

## ■ ARTICLES

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### **Transnational constitutional law: The normative question**

#### **ERSATZ UTOPIANISM**

In what follows, I would like to outline a research agenda. Its aim is to submit to scrutiny a set of ideas harboured by a number of European scholars with regard to the constitutionalisation of international legal structures, possibly even the system of public international law as a whole.<sup>1</sup>

Much enthusiasm has been invested into the constitutionalisation of transnational legal relations. As a result, the pursuit of constitutionalisation seems to serve as a contemporary substitute for the pursuit of political goals. Now that the aspiration to create a truly free society appears to have been laid to a rest, at any rate since the end of the twentieth century,<sup>2</sup> pushing constitutional law beyond the nation state appears to be a final outlet left for utopian hope. Whereas, with regard to its form, the project undoubtedly has utopian appeal, it is substantially committed to the most commonplace principles of free trade and human rights.<sup>3</sup> It epitomises utopianism bereft of a dream.

The pursuit of this ambition does not leave the concept of constitutional law unaffected. Indeed, I surmise that the project is, in a certain respect, self-defeating. Assuming that what its proponents expect to emerge is true transnational constitutional discipline the result is likely to be sobering. What constitutional legality is likely to amount to, in a transnational context, is either a recrudescence of common law complacency<sup>4</sup> or an uneasy amalgamation of legality and administrative rationality.

#### **IDEALISM, MINIMALISM AND PARTICULARISM**

I commence with outlining three ways of accounting for the constitution beyond the nation state. For reasons of convenience, I refer to these as "idealism", "minimalism" and "particularism", respectively.

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1 See, for example (summarizing Tomuschat), Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) *Harvard Journal of International Law* 223-242.

2 See Francis Fukujama, *The End of History and the Last Man* (New York: Free Press, 1992).

3 See Erika de Wet, 'The Emergence of International and Regional Value Systems as Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611-632.

4 For an excellent account, see Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986).

According to *idealists*, international law already is in a process of constitutionalisation.<sup>5</sup> They believe that in certain core areas international law embodies, and lends special legal form to, fundamental values underlying the international community. In a case of conflict, they are accorded precedence over the self-interests of nation states. For example, it would be legally impossible for states to enter into an agreement in which they mutually commit themselves to going to war against a third country.

By contrast, *minimalists* do not believe in a supreme overarching value order whose norms resound in the lower normative strata of the international community. Rather, they argue that a set of fundamental principles needs to be identified whose application would help to determine the instances in which international obligations may or may not trump conflicting national laws.<sup>6</sup>

A radically different perspective is reflected in the work of *particularists*. In their opinion, the universal system of public international law is more or less in demise.<sup>7</sup> Nevertheless, they rest their constitutional hope on the legally controlled self-governance of segmented and fragmentary subsystems of public and private international law.

Despite these profound differences of perspective, the three models are united in their belief about what it takes to live up to the demands made by a transnational constitution. It involves, so they say, a great deal of experimentation and deliberative engagement. Constitutional discipline is seen to emerge from processes of juridical conversation that are pregnant with fresh ideas.

The question remains, therefore, what accounts for the normative force of such a constitutional law. Arguably, philosophical ideals are also put to the test in processes of conversation. But this does in no way bestow on them an authority similar to the normative authority of law.

### THREE PERSPECTIVES ON NORMATIVITY

The normativity of constitutional law can be explored from at least three different perspectives.

First, one may want to know what lends authority to the constitution. Answers will vary according to how this authority is conceived. For example, the authority of a constitution may be seen to depend on giving context-sensitive expression to universal ideas, such as human rights, the rule of law or democracy. I suppose that this, if anything, is the late twentieth century European view of

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5 See, for example, Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579-610.

6 See Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907-931.

7 See, notably, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Frankfurt aM: Suhrkamp, 2006).

constitutional law.<sup>8</sup> Alternatively, the authority of a constitution may be seen to be derivative of conditions necessary for the realisation of self-government. The latter conception of authority, I surmise, is closer to the revolutionary tradition.

