to the question of how to turn the conceptual and methodological monism of constitutional theory into a pluralist one to explore the new constitutional horizons of constitutional pluralism.

4. …. Really? This? Now?

Some eyebrows may be raised at the publication of a book on transnational constitutional pluralism in the early 2020s. It is a virtual cliché of international and domestic politics that events over the past decade have shattered the complacent belief in a global 'rules-based order',[56] potentially posing a serious blow to the future of many of the transnational legal and governing structures which contribute to our 'circumstances of constitutional pluralism'. The aftermath of the global financial crash and the 'great recession' of 2008, the refugee crisis sparked by the Syrian civil war (and many states' shameful responses to it), as well as the global pandemic sparked by the lightning-quick spread of the SARS-CoV-2 virus, each, in their own way, it could be argued, represent a turning point in the legal and political contexts which gave rise to

[55] Roughan and Halpin (n 33).
[56] G John Ikenberry, *A World Safe for Democracy: Liberal Internationalism and the Crises of Global Order* (Yale University Press 2020).

the ‘circumstances of constitutional pluralism’. Amidst these economic and social crises, political populists who have been in the ascendency in the second decade of the second millennium have trained their cross-hairs on sites of transnational law and governance in their more general attack on ‘corrupt elites’ undermining the will of the ‘pure people’ whom they claim to uniquely represent.[57] This was showcased in the populist movement which took the United Kingdom out of the European Union in 2016 (the first state to leave the organization in its more than sixty-year history), ostensibly ‘taking back control’ towards a legal and political monism. [58] Similarly, the increasingly populist authoritarian governments of remaining Member States such as Hungary, Poland and Slovenia have used the EU as a target to drum up support for their authoritarian brand of politics centered around a monistic national identity.[59] Beyond Europe, populists have promoted a rhetoric around the structures of transnational law and governance as a form of imperial domination controlled by hegemonic global powers or, alternatively, as a story of freeloading states, trading on the wealth and power of others.[60] That this latter form was a rhetoric promoted by the United States during the Trump administration, traditionally a robust supporter of transnational law and governance (even if it proved particularly reluctant to participate in those structures and be bound by their norms in practice), accompanied by steps to withdraw from transnational structures such as the Paris Climate Agreements and the World Health

[57] Cas Mudde, ‘Populism: An Ideational Approach’ in Cristóbal Rovira Rovira Kaltwasser and others (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017).;
[58] Ralf Michaels, ‘Does Brexit Spell the Death of Transnational Law?’ (2016) 17 German Law Journal 51.
[59] See, for example, in the Polish context Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019).
[60] See generally Frank A Stengel, David B MacDonald and Dirk Nabers (eds), *Populism and World Politics: Exploring Inter- and Transnational Dimensions* (Springer 2019).

Organization during a global pandemic, seemed a particularly menacing development.[61] These issues were further exacerbated by the global pandemic caused by the rapid spread of the SARS-CoV-2 virus beginning in late 2019. The ensuing border closures, jealous hunting and stock-piling of medical equipment by (mainly wealthy) states, as well as the subsequent 'vaccine rows' about access to and distribution of the various vaccines seem to suggest that ultimately, when the chips are down, states are what matters.[62]

The potential significance of these events for our current inquiry is that they could signal a new direction of travel towards not more, but less, pluralism of law and governance. They suggest that the need for the practices, institutions and structures which gave rise to the circumstances of constitutional pluralism in the first place are being replaced by a clamor for a resurgent state, reclaiming its authority and position in global law and politics in times of crisis, necessitating a return to a more traditional state-based form of legal and political monism. It is ironic, it might be suggested, then, that a book on a transnational pluralist constitutional theory should appear in the midst of such turmoil which seems to herald a return to monism.

We could, in response to these claims, justify the publication of the current volume at this juncture with some sort of 'owl of Minerva' claim; that it is precisely at the end of a historical epoch that we truly understand it.[63] However, we do not need to refer to

[61] Robert Jervis and others, *Chaos in the Liberal Order: The Trump Presidency and International Politics in the Twenty-First Century* (Columbia University Press 2018).; Elijah Wolfson, 'Trump Said He Would Terminate the U.S. Relationship With the W.H.O. Here's What That Means' [2020] *Time Magazine* <https://time.com/5847505/trump-withdrawal-who/> accessed 11 May 2021.
[62] See Florian Bieber, 'Global Nationalism in Times of the COVID-19 Pandemic' [2020] Nationalities Papers 1.
[63] "When philosophy paints its grey in grey, a shape of life grown old […]; The owl of Minerva begins its flight only with the onset of dusk"; Georg Wilhelm Fredrich Hegel, *Hegel: Elements of the Philosophy of Right* (Allen W Wood ed, HB Nisbet tr, Cambridge University Press 1991) 23.

