

# Introduction: Political constitutions in transnational society: introducing socio-legal and interdisciplinary perspectives

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This Special Supplement of the *Journal of Law and Society* builds on the success of the Special Supplement *Societal Constitutions in Transnational Legal Regimes*, which was published in 2018 and focused on non-political societal constitutions and their transnationalization and globalization. This current volume revisits political constitutions and their recent societal evolution and transnationalization. It explores the societal evolution of political constitutions beyond the traditional semantics and structures of state and national institutions and imaginaries.

Individual contributions use interdisciplinary and socio-legal methods to examine political constitutions and constitutionalism in supranational, transnational, and international constellations. They focus on methodological modifications in constitutional theory as much as reconceptualizations of its classic concepts, especially polity, identity, citizenship, and the public sphere and its reason, deliberation, and mobilization.

Relations between transnational polities and legal networks are examined in individual articles to highlight the role of non-political constitutional regimes in political institutions and constitutional settlements. Classic notions of republicanism, democracy, legitimacy, sovereignty, freedom as non-domination, and social justice are analysed beyond nation states because the impact of their transnationalization on practical politics cannot be underestimated as the current critical state of the European Union (EU) illustrates in the most persuasive way.

Public and private constitutional regimes, conflict of laws, and the relationship between political and economic constitutions are discussed in both general theoretical and specific international, European, and national contexts. The EU's political legitimacy depends on a strengthening of market governance and economic constitutionalism. Nevertheless, the societal strength of its economic constitution is matched by the weakness of its political legitimacy. The common market was originally expected to facilitate the common good of a transnational European polity, yet

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this political benefit of the EU's economic constitution has been significantly questioned in recent decades.

The transnationalism of current political constitutions is also discussed in the context of plurinational statehood and its regional and sub-national political, administrative, and cultural units. The EU's transnational democratic failings are not only consequences of the democratic deficit at the EU level but, much more importantly, of a democratic disconnect at the member state level. The urgent need for democratic reconnection, therefore, applies to the relationship between the EU and its member states as much as between constitutional bodies of national politics and sub-national institutions.

The volume opens with Richard Bellamy's article 'Political Constitutionalism and Populism'. Using the methodology of political science and constitutional theory and focusing on the fields of constitutional politics and institutions, Bellamy defines populism as a form of anti-system politics that draws on either a socio-cultural or an economic challenge to the established institutions and values. This distinction is then contrasted to the two regulative ideals of constitutionalism, limited government and non-arbitrary rule.

According to Bellamy, political constitutionalism rests on the ideals of non-arbitrary rule and socio-cultural pluralism, and can be contrasted to legal constitutionalism, which is associated with the ideal of limited government and economic liberalism. While political constitutionalism is incompatible with right-wing populism, it can accommodate the legitimate demands of left-wing populism. Bellamy subsequently puts this theoretical argument to the practical test of recent constitutional developments in the United Kingdom (UK) and analyses legal constitutionalism and its limits in combatting the rise of populism. Criticisms of political constitutionalism's alleged legitimization of populism and democratic backsliding, including Brexit and post-Brexit policies, are refuted on the basis that the model of political constitutionalism in the UK and elsewhere can be made increasingly responsive to the popular will. The article concludes by calling for democratic reforms that could further strengthen the legitimacy of political constitutionalism.

Jiří Přibáň's article 'Constitutionalism, Populism, and the Imaginary of the Authentic Polity: A Socio-Legal Analysis of European Public Spheres and Constitutional Democritization' also focuses on the concepts of political constitutionalism and populism analysed by Bellamy. It adopts a socio-legal perspective to emphasize the duality of political constitutions as both power limitations and power enhancements. The article uses Charles Taylor's notion of 'social imaginaries' and opens by analysing the constitutional imaginary of the public sphere, which is distinguished from the imaginary of the authentic polity. Populism is described as drawing on the politics of authenticity and its primary belief that the constituent power of the people has to be protected against corruption by bodies of both representative democracy and unrepresentative technocracy.

According to Přibáň, the promise of authenticity is behind the recent resurgence of both right-wing and left-wing populism, which significantly empowers the constitution of what Zygmunt Bauman described as 'explosive communities'. Following socio-legal analysis of populism, the imaginary of the authentic polity, and identity politics, the article explores the EU's transnational politics and law and discusses possible responses to the rising populism in the imaginaries of European public spheres and 'demoicracy'. Přibáň concludes by emphasizing that the EU will be increasingly challenged by the populist backlash at the national and local levels of its member states unless it starts constituting its alternative imaginaries of public mobilization and democratic constitutionalization.

Ming-Sung Kuo's article 'Democracy and Emergency: Finding the Constitutional Foundation of the Knowledgeable State in Social Dynamics' draws on the interdisciplinary perspective of institutional epistemology and focuses on the dynamics between law and society in constitutional

governance. Connected to Bellamy's distinction between political and legal constitutionalism and Příbáň's distinction between public opinion and expert knowledge, the article investigates the relationship between political and legal constitutionalism in the specific societal context of expert knowledge.

