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Introduction – Constitutionalism: a theoretical roadmap

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Constitution, constitutionalism, constitutionalisation – these are some of the terms used to describe the political and legal culture, not only within states, but also beyond states. Often these terms take a descriptive and empirical twist; they describe empirically observable events relating to the structure and organisation of political spaces. At other times, they take a normative twist and become prescriptive and axiological. In their latter disguise they refer to the values and principles that an entity possesses or should possess, in addition to any organisational format that it may have. Regardless of what form they may take, we should acknowledge that the term ‘constitutionalism’ and its derivatives are pregnant with promises that exert a strong appeal, and place constitutionalism at the apex of political and legal aesthetics or virtues.

It is important, then, to explain the meaning of constitutionalism before we discuss whether it operates in political spaces beyond states and, if it does, what its nature is. Constitutionalism is about the normative and structural premises of political orders; but whereas constitutions utter the forms of organisation of specific political spaces and the normative commitments of the members of that polity,¹ and whereas ‘constitutionalisation’ refers to a constitution-hardening process, constitutionalism is the ideology behind the process of constitutionalisation and the ideology behind constitutions as outcomes. To put it differently, constitutionalism provides the ideological context within which constitutions emerge and constitutionalisation functions.²

¹ ‘A constitution is an ordering of a city in respect of its offices and particularly of the sovereign one.’ *Aristotle’s Politics*, Book III (trans R. Robinson) (Oxford: Clarendon Press, 1962), p. 19.

² ‘When we speak of constitutionalism, we refer to the set of ideas and principles which form the common basis of the rich variety of constitutions which we find in many countries of the world . . . Thus constitutionalism encompasses institutional devices and procedures which determine the formations, structure and orderly functioning of government, and it embodies the basic ideas, principles and values of a polity which aspires

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Although constitutionalism lacks ontological definition,³ it consists of a number of themes which acquire meaning in the particular context in which they apply. Such themes include the *pouvoir constituant*, normative and organisational principles, institutional settings, conditions of membership, exercise of political power or the interface between centres of power. Last, but certainly not least, constitutionalism is not a static property. It expands, recedes or changes direction; but it constantly provides a template, according to which laws are created, behaviours are regulated, or institutional functions are assessed.

Lest there be any misunderstanding, we should say at this juncture that ‘constitutionalism’ is not synonymous with ‘constitution’. A constitutional document may represent the fruition in time or space of constitutionalism, but it is just one of its facets, because constitutionalism is not about a single ‘constitutional moment’⁴ but about a series of such moments, some more pronounced and explicit, others rather implicit or mundane. Having said that, can there be a constitution without constitutionalism? Weiler has admonished the European Union (EU) for developing a constitution without constitutionalism.⁵ One may agree with such a verdict if a ‘thick’ version of constitutionalism is taken,⁶ according to which constitutionalism

to give its members a share in government.’ U. K. Preuss, ‘The Political Meaning of Constitutionalism’, in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury: Ashgate, 1996), p. 11 at p. 12; T. C. Grey, ‘Constitutionalism: An Analytical Framework’, in J. R. Pennock and J. W. Chapman, *Constitutionalism* (New York: New York University Press, 1979), p. 189 at p. 190; N. Walker, ‘European Constitutionalism and European Integration’ (1996) *Public Law (PL)* 266 at 268–75; F. Snyder, ‘General Course on Constitutional Law of the European Union’, in *Collected Courses of the Academy of European Law*, vol. VI (1998), p. 41 at p. 56; P. Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *European Law Journal (ELJ)* 125 at 126–28; C. Möllers, ‘Pouvoir Constituant-Constitutionalisation’, in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2006), p. 183.

³ W. Murphy, ‘Constitutions, Constitutionalism and Democracy’, in D. Greenberg, S. N. Katz, S. C. Wheatley and M. B. Oliviero (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993), p. 3; D. Castiglione, ‘The Political Theory of the Constitution’, in R. Bellamy and D. Castiglione, *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford: Blackwell, 1996), p. 5.

⁴ B. Ackerman, *We the People: Foundations I* (Cambridge, Mass: Belknap Press of Harvard University Press, 1991).

⁵ J. H. H. Weiler, ‘European Neo-constitutionalism: In Search of the Foundations of the European Constitutional Order’ (1996) *Political Studies (Pol S)* 517 at 518.

