

## Introduction

GRÁINNE DE BÚRCA AND J. H. H. WEILER

The issue of constitutional authority, and more particularly the plurality of claims to legal and constitutional authority, has been a dominant theme of European Union legal scholarship in recent years. The resonance of the topic is evident in many of the major EU developments of the past decade: the momentous eastwards enlargement; the gambit of the unratified Constitutional Treaty; the growing number of national constitutional court challenges to EU authority claims; the likely EU accession to the European Convention on Human Rights; and finally the rulings of the European Court of Justice on the relationship of EU law to the international legal order.

When we were approached by John Haslam, editor at Cambridge University Press, with the suggestion that we put together a book of essays on the constitutional law of the EU, we embraced the opportunity he offered to invite a small number of the leading scholars in the field to write an in-depth essay on this compelling theme. The book is our second collaborative project, coming ten years after the publication of our first co-edited volume on the European Court of Justice.<sup>1</sup>

We conceived of the book as an opportunity to revisit the persistent question of contested constitutional authority in the European Union. The initial and familiar context of plural claims to final authority in the EU was the rejection by national constitutional courts of the unconditional assertion of the primacy of EU law by the European Court of Justice. The ‘pluralist movement’, as Julio Baquero Cruz has labelled it, came to prominence with the famous Maastricht decision of the German Bundesverfassungsgericht.<sup>2</sup> Its origins, however, are to be found in a range of earlier judgments of the highest courts of various

<sup>1</sup> de Búrca, G. and J. H. H. Weiler, eds., *The European Court of Justice* (Oxford University Press, 2011).

<sup>2</sup> Baquero Cruz, Julio, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, 14 *European Law Journal* (2008) 389–420.

Member States which was described over two decades ago by Joseph Weiler as the second dimension of the bi-dimensional character of the claim to supremacy of what was then EC (European Community) law.<sup>3</sup> And while this pluralist movement has been the subject of significant scholarly discussion since that time, the debate has gained further momentum in recent years. This is in part because of the controversial character of the ongoing European integration process, most dramatically manifested in popular contestation over the Maastricht, Nice, Constitutional and Lisbon Treaties, and in part because of the articulation of similar claims to final constitutional authority by some of the newest Member States of Central and Eastern Europe.<sup>4</sup>

The essays in this book reflect on this familiar dimension of the pluralism debate, but they also address another increasingly pressing aspect, namely how to think about the multiple claims of authority of other sites of governance outside and beyond the EU and its Member States. Apart from regional entities such as EFTA (European Free Trade Association), the EEA (European Economic Area), the ECHR (European Convention on Human Rights) and more generally the Council of Europe,<sup>5</sup> conflicting plural claims of authority have increasingly been raised by other global and international actors including the WTO (World Trade Organization), as well as the UN (United Nations) and its organs. These conflicting claims have sometimes played themselves out in the political realm, but increasingly they have come before the European Court of Justice and other international tribunals. Yet many of the fundamental questions regularly addressed by national legal systems about the proper relationship between domestic law and customary international law, as well as multilateral treaties of various kinds, and also the many novel forms of ‘global administrative law’ and

<sup>3</sup> Weiler, J. H. H., ‘The Community System: The Dual Character of Supranationalism’, 1 *Yearbook of European Law* (1981) 267–306.

<sup>4</sup> Sadurski, W., ‘“Solange, Chapter 3”: Constitutional Courts in Central Europe – Democracy – European Union’, 14 *Environmental Law Journal* 1 (2008) 21–35.

<sup>5</sup> See, e.g., the controversy in recent years over EU disconnection clauses: Smrkolj, M., ‘The Use of the “Disconnection Clause” in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?’ (2008), available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1133002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133002)>; and Joris, T. and J. Vandenberghe, ‘The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?’, 15 *Columbia Journal of European Law* (2008–2009) 1.

global governance are only beginning to be addressed by the European courts.

The language of constitutional pluralism is increasingly being used both to describe the existence of and the relationship between the many different kinds of normative authority – functional, regional, territorial and global – in the transnational context. It has particular traction, however, in relation to the European Union, a political and legal entity which has long defied easy categorization in the language of constitutional law or of international organizations. The essays in this book return to consider some of the original and fundamental questions about the nature and character of the EU, probing the continuities and discontinuities with international law on the one hand, and with state-based constitutionalism on the other. They examine the questions of contestation over legal and constitutional authority to which the changing transnational landscape gives rise, primarily but not only from the perspective of the European Union and its courts. While revisiting the problem of constitutional pluralism within the EU, the contributions also consider the way in which the European Union and its courts grapple with the competing authority claims of other international, regional and global sites of governance.