The constitutional state is analysed as the social organization of epistemic competence and knowledge production required by constitutional governance. According to Kuo, this constitutional ordering depends on a specific societal dynamic between expert knowledge and politics, which leads to the establishment of the 'knowledgeable state'. This epistemico-political constitution is subsequently examined at the transnational level of the World Health Organization's early response to the COVID-19 pandemic. As regards the structural interaction between the state's constitutional ordering and society's knowledge production and its transnational context, this unique societal constitution of political governance leads to the new supra-state political landscape. Nevertheless, this landscape involves legitimation challenges as regards expertise-steered global constitutional governance and crisis responses beyond the constitutional state's capacities and institutional framework.

Chiara Valentini's article 'Democratic Representation and Non-Majoritarian Actors in Constitutional Orders: A Systemic Analysis' further elaborates on the problem of legitimation by representation in political constitutionalism and the role of non-majoritarian institutions, bodies, and actors in democratic societies. Her adoption of systems theory leads to the formulation of political representation as a complex and pluralistic process involving different actors and activities.

Non-majoritarian institutions legitimized by their specific expertise and societal functions – such as regulatory agencies, adjudicative bodies, public service providers, and central banks – controversially exercise public authority beyond popular election and control. Their expert decision making and legitimation may run independently of – and indeed sometimes counter to – the principle of political representation, yet their already enormous political power is further increased by the globalization and transnationalization of law and politics. They are not responsible to the political institutions of representative democracy, yet they often significantly limit and counteract the decision making of those institutions and therefore constitute counter-majoritarian power in democratically organized polities.

Using Niklas Luhmann's theory of social systems, Valentini elaborates an analysis of these counter-majoritarian institutions, especially adjudicative bodies and judges in transnational constitutional regimes. Adjudicative institutions are expected to be impartial and independent of political power and influence, including that of politically representative and democratically elected bodies. Valentini, therefore, looks for broader alternatives and possibilities of democratic representation of adjudicative bodies based on responsive representation of societal plurality and complexity. She concludes by stating that non-majoritarian actors and institutions can achieve their representative status and potential diachronically as part of a systemic continuum that unfolds over time.

Christian Joerges' contribution is entitled 'Transnational Constitutionalism – Conflicts-Law Constitutionalism – Economic Constitutionalism: The Exemplary Case of the European Union' and continues the exploration of the most general themes of transnational and political constitutionalism, especially the emergence of non-representative and non-majoritarian economic and societal powers beyond democratic legitimacy in the context of the EU's economic constitutionalism.

Joerges considers transnational constitutionalism a social fact that poses some fundamental challenges to both the rule of law and politics, not least because economic institutions emerge as

ever more powerful and influential in transnational society. Importantly, he asks whether these institutions should be either recognized or confronted by political constitutionalism. To avoid the pitfalls of either spontaneously evolving transnational constitutionalism beyond the state or national constitutionalism returning to the defences of state sovereignty as the monopoly of legitimate rule, Joerges proposes a third way: an ambitious reconceptualization and reconstruction of the EU as a transnational legal order based on a three-dimensional conflicts law with democracy-enhancing potential.

According to Joerges, this reconceptualization and reconstruction reinvigorates the original 'united in diversity' motto of the EU's Draft Constitutional Treaty of 2004. He concludes by arguing that this alternative transnational legal order preserves the constitutional democracies of the EU's member states while providing for cooperative problem solving of transnational regulatory tasks and retaining supervisory powers over national and transnational operations and arrangements of private governance and economic constitutionalism.

While Joerges looks for specific legal and regulatory solutions to the EU's transnational economic constitutionalism and its growing power and weakening legitimacy, Michelle Everson, in her article 'The Economic Constitution and the Political Constitution: Seeking the Common Good in the Post-National Setting', offers a general analysis of the EU's post-national constellation and economic constitution as its legitimation framework. She provides an extremely useful historical contextualization of transnational economic integration, its ordoliberal precepts, and the economic constitution as the EU's design template and saviour in the absence of political and constitutional settlement.

Everson's analysis of the recent economic crisis and structural tensions in the EU and beyond its framework within the World Trade Organization reveals both the external limits and the internal tensions of economic constitutionalism. She focuses on adjudicative institutions and agents of economic constitutionalism and their place within the European legal system, including the EU Charter of Fundamental Rights, and contrasts the Charter to alternative forms of economic constitutionalism that incorporate more socialized models of the market economy.

This critical comparative approach offers a theoretical perspective on the economic constitutional role of ordoliberalism that leads to the argument that the concept of the economic constitution stretches beyond law and economy and needs to integrate the socio-political context and the notion of the common good. Everson concludes by critically assessing modern economic constitutionalism as a misplaced universalism and technocratic absolutism that abdicates political responsibility for the common good.

