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Review article

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Books reviewed

Constitutionalism in the global realm: A sociological approach, by Poul F. Kjaer, London, Routledge, 2014, 178pp., £85 (hardback) ISBN 978-0-415-73373-1

Constitutional fragments: Societal constitutionalism and globalization, by Gunther Teubner, Oxford, Oxford University Press, 2012, 213pp., £24.99 (hardback), ISBN 978-0-199-64467-4

A sociology of constitutions: Constitutions and state legitimacy in historical-sociological perspective, by Chris Thornhill, Cambridge, Cambridge University Press, 2011, 451 pp., £84.99 (hardback), ISBN 978-0-521-11621-3

Introduction

Constitutional matters are fast rising up the political agenda, no more so than in the United Kingdom where the post-Scottish referendum period has demonstrated this acutely. In the lead-up to that referendum in 2014, and in its immediate aftermath, constitutional reform was being made almost on the

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run. Many promises were made to the British/Scottish people by several politicians who by all accounts had no mandate to make such declarations or decisions (e.g. ex-Prime Minister Gordon Brown, who held no ministerial or governmental position at the time), but who, nevertheless, continued to suggest radical reform – and solemnly promised its delivery – without there seeming to be any constraint on what they said could be done or might actually be done. And after the 2015 election in the United Kingdom these pressures for constitutional reform escalated. In part this was a result of the panicky response by 'Westminster politicians' to the prospect of a 'yes' vote in the referendum and the victory of the Scottish National Party (SNP) in the parliamentary elections, but it also indicates the nature of the British constitution. The British constitution is one largely 'made on the hoof', so to speak, since it is not characterized by a systematic and written document but is the result of *ad-hoc* legislative enactments, legal decisions made by the courts, parliamentary precedent and more besides. In the literature on constitutional matters the British constitution is, as a result, designated a quintessential 'political constitution' (or sometimes a 'constitution by convention'). Indeed, it may be the only true example of such a political constitution, though there are aspects of political constitutions elsewhere and this designation continues to play a leading part in contemporary constitutional debate (e.g. Tomkins, 2013).

Political constitutionalism is sympathetic to popular democracy: it is particularly concerned with how, and by whom, executive powers are held to account. Indeed it stresses the absolutely essential role of 'democratic control' over constitutional matters – involving the parliamentary privileges of 'self-governance', the balancing of powers and interests, judicious compromise, etc. From this perspective the democratic political process is seen *as* the constitution – there is no 'higher authority' to which appeal can be made. All the constitution offers is a framework for resolving disagreements and solving disputes (Bellamy, 2007). It is 'republican' in a liberal Madisonian sense (Tomkins, 2005), though it is very much against the foregrounding of a rights discourse – embodied in the law – if that is seen to trump the sovereignty of parliamentary processes in political decision-making.

Political constitutionalism is mainly contrasted to legal constitutionalism in academic discussion. Legal constitutionalism is more concerned with the formal arrangements of constitutional governance and powers, particularly those associated with the rule of law and judicial review. It stresses the vigilant respect for the higher constitutional arrangements embodied in a legally binding 'contract' guiding and legitimizing governmental powers, with a particular attention to limiting those powers in various ways. It also demonstrates a certain hesitancy in respect to 'popular democracy', particularly in its deliberative and participatory forms (and hence its scepticism of political constitutionalism). Popular democracy stresses the procedural dimensions to democracy: norms such as transparency, due process, the representativeness of participants, etc. But these are seen as neglecting the formal conditions necessary for democratic governance: substantive dimensions such as an independent judiciary and

the genuine rule of law, a separation of powers, contestation and compromise over political outcomes and, in particular, the subjecting of legislative activity to scrutiny by a supreme judicial body empowered by custom and practice to interpret and protect the constitution.

And this relates to a second reason for the rise of interest in constitutional matters: the almost universal emergence of a human rights discourse in the post-Second World War period. Originally driven by the founding UN Treaty and its subsequent additions and supplements, charters of human rights are now a ubiquitous feature and concern across the political spectrum and across the globe. And these charters of human rights are increasingly being given legislative backing in various contexts (e.g. the European Union) and so becoming part – indeed, a vital part – of international law and constitutional arrangements.