Second, it may be asked whether a constitution is indeed law in the sense of guiding behaviour (from an "internal point of view") or merely the idealised refraction of power equilibria between and among contending social forces. In this connection, it is also relevant to examine whether legal consequences are attached to perceived violations of constitutional norms, for example, the invalidity of a piece of legislation or the irrelevance of what purports to be an exercise of veto power.

Third, what is normative about a constitution can be explored by asking what it takes to respect it as binding. The usual suspects believed to supply an answer range from strict adherence to the constitutional text all the way up to commitments to background overarching principles. I, for one, find interpretative accounts of bindingness unnecessarily narrow and disingenuous. It should go without saying, too, that the respective accounts are relevant to assessing the authority of a constitution in the first place.

### THREE CONCEPTIONS OF HOW A CONSTITUTION IS BINDING (IF IT IS)

I am interested in exploring the third type of question, that is, how is binding what is binding if it is; or, put more simply, what does it take to comply with the constitution as law?

I suggest that the normativity qua bindingness of the constitution can be drawn out as follows.<sup>9</sup>

The normativity of the constitution can be seen to depend on its quality of being *higher law*. It is higher law in that it trumps, on one way or another, ordinary law. What matters, however, is not that the constitution is the supreme law of the land, but that it is law, as it were, emphatically understood. The shibboleth of law is legality, that is, the requirement of mere outward conformity with norms. Mere outward conformity demands that one do as the law says without sharing the point of view from which it would also make sense to do so. Acting legally means determining oneself to be determined by an alien will as if it were one's own. Power-conferring norms lend expression to this ideal. The constitution, thus construed, is a system of power-conferring rules. This understanding of constitutional normativity fits a society of strangers in which the "circumstances of politics" obtain.<sup>10</sup> People agree to disagree over many vital issues.

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8 I need to concede, however, that I am drawing on the account given by Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971-2028.

9 For a more detailed account in German, see Alexander Somek, 'Legalität heute: Variationen über ein Thema von Max Weber' (2008) 47 *Der Staat* 428-465.

10 On the latter, see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

The constitution as *super law*,<sup>11</sup> by contrast, treats legislation and the administration of justice as human action that needs to comply with basic precepts of political morality. From the perspective of super law, the constitution supplies a set of aspects for assessing the rationality and reasonableness of government action.<sup>12</sup> However, the aspects provided by a constitution are relevant only as components of the precepts of political morality that govern the conduct of the state.

A fine but important line separates super law in constitutional form from those other varieties of super law that are practically manifest, in particular, in the context of market integration regimes. On an intellectual plane, non-constitutional super law is to be encountered in law and economics. In this form, super law does not take the "circumstances of politics" into account but is rather congruent with the aim of good administration to feed its reasoning into practical problem-solving.

Indeed, I surmise that in a transnational context constitutional super law is likely to be absorbed by the finality of administrative processes.<sup>13</sup> Borrowing a term used by Charles S. Pierce in order to describe truncated interpretative processes one might also call it super law in a "degenerated" form. Mind also that a similar problem arises for higher law with regard to civil law or common law baselines.

Finally, *inventive law* draws out one more consequence, already latent in super law, namely, that the realisation of practical reason in adjudication requires more than merely good reasons. It also needs to be able to draw on good ideas. What it means to be faithful to the constitution, which is then most likely understood to be a project of "constitutionalisation", is to contribute one or the other "creative" idea to an emerging edifice.

What is particularly intriguing about these three conceptions of the bindingness of the constitution is that they are not unconnected. Indeed, there are intellectual paths leading from one to the other.<sup>14</sup> I do not claim that transitions are in any respect necessary in the sense that whoever endorses higher law is also forced to underwrite, at a certain point, super law; however, it is the case that once a transition has been made the normativity that comes later in the sequence appears to be more rational than the former simply because it made explicit – and potentially subject to intentional choice – some of the presuppositions implicit in the former. This is what classic German philosophy understood to be comprehension (*Begreifen*).<sup>15</sup>

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11 See Carl Schmitt, 'Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität' (1978) 17 *Der Staat* 321-339.

12 The first to have articulated this perspective was Harlan Fisk Stone, 'The Common Law in the United States' (1936) 50 *Harvard Law Review* 4-26.

