The Sovereign Strikes Back

A Judicial Perspective on Multi-Layered Constitutionalism in Europe

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Abstract

The supranational web of public law is often described as a new constitutionalism. It emerged in a globalized world together with global markets. In the course of the multilayered constitutional experiment, the old, national constitutional framework had lost its ability to deliver on the key features associated with constitutionalism: limiting the exercise of political powers and preventing the arbitrary exercise thereof. In the multilayered era it has become difficult to pinpoint the centre of authority. Ultimately, someone needs to govern, if not for other reasons, at least to avoid chaos. Is it possible to have the guarantees of freedom, rule of law and efficiency that a constitutional democracy seems to provide in a system where there is no sovereign with authority?

Keywords: Constitutional identity, constitutionalism, fragmentation, globalization, multilayered constitution, sovereignty, trust.

A Introduction

The supranational web of public law is often described as a new constitutionalism. It emerged in a globalized world together with global markets. It is best described as an intricate web of interactions between traditional constitutional actors (such as nation States and their governments) and supranational actors that do not necessarily have formal, organizational existence or democratic legitimacy. It manifests in supranational legal instruments (*e.g.* regional human rights treaties) that, at times, impose legal obligations on individuals directly, *i.e.* without the mediation of the national State. Whatever virtues this unorthodox arrangement of public powers promised and provided, it became the culprit of governance dysfunctions at a moment of reinvigorated nationalism. Sadly, the insulation of supranational actors from local sensitivities and consequences turned into a rallying cry when the time came for backlash.

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Traditional, nation-State-based constitutionalism relied on separation of powers and various forms of democratic control over the branches of power within the sovereign State. A multilayered constitution promises protection against the whims of the sovereign State through mobilizing forces that surpass the level of national politics. It is intuitively attractive to trust faraway entities with constitutional control functions: allegedly, they are beyond the influence of national power holders and hence not subject to local bias and majoritarian intolerance. The price is this: decisions being taken by people with little knowledge or respect for local conditions and cherished national taboos and biases. The multilayered constitutional venture is premised on mutual trust between constitutional actors and is held together by the intricate interdependence of governments and supranational constitutional actors bordering hypocrisy, and common beliefs that have a family resemblance to wishful thinking.

Whatever virtues national constitutions have in the multilayered reality, there seem to be new layers of constitutionally relevant decision-making that were not part of the picture when the classic constitutional techniques on limiting governmental powers emerged on the domestic level (such as separation of powers, checks and balances or federalism). Irrespective of the empirical truth or the validity of the normative assumption of an emerging global or transnational constitutionalism, and assuming for the sake of argument that the multilayered network intends to provide the benefits of constitutionalism, it is undeniable that traditional constitutional arrangements do not capture the constitutional realities of supranational interdependencies. When supranationally developed regulations become the law, bypassing national parliamentary control, the constitutional guarantees of lawmaking disappear. Furthermore, elected officials of national governments and also their civil servants participate in supranational law- and decision-making processes without meaningfully defined mandates. Nonetheless, they are comfortable to take (or refuse) particular negotiating positions, decisions that are outside the purview of constitutional accountability mechanisms.

In the course of the multilayered constitutional experiment, the old, national constitutional framework has lost its ability to deliver on the key features associated with constitutionalism: limiting the exercise of political powers and preventing the arbitrary exercise thereof. The remaining constraints on executive powers are further weakened where the executive continues to act through international institutions without legislative oversight or political accountability on the national level. International defence cooperation has opened up a new terrain for the exercise of unchecked discretionary powers, triggering additional spending on the national level: troops and equipment on a North Atlantic Treaty Organization (NATO) mission are still funded by national taxpayers at the end of the day.[1]

Not even the much-cherished protection of fundamental rights will be effective where special networks (like trade regimes) operate as sheltered worlds with little concern about the human rights network. In an ideal case, regional and

1 To the extent lawmaking on the supranational level involves negotiation with private actors, the multilayered network offers little control over the process; private deals become public law.

