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*Martin Loughlin, John P. McCormick, and Neil Walker*

## The Twilight of Constitutionalism?

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*Martin Loughlin, John P. McCormick, and Neil Walker*

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# The Twilight of Constitutionalism?

*Edited by*

Petra Dobner  
and Martin Loughlin



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Petra Dobner (Berlin)


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## Introduction

Petra Dobner and Martin Loughlin

The twilight of constitutionalism? Surely not. Constitutionalism is a modern phenomenon, a feature of political life over the last 250 or so years, but one which in recent decades has been enjoying a greater influence in public discourse than ever before. Under its influence, modern constitutions have established a set of governmental institutions that provide the necessary conditions for the realisation of a democratic *Rechtsstaat*. Such constitutions constrain politics by legal means, structure power relations comprehensively, help normatively to integrate societies, and offer a practical account of legitimate democratic rule within the state. While these achievements cannot be denied, the fact is that this period of maturation of constitutionalism coincides with the erosion of some of the basic conditions on which those achievements have rested. Foremost amongst these conditions are those of statehood and a concept of democracy generated from the claim that 'we the people' are the authorising agents of the constitutional scheme. Constitutionalism is increasingly being challenged by political realities that effect multiple transgressions of the notion of democratic statehood. It is in this sense that constitutionalism can be understood to be entering a twilight zone.

The combination of these diverging trends of triumph and demise offers one powerful reason why interest in theorising about constitutions has recently gained a new momentum. However ambiguous the term 'globalisation' may be, among the few certainties is an acknowledgement of a growing incongruity between the political (ie the world of things that need to be ordered collectively in order to sustain society) and the state (ie the major institution for political decision making during modern times). And it is this incongruity that presents a serious challenge to the practices of constitutionalism. The far-reaching consequences and possible remedies of this double disjunction of politics and state and of state and constitution form the centre of an ongoing debate about 'constitutionalism beyond the state'. Whether the processes of constitutionalisation at the transnational level are to be seen as compensating for losses at the national level or as an enhancement by adding a new layer of constitutional ordering, these contemporary developments offer strong incentives for revisiting the achievements of constitutionalism, analysing its current modes of transmutation, and debating its future prospects. These are the issues that the chapters in this collection address.

The book investigates these issues in six parts. The first part deals with perhaps the most critical question concerning the character of modern constitutionalism, that of the mutual dependency (or possible independency) of statehood and constitutionalism. Dieter Grimm provides an overview of the achievements of constitutionalism, and outlines its central elements of democracy, limited government, and the principle of the rule of law. He argues that the achievements of constitutionalism are tied to an acknowledgement of its constitutive conditions—the boundary distinctions between public and private, and between internal and external. For this reason, Grimm contends that, to the extent that statehood is being eroded as a result of the blurring of these boundaries, then constitutionalism must be seen to be in decline. Internationalisation is opening up a gap between the exercise of public power and its modes of legitimation which constitutionalism is unable to close. Constitutionalism, in short, cannot be reconstructed on the international level.

Ulrich K. Preuss reworks Grimm's account of the achievement of constitutionalism and, in contrast to Grimm's analysis, argues that the essence of constitutionalism is misunderstood if it is too directly linked to the concept of statehood. In Preuss's view, the principle of territoriality—which is, he claims, the essence of statehood—was made effective by the absolutist state and that the key feature of constitutionalism has been to overcome the logic of the absolutist state. This has been done by linking sovereignty not so much to territory as to a people. Exploring this latter relation, Preuss argues that constitutionalism maintains the potential to overcome its historic links with statehood and to provide a means of normative integration of institutional arrangements at the transnational level. Martin Loughlin's response to the possibilities of transnational constitutionalisation is more sceptical. For Loughlin, the emergence of the novel concept of constitutionalisation is associated with certain social and economic processes that presently are affecting government at both the national and international levels. Constitutionalisation is the product of a reconfiguration of the values of constitutionalism; it promotes a merely legalistic understanding of constitutionalism and deflects from a broader notion of political constitutionalism, i.e. a form of constitutional thinking directed not only at the legal order but at political organisation in general.