⁶ For the thin and thick notion of constitutions, see J. Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’, in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), pp. 152–53.

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is not only about the normative and structural scaffolding of a polity, but also about its *telos*. On the other hand, one may say that where there is a constitution of some sort there is also constitutionalism, especially if we rise above the particulars and view constitutions in conceptual terms and as a whole. Be that as it may, what Weiler's criticism alludes to is the precariousness of constitutions that lack the gelling power of constitutionalism – that is, when the political or legal facts reflect or correspond loosely, if at all, to the attitudes and articulations of those that form the polity. One may say that this is the case at the international where some sort of constitutional sample can be traced, however the meaning of international constitution is contested, and no agreement as to its overall rationale exists. The reason for this state of affairs is that international constitutionalism, if not totally dormant, at best lacks momentum or confidence. To a lesser degree, the debates about the European Union's real, virtual or even invisible constitution and the debates about its content, reveal the uncertainty that afflicts those polities which lack a fully developed constitutional conscience. This is because constitutionalism provides the optic that frames the debate about constitutions, and attributes meaning to the debate and to its outcome. If the optic is missing or is blurred, constitutional visions become equally blurred or are contested.⁷

From all of this, it is possible to surmise certain points about the meaning and value of constitutionalism. Constitutionalism is the narrative behind processes of self-creation, self-perception, self-identification, or self-projection. Furthermore, constitutionalism employs prescriptive, axiological and empirical tools,⁸ not only to construct but also to continuously read politico-legal spaces.⁹ Finally, constitutionalism is not an absolute and total quantity but a matter of degree¹⁰ and of sensibilities, and comes into being in particular contexts.

⁷ G. Walker, 'The Constitutional Good: Constitutionalism's Equivocal Moral Imperative' (1993) 26 *Polity* 91 at 98–9.

⁸ T. Cottier and M. Hertig, 'The Prospect of 21st Century Constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law (UNYB)* 261 at 279–82.

⁹ According to Weiler, constitutionalism is '... a prism through which one can observe a landscape in a certain way, an academic artefact with which one can organise the milestones and landmarks within the landscape, ... an intellectual construct by which one can assign meaning to, or even constitute, that which is observed'. J. H. H. Weiler, 'Introduction: The Reformation of European Constitutionalism', in J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 221 at p. 223.

¹⁰ N. Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), p. 31 at p. 33.

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The above account of constitutionalism is particularly important when we discuss transnational constitutionalism because, traditionally, constitutionalism has been a statist *objet d'art*. This is because states are the prototype political units which are self-referential and often endowed with a stable and written constitution. Moreover, states are infused with their own version of normative ethos. It is not difficult, then, to explain why constitutionalism is questioned in spaces beyond the state. For one thing, these spaces may not exhibit certain constitutional attributes found in states. For example, such spaces may lack a common or a coherent organisational or normative charter or lack common governmental structures. However, even in such spaces, questions arise about conditions of membership, about relations, or about the organisation and regulation of power. To the extent that members of such spaces do not lead a nomadic life, they need to devise ways to regulate their mutual interactions. Any such organisational charter may refer to a thin notion of constitutionalism but it does not preclude the emergence of thick constitutionalism on the basis of more intense normative and structural alliances and allegiances. In this case, aggregations of states that share common perspectives may form linkages based on common normative and organisational standards, principles and rules. They can also establish their own legislative, executive or adjudicative institutions to regulate their lives and mitigate conflicts about fundamental principles or rules. All of the above will eventually make the constitution of the polity and project it as a unitary and autonomous order internally or externally.¹¹ One such micro-order is the European Union, which is characterised by common normative patterns, is endowed with legislative, executive or judicial powers and enjoys a degree of autonomy.

Even if constitutionalism does operate in areas beyond the state, state constitutionalism often becomes the standard-bearer of comparisons.¹²

¹¹ For example, the EC is a member of international organisations such as the United Nations Food and Agriculture Organisation (FAO) and the World Trade Organization (WTO). The autonomy of the EU has been affirmed in a number of opinions such as *Opinion 1/91* [1991] ECRI-6104 at 6108; *Opinion 2/94* [1996] ECR I-1759; *Opinion 1/76* [1997] ECR 755 at 759. J. Sacks, 'The European Community's Membership of International Organizations' (1995) *Common Market Law Review (CMLRev)* 227; D. Vignes, 'La participation aux organisations internationales' in R.-J. Dupuy (ed.), *Handbook of International Organisations*, 2nd edn (Dordrecht: Martinus Nijhoff, 1998), p. 62.