recondite Hegelian philosophies of history to reject the premise upon which this skepticism is based. It is undeniable that many of the dominant structures that have given rise to the 'circumstances of constitutional pluralism' over the past number of decades have been swept up in global events and have been subject to unprecedented political attacks. It is also undeniable that a significant trope in these attacks has been a 'return' to the nation state; whether in the pursuit of some project of national renewal or as a purely practical observation that the historic achievement of the state remains the most plausible form of law and governance to provide and protect for individual security and safety.[64] There is thus a superficial attraction to the idea that Minerva's Owl has taken wing on the 'circumstances of constitutional pluralism', and that governing arrangements in the next decades will be based more and more around less and less legal and political pluralism.

However, looking more closely, we have strong reasons to seriously doubt whether Minerva's Owl has even woken up from her daytime slumber, let alone taken wing. It is beyond the scope of this introduction to provide an exhaustive overview of the developments to tackle the various crises of the past decades. However, focusing exclusively on Europe for brevity and simplicity, we can point to three particular trends which suggest that the various crises of the past decade prognosticate *more* rather than *less* legal and political pluralism.

The aftermath of the global financial crisis has resulted in *increased* rather than *decreased* regulation and governance in the form of both primary EU treaty law and secondary EU law bolstering legal and political pluralism between state and EU levels

[64] See, Martin Loughlin, 'In Defence of Staatslehre' (2009) 48 Der Staat 1; Martin Loughlin, 'The State: Conditio Sine qua Non' (2018) 16 International Journal of Constitutional Law 1156.

of governance.[65] This has, in turn, had the effect of boosting judicial pluralism within the context of EU law, with the German Federal Constitutional Court, a traditional protagonist in judicial pluralism in the EU context, making a series of resolutely pluralistic landmark decisions based on the measures taken to dig the Eurozone out of its crisis.[66]

In a similar way, the EU's rule of law crisis has resulted in (belated) enhanced EU scrutiny of domestic constitutional reforms in Poland and Hungary, resulting in infringement procedures being brought based on the threat to the rule of law.[67] These have occurred within the context of a legal and political pluralism professed, strategically, by the increasingly authoritarian institutions of these states.[68] The pandemic has seen further enhanced concerted action by the EU institutions both in terms of vaccine procurement and distribution (even if with mixed success) and major developments in EU-level management of the European economy in the form of an EU Recovery fund agreed in July 2020 under the banner of "next generation EU".[69] Even Brexit, ostensibly the most portentous harbinger of the end of the circumstances of constitutional pluralism (at least in a European context),[70] has resulted in *more*, rather than *less*, legal and political pluralism in Europe. The structures which were established

[65] See generally Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2015); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015).
[66] See Sabine Saurugger and Fabien Terpan, 'Integration through (Case) Law in the Context of the Euro Area and Covid-19 Crises: Courts and Monetary Answers to Crises' (2020) 42 Journal of European Integration 1161.
[67] See, for example, European Commission, 'European Commission Refers Poland to the Court of Justice' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524> accessed 6 May 2021.
[68] R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59..
[69] See Special European Council Conclusions 17-21 July 2020, available at: https://www.consilium.europa.eu/en/meetings/european-council/2020/07/17-21/
[70] Michaels (n 58).

in the withdrawal arrangements and the future Trade and Co-operation agreement have merely *added to*, rather than subtracted from, Europe's pluralistic complex regulatory structures. Now, alongside the complex edifice of the EU's legal and political structures for its Member States and the various legal frameworks for dealing with third countries, can be added a bespoke novel architecture of the particular arrangements put in place by the agreement between the EU and UK on the terms of the latter's withdrawal as well as the subsequent Trade and Co-operation Agreement governing the future relationship between the bloc and the UK.[71] Moreover, the conditions of the UK's withdrawal have established a particularly baroque form of legal and political pluralism between the EU and one corner of the UK, Northern Ireland, in the form of the Northern Irish Protocol.[72]