But, as indicated above, human rights pose a dilemma for political constitutionalism, in particular since they seem to take precedence over domestic parliamentary practice, subjecting domestic legislative and legal judgement to a 'higher' tribunal embodied in the law. As a result they are viewed as a threat to the political constitution (Campbell *et al.*, 2001; Geuss, 2013; see also Webber, 2009).

But in addition to political and legal constitutionalism there are several other contrasting formulations and alternative characterizations: economic constitutionalism, territorial constitutionalism, labour constitutionalism, cosmopolitan constitutionalism and corporate constitutionalism being the ones that come immediately to mind (Dukes, 2014; Gallagher, 2014; Joerges, 2005; Thompson, 2012, chapter 2).[1] And what the books under review bring into focus is yet another approach, this time stressing the sociological analysis of constitutional matters. Clearly, this is not a form of the constitution like the others discussed and mentioned but a quasi-methodological take on how these should be analysed. In many ways 'sociological constitutionalism' is 'the new kid on the block' in constitutional debate: there has been an upsurge in discussion of this in recent years (mainly since Sciulli, 1992), and the three books under consideration serve to illustrate this resurgence in interest.

Society and its constitutions

What sociological constitutionality claims to bring to the analytical table is a concern with the underlying social configurations of forces and institutional pressures that shape both constitutional outcomes and the processes leading to their change. Chris Thornhill's *A sociology of constitutions* is exemplary in this respect, dealing as it does with the dynamic of constitutional forms: their making, unmaking and remaking over several centuries. It provides an uncompromisingly detailed and telling analysis of the structural and conjunctural forces that have shaped constitutional developments in a mainly European context since the Middle Ages. For anyone seriously interested in constitutional history, this book provides an excellent and erudite analysis. Broadly speaking, in Thornhill's approach a 'constitution' exists for any historical normative order

that demonstrates a rudimentary governance arrangement, and it is by this move that the term 'constitution' is transformed into a synonym for a legal order, and hence an aspect of power. So this type of analysis makes sense as descriptive sociology where the objective is to sketch the 'power maps' through which the social world functions. However, whilst one should have nothing but praise for Thornhill's scholarship, in a moment I draw attention to several potential reservations about the form of analysis that Thornhill deploys in his book (and similarly with the others under review).

Thornhill's book is mainly concerned with 'internal/domestic' constitutional developments. This is the traditional domain for constitutional analysis, and, indeed, a strength of Thornhill's book is that it plots historically how such a territorial and jurisdictional exclusivity came about: how the national territory was constructed socio-politically and its constitutional arrangements secured. But one other reason discussion of constitutional matters is increasing is that the domestic/national arena is no longer thought to provide an adequate context for constitutional debate. 'Globalization' has shattered the illusion of state-centric political formations, as multiple transnational and transformational logics are argued now to be in play, posing the problem of how constitutional matters can be reconfigured to suit this new era. This is where the other two books under review enter the picture, since they explicitly address these issues. In *Constitutional fragments* Gunther Teubner continues his robust, somewhat eclectic, but always innovative and provocative project for a reconceptualization of transnational legal orders and constitutional deconstruction, while Poul Kjaer (a one-time student and colleague of Teubner's) provides a more normative account of the problems thrown up by globalization and what might be done to counter some of the trends suggested by Teubner. And whilst *Constitutionalism in the global realm* is concerned mainly with the normative order of the European polity, its terms of reference stretch a little further to embrace the wider global realm beyond. But that realm does not extend much further than the North Atlantic countries. Thus, whilst both these books take 'globalization' almost as a given in order to explore its constitutional consequences, quite what 'globalization' means from their point of view is not clearly stated: Latin America, Africa, the Middle East and Far East, for instance, hardly get a look in. So an early point of comment would be to challenge the highly generalized, somewhat loose and ubiquitous notion of globalization operating in these books in the name of the continued salience of nationally based economic, political and, indeed, social formations for the international order and constitutional arrangements (Thompson, 2015a).

