DERECHO & CRÍTICA SOCIAL

Volumen II

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NEW UNDERSTANDINGS OF CONSTITUTIONALISM

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I will speak today of the changing face of constitutionalism, of a perceptible shift that we are witnessing away from a more traditional understanding and in the direction of a constitutional pluralism and of *constitutionalisation*. My argument is that there two tendencies mark a radical, and arguably a dangerous, shift away from the more traditional understanding, a shift that surrenders the political moment to the economic logic of globalisation.

Let me say something about the two constitutional imaginaries, or constitutional stories.

The first of the two tales is the more familiar, modern story of constitutionalism, as unfinished project, that in its many variations can still be collected into a single narrative. The constitutional theorist begins by drawing a distinction; between politics and law, between will and reason, democracy and rights, or in its more interesting formulations, between constituent and constituted power. However the distinction is configured, what is constant is that the poles articulate, and that their articulation is characterised by tension. Constitutionalism is the name for that articulation and that tension. Constitutionalism here also holds the promise that the tension will be productive.

In this more familiar narrative, the constitution has been analysed as giving us the vocabulary to furnish democratic experimentation and as simultaneously delimiting the field of experimentation. If it achieves both imperfectly, then that imperfection itself has been seen as an advantage. In

indeterminacy, that is, in the imperfect delimitation, it harboured responsiveness to the dynamism of the political; in the specificity of constitutional language, necessarily reductive of the scope of political meanings, it secured both containment and stability. This imperfection in both directions, guarantees that there will always be tension, and constitutionalism straddles this tension with the promise of self-determination on the back of what it sanctions as conditions of that self-determination in terms of relevant constituency, containment in rights- and property-regimes, what is negotiable and what is fixed. Niklas Luhmann would call this the constitution's selective release of the future in, respectively, social, material and temporal dimensions.

This traditional take on constitutionalism does not lack dynamism. Some of its more conservative renditions of course do. But at the other end of the spectrum, with the deconstructive turn for example, a full range of alternatives becomes visible inherent in a text that could be unpacked in contrasting ways, the unsettledness of its meaning tracking the restlessness of the political. This has in turn allowed constitutional lawyers a claim on *the constituent* in the various modalities, that the constituted does not, and could not, exhaust.

Where there is danger of a lapse – of the live spirit of the democratic into the dead letter of the legal text – a constitutional moment animates the spirit anew. At one level the urge to keep the flame alive explains the obsession to grant the status of a moment to any semblance of mobility of the body politic; where there is no mobility to grant it to a constitutional court; where neither of these live up to the task, to read the constitutional momentum into social dialogue; when the crippling poverty of social dialogue in turn proves no capacity to carry anything close to the ambition of constitutional creativity then to defer the constitutional to the ideality of a dialogue that would. There is something nostalgic but moribund about these efforts to ground the appeal of the constitutional in some form of rational public discourse in the era where the political finds its outlets thwarted in mass consumption and mass apathy. And Gianfranco Poggi puts it well when he reminds us that

"Marx was not far wrong in his bloody-minded suspicion that the duty imposed on the member of civil society periodically to experience *'ecstasies'* – to sublimate away their mundane, egoistic interests in order to act as citizens – was at best a high-flown idealistic abstraction, at worst a deceitful cover for substantial continuities and congruities between the interests pursued in each [private and public] sphere"[1].

In any case, it is really difficult in the midst of this inertia to find something, anything, to ascribe momentum to, and Luhmann can ask, not without a touch of *Schadenfreude*, "if there was no demos, would anyone notice?"[2] In marked contrast, there is a strong temptation to deny that very status of a constitutional moment to the deafening resonance of political events that do not fit the logic of constitutional moments, such as the decisive reaction to the European constitution and the widespread *anti-establishment* riots in Paris and Athens. Is it perhaps the exhaustion of this paradigm of constitutionalism as paradoxical but productive, this concept-in-tension whose tension no longer registers with any force nor animates political debate, that has led to the rise of a second narrative of constitutionalism?

Here it is constitutionalism's *plural* explosion on to the global scene that puts this first paradigm, this first constitutional story, to question. If modern constitutionalism finds its coordinates in the articulation-in-tension of politics and law, the new paradigm leaves it without its constitutive tension. Instead we have horizontal proliferation. What coinage precisely sets something in circulation as constitutional is not specified, but then pluralism perhaps tells us it shouldn't. Against hegemonic understandings, hierarchy-building, privileged political imaginaries and the rest, pluralism invites plurality also at the level of definitions: no privilege to any one of the criteria of the constitutional: constitutionalisms *from below* carry with them their own self-definitions. At some level this is invigorating; at another it is hugely problematic.