Futurology is a fool's game. However, it is possible to state with reasonable certainty that the trend in responses to the various crises which have emerged over the past decade or so have involved *more* rather than *less* transnational pluralism. A pluralism of law and governance has become an increasingly consistent response to the various recent regional and global crises, and we can expect this trend to continue into the immediate future with further crises looming on the horizon. As Chapter 8 of our current volume emphasizes, some form of state co-operation and co-ordination establishing transnational legal and governance structures is an inevitable feature of our

[71] Most remarkably with the retention of the doctrine of supremacy within the UK's legal system for EU law passed prior to Brexit and with respect to certain aspects of the Withdrawal Agreement. See Cormac Mac Amhlaigh, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit' (2019) 21 Cambridge Yearbook of European Legal Studies 41. Steve Peers, 'The End - or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 Yearbook of European Law 122..l ; On the EU/UK trade and co-operation agreement see: https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

[72] Katy Hayward, '"Flexible and Imaginative": The EU's Accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' [2021] International Studies.

contemporary world and our responses to global problems. In the light of the inertia of that need, it seems a reasonably safe bet to argue that it will displace rhetorical calls for a 'return to state sovereignty' (whatever that might mean) for the foreseeable future, not least in the context of the ever-looming climate crisis.

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As noted above, this book is divided into two parts based on the two dimensions of constitutional theory: legality and legitimacy. Chapter 2, which opens the part on legality exploring the first of our 'background conditions' of our theory of constitutional pluralism, situates our idea of a constitution within a tradition of thinking about fundamental law and its connection to analytical legal theory and takes a hard look at the question of whether the fact that our dominant descriptive accounts of constitution-as-legal system which have been developed within the context of the state pose insurmountable obstacles to the co-option of this idea of constitution to examine constitutional plurality as a 'circumstance' of constitutional pluralism. Framing the question in terms of legal theory's 'plurality problem', it examines in detail the attacks on these state-centered accounts of law and legal system from legal pluralists who argue that the tools of analytical legal theory are not up to the task of analyzing legal plurality. These attacks are presented as a strong claim that legal theory assumes that all law is state law, an intermediate claim that state law is the best or 'paradigmatic' form of law, and a weak claim, that legal theory has neglected non-state forms of legal ordering. Parsing each claim and analyzing each one in detail in the light of different accounts of

legal system from the analytical tradition, it argues that whereas there may be some truth to the legal pluralist critique of analytical accounts of law and legal system, particularly with regard to the weak claim, the critiques do not present insurmountable obstacles to theorizing constitutional plurality using these primarily state-developed analytical tools in principle. Following on from the conclusions of Chapter 2, Chapter 3 focuses on the particular case of international law, reviewing in particular the objections to characterizing international law in terms of a 'constitutional' legal system. These are presented as a series of reasons revolving around the existence of a 'world state gap'; that is the absence of a single centralized coercive international authority which makes, adjudicates and enforces norms of international law. It examines the ways in which analytical legal theory has wrestled with the problems associated with the 'world state gap', particularly through a focus on the accounts of international law advanced by Hans Kelsen and H.L.A. Hart, as well as more contemporary contributions to the debate on the systemic nature of international law, concluding that that analytical legal theory has found imaginative solutions to the problem such that it is meaningful to speak of an international legal system. Whereas the case of international law is, in some sense, the "well established, low-hanging fruit"[73] of this type of constitutional plurality, the chapter argues that the solutions developed to manage the 'world state gap' in respect of international law offer resources to the systemic theorization of other, particularly transnational, non-state legal contexts which similarly operate in the absence of a singular and unified coercive legal and bureaucratic authority, or which operate within a context where the authority of different systems and sites of

[73] Roughan (n 25) 69.

governance are contested. Based on the conclusions of the previous two chapters, Chapter 4 goes on to examine how extant analytical accounts of legal systems account for constitutional plurality. It examines a puzzle which constitutional plurality poses for recognition-based accounts of legal systems: how to move beyond the 'monist manner' of collapsing constitutional plurality into a perspective-based form of constitutional monism. Standard validity-based accounts of legal systems fail to recognize plurality given that, for these accounts, everything that is valid according to the system constitutes part of the legal system. In this chapter, alternative criteria of individuation are advanced and defended based on political reasons for individuating norms in a particular way, which presents an account of the individuation of legal systems more conducive to constitutional plurality than existing approaches.