¹² F. Mancini, 'Europe: the Case for Statehood' (1998) 4 *ELJ* 29; J. H. H. Weiler, 'Europe: The Case Against the Case for Statehood', *ibid.*, 43. For a general discussion see J. Shaw,

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Excerpt

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Such comparisons are, however, unwarranted, because they are often based on an abstract and ideal model of state constitutionalism which is not real¹³ and, secondly, they fail to appreciate the different dynamics in post-state spaces. Indeed, constitutionalism in post-state spaces may give rise to a different type of intellectual or practical enquiries. Thus, we not only need to consider the particular features of those spaces and understand their different historical experiences but, above all, we need to attune the constitutionalist themes and debates to the idiosyncrasies of such orders.

For instance, constitutionalism advertises its function in circumscribing political power.¹⁴ This reflects the particular experiences of states in their political journey through history. However, this theme acquires a different dimension at the international, because the international is not endowed with legislative or governmental powers, and enjoys no separation of powers. If there are restraints, these are of a different kind and degree and refer, for example, to the relations between states or between states and organisations. Then, one needs to see the rationale behind the restraining function of constitutionalism, which is to protect people against the exercise of political power by institutions. However, at the 'international', states are not only the *pouvoir constituant* but also participate directly in law-making and law-enforcement. Consequently, the international is not an independent entity and cannot rise above its constituents but the 'sovereign' and the 'subject' merge.¹⁵ On the other hand, the EU has its own legislative, judicial and governmental institutions which interact at different levels and enjoy a degree of autonomy. Therefore, one may need to examine the relations between the EU, the member states and individuals as well as the relations between the EU institutions.

'Postnational Constitutionalism in the European Union' (1999) 6 *Journal of European Public Policy (JEPP)* 579; N. Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. H. H. Weiler and M. Wind, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 1999), p. 27.

¹³ M. Poiars Maduro, 'Europe and the Constitution: What if This is as Good as it Gets?' in J. H. H. Weiler and M. Wind, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 1999), p. 74.

¹⁴ G. Sartoti, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review (Am Polit Sci Rev)* 860.

¹⁵ H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), pp. 50–78.

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Further, whereas the existence of a ‘demos’ either in ethno-cultural or civic terms is presented as a precondition of state constitutionalism, the international has no ‘demos’ in the sense of a body-politic that can bind its members;¹⁶ whereas the EU, whose subjects are states and people, exhibits some discerning elements of demos and democracy, and therefore constitutionalism in that context adopts a different meaning.¹⁷ It has also been said that ‘constitutions are about moral commitments and identity’.¹⁸ However, in a polyvalent order such as the international, constitutionalism may be more about normative neutrality and accommodation of differences than about projection of a common value system.

What the preceding examples have shown is that constitutionalism gives rise to different type of questions in the different *topoi* to which it applies. But there is something more. Constitutionalism is not built on a *tabula rasa* but is moulded by the political struggles and accommodations that have marked any of the referent *topoi*. Within states, constitutions are often the product of disruptive or explosive events that formalise and perpetuate their outcomes. The history of the international is marked by the Westphalian accommodation and the rise of sovereign states, the self-determination struggles, the quest for peace after devastating wars, or the emergence of the human rights movement, to name some of its most characteristic moments. The European constitutionalism has been inspired by the need to contain the negative impulses of nation-states, the downplaying of sovereignty, the search for peace through prosperity, human rights and the rule of law.¹⁹

Having said that, one may trace in the origins of the EU a strong ahistorical streak, and a move to rewrite history from then on. Compared

¹⁶ J. H. H. Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 547 at 548.

¹⁷ J. H. H. Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1 *ELJ* 219. For an opposing viewpoint, see Bundesverfassungsgericht, decision of 12 October 1993, *Treaty of Maastricht* (Brunner), 89 BverfGE 155; [1994] 1 *CMLR* 57, para. 44; D. Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *ELJ* 282.