Let us begin straight away with what *must* appear paradoxical about *constitutionalisation*, the constitutional curiosity that is this incremental, fragmentary process of becoming-constitutional. If the term constitutional

[1] Poggi (1978) 118.

[2] Luhmann as quoted in Fischer-Lescano (2004) 78.

connotes a framing function, the Constitution a system of meta-rules that allow law to be recognised as valid and frame the contours of what can be contested legally, what does it mean to talk of constitutionalisation as an ongoing process? And what does it mean to talk of constitutionalisation at the European level, where constitutional functions appear to be distributed between national and transnational level with no jurisdiction over the distribution (and with some famous constitutional battles fought precisely over jurisdictional allocation)? If constitutionalism traditionally denotes a certain articulation of the political and the legal, where might one look now for the political register within constitutionalisation, with the weakening or collapse of political opportunities of framing or intervention? Constitutionalisation thus appears question-begging on two important fronts, significant because constitutive of the constitutional in two directions, externally with politics, internally in law. The first involves the articulation, or coupling, of the legal and the political; what appears question-begging about the coupling is that the political is not given expression to except, as we said, *a posteriori*, and therefore it appears as both condition and product of *its* coupling to law. The second involves the fundamental question of what gives law its systematicity; in this context it is question-begging to assume the hierarchisation of jurisdiction, or framing function, as taking place *a posteriori*.

This last point links directly to *constitutional pluralism*. To call a constitutional order plural is, at least *prima facie,* contradictory. As Chris Thornhill thoughtfully puts it, the constitution is the point of final normative regress in the system[3]. Such regress is what systematicity requires, and systematicity is the distinctive feature of the legal order. Even in the context of the common law and its insistence on the virtues of the ad hoc and the pragmatic, its most celebrated theorist, Herbert Hart, introduces the constitutional distinction between primary and secondary rules as constitutive of what it means to have a legal system. If he defines law as the union of primary and secondary rules it is because secondary rules, rules of recognition (of validity), of change and of jurisdiction grant the body of

[3] Thornhill (2012).

rules their systematic character: recognition ultimately gathers the fragments (the disparate rules at the various levels at which they are instantiated) as *one* corpus, hierarchically structured and in that sense only, rational. This rationality-as-systematicity finds its apogee in Kelsen. In both cases and across the vast range that stretches between these two extreme positions, law is defined through its systematicity, its ultimate points of regress the "rule of recognition", the *Grundnorm*, the basic constitutional principles, and thus against *plurality*.

It is perhaps indicative that the first round of agonising over the difficulties of sustaining such gathering orders at the transnational level came from legal theorists versed in these traditions. Neil MacCormick famously confronted the question over overlapping and non-hierarchical legal systems in his *Beyond the sovereign State*[4] and some years later *solved* it by accommodating whatever plurality he could in the notion of a *commonwealth*[5], which entailed a pluralism of sorts.

That of course is all a long time ago, and the constitutional question has been *answered* in large outwith such attempts to think it through in terms of the concept of law itself. The storming of traditional *unitary* constitutional imaginaries by constitutional pluralism suggested removing the old fixities and led to a renegotiation of constituencies, competencies, operative levels and structures. The notion of a constitutional project in the making was greatly facilitated by the notion of constitutionalisation as ongoing, and I would therefore suggest that the two cannot be divorced: pluralism gains its point of purchase in constitutionalisation that imports a certain openness to the future, and constitutionalisation gains its justification from its ability to accommodate the plural. The becoming-constitutional comes to dominate the new space and imaginary.

Let us identify two forms that this new constitutional openness to the plural takes:

[4] MacCormick (1993).

[5] MacCormick (1999).

The first form comes in the production of "decisively non-holistic forms of constitutionalism", as Neil Walker puts it[6], in which constitutional norms are produced at varying levels. *Constitutionalisms from below* find their niche here, as do, more insidiously, the open method of coordination and other forms of *soft* law whose *hardening as constitutional* installs itself at crucial junctures of the market system to produce what Richard Hyman calls the "flexible rigidities" of the labour market [7] and the new competitive alignments of national systems of social protection.

The second form involves the constitution of different functional spheres of transnational exchange and interaction; *functional* in the sense that in each case the sectoral constitution is constitutively oriented to meeting the exigencies of the regulation of the economy, the lifeworld, the politics, or of security, whatever the field, at the transnational level. In that sense it regards *the proliferation of constitutional registers* and the separation off of the *economic Constitution* and the *social Constitution* from the *political Constitution*.