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international standards, *e.g.* on human rights, would be generated by a political community and its institutions that are held together by shared values and shared constitutional traditions, bypassing borders. This assumption is reinforced by the sense that nation States join international organizations knowingly limiting their own sovereignty in order to pursue common political or economic objectives. Despite such noble commitments, in practice regional or international standards drawn in political and judicial processes often correspond to a *minimum* that is acceptable to Member States in light of (and not in spite of) their national differences on a given issue.

New formats and layers of decision-making result in further increase of unchecked government power. While new variants of distribution of power appear to be at play, classic constitutional constraints on political powers are becoming less relevant. For Jürgen Habermas a constitution remains highly relevant for post-national Europe, provided that it results from a democratic process that legitimizes it. In such a context, the centre of democratic legitimacy is not the State, but a political community (a people) that is not defined along national borders. Such a political community is based on the workings of transnational mass media, NGOs, and popular political movements that translate the concerns (if not the will) of the people and impose constraints on the holders of political powers beyond the boundaries of nation States.

In search of a force to hold this construction together, Habermas offers cosmopolitan solidarity rooted in the moral universalism of human rights.[2] Alternatives include conceptions of constitutional identity[3] and constitutional patriotism[4] that transcend the confines of nation States and national constitutions. The common thread of such concepts is that they envision a political community as a diverse society with a shared commitment to the basic premises of constitutionalism and universal human rights. The common challenge for such theories has been to account for the disagreement and discord evidently resulting from diversity in such communities. The trouble is that for the time being there seems to be no European demos, and linguistic differences remain a formidable barrier to forming any (and especially a political) community. At best, conflicts that are generated (and often frozen) at the national level can be diffused, or at least managed, at the supranational level.[5]

In the age of rising populism, anti-liberal, anti-constitutionalist and anti-European sentiments, objections against the multilayered constitutional adventure are phrased in terms of defending national constitutional identity. In Europe, cries defending national constitutional identity are hard to (mis)take for claims for exceptions on lesser issues of little consequence any more. When a

2 J. Habermas, 'The Postnational Constellation and the Future of Democracy', *in* J. Habermas, *The Postnational Constellation. Political Essays*, M. Pensky, trans. ed., 2001, p. 102-103, 108.

3 Prominently M. Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture and Community*, London, Routledge, 2010.

4 Especially J.W. Müller, *Constitutional Patriotism*, Princeton, Princeton University Press, 2007.

5 Ch. Joerges, 'Constitutionalism in Postnational Constellations. Contrasting Social Regulation in the EU and in the WTO', *in* C. Joerges & E.-U. Petersmann (Eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, London, Hart Publishing, 2006, p. 494.

national government in the European Union (EU) argues that "we have the right to decide who we wish to live together with in our country", that national government challenges the common European political and constitutional venture at its core, using the oldest and most potent of weapons in its rhetorical arsenal: the defence of national sovereignty. The source of this tension appears to be a design feature of the European multilayered constitutional experiment: Article 4(2) of the Treaty on European Union (TEU) expressly provides that the

> Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

In short, in the multilayered era it has become difficult to pinpoint the centre of authority. Ultimately, someone needs to govern, if not for other reasons, at least to avoid chaos. The question is how (national) sovereign power is exercised in this new reality, assuming that there remains a sovereign with authority. Is it possible to have the guarantees of freedom, rule of law and efficiency that a constitutional democracy seems to provide in a system where there is no sovereign with authority?

This article first explores the origins of the multilayered constitutional experiment together with the fundamental dilemmas it poses for constitutionalism (Part I). Part II accounts for the forces that are commonly associated with the daily operations of the multilayered constitution, while Part III takes a closer look at the dynamics that are usually associated with global constitutional convergence. Instead of convergence, disagreement and a spirit of national exceptionalism appear to dominate the picture. Part IV focuses on the terrain of nation States: the enforcement of supranational obligations. This is a zone where the unfinished multilayered experiment is most forcefully shattered by claims of national sovereignty, dressed in the fancy robes of constitutional identity claims. The return of the sovereign appears to have shaken the multilayered constitution construct built on high hopes and allegedly shared values, the construct that was meant to be held together by mutual trust. The trouble is not only that Europe (or at least a European way of life) may have little future left without European States relying on each other's cooperation much more than ever before, but also that the multilayered constitutional experiment got a bad name for its very foundation: old-fashioned constitutionalism.