To the extent that recent trends have led to a search for functional equivalents to the state at the transnational level, then this has been most clearly visible in the development of the European Union (EU). The ongoing process of European integration has fuelled a number of attempts to conceptualise this specific multi-level system of constitutions on the regional, the federal, and the European levels. Among the many questions which are raised, the mutual relationship between political and legal autonomy of the member states, their political and legal cooperation on the European level, and the independence of some genuinely European institutions may be highlighted. The constitutional question has arisen in part because of efforts to understand the *sui generis* character of the EU itself. But it also arises because power-sharing arrangements within the EU have touched on crucial aspects of democratic governance and raised questions about the legitimacy of EU actors. These developments provide the focus for the chapters in Part II.

Tanja A. Börzel offers an account of the nature of the structure of governance of the EU. In contrast to understandings of the EU as a prototype of 'network governance' or as 'governance without government', she argues that empirically the EU is best characterised as a form of 'governance *with* the state'. Börzel argues that the governing arrangements of the EU most closely resemble the German model of cooperative federalism; the EU has developed a supranational constitutional system, but this constitution, far from being autonomous, is interlocked with national constitutions. Fritz W. Scharpf advances this discussion by developing a theoretical framework which distinguishes between the sources for legitimation in European politics, which he argues lie entirely within the state, and the exercise of public authority, which by contrast is often located on the European level. Scharpf's model of a two-level polity parallels Börzel's. But Scharpf takes the constitutional analysis further by suggesting that this model imposes specific limits to the legitimacy of EU institutional action.

In the final chapter of this part of the book, Sonja Puntscher Riekmann argues that a core concept of modern constitutionalism is that of representation. In the European tradition, this concept is expressed mainly through the existence of parliaments as institutions that, acting as representative forums of the people, provide a vital source of constitutional legitimacy. Maintaining that the EU contains important federative elements, Puntscher Riekmann contends that constitutionalisation of the EU is a necessary process but that serious problems of representation exist. In the context of the failed Constitutional Treaty, she thus explores the potential role of parliaments to provide the means of enhancing representation within EU governing arrangements.

Whereas Part I focuses on the erosion of statehood, Part III addresses the other main plank of modern constitutionalism: the question of democracy. From different perspectives, the essays in this part converge on one central question: in what ways, if at all, can transnational constitutionalism be reconciled with the claims of democratic legitimacy? Petra Dobner examines the growing tension between the normative desirability of democratised law and the practical dissolution of the relation between law and democracy at the transnational level. She argues that the transformation of statehood leads simultaneously to forms of deconstitutionalisation and losses of democratic control. The emergence of global law, she contends, has yet to account for these losses, and present trends generally compound the challenge of finding democratic ways of living. Marcus Llanque takes a different tack. Examining the genealogy of citizenship, he seeks to broaden the meaning of the concept to render it more useful to contemporary circumstances. Distinguishing citizenship from such concepts as 'the people' and 'nationality', he adopts a notion of citizenship founded on the idea of constitutional membership. Starting from experience on the national level, Llanque rests his case with a plea for further explorations of the meaning of constitutional membership with respect to a future polity which is able to balance national, transnational, supranational, and cosmopolitan claims of allegiance and loyalty.

Hauke Brunkhorst closes this part of the book with a broad-ranging account of the impact of the emergence of 'world society' on the ideals of constitutional

democracy. Brunkhorst bases his argument on the premiss that constitutionalism has always maintained the Janus-face of inclusion and exclusion, emancipation and oppression. Although Western constitutionalism has acquired its inclusive qualities at the price of its cosmopolitan claims, he suggests that it has nevertheless been able to provide a legal means of coordinating conflicting powers within nation-state systems. Brunkhorst argues finally that the democratic possibilities which are inherent in the emergence of a world society can be realised only by promoting an agenda of radical reform which, in conceptual terms, requires us to overcome the limitations of dualistic and representational thinking (an argument that would appear to run counter to those of Grimm and Puntischer Riekmann).