Poul Kjaer in *Constitutionalism in the global realm* addresses these issues in the context of his discussions of normative orders (that is, constitutional orders always embody a judgement as to their ideal standards of operation and the ultimate values to which they aspire). In the context of Western Europe this broadly involves a commitment to various forms of 'liberal' inspired arrangements, founded on the promotion of equal rights within a culturally defined frame of the public good. Kjaer's problem is how to understand the proliferation of

these organizational orders and frame a system for their mutual recognition and compatibility. We have multiple sites of constitutional discourse and political authority, he claims, many of which lay outside the traditional compound of nation-state relationships.

But how are constitutional conflicts solved in this world? Distinct species of normative orders can coexist, it is claimed. An institutional normative order has a self-referential existence, such that powers originally acquired by custom and convention are subsequently redefined and confirmed through formal legislation. Where there is a plurality of institutional normative orders within a functioning constitution there may be mutual recognition of each but no single one with authority over the others. Hence a 'constitutional pluralism' results (Loughlin, 2014; Walker, 2002), where there is no necessarily ultimate resolution of competences.

Be that as it may for a moment (we return to these issues below). A key question for all three books is how they choose to treat societal analysis in an analytical sense. Exactly how is their claim to a novel commitment to a *sociological approach* to constitutional matters set up, and what are its consequences? Here there are several coincidental levels at which this can be discussed and which characterize all three books.

The first of these is that they all pay homage – to varying degrees – to the work of Niklas Luhmann as an intellectual inspiration for how 'the social' should be analysed (Thornhill, pp. 13–14; Teubner, *passim*; Kjaer, pp. 41–43).[2] For Luhmann the social order is made up of a series of (relatively?) autonomous spheres of meaning, displaying different 'logics of observation'. These systems may be economic, political or legal systems, organizational entities, media institutions, etc. Each of these systems orients itself according to its own distinctions, its own constructions of reality and its own observational codes. In this 'systems theory' the law is conceived as one of these highly abstract autopoietic systems; this is an account of law as a kind of self-referential network, which has its own logic that resists its complete instrumentalization (Luhmann, 1985). So the overall global system is characterized by overlapping relatively enclosed functional (sub-)systems, which poses the problem of their macro-level co-ordination and governance. Thus, strictly speaking, at one level at least, there can be no stable domestic or 'global' constitution. The constitutive differentiation of society into (sub-)systems means that they all operate according to their own distinctions, thereby continually reproducing new differences as they abut and collide with one another. The best that can be expected from this is a loose coupling between different sub-systems (of which the law is a key one). This frustrates any attempt at overall co-ordination or governance by a competent authority. Only 'self-governance' is possible, driven by the enclosed inner logic of each (sub-)system. One consequence is that new perturbations, differentiations, irritations, provocations and unexpected events continually arise in the world, hence Teubner's characterization in his title of *Constitutional fragments*. This enables him to align his approach with an understanding of the global as a radically differentiated 'polycontextual' space, where territories and national

sovereignties are broken apart as contingent events produce a 'global law without a state': a transnational legal order for global markets that has developed outside of national and international law strictly speaking. In distinction to, say, Kelsen (1992) then, this is no plural system of legal orders under the overarching legal order of international law – no hierarchy of law is possible. Teubner subscribes to a radical legal pluralism.

A further consequence of this societal approach – viewed within a Luhmann-esque framework of system and sub-system communicative action – is to cast the net of constitutionalization very much wider than the usual emphasis on high-level 'political' constitution-making. As a result of the progressive differentiation of society, it sees constitutions everywhere. All organizations or institutions are made up of constitutions, or have constitutions, so constitutionalization is a genuine societal process, one happening almost everywhere (Thompson, 2015b). The task is to uncover these and trace their systemic connections in the new global or any other order and assess their consequences.