B Multi-Layered Constitutionalism: Origins and Dilemmas

I Troubled Beginnings

In post-authoritarian settings, whether in Latin America or in Italy,[6] constitutions were in search of a new, democratic identity that was not easily available

6 G. Martinico, 'Constitutionalism, Resistance and Openness. Comparative Reflections on Constitutionalism in Postnational Governance', *Yearbook of European Law*, 2016, p. 10-13.

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domestically. Hence there was a willingness to conform to an (partly imaginary) international normative order as a source not only of inspiration but also of control. In the 1990s the opening of a constitutional system to supranational influences reflected a certain optimism that prevailed after the collapse of authoritarian regimes. By then, democratic constitutionalism had not only been spreading of its own, but it was internationally endorsed and seemed to become the new 'global normal'. The hope was that national and supranational players committed to the rule of law, democracy and a strong human rights agenda would form a community in the emerging global order.

The supranational web has become especially complex in the past decades in Europe as a result of the expansion of the EU and the gradual expansion of the European Court of Human Rights' (ECtHR) jurisprudence. The daily routines of European institutions create the impression of linear progress towards an aspirational 'ever closer' union. The web woven by supranational networks may be complex, but in practice it is pretty loose.[7]

While the dilution of State sovereignty started several decades ago, multilayered constitutionalism as an intellectual problem emerged in Germany in the 1990s. When it became obvious that under the new EU Treaty decision-making in the EU could prevent the domestic branches from exercising their constitutional powers, the German Constitutional Court rushed to reaffirm national sovereignty in the *Maastricht* decision of 1993.[8] The Court was supportive of Germany's EU membership. However, it reaffirmed the subsidiarity principle as a limitation on EU competences and reinforced prior parliamentary scrutiny over the national government's participation in EU decision-making mechanisms.

In response to the *Maastricht* judgment, some German scholars urged the conceptualization of this new form of regional constitutional interaction and its reconciliation with the needs and institutions of representative government on the national level (*Verfassungsverbund* or 'multilevel constitutionalism').[9] In the words of the President of the German Constitutional Court, Andreas Vosskuhle:

> The concept of Verbund helps to describe the operation of a complex multilevel system without determining the exact techniques of the interplay. ... it opens up the possibility of a differentiated description on the basis of different systematic aspects such as unity, difference and diversity, homogeneity

7 "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Charter of the Fundamental Rights of the European Union, Art. 52(3).

8 BVerfGE 89, 12 (1993).

9 *See* I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam. European Constitution-Making Revisited?' *Common Market Law Review*, Vol. 36, 1999, p. 703. The counter-concept is *Staatenverbund* referring to a composite of states. As discussed in N. Walker, 'Multilevel Constitutionalism. Looking Beyond the German Debate', *in* K. Tuori & S. Sankari (Eds.), *The Many Constitutions of Europe*, 2010, p. 143.

> and plurality, delimitation, interplay and involvement. The idea of Verbund equally contains autonomy, consideration and ability to act jointly.[10]

In this approach, alternative centres of authority add a new quality to the national constitutional order by replacing a familiar pattern of hierarchical imposition of supranational rules with a continuing interaction between the intertwined levels of transnational politics. However, for critics, this expansion inevitably results in the fragmentation of international law, a consequence that was dutifully reported by responsible scholars on the International Law Commission to the UN's General Assembly.[11] Fragmentation is bad news, and it does not help much that the force that is expected to counter it is 'constitutionalization' of international law (yet to happen).[12]

To be fair, multilayered constitutionalism was enabled by the openness of some national constitutions. In the Netherlands (Constitution, Article 120) and in some Latin American countries, constitutional openness was a conscious design choice when international human rights treaties were made part of the national constitution (forming an imaginary constitutional block).[13] In other countries, international obligations were imported as enforceable constitutional provisions or principles by domestic courts.[14] Whether courts embrace supranational norms to expand their own jurisdiction or to protect the constitution from being dismantled by an incumbent government for its own selfish purposes is secondary. The result is multilayered constitutional engagement – as controlled by courts.[15] Where higher courts do not wish to see lower courts engage with supranational legal norms, they easily put an end to it.[16]

