

EDITORIAL

The current scholarship in European law, international law and legal theory seems to be obsessed with exploring the power of constitutionalism. In the globalised, fragmented world with a multiplicity of actors, international legal regulation has developed through strongly independent regimes such as EU law, WTO law, environmental law, human rights, and space law, within the framework of general international law. Each regime has developed strong specialised substantive law while the procedural norms and the structures of the regimes are less developed. While the global legal regulation has become more fragmented and specialised through the diversification of norm-creating powers, there is concurrent pressure to unify and consolidate these normative orders. Constitutionalism has become one of the suggested means to consolidate the regimes and their inter-regime relations.

In the EU, the hope posited in constitutionalism has lately manifested itself in the creation of the Constitutional Treaty (formally, the Treaty Establishing a Constitution for Europe).¹ Regardless of the efforts invested in this project, it is not going to enter into force as a whole. Most likely, it is going to lead to a piecemeal amendment of the founding treaties, while a part or parts of the Constitutional Treaty will enter into force in the near future – although under a less provocative title. In the international law sphere there is an extensive debate on the UN Charter as a world constitution. Although it is widely recognised that the United Nations Charter enjoys a particular character due to the fundamental nature of some of its norms, principles, and purposes as well as its universal acceptance by the international community of States,² its potential role as a constitution remains disputed. Nevertheless, whether it is EU law, WTO law, or the UN law, the coherence and unity of their internal structures as well as the inter-regime relations are presently under academic scrutiny.

We academics are all wrapped up in our respective constitutionalism debates struggling with seemingly similar problems, yet the debates are detached. We should not presume that there is only one single debate on constitutionalism, on the contrary,

¹ OJ C 310, 16 December 2004.

² Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, *UN Doc. A/CN.4/L.702*, 18 July 2006, 22 para. 36.

it seems that there are different discourses for different legal disciplines. Our interest was raised by this realisation resulting in two specific observations. First, we felt that when we were discussing constitutionalism, we never quite understood what the other was saying. This seemed to have something to do with one of us being an international lawyer and the other a European lawyer. Second, we disagreed on the power, or the potential, of constitutionalism to engender coherence or fragmentation. In either case we were struck by the fact that two separate discourses – or at least two different definitions of constitutionalism – were meeting in our discussion and we were not able to learn from one another. We were forced to ask if the things that separated us were really meaningful or only imaginary; a misunderstanding, a miscommunication, a territorial fight between autonomous disciplines?

Reaching beyond what seemed to us an unidentified fog of notions and structures, we wanted to lift the veil of confusion and have a meaningful debate. This attempt led us to organise a conference ‘Foundations of Europe: Chasing Constitutionalism’ in Helsinki, 29-30 September 2006. We attempted to ask the kind of question J.L Austin posed his students, according to a recent biography, namely, ‘Do you mean what you say when you say . . .’.³ To put it plainly: what are we talking about when we talk about constitutionalism and what do we expect from constitutionalism?

We were ambitious in inviting, and fortunate in that they accepted, not just scholars of legal science, but internationally leading scholars of law in their respective fields of study, to speak at our conference: Professor Joxerramon Bengoetxea from Oñati, Spain; Professor Kaarlo Tuori from Helsinki, Finland; Professor Samantha Besson from Fribourg, Switzerland; Professor Bardo Fassbender from Berlin, Germany; and last but not least, Professor Miguel Poiares Maduro from Lisbon, Portugal, currently serving as an Advocate General of the Court of Justice of the European Communities. This issue of No Foundations (NoFo) is dedicated to this conference, consisting of those lectures that were available for publication.

The road of the Constitutional Treaty since the Convention that produced it is perceptively analysed by Joxerramon Bengoetxea in his contribution ‘European ways of constitutionalism’. He studies the constitutional crisis, as some have called it, and examines several central political documents depicting the crisis from a legal sociological point of view. According to him, the documents reflect the uneasy relationship between European formal and idealist legal cultures and *Realpolitik*.

³ Lacey, Nicola: A Life of HLA Hart: The Nightmare and the Noble Dream. Oxford University Press, 2004, 159.