What is clear from these analyses of the social constitution is that it privileges sociality as understood in classical interrelatedness terms. The social is constituted by relationships: connections, combinations, interactivities, flows, chains and entanglements are the language of explanation operating here. There is also a sense in which it is constituted by means of a contract, convention or pact in some manner and, with this, the norms, habits and repetitions that take shape in the shadow of the contract. So social existence is fundamentally relational in character. This tends to downplay the way the social is also forged and continually reinforced by the consequences of will and passion, where chance, fortune and determination provide the analytical terminology to understand the social, and where 'affect' is as much a determinant of sociality as the cold logic of institutions and their devices. This would give a somewhat different take on constitutional history, one suspects, and place social constitutionalization into a much more 'illiberal' disordered framework of struggle, temporary and contingent violence, stress, conflict and so on.[3] And it would mean that contemporary 'global' constitution-building (or not) would be recast into a more aggressive, fatalistic, disjointed, precarious and 'irrational' analytical context. And although this might at first sight seem close to the way Teubner approaches analytical matters, his approach is one that – despite its gesture to a fragmented social terrain – continues primarily to live in a world of rational systemic interrelatednesses.

Both Poul Kjaer and Gunther Teubner activate another take on the social, however: what they term a 'world society'. This operates as a backdrop to their analysis of the difficulty of global constitution-making. But, for Kjaer in particular – since we all already live in a world society – this provides the crucial support for at least the possibility of global constitutionality. Of course, in an Anglo-American intellectual environment 'world society' is a phrase most closely associated with the English school of international relations (Buzan, 2014; Meyer *et al.*, 1997). But in the first instance Kjaer's and Teubner's use of this term is not derived from the English school but from Niklas Luhmann (see Kjaer,

chapter 2; Teubner, *passim* – also Luhmann, 1982, 1997). Nevertheless, there are underlying linkages between the English school's idea of world society and that of Luhmann. That link is provided by Kant (and indirectly by a particular form of cosmopolitanism). Buzan – as the most eloquent spokesman for the English School – includes Kant as a major influence (Buzan, 2014, Figure 2.1, p. 14). Kjaer invokes Kant in passing in relationship to modern social forms of organization, Thornhill in relation to his support for normative orders and the Enlightenment (p. 7) and Teubner in relationship to his critical reflections on 'World Society'. These are not centrally implicated in the detail of each book's analysis (apart from that of Teubner), but, as I hope to demonstrate in a moment, Kant acts as an indispensable intellectual underpinning for any modern – particularly global – constitution-making.

And whilst it is well known that Kant is important for the derivation of modern cosmopolitan constitutionality, this is not quite a form of the sociological constitutionality that is discussed in these books. For instance, a leading exponent of cosmopolitan democracy, David Held, argues that cosmopolitan sovereignty

> conceives international law as a system of public law which properly circumscribes not just political power but all forms of social power. Cosmopolitan sovereignty is the law of peoples because it places at its centre the primacy of individual human beings as political agents, and the accountability of power. (Held, 2002, p. 1 – note the similarity of this formulation to that of Rawls, 1999).

Presumably, the analysis of cosmopolitan constitutionality would be similarly driven by an underlying individualistic logic rather than one that foregrounds the *prima facie* necessity of 'sociality' as its constitutive component.

A higher moral authority or a deeper structural truth?

These points about Kant are important in relationship to one of the most significant features of contemporary legal and constitutional analysis, namely the way it tends to defer to philosophical-inspired forms of reasoning. In the analysis of constitutional matters this appears in the form of two temptations which have proved almost impossible to resist – and these books provide no exception. The two temptations are: firstly, to subject the law and constitutional analysis to a higher moral authority, and/or, secondly, to subject it to a deeper structural truth – which provides the obvious immediate connection to the books under review here.

The first of these temptations is the route taken by 'philosophies of the law' broadly speaking. An exceptional example of this is the leading contemporary neo-Kantian, Jürgen Habermas. Habermasian theories of law wish to subject the law to their own particular moral precepts and aspirations. In Habermas's case this amounts to him asserting that juridification and adjudication should

be conducted according to the persona of the reasonable/rational man – a man like himself in fact.[4]