¹⁸ J. H. H. Weiler, ‘A Constitution for Europe? Some Hard Choices’ (2002) 40 *Journal of Common Market Studies (JCMS)* 563 at 569; A. Estella, ‘Constitutional Legitimacy and Credible Commitments in the European Union’ (2005) 11 *ELJ* 22.

¹⁹ J. H. H. Weiler, ‘Fin-de-siècle Europe: Do the New Clothes Have an Emperor?’ in J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 238.

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Excerpt

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with states where historical myths and symbols play an important role in their constitution, the EU rejected the historical baggage that its members carried or the 'pathos' of national constitutional aesthetics and built itself on the ahistorical and apolitical foundations of technocratic functionalism.²⁰ Be that as it may, the question remains as to whether the EU has developed its own brand of constitutionalism, which has subsequently acquired its own meaning.

Although the above discussion provides only a crude schematisation of the contours that international and European constitutionalism take, it is important to keep these contours in mind, because they are often neglected in the political or intellectual excitement that the language of constitutionalism provokes.

Overview of the book

The discourse on international constitutionalism is gaining momentum, but it is still in its infancy and appears rather slippery.²¹ On the one hand, there are those who deny the existence of constitutional culture or conscience at the international or think that it is not a workable hypothesis.²² Often they reach this conclusion by transposing to the international benchmarks borrowed from state constitutionalism. One area that fuels such scepticism is the normative, executive and adjudicative heterarchies that exist in the international in contrast to the hierarchies found in states.²³ Conversely, there are those who use the language of constitutionalism to describe and analyse organised clusters within the international, such as the lego-political order of the United Nations or

²⁰ U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *ELJ* 14.

²¹ For a general discussion, see D. M. Johnston, 'World Constitutionalism in the Theory of International Law' in R. St. J. Macdonald and D. M. Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005), p. 3; B.-O. Bryde, 'International Democratic Constitutionalism', *ibid.*, p. 103.

²² 'International Law, in fact is a *law without a constitution*. And since it is not grounded in a constitution, it lacks the possibility of natural growth. Unconnected with a *society*, it cannot adjust itself to its needs.' (Italics in the original.) A. Zimmern, *The League of Nations and the Rule of Law 1918–1935* (London: Macmillan, 1939), p. 98; S. Sur, 'L'état entre éclatement et mondialisation' (1997) 30 *Revue Belge de Droit International (RBDI)* 5 at 11.

²³ M. Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law (EJIL)* 566; but see T. Schilling, 'On the Constitutionalization of International Law', *Jean Monnet Working Paper 06/05*.

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[More information](#)

that of other international organisations and regimes such as the World Trade Organization (WTO),²⁴ international criminal law, and international, regional, or subject-specific human rights regimes.²⁵ They trace in such orders constitutional characteristics or vague constitutional promises deriving from hierarchical relations, general principles, or divisions of competence.²⁶ To give one example, both the United Nations (UN) and its Charter are often viewed through constitutional lenses²⁷ because of the principles the Charter contains, and the hierarchical order it establishes on the basis of Article 103. One may want to add here the Weberian trait of ‘subjective orientation’; that is, people or states looking to the Charter to find direction. On the other hand, it can be noted that the UN Charter does not offer a total constitution in the sense that it does not regulate all the areas of the international political economy, and it cannot impress itself on its members. Even further, some identify a nascent constitutionalism built around *jus cogens* principles. These serve to ‘verticalise’ the international lego-political order; but one may object that this is not all that constitutionalism is about, and in any case any such hierarchy is only ideational rather than real since the content of *jus cogens* is not stable.

The literature on European constitutionalism is thriving, due to the EU’s declared constitutional tendencies; although one may comment that it is often replete with inquiries as to whether the EU has a constitution, whether it needs a constitution, and if it does, what is, or

²⁴ D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

²⁵ In relation to the ECHR, see *Loizidou v. Turkey* (Preliminary Objections) – 15318/89 [1995] ECHR 10 (23 March 1995), para. 75: ‘constitutional instrument of European public order’. L. Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’ (2002) 23 *Human Rights Law Journal* (HRLJ) 161; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), particularly ch. 7.