Chapter 5 opens the second part of the book on our normative account of constitutional pluralism by exploring the different meanings which have been attributed to the idea of constitutionalism as a normative theory of legitimate governing authority in its history. This survey reveals how conceptual disagreement about the concept of constitutionalism betrays a disagreement about substantive values regarding what legitimate authority requires. Chapter 6 focuses on two particular problems associated with the concept of constitutionalism as a normative theory of legitimate authority in the light of the plurality of constitutional values surveyed in the previous chapter. The first is a critique of the language of constitutionalism which questions the utility of constitutionalism as a normative theory of legitimate authority in the light of the

considerable "definitional conundrums"[74] which affect the concept. These conundrums reflect disagreement regarding the value of constitutionalism as normative theory which, in turn, potentially opens up a space among the resulting "cacophony"[75] for the hegemonic capture of the language of constitutionalism to give a cover of legitimacy to otherwise illegitimate norms and structures. The second critique considered in this chapter, the 'illegitimacy' critique, questions the value of constitutionalism based on democratic considerations. It examines an influential seam of constitutional theory which critiques the tendency towards legal entrenchment and judicial supremacy in constitutional theorizing on democratic grounds; a trend which is amplified at the transnational level where the idea of 'new constitutionalism'[76] potentially oppresses and dominates democratic political communities.

Chapter 7 interrogates a further 'category error' critique of transnational constitutionalism as legitimacy based on the 'no-demos' thesis. This well-known critique of constitutionalism beyond the state, argues, at root, that transnational governance is not 'constitutionalism-apt' in the light of the significant social, institutional and political *disanalogies* between the state and transnational level of governance. In particular the absence of a *demos* in the latter context, a key hallmark of legitimate authority in the state constitutional tradition, makes attempts to think of legitimate authority at transnational level in constitutional terms either "oxymoronic"[77]

[74] Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 9.
[75] Cormac Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5 Global Constitutionalism 173.
[76] Stephen Gill and A Claire Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014).
[77] Loughlin, 'Constitutional Pluralism: An Oxymoron?' (n 54).

or "utopian."[78] The chapter interrogates the latter charge of utopianism implicit in the 'no-demos' critique of transnational constitutionalism, arguing that the question of idealism in normative theory is context-specific and contingent upon the purposes of our theorizing. It is not, therefore, a necessarily problematic feature of normative theory.

Our final chapter, Chapter 8, pulls together the different threads of the discussion on constitutionalism as a normative theory of legitimate authority in the previous chapters of this part of the book and attempts to address the various critiques to advance a normative theory of transnational constitutional pluralism. It takes as its starting point Dworkin's 'interpretative' approach to political value in the face of conceptual disagreement, arguing that it helps to makes sense of and improve the characterization of disagreement considered in the previous chapters around the political value of constitutionalism.[79] Taking an interpretative approach to conceptual disagreements surrounding the concept of constitutionalism as well as the question of whether it can be 'exported' to the 'foreign climate' of transnational law and governance shows how these disagreements are a form of disagreement about what legitimate authority requires, as well as reflecting concerns about problems of idealization in normative theory. It also, moreover, helps address these disagreements in a convincing way to provide a more substantive normative account of constitutional pluralism. It achieves this, in part, by resolving what it identifies as the 'first constitutional question' of constitutional theory: the resolution of its 'definitional conundrums' in a non-arbitrary

[78] Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 International Journal of Constitutional Law 657.
[79] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) ch2.

way by focusing on the value of the concept in terms of legitimate governing authority. This helps answer the various critiques canvassed in the preceding chapters. With regard to the cacophony critique, an interpretivist approach brings our disagreement onto the 'same page' of a shared political value while simultaneously encouraging us to think of political value (such as constitutionalism) in holistic terms. Moreover, the holistic tendency in Dworkin's interpretivist approach to concepts of political value contains the basis for a resolution of the illegitimacy critiques of constitutionalism and transnational constitutionalism respectively, through the unity of value. The unity of value discourages accounts of political value based on 'lop-sided' or 'partially' worked-out normative theories which are, the chapter argues, the basis of the illegitimacy critique. Furthermore, with regard to the question of idealism in transnational constitutional pluralism, it argues that an interpretative conception of transnational constitutional pluralism tailored to the purposes of practical reasoning is not only feasible but can provide a useful approach to thinking about questions of legitimate authority under the circumstances of constitutional pluralism.

In conclusion, the aim of the current volume is to make a contribution to the field of pluralist constitutional theory by examining in detail some of the puzzles and problems associated with constitutional plurality and pluralism. The hope is that it will support further avenues of inquiry into the past, present and future of constitutional theory in our evolving and increasingly challenging circumstances of constitutional pluralism.