Michael Wilkinson's article 'Political Constitutionalism in Europe Revisited' offers the same fundamental criticism of the failures of political constitutionalism vis-a-vis the growing power of transnational economic constitutionalism, for which the EU serves as a case study. According to Wilkinson, the euro crisis has revealed legitimation gaps in the EU's structure and organization. These are linked to the legacy of ordoliberalism and its authoritarian roots in the inter-war period of nation state constitutionalism and the post-war period of transnational European integration.

Similarly to Everson, Wilkinson adopts a hybrid methodology drawn from the fields of history and political science and applies it to the evolution of the EU's post-sovereign constitutional polity. Informed by critical theory, he analyses the evolution of treaties and focuses on the special importance of the Treaty of Maastricht as a decisive step towards the future euro crisis conflict between economic decisions and political legitimacy.

According to Wilkinson, the post-Maastricht era is theoretically defined by the concept of post-sovereignty, the prioritization of law over politics, and the transformation of critical philosophy into Habermasian discourse analysis and post-national constitutionalism. Criticizing the demise

of critical theory in the era marked by the slogan ‘the end of history’ as much as the reunification of Germany and the collapse of the Soviet Union, Wilkinson shows that the universalistically optimistic constitutional theory of Jürgen Habermas, a pivotal intellectual authority of that era, actually obscured anti-systemic challenges already emerging in neoliberal European and global economy, politics, and law and resulting in the euro and other crises.

In his article ‘Plurinational Democracies in Europe: The Quest for a Profane Constitutionalism’, Joxerramon Bengoetxea continues the critical examination and scrutiny of the EU. However, he focuses on the general right to self-determination and self-government of sub-state nations in plurinational member states and examines general conceptualizations and specific peaceful solutions to conflicts regarding contestations over territory, citizenship, and sovereign authority. In this intellectual endeavour, he employs the terms ‘militant democracy’ and ‘plurinational democracy’ and uses a great number of fundamentally different examples from Quebec to Kosovo to prepare the conceptual and argumentative ground for an analysis of the legally and politically most complex case: the Catalan secessionist and sovereigntist movement.

Bengoetxea revisits the classic conceptual framework of state constitutionalism as the unity of people, territory, and rule of law, and examines the intellectual and political tradition of constitutional law based on popular and legal sovereignty, two classic concepts of political and legal constitutionalism. He considers the possibility of a constitutional transformation towards a pluralist and federal concept of plurinational democracy that would have the capacity to peacefully recover the typically modern notion of self-determination and self-assertion of a nation as a political community.

Combining a broad global perspective involving the analysis of different secessionist movements around the world with a detailed local perspective entailing the examination of the legal and political context of sub-state nations in Spain, Bengoetxea argues that the constitutional state based on the popular sovereignty of a majoritarian nation often neglects the recognition claims of national and territorial minorities. According to his analysis, this approach can lead to militant constitutionalism and the doctrinal exclusion of sub-state nations from political and constitutional debates. Bengoetxea, therefore, critically concludes that this form of a militant national constitutionalism, which sacralizes both the text of a constitution and the pre-defined exclusionary *demos*, needs to be revisited and countered by a more profane and flexible alternative.

Finally, Carmen Pavel’s article ‘Coercion and Justification: A Global Public Reason Perspective on Security Council Reform’ revisits topics closely related to Bengoetxea’s analysis of sub-state nations and their constitutional rights to self-determination and self-assertion. Matters of political coercion and legal justification and the relationship between these two aspects of both national and transnational constitutionalism permeate all political structures – sub-national, national, international, and transnational. Pavel, therefore, takes the United Nations Security Council as a case study of the only international body that authorizes the use of force beyond cases of self-defence. She describes its international legal and political functions to outline a general theoretical argument for an emerging global political and legal culture based on global public reason.

According to Pavel, the question of whether the Security Council should be entrusted with such an extraordinary range of functions – from peacekeeping to legislating and protecting human rights in humanitarian emergencies – requires profound philosophical engagement. Her combination of philosophical speculation and institutional analysis offers a fascinating study of problems beyond traditional methodologies of international law and politics. The Security Council’s protection of international peace and security and its increasing role in responses to humanitarian emergencies and societal collapses effectively mean that its authority, structure, and decision making need to be fundamentally reformed in the context of current transnational

law and politics. Pavel reconceptualizes the justification and legitimacy of the Security Council through the public reason tradition of modern philosophy and concludes that the emergence of a global political culture already reveals the normative inadequacy of its authority and operations and the urgency with which it needs to be reformed.

Pavel's article reveals a general trend in the study of the law and politics of transnational society: the power of international and transnational organizations gets stronger, yet its legitimacy gets weaker. The volume thus ends by returning to the initial topic of political constitutionalism in its sub-national, national, international, and transnational constellations. All of the contributions demonstrate in their original manners of writing and reasoning the urgency of socio-legal and interdisciplinary reconceptualizations of the classic concepts of polity, identity, deliberation, legitimacy, and the public sphere and its reason.

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