The remaining parts address three of the main approaches to transnational law that arise from a constitutional perspective. Part IV explores the changing relationship between national constitutional law and public international law, with the two chapters in this part offering alternative explanations of the prospects of extending constitutionalism beyond the borders of the nation state. Mattias Kumm suggests that progress can be made with understanding the emerging relationship between national constitutional law and public international law only if we move beyond the crude division between the triumphalists, who see the present era as marking a radical extension of constitutionalism's claims in the international arena, and the nostalgists, who believe constitutionalism can only be realised in a world of sovereign nation states. Critiquing the position of 'constitutional nostalgia', a stance that underpins many advocating what he calls 'democratic statism', Kumm proposes in its place 'the practice conception of constitutionalism'. The practice conception is, he argues, a conceptual arrangement that is better fitted to adequately address the constitutional challenges that emergent transnationalism presents. In his contribution to this part, Rainer Wahl, by contrast, vigorously defends the conceptual use of 'constitution' as a state-centred concept. Wahl presents the case that the extension of the usage of the concept, whether as a form of 'higher law' in the international arena or as a species of 'societal law', amounts to a political emptying of the concept. Those who use the language of constitutionalism in such circumstances, he claims, are seeking to exploit the 'noble aura' of the term without being able to realise its necessary prerequisites.

Part V marks a slight detour. It considers the attempt to evade many of these conceptual intricacies by the suggestion that the evident tendencies towards global governance do not of themselves raise issues of constitutional quality. This part focuses on the concept of Global Administrative Law (GAL), and highlights the perception that the evolution of global law mostly engages issues of administrative rather than constitutional law. Nico Krisch weighs the pros and cons of applying the insights of constitutionalism to issues of global law. He argues that the modest scale and narrower reach implied when one talks about the globalisation of administrative law offers a more suitable model both for scholarship and political reform than constitutionalist approaches with their holistic vision. Alexander Somek does not challenge Krisch's observation that recent trends are better understood from an administrative rather than a constitutional perspective. But Somek draws out some

of the issues raised by the ostensibly modest ambition of the GAL project. He is, in particular, critical of the claim that the project amounts only to a redescription of modern international law under the dominating influence of administrative rationality. Rather, he claims, it marks the triumph of administrative rationality over the legal form itself. The world that GAL describes, Somek concludes, is not that of the demise of the state under globalising pressures; it marks instead the triumph of the state (the state as administration) over both politics and law.

Finally, Part VI offers three accounts of the way in which the fragmentation of law and constitution under globalising pressures can be addressed only by analysing the emergence of norm production from the societal periphery. This is the driving theme of the concept of societal constitutionalism. Neil Walker returns to the themes of Part I, dealing with the constitutional consequences of the erosion of statehood. He does so by considering whether—and, if so, on what terms—constitutionalism can remain a viable concept in the old state setting. And he asks whether—and, if so, on what terms—constitutionalism could possibly be adapted to new settings. His reconciling conclusion is that the use of the term constitutionalism should be retained, and it should be used to serve as a placeholder for exactly those concerns with respect to which others reject the use of the constitutional language when speaking about the transnationalisation of law. Constitutionalism, Walker argues, serves a crucial longstop function of providing a medium for dealing with the abiding concerns we still have, and ought to have, about our ideas of the common interest.

Riccardo Prandini frames the question of societal constitutionalism in rather different terms. In Prandini's account, the evolution of constitutionalism is to be seen in the mode of morphogenesis, that is, as a socio-cultural cycle in which a given institutional and cultural structure through cultural and structural interactions activated by societal actors gives rise to new forms. Prandini's approach displaces the centrality of the political in discussions of constitutions and offers an analysis of constitutionalisation as a specific movement generated by the proliferation of legal orders operating, both privately and publicly, at subnational, national and transnational levels. Finally, Gunther Teubner, beginning from the empirical observation that transnational private actors intensively regulate entire areas of life through their own private governance regimes, seeks to reposition the main constitutional question we face today. According to Teubner, the critical questions are raised by asking how legal theory should react to these major trends of privatisation and globalisation: how can nation-state constitutionalism be redesigned in a way that might enable constitutionalism's achievements to cope with these developments? Overcoming state-centrism and accepting the polycentric form of globalisation, he argues, are two sides of the same coin, and they result in the need to accept that the world of nation-state constitutionalism finds a functional equivalent in the emerging production of a global societal law.

It cannot be denied that the production of law, which used to be reserved to governmental institutions, has increasingly been complemented by forms of private regulation. And while the legitimacy of this production may well be questioned, its existence does call for theoretical conceptualisation and also integration into

the framework of constitutional thinking. The developments that the chapters in this book examine pose some basic questions about the foundations of modern constitutionalism, have provoked calls for a revision of that heritage, and evoked a lively debate about the future of constitutionalism. Constitutionalism is changing—that is beyond question. But the direction of change remains an open issue.

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