I have no objection to the release of the constitutional from its linkage to the State form, and I share none of the critics' concerns that this release is epistemologically problematic. To the extent that it taps a certain emancipatory potential locked in the constitutional frame, I too would most certainly argue for its release in the, openly political, direction of providing social protection and reversing entrenched advantage. But that should not occlude what is the political danger that we currently face, and towards which *constitutionalisation* and *pluralism* have been instrumentally harnessed. It is the danger of the cooption of constitutionalism by the economic logic of globalization.

Why has so little attention been paid to the danger? It is perhaps because pluralism promises to release political voices from the straight-jacketing of the state. And it is perhaps because of the way in which such a variety of oppositional discourses to the state find expression in legal pluralism, that allows certain broadly emancipatory projects to co-exist so seamlessly with

[6] Walker (2009) 25.

[7] Hyman (2006).

neo-liberal forms, in both their endorsement of the opposition to State-centred and -centralising constitutionalisms. There is a grand coalition forming. Proponents of the so-called *social dialogue* in Europe have been keen to claim the language of constitutionalisation for the employer-trade union negotiations in European employment relations; combined with Habermas's discourse principle in its democratic instantiation, it is viewed as approximating (in theory at least) the realization in the European policy of the co-originality of constitution and democracy (it is just that in institutional practice, social dialogue is too toothless even for its apologists to take seriously.) Release from the confining normative claims of the state and its monopolising of the common good propels the pluralists; hatred of the state joins libertarians and anti-state activists in a common cause (or those like Francois Ewald who seem to have oscillated from the latter to the former), so that constitutional pluralism is celebrated across the board as "adapted to the multiplicity of identities and loyalties"[8]; identified with democratic experimentalism[9]; or constitutively linked to democratic experimentalism and cosmopolitan awakenings (Habermas and disciples, also Kumm, Gestenberg, etc.)

Let me repeat, in a sobering way, the root quandary. In its *framing function*, constitutionality was understood as underpinning the unity of the system in the more-or-less precise terms of holding fast the criterion that decided inclusion (or identity) and what did and what did not belong to the legal order (what is *ultra vires*, what is unconstitutional); it allowed variety (in containing rules of change and delimiting legitimate interpretative scope); it allocated jurisdiction. There are a number of ways to re-describe this function, and of course none of them allow for watertight containment; of course there is room for interpretative adjustments, revisiting and renewing these norms through novel interpretations. And while distinctions here can be made between rigid and flexible constitutions, or regarding specific provisions like basic rights, in its framing function, as setting the terms, constitutionality could not be put to question legally. To *undo* this framing

[8] Krisch as quoted in Thornhill (2012).

[9] Dorf & Sabel (1998).

function in the name of pluralising, not only undercuts the constitution as an institutional achievement in its own right, but more worryingly harnesses it, or at least leaves it vulnerable, to a logic of economic colonization in the following sense.

With constitutionalisation, as emergent quality of the constitutional, we have a re-orientation of constitutional function and the achievement of a constitution in an incremental fashion. Manifold sites of transnational administrative justice operating in the absence of state-constitutional principles, acquire constitutional standing if they can be seen to still be *framed* – whatever that now means - and guided by principles of legality, proportionality, rationality. Alongside this comes an entrenchment of norms which acquire constitutional standing through recursive operations, or through generalization as bench-marking. Staggered, fragmented and disjointed processes are uploaded to constitutional standing. Unconcerned with pedigree and fixated on output –oriented tasks of "managing, shaping, constraining political power" after the fact of its emergence – the new constitutionalism forces us to re-think the constitutional in terms of a process where "[g]radually the layers of common normative principle thicken; they come to be argued for and adapted through a mixture of comparative study and a sense that they are (or are becoming obligatory)"[10]. As Thornhill summarises the mood in European legal theory:

> "The focal shift towards pluralism reflects the underlying sense that, if the EU has a constitution, this is a constitution that is not exhausted in legal texts, and that only comes to light through analysis of the correlation between legal formation, patterns of conflicting motivation, claims to juridical primacy, and embedded societal processes of legal dislocation and realignment"[11].

And with this, to transfer Luhmann's insight from national constitutionalism, the impasse is turned productive, the paradox of the democratic deficit of the European or the global Constitution *unfolded* in what is becoming the *evolutionary achievement* of a global constitutionalism,

[10] Kingsbury (2009) 32.

[11] Thornhill (2012) 415.

with pluralism substituting for democracy and constitutionalisation substituting for constitutionality.

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