It is in *The divided west* (Habermas, 2006, Part IV) that Habermas provides his most elaborated blueprint for how the international sphere should be directly constitutionalized. In this book he suggests the creation of 'a supranational power above competing states that would equip the international community with executive and sanctioning powers required to enforce its rules and decisions' (2006, p. 132). And although this is not a global *Rechtsstaat* it would embody the world-wide rule of law: 'A weakly constituted community of states … supplemented at the supranational level by legislative and adjudicative bodies and … by sanctioning powers' (2006, p. 133). He argues for the creation of 'an inclusive world organization that … is restricted to a few carefully circumscribed functions – (i.e.) international security and human rights' (2006, pp. 134–135). As is clear, much of this parallels Teubner's conception of 'societal legal sovereignty', though shorn of its hierarchical components. And, whilst Habermas provides a masterly account of this constitution-making as an on-going historical and discursive process, the point being made here is that his theory of the law and constitution-making is thoroughly morally rationalistic.[5] It is a modern variant of Kantianism. Kantian justice depends upon the capacity for critical thought, and not upon strict adherence to positive law. Legal reasoning should proceed according to non-legal norms grounded in Kantian practical moral judgement, seen as in itself a critical exercise of reasoned thought akin to how an enlightened moral philosopher would operate.[6]

The second temptation is to reduce the law and constitution-making to an effect of social relations in one way or another: this is the route taken by sociological approaches to the law and in large part by the three books under review here. For this position the rule-based aspect of law is, admittedly, important but provides an inadequate basis for the purposes of the understanding of law in its societal context. Thus, legal sociology regards law as a set of institutional practices which have evolved over time and develop in relation to, and through interaction with, cultural, economic and socio-political structures and institutions. As a modern societal system, law strives to gain and retain its autonomy in order to function independently of other social institutions and systems such as religion, polity and economy, almost exactly how Luhmann and Teubner formulate it, as discussed above.

But an alternative and classic example of this is provided by Pierre Bourdieu in *The force of law* (1987).[7] Perhaps the most sophisticated and critical sociological theory of law and lawyers, Bourdieu sees law as a social field in which actors struggle for cultural, symbolic and economic capital and in so doing develop the reproductive professional habitus of the lawyer. These are units or collections of social locations that are usefully considered as macro-structures – the fields – where processes of conflict and competition are crucial to understanding the internal evolution of these collections of social locations. Given this emphasis then, for Bourdieu, the law could be no more than what those actors in these situations – in the habitus and the field – actually do: the law is what lawyers, barristers and judges do.

Within these fields – and crucially between them – Bourdieu emphasizes relationships of domination and subordination: his social order is very much a hierarchical one. Change is always refracted through the problems of dominance and subordination. So this is a strict structural topology, rather than a kind of assemblage where accidental and contingent events act to initiate a reassemblage and dynamic change – thus contrary to Teubner in this instance. It involves a classical sociological imagination, one in which the law, for instance, can only be understood as a subordinated field within the power relations that structure the overall social topology.[8]

The history of reasoning about legal matters (rather than legal reasoning as such) is littered with examples of these two responses. But outlining these strictures against the reduction of the law to something else would not mean that the law exists in an entirely self-contained world – in a vacuum of its own making. Rather it implies that the law only exists under specific and particular historical articulations – articulations with other social terrains and elements. These articulations are the necessary assemblages that could be examined in the context of the internationalization of the law and constitutionalization. So Bourdieu would provide an alternative approach to the analysis of social constitutionality, which demonstrates the particularity of the Luhmannesque landscape that characterizes the volumes under discussion. Drawing attention to the contrasting ways sociality could be set up provides an insight into the potential limitations of adopting a single theoretical framework.[9]

What to make of 'sociologizing constitutions'

We live in a time where 'social constructionism' is rife and where social enterprise and social media are the ubiquitous formations of our modernity: the 'social studies of … ' motif has proliferated in recent years. This trend has now been joined by sociological studies of constitution-making. And whilst there is nothing wrong with social constructivism – when it is used sparingly and carefully – or the extension of an interest in sociological approaches to the analysis of constitutions, this does tend to 'privilege the social' in analytical matters. Social relationships are seen as the underlying determinant of all other relationships that are broadly associated with socio-political analysis. Nowhere is this more so than in contemporary approaches to the market and economics. 'Analysis of the market mechanism needs to be firmly embedded in social relations' is a current strong refrain from this position (often traced to the influence of Karl Polanyi). And that goes for all other aspects of what is termed 'society'. But why privilege the social in this way? Although no doubt controversial, historically the category of 'society' was more a political construct than a straightforwardly social one. Each time 'society' has been invoked as an object of analysis – and with it 'social relationships' – it was a political move that swept it into existence and propelled its advance (see e.g. Donzelot, 1994; Wickham, 2014). The term 'society' represented a mechanism of governance (or perhaps, following Foucault, of 'governmentality'): it was (and still is)

part of the techniques of power for governing a population. Thus we might need to remain sceptical about a singular significance attributed to 'social relations' in the analysis of constitutionality.