The collection begins with a Prologue by Joseph Weiler, in which he reacts against the ubiquity and vacuity of the term ‘constitutional pluralism’ as it has evolved in the EU literature since its introduction by the path-breaking work of Neil McCormick. He contrasts the idea of constitutional pluralism with his own conception of constitutional tolerance, and identifies what he considers to be the truly distinctive feature of the EU’s constitutional system.

The first chapter by Bruno de Witte analyses the EU as an international legal experiment. He asks what were the characteristics of the original historical experiment that led to the establishment of the EU, and whether the EU can still be considered as an ‘international organization’ today. He notes the development of elements of supranationality in other legal regimes, which suggest both that EU law is not so distinctive as to be *sui generis*, and that international law can and has developed innovative features in contexts other than the EU. The upshot of his analysis is that it still makes sense to conceive of the EU as an international legal experiment and that this understanding should continue to inform our thinking about the EU. The EU is, in his words, an advanced form of international organization with some federal

characteristics, but it remains an organization created and amended by international treaty with the Member States unquestionably still Masters of the Treaties.

While de Witte's chapter traces the continuities between EU and international law and rejects the usefulness of a *sui generis* characterization, Neil Walker's chapter locates the place of the EU between the state-based and the international order, shaping its own variation on the common form of political modernity. He argues that the same three issues of political modernity that shaped the nature of the state-based system and, parasitically, of the international system, are implicated also in the EU's form: the idea of collective agency as the animating source of political community (popular sovereignty); the generative resources of political community (the balance between particularism and universalism); and political ontology (the model of the social world, the relationship between individualism and collectivism). He notes how the issue of collective agency has become more pressing in the EU as the model of elite-led integration-through-law has given way to a more expansive political project with an embryonic notion of citizenship; how in terms of generative resources the EU – being built on distinct national identities – cannot lay a strong claim to particularism, yet neither can it claim like the international order to be substantively universalistic; and finally how the relationship between individualism and collectivism within the EU remains skewed towards individual market-freedoms with a weaker social model. Although Walker does not endorse the *sui generis* concept rejected by De Witte, he describes the status of the European order – placed somewhere between an inter-governmental/international order and a national federal order – as paradigmatically 'in-between'. This in-between status, he argues, is crucial, having both a particularity that renders it capable of being exemplary, even while the thinness of its transnational model makes it of relevance to systems beyond the EU.

The next two chapters, by Gráinne de Búrca and Daniel Halberstam respectively, examine the relationship of the EU and the international legal order through the conceptual lenses of constitutionalism and pluralism. De Búrca's chapter looks anew at the case-law of the ECJ (European Court of Justice) on the relationship between EU law and the international legal order, in the light of the famous *Kadi* judgment. She suggests that the ECJ in the *Kadi* judgment – contrasting with the strong constitutionalist approach of the General Court below – adopted

a robustly pluralist approach to this relationship, drawing a sharp line between the internal, autonomous EU constitutional order and the international order, and asserting the clear primacy of the former over the latter. When set alongside earlier rulings of the ECJ on the topic, she argues that our previous assumptions that EU law as a ‘new legal order’ was distinctively open to international law, both custom and treaty, may need to be revised. Drawing on Koskenniemi’s reinterpretation of Kant’s idea of constitutionalism as universalizability, she argues that a soft constitutional approach premised on the existence of an international community and on common principles of communication would be a better normative fit for the EU in shaping the relationship between EU and international law. The chapter concludes that even if the specific outcome of the *Kadi* case is commendable for its insistence on human rights review and procedural fairness requirements, the strong pluralist approach is at odds with the self-presentation of the EU as an organization with a distinctive commitment to international law, and it seems to shun the international engagement and dialogue (in this instance, judicial engagement and dialogue) that has frequently been presented as one of the EU’s strengths as a global actor.