²⁶ For the constitutional interpretation of the international order see T. Cottier and M. Hertig, ‘Prospects of 21st Century Constitutionalism’ (2003) 7 *Max Planck UNYB* 261; C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Recueil des Cours* (RC) 10; A. von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’ (2006) 47 *Harvard International Law Journal* (Harvard INT LJ) 22.

²⁷ B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* (Columbia J Trans Law) 529; P.-M. Dupuy, ‘The Constitutional Dimension of the Charter Revisited’ (1997) 1 *Max Planck UNYB* 1; R. Chemain and A. Pellet, *La Charte des Nations Unies. Constitution Modiale?* (Paris: Pedone, 2006).

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should be, the content of any existing or prospective constitution. The literature also replicates state envisions of constitutional organisation by conflating constitutionalism with hierarchical relations, and sometimes fails to take cognisance of the Union's distinct culture.

This book scrutinises the unfolding models of European and international constitutionalism by contextualising their structural and normative premises and critically reflecting on their constitutional ethos. It merges analysis and evaluation, whilst recognising that both the international and the European domain have their own 'constitutional culture' and dynamics. By combining the study of European and international themes, this book provides the needed nexus of knowledge and critical reflection on the nature and terms of the constitutional debates within the European and international context. In particular, the book addresses a number of constitutional topics such as: (i) the nature of European and international models of constitutionalism and their underlying principles; (ii) the *telos* behind international and European constitutionalism; (iii) the role of the state and of central courts; and (iv) the relations between composite orders.

The contributors to this collection deal with the above issues from different perspectives, and some are more sceptical than others. This degree of intellectual plurality reflects the authors' understandings of constitutionalism. It is not our aim to devise a single or comprehensive model but to generate knowledge and offer the reader an intellectual framework for making sense of the political and legal phenomena beyond the state.

At this juncture it is important to explain some of the concepts we are going to use throughout this book, which is, first of all, about international and European models of constitutionalism. By 'international' we mean the international political space as the primary and total layer beyond states. That said, clusters can be formed within the international, having their own political culture such as the UN. By 'European' we mainly refer to the EU, which already employs constitutional language and has explicitly declared its constitutional aspirations, but also to other organised clusters, such as the Council of Europe, and its European Convention on Human Rights (ECHR), in particular. These organised clusters evolve from the international, but because they exhibit self-referential and self-contained constitutional dimensions which are particular to them and different from the international, they are treated separately. We also use the word *models* when we refer to international and European constitutional phenomena. Model is a

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Excerpt

[More information](#)

construction that, in our case, represents the structure and properties of particular international or European spaces. Furthermore, the international and European models are put under the umbrella of transnational constitutionalism because, first, transnational describes spaces that exhibit patterns of organisation and law creation other than states; second, transnational alludes to transactional relations which can be horizontal or vertical but not necessarily and exclusively hierarchical; third, because of the interlacing and cross-cutting of constitutional configurations at state, international or European level. A final point should be made here by way of clarification. Often the word ‘supranational’ is used to describe the political situation beyond states; we have avoided this term because it evokes hierarchical relations.

Looking now more specifically into the contributions, the first part examines the role of the state, of courts and of constitutional principles.

Patrick Capps’ chapter compares the arguments made by social contract philosophers to justify the creation and internal normative structure of the state with their arguments in respect of international relations. In the latter case, they reject the concept of what Kant might have called ‘the universal state’. Specifically, they argue for the *discontinuity thesis*. Variants of this position fall into three relatively distinct categories: (i) the universal state is empirically impractical; (ii) the sovereign state, as an agent, behaves differently from human agents; and (iii) the state is not an agent. Each version of the *discontinuity thesis* is used to justify a different kind of order in international relations; an international order rooted upon the prudential interests of states; or an order generated without the need for legislation through a sovereign power or, finally, an order established transnationally through the regulation of sub-state linkages. For Capps the whole exercise is multidisciplinary and solutions to the problems of establishing international legal order require a very clear analysis of the problems faced in international relations coupled with solutions to the problems of normative legitimacy and with innovation in the design of international institutions.

Pavlos Eleftheriadis considers the standing of states in the European Union by looking into how institutions make decisions. Decision-making in the Union is a combination of formal equality of states with proportional equality on the basis of states’ population. Proportional equality refers to the standing of states in the Council or their representation in the Parliament. He then examines two issues: the allocation of powers between the Union and member states and the principle of