But with this conception it is as though the constitution runs along behind society, hoping to catch up so that it can be fully explained and elaborated, such that somehow it is society that 'invents' the constitution (typified by *A sociology of constitutions* – and see Thornhill, 2013). Perhaps, as a consequence, we might reverse this imaginary: *it is the constitution that invents society*.[10] One has to explain the 'constitutional scene' very much in its own terms: through its immanent practices (Weinrib, 1988) and conditions of existence as public-legal orders – which are contingent and historically specific (much along the lines suggested by Loughlin, 2004, 2010).[11] This speaks against the huge temptations that saturate the analysis of law and constitution-making mentioned earlier: the reduction of the law and constitution-making to a deeper structural truth, on the one hand, and/or the subjection of the law and constitution-making to a higher moral authority, on the other hand. Both of these temptations need to be resisted, though it is very difficult successfully to do so. The point of the notion of constitution-making as discussed in this critical context would be that it provides a restraint on such a 'social' process: it puts a legal limit on such action, invoking a 'neutrality of the law' and a unified space for the organization of relative social peace (Saunders, 2002).

Constitutionality versus governance?

One final issue the analysis of these books enables us to at least raise, if not to clarify completely, is the differences between constitutionality and governance or, perhaps better put, between social constitutionality and political governance. The notion of governance has appeared over the last 20 years or so as a substitute term for government and so, possibly, for constitutionality in terms of an apparatus of rule. Now we have a growing discourse of social constitutionality ostensibly at least covering much the same ground as governance. Perhaps then, in this context, constitutionality offers something different (possibly more, possibly less) than does governance? These are clearly closely related categories, and clarifying the differences between them is not easy.

If we were to sum up the way constitutionality is discussed in the books under review, it represents a structure of formal regulations and orders conferring specific powers to an organization or institution, established upon the primary condition that it abides by the constitution's limitations and one usually codified by a legal apparatus. An important element of this is that it puts some limits on the exercise of those powers (sometimes included under the rubric of 'judicial review', but not always so). It is important to note the features of an organizational constitution being appealed to here: self-conscious rule making; an internal governmental institutional structure; delineation of spheres of competence and an interpretative autonomy able to assess the

scope and meaning of those competences; clarification of stakeholders and specification of the rights, responsibilities and obligations of those party to the constitution; and some form of separate legally recognized authority with autonomy for policy formation. Not all of these would necessarily be present in every 'constitution', but they represent a template for assessment.

On the other hand, governance is a more general category pertaining to an overtly 'political' process of authority and control, one that does not display any obvious or necessary constraint in the way that a constitution does. Governance is more fluid and adaptable, pressed into service for different purposes and under different circumstances.

The question posed by these books is the relationship between these two forms of order. In the case of Kjaer's *Constitutionalism in the global realm* it looks like governance is the more general category, so constitutionality would fall under its embrace as a particular form of governance. But for Teubner's *Constitutional fragments* the argument is that in an organizational or administrative society the notion of governance; increasingly renders itself with respect to its total social constitutionality, rather than the more traditional notion of its governance; so a variegated constitutionality trumps governance here, one suspects.