Halberstam’s chapter rejects the idea of a dichotomy between global and local responses to the question of constitutionalism in an era of global governance, and presents constitutional pluralism as a third approach. While the local approach emphasizes states as the only legitimate locus of constitutional authority, and the international order as relevant only to the extent that it serves the interests of states, the global approach sees states as serving a cosmopolitan constitutional order. The third approach, however, treats the hierarchy between global and local as unsettled and accepts the fact of contested authority ‘in the spirit of pluralism’. A pluralist approach, in his view, requires both the existence of a plurality of partially autonomous sites of public governance with mutually conflicting claims of authority, but also ‘mutually embedded openness’ regarding these competing claims. Halberstam presents constitutionalism as a tradition that grounds the legitimacy of public authority in limited, collective self-governance through law, embodying the three elements of voice (representation), rights and expertise (instrumental capacity). He suggests that the respective claims of authority of each of the plural sites of governance can be articulated in these terms. Turning to the *Kadi* case before the European courts, he argues that the global constitutionalist

approach of the General Court (formerly CFI (Court of First Instance)) undermined the legitimacy of the EU in terms of voice and rights protection. Only the Advocate General attempted to promote a pluralist approach, he argues, while the ECJ rejected both global constitutionalism and pluralism, opting instead for the local constitutionalist approach. Halberstam concludes his chapter by outlining what an approach to the *Kadi* case that took constitutional pluralism seriously would look like, in particular by integrating international law more fully into its analysis. Ultimately, he posits constitutional pluralism – a horizontal accommodation among equals which avoids the consolidation of power in one institution – as a third empirically and normatively attractive alternative to either local or global constitutionalism, which could draw inspiration from the EU's experience of internal pluralism.

The final chapter by Nico Krisch stands in opposition to Halberstam's proposed model of constitutional pluralism, by reintroducing a dichotomous perspective on constitutionalist versus pluralist approaches. Krisch presents a robust idea of pluralism as the best normative fit for the sphere of global governance. While constitutionalism, on his account, draws on domestic law to formulate normative principles for the postnational order, pluralism focuses on the heterarchical ordering of authority and on the 'open political form' of the postnational order. 'Foundational constitutionalism', he argues, is presented as a justification for governmental legitimacy, combining key concepts such as the rule of law, individual rights and collective self-government. The UN and the EU draw on this narrative, and some scholars even seek to present the entire arena of global governance in constitutionalist terms. Krisch then presents a range of critiques of constitutionalist thought from scholars such as Tully, Mouffe, Hirschl and Dryzek, and argues that the capacity of constitutionalism to accommodate diversity is limited. Pluralism on the other hand, by taking difference seriously, is capable of accommodating argument and political resistance and of dealing with contestable claims of supremacy at the level of different polities. Krisch questions whether Halberstam's third possibility of constitutional pluralism is really possible, and suggests it may simply replicate or echo domestic forms of constitutionalism. Despite its risks, he argues that pluralism may be 'our best chance', in that it preserves space for contestation and experimentation, prevents domination by powerful actors and provides an effective system of checks and balances.

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The volume closes with what we view as the distinctive characteristic of this volume, namely a dialogical epilogue in which the claims and arguments of the chapter authors are interrogated by Joseph Weiler, with a view to getting to the heart of each argument and exposing what is at stake in the debates.

## *Prologue: global and pluralist constitutionalism – some doubts*

J. H. H. WEILER

### **Global Constitutionalism and Constitutional Pluralism: the sociological pay-off**

Like an infectious virus which simply develops new resistant strains when we think we finally have it under control, so it is with <Constitutional> <kənstɪ'tʃʊənl>. The most recent academic pandemic, particularly virulent (cerebral indigestion being one of its milder symptoms) is the result of a genetic fusion of the ubiquitous Global Constitutionalism and Constitutional Pluralism strains which dominated the 1990s and 2010s. Global Constitutionalism is already, at least in the eyes of some, a discrete academic discipline, with a soon to be published *Journal of Global Constitutionalism*, with various masters' degrees, treatises and the other usual accoutrements. Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high tables of the public law professoriate. From my vantage point of editor-in-chief of the deliciously and ambiguously entitled *International Journal of Constitutional Law* (I·CON)<sup>1</sup> I have begun to wonder: Is there anyone out there who is not a constitutional pluralist? Who does not believe that the global space is in some form constitutionalized?

I do not recall ever using constitutional pluralism in my own writing, but like M. Jourdain, I was instructed that I too, apparently, converse in the prose of constitutional pluralism, which, paradoxically makes me (and everyone else) a comfortable *Bourgeois gentilhomme*. That, of course, is the price of success of a concept/fad: what begins as heterodoxy becomes prevailing orthodoxy, in this case when Constitutional Pluralism (the maverick constitutional pluralism strain) suddenly emerges as hopelessly politically correct.