13 For keen observations on the fate of old normative ideas in the area of modern bureaucratic problem-solving, see Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton: Princeton University Press, 2005).

14 For a reconstruction, see Somek, note 9.

15 See Jürgen Habermas, *Erkenntnis und Interesse* (2d. ed., Frankfurt aM: Suhrkamp, 1973) at 331-332.

It is also not the case that one form of bindingness comes to replace fully the other. Higher law with its attendant reliance on methods of interpretation coexists, however in an uneasy manner, with super law. Regimes differ, nonetheless, with regard to the type of normativity that is deemed to be normal. European Union law, for example, has come to accept as normal the judgments of a highly creative court.

## SLAVERY

Returning to transnational constitutionalism, I speculate that the type of bindingness that is most likely to be encountered in the transnational sphere is either of the inventive kind or a variety of "degenerate" super law that has been absorbed by administrative processes.<sup>16</sup> The former, at any rate, is the form in which the three versions of transnational constitutional law – idealism, minimalism and particularism – make their appearance. The latter is manifest in the jurisprudence of international tribunals that consistently and persistently ignore the limits set to the competence of transnational institutions.<sup>17</sup>

It is important to explain what this means given that in international circles the constitution currently seems to enjoy the standing of a dearly loved feel-good sign. At least two core constitutional issues need to be taken into account, namely, the issue of representation, on the one hand, and the issue of liberty, on the other.

The emergence of transnational constitutional law is correlated with the demise of parliaments as representative institutions.<sup>18</sup> The question is whether we could take comfort from the fact that responsive and deliberation-oriented administrators, checked by equally deliberation-oriented judicial tribunals, would in the future assess and manage the risks endemic in highly competitive knowledge-based economies.<sup>19</sup>

Another question affects liberty. If the most recent resurgence of Republicanism, which is associated with the work of Skinner<sup>20</sup> and Bellamy,<sup>21</sup> has it right then two concepts of liberty are at stake here. According to a *liberal* conception, which can be traced back to Hobbes, freedom means absence of impediment of

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16 On the latter see my forthcoming article 'Administration without Sovereignty', to appear in: M. Loughlin (ed.), *The Twilight of Constitutional Law: Demise or Transmutation?*

17 On the European Court of justice, in this respect, see Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008) at 111-137.

18 See Alexander Somek, 'Demokratie als Verwaltung: Wider die deliberativ halbierte Demokratie', to appear in (2009) *Soziale Welt*.

19 For an introduction to the debate on global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15-61. See also Anne-Marie Slaughter, *The New World Order* (Princeton: Princeton University Press, 2004).

20 Quentin Skinner, *Liberty before Liberalism* (Cambridge, Cambridge University Press, 1998).

21 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

motions. Living in a constitutional democracy does not make you more free than living under absolute monarchy unless the monarch makes life harder for you. Indeed, it is possible for people to be more free under a benign kingship than under a zealously overregulating constitutional democracy. According to the *republican* conception, which can be traced back to Harrington, we would still be more free in such a democracy simply because the limits to our actions would be mediated by constitutional constraints. By contrast, in an absolute monarchy we would depend on the good or ill will of whoever happens to be Queen or King. For republicans, the resulting dependence on the whims of others is tantamount to slavery.

With the fusion of transnational constitutional law with practical problem-solving experimentation easily transgresses jurisdictional bounds. According to republican theory, we would consequently run the risk of becoming the slaves of administrators.

But maybe the republican persuasion does not represent how we conceive of our freedom. Maybe we are happy as long as there is reason to be confident that with the global ascendancy of free market liberalism the obstacles are going to be less rather than more.

This would, in a shrouded way, reintroduce an ancient truth. The constitution that you live under tells you something about who you are.

## CONCLUSIONS

I explained at the outset that I would only present a short sketch. Indeed, my observations merely developed a perspective on current debates. This perspective promises to be more sober and less prone to idealisation than the pre-mature celebration of the constitution beyond the nation state.

What the observations suggest, in all their roughness, is that legal science has important contributions to make in order to enhance our political self-understanding.

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