But are these much more than descriptive statements of a state of affairs? There is a sense in these books that all normative orders occupy the same status and authority. But surely they do not. Some prevail over others. Even in Europe the authority of the state at the domestic level, for instance, still prevails over that of the church or the family, say, and the Council of Ministers directs matters between states at the EU level. How are conflicts of authority settled in these arrangements? The best that Kjaer can offer is some notion of an ongoing network of relationships that secures co-operative co-ordination and compliance (p. 153) and 'the *promise of a future* which reconciles the internal and external dimensions of normative orders is constantly reproduced' (pp. 155–156). But we need to maintain a clear distinction between state and government/governance when undertaking constitutional analysis. Surely the state remains the source of all law, so that the state has power while the constitution involves authority and commitment (loyalty). These are not the same though they are constantly elided in the analyses in these two books, though this is less so for Thornhill's *A sociology of constitutions*. He provides a much more forceful analysis of power and the role of the state in deliberations over constitution-making, as befits a sociological investigation, but at the same time he might have made more of the differences between power and authority in this regard.

Perhaps there are two overriding lessons to be learned from these books. Firstly, that the sociological investigation of constitutions remains in its infancy, so that there is still a lot to be gained from extending these analyses, particularly to include a wider range of theoretical approaches: to parallel the *constitutional pluralism* argued for here with a *theoretical pluralism* in terms of analytical framing devices. And secondly, that the formulation of '*global constitutionalism*' – whatever that may eventually mean – is also in its infancy,

requiring a highly detailed enquiry into the characteristics of the international system and its possible political orders (e.g. Thompson, 2012). This latter is an urgent task given that we are entering a new period of international instability and the potential for severely disordered outcomes.

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Notes

1. There is no easy designation for 'corporate constitutionalism', though early books on organizational sociology could provide the contours for its specification (Barnard, 1938; Selznick, 1957).
2. On Teubner's account of his differences with Luhmann, see Teubner (2005).
3. 'Constitutions are agonistic texts that contain within them the seeds of dissonance' (Loughlin, 2015, p. 15).
4. When discussing the making of the constitution, for instance, he writes:

> … on the basis of […] freedom of choice citizens are accorded autonomy in the sense of a reasonable will formation, even if this autonomy can only be enjoyed and not legally required of them. They should bind their wills to just those laws they give themselves after achieving a common will through discourse. (Habermas, 2001, p. 767).

That is, they should act like a liberal philosopher. What is needed is discursive reasoning operating across historical time – 'a rational constitutional discourse traced through the centuries' (Habermas, 2001, p. 768) – that provides a self-correcting process for the reconciliation of will and reason, the public and the private, constitutive power and constituted power, reason (facts) and rhetorical force (norms) (Habermas, 1997), rule of law and popular sovereignty.
5. The radical gloss to this is given by Habermas's insistence that contemporary juridification is not only a rampant consequence of instrumental reason, proliferating in every corner of social life, but also beyond restraint and a disguised front for oppressive subordination on the basis of class, gender and race.
6. And whilst at first sight this might seem quite different to how overtly religious approaches to law are conceived, in fact these share a structural similarity. In the religious case it is God that provides the moral authority to judge the legal domain. In fact, it might be claimed that all philosophical approaches to the law are at heart ridden with religiosity in their attempts to situate the law within a higher extra-moral/ethical universe. Moral authority is sought through an appeal to salvation.
7. There is also a text by Derrida with this same title (Derrida, 1990), but, as its subtitle indicates, this takes a completely different approach, one with a decidedly philosophical bent.

8. On the other hand we have the characteristic Marxist approach to law: here the law is nothing more than the reflection of social tensions as written into all social structures under capitalism. The field of law is a superstructural domain, linked in tenuous but nevertheless determinant ways to the substructure of production relations and exploitation. It is an apparatus of state power subservient to the interests of the ruling class, and working to suppress the proletariat and smother its aspirational political objectives. Here is an almost textbook example of subjecting the law to a deeper structural truth. Thus, whilst radically different in form, this shares an analytical affinity with Bourdieu's position just outlined and, indeed, with the books under review here. They all want to reduce the law to 'something else' – a deeper structural truth.
9. In fact, Thornhill recognizes the particularity of a Luhmannesque framework (p. 19), but without referring to Bourdieu.
10. Here I am following Hobbes and Rousseau, rather than Locke, as providing the imaginary for the constitution (Loughlin, 2015).
11. Thus instead of the terminology of 'embeddedness' and 'planting' used to describe the delicate relationships between the social and other aspect of existence, I would substitute the term 'situatedness'. This expresses a less rigid configurative arrangement which is more contingent and conjunctural.

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