<sup>1</sup> Our editorial policy is, Janus-like, to regard ourselves as both the 'International Journal of Constitutional Law' and the 'Journal of International Constitutional Law'. That is why I·CON can claim to be an icon.



This is a problem, since the idea is to *épater le bourgeois* or, indeed, *la bourgeoisie* as a whole, not to become one. Is that not the name of the academic game of originality, viz. power and fame? So, two new devices emerge. The first is that fusion of pluralist constitutionalism with global constitutionalism. The second is evocative of the old European states staking a claim to new territories, using the prerogative of the powerful to give names – combing the old and new as in New Amsterdam or New Caledonia, or New South Wales. In similar fashion we have a wonderfully evocative new vocabulary by the academically (truly) powerful such as Cosmopolitan Constitutionalism, Contrapuntal Constitutionalism, Multi-polar or Dialogic Constitutionalism.

Blessedly, both global constitutionalism and constitutional pluralism are remarkably underspecified concepts which allow a multiplicity of meanings without offending any received understanding. I say blessedly because it accounts for the richness which the reader will find in this book, a broad gamut of understandings of how the constitutional and the international meet and interact and how the constitutional and the constitutional meet and interact. The gamut is indeed wide: compare the approach, sensibility, definition of the problem and its solution in, say, the excellent contributions of Bruno de Witte and Nico Krisch.

But this book is not only exposé: it is also, or at least attempts to be also, a critical exposé. Let me explain the sense in which I mean this. A small ‘historical’ detour is necessary.

### The constitutional beyond the state

Whether we go back to antiquity in, say, Aristotle’s *Nicomachean Ethics* or fast forward to modernity well into the twentieth century, the notion of a constitutional legal order was typically associated with the state as distinct from any notion of an international legal order. This was even more so in relation to ‘thick’ or ‘robust’ constitutional legal orders where, in American style (a *parvenu* state, but the oldest and longest uninterrupted contemporary constitutional order<sup>2</sup>), the constitution meant a higher law with the apparatus of judicial review and constitutional enforcement. It is the robust version that interests us, and

<sup>2</sup> Needless to say, as someone who was educated as a lawyer in the United Kingdom, I never bought into the Dicey bluff, a droll case of intellectual penis envy – ‘we too have one’.

our authors, most, since it is the interaction of such orders which gives rise in the most acute and telling way to the issues that bred the turn to constitutional pluralism. It is also the robust version, espoused with a vengeance by the European Union, which provided the siren call to so many early advocates of a (rather primitive) version of global constitutionalism.

Rereading Mauro Cappelletti's evergreen *Il Controllo Giudiziario Di Costituzionalità Delle Leggi Nel Diritto Comparato*<sup>3</sup> is instructive in two senses. On the one hand it is surprising to recall how exceptional the robust version was as late as the middle of the twentieth century, given its ubiquity today. On the other hand it is surprising to note how swift its spread was from that moment onwards. The first serious 'globalization' of constitutionalism was, thus, a horizontal movement: a spread, quite global in its reach, albeit still firmly situated in statal settings. When scholars such as Alfred Verdross projected a constitutional understanding and vocabulary onto the UN (United Nations) and international legal system, it was for the most part the exception that proved the rule type of exercise and one that was neither convincing at the time it was made and ideologically problematic at the same time.

It was the advent of the European Communities, and especially the well-known legal developments of the 1960s and 1970s which took the internationalization of the constitutional to a new level. Make no mistake, this experience was highly exceptional, but in its audacity and political centrality it had far-reaching conceptual and practical influence. Of course international law proper never allowed the use of domestic law as an excuse for non-performance of international legal obligations – thus displaying a supremacy principle every bit as capacious as that found in the EC (European Community) legal order. But for the most part, supreme international legal norms were imposed on states, not in states, and were result-oriented, thus insulating municipal constitutional orders from the direct commands of international law.

Even when international norms reached into the municipal legal order, long before even the great Neil MacCormick articulated the problem of incommensurate constitutional authorities, the international legal order had developed the most ingenious device to neuter the conflict – the conceptual and institutional artefact of state

<sup>3</sup> Cappelletti, M., *Il Controllo Giudiziario Di Costituzionalità Delle Leggi Nel Diritto Comparato* (Milan: Dott. A. Giuffrè, 1968, 1972).