Bengoetxea also suggests several different cures for the diagnosed illness of the 'European way of constitutionalism', i.e., the crisis of the Constitutional Treaty. One of those cures is 'overcoming the Peter Pan syndrome' which would mean ratification of the Constitutional Treaty by majority and embracing an EU wide landscape of variable geometry.⁴

Kaarlo Tuori's insightful article 'The failure of the EU's constitutional project' also deals with the Constitutional Treaty, but whereas Bengoetxea focused on the EU level, Tuori focuses more on the interplay between the national and trans-national levels, at the same time balancing the legal and the political perspectives on constitutionalism. He analyses the difficulties caused by applying concepts inherited from the nation-state, e.g., constitution and constitutionalism, on the trans-national level in an environment where no trans-national *demos* exists. Tuori finally answers in the negative to the question he poses in the beginning: was the constitutional project of the EU a mistake? His remedy for the constitutional crisis of the EU, explored by Bengoetxea, is to give it some time. According to Tuori, an immature legal order such as that of the EU is hardly ready at the present stage to have a formal 'constitution through an act of self-legislation'.⁵ Tuori describes some of the steps necessary in order to develop a trans-national constitutional culture that could make a trans-national constitution a viable option.

This issue of the NoFo ends with a detailed analysis, 'The concept of constitution in Europe: Interpretation *in lieu* of translation', by Samantha Besson. It is only fitting that with such a complex object of study, we end where we started from, namely clarifying the concepts we use and conceptions we hold relating to constitutions and constitutionalism. Besson stresses that interpretation in this context is an act that necessarily involves the objects of interpretation (i.e., concepts) in a dialogic interaction between the national and trans-national levels, whereas translation is a one-way exercise in that it 'leaves the pre-existing concept untouched'.⁶ In essence, although in a more sophisticated way, Besson sketches out the way forward for European constitutionalism. What could perhaps cater for our expectations for it would be to construct a model that would accommodate true constitutional pluralism in Europe, complete with also a mechanism for de-territorialised democratic legitimacy. This is an

⁴ See Joxerramon Bengoetxea in this volume, 32-34.

⁵ See Kaarlo Tuori in this volume, 47-48.

⁶ See Samantha Besson in this volume, 52.

ongoing challenge for constitutional theory and for the re-interpretation of constitutional concepts adapted to the trans-national European legal order.

The views presented by Bardo Fassbender and Miguel Poiares Maduro have been published elsewhere. Both presentations provided further understanding in the particularities of constitutionalism in international law and European Union debate. Fassbender wrote his famous article 'The United Nations Charter As Constitution of The International Community' already in 1998,⁷ which he recently followed up with "'We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law'.⁸ Maduro, in his lecture 'Passion and reason in European integration', insisted on inserting passion, not only reason, to European integration, described constitutionalism as one of the tools of democracy, and spoke of the asymmetries related to democratic decision making.⁹

The conference started from the point that constitutionalism has many appearances. We were struck by the realisation of how many and varied appearances constitutionalism may have and how deeply interconnected the legal and political debates are. The diversity is puzzling, since constitutionalism debates in different fields of law or sub-regimes have emerged as a response to seemingly similar complications. Constitutionalism aspires to do away with structural problems, to attain coherence and unity of the regime or regimes, and of course to regulate the use of political power, while addressing the same questions: the basic ideas of constitutional order such as its form, legitimacy, purpose, credibility; and tasks such as limiting 'government' powers to protect individuals, acting as the repository of the common good, or establishing the separation of powers. On the one hand, the underlying current in different constitutionalism debates may generally appear the same, only adding to our confusion. On the other hand, compared with each other, the respective debates seem to give different meanings, interpretations, or value for the constitutional concepts.

⁷ Fassbender, Bardo: The United Nations Charter As Constitution of The International Community. *36 Columbian Journal of Transnational Law* (1998), 531-619.

⁸ Fassbender, Bardo: 'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law. In Loughlin, Martin & Walker, Neil (eds): *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford University Press 2007, 269-290.

⁹ He gave a speech on the interactive relationship between the EU and national legal orders relating to some similar questions at the Finnish Parliament's centennial anniversary seminar on 2 October 2007 entitled 'Demokratia ja säädöspolitiikka', which can be accessed (in Finnish) at: <http://www.kansanvalta.fi/Etusivu/Tutkimusjakehitys/Julkaisujajatutkimuksia>.

We concluded, in the conference, that despite the fact that the constitutionalism debates in European law, international law, and legal theory share an interest in these basic notions but use them in different ways, a fruitful cross-regime debate is possible. In fact, cross-disciplinary discourse seems unavoidable if one wants to make sense of constitutionalism in the contemporary circumstances of constitutional pluralism. However, it must be clear from the outset that success in such potentially fertile exercise requires clarity of definitions, mutual understanding of the disciplines involved, and a well-informed theoretical foundation. In the beginning of the exercise, and possibly even at the end of it, one must be cautious in trying to translate the solutions of one regime directly to another.

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