II From Dilemmas to Backlash

The dilution of State sovereignty started in the economic sphere. It was at the meetings of regional and global economic cooperation (such as the World Bank, the International Monetary Fund or the International Nuclear Regulatory Agency) that the production of 'global law without states' had begun.[17] Supranational economic regulatory mechanisms brought new ways of asserting political

10 A. Vosskuhle, Multilevel Cooperation of the European Constitutional Courts. Der Europäische Verfassungsgerichtsverbund, *European Constitutional Law Review*, Vol. 6, 2010, p. 183-184.

11 Report of the International Law Commission, Finalized by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006.

12 A. Peters, 'Compensatory Constitutionalism. The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, Vol. 19, 2006, p. 579.

13 E.M. Gongora-Mera, Inter-American *Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, Inter-American Institute of Human Rights, 2011.

14 61/2011 (VII. 14.) AB decision. At the same time, the Court made it clear that it did not have jurisdiction to declare constitutional amendments unconstitutional.

15 2 BvR 2735/14, 15 December 2015, esp. paras. 41, 43.

16 Judgment no. 49 of 2015 (Italian Constitutional Court).

17 G. Teubner, 'Global Bukowina. Legal Pluralism in World Society', *in* G. Teubner (Ed.), *Global Law Without a State*, Aldershot, Ashgate, 1997, p. 3.

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power. To do what the World Bank has approved is convenient, and it looks legitimate, even if such adherence brings previously unseen constraints on national policy options. Even though litigation is not central to the operation of global power networks, the emerging multilayered system had a litigation component. With courts in the picture, the vocabulary of constitutionalism appeared suitable for discussing these strange new developments. While a select few cases draw much attention, the crucial constitutional shortcoming, namely the lack of popular (democratic) control over the content of global law or transnational legal orders[18] could not be remedied by judicial fiat.

The search for the global constitution is usually a high-spirited exercise. The hope placed in supranational constitutional arrangements originates from the expectation that a power beyond the purview of the sovereign State may be able to counter its absolutism from the outside. At least for some scholars, constitutionalism has started to depend on a 'transnational,'[19] 'global'[20] or 'cosmopolitan'[21] legitimacy. With roots in the Kantian ideal of a cosmopolitan-liberal world order, the search for the missing parts was conducted in a language invoking the universality of human rights. The consequences of the interplay of domestic constitutional arrangements were predicted in terms of universal convergence towards the respect for human rights, the rule of law and recognition of common democratic practices, associated with constitutionalism. Lurking behind these reassuring terms was a wide-ranging institutional variation of such extent that the untrained observer could hardly see true similarities with classic constitutionalism even after a careful and closer look.

Today the picture of multilayered constitutionalism is coloured by global economic crises, transnational terror networks and coordinated transnational responses to aggression – and a potential backlash due to the consequences of these developments. According to its many observers, sovereignty is becoming diffuse. It is replaced by a plural order with a less and less identifiable centre. At the moment all we know is that the nation State and its sovereignty are difficult to replace with an alternative construct for the purposes of making sense of the multilayered constitutional 'project'.[22] And it seems that when threatened, in the midst of uncertainty and insecurity, the nation State returns with scorn and vengeance. And it is welcomed by many, even when it does not promise to restore paradise lost (as it often does in populist constitutional 'theory').

18 T.C. Halliday & G. Shaffer, 'Transnational Legal Orders', *in* T. Halliday & G. Shaffer (Eds.), *Transnational Legal Orders*, Cambridge, Cambridge University Press, 2015, p. 1.

19 J.-R. Yeh & W.-Ch. Chang, 'The Emergence of Transnational Constitutionalism. Its Features, Challenges and Solutions', *Penn State International Law Review*, Vol. 27, 2008, p. 89; R. Dixon & D. Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *International Journal of Constitutional Law*, Vol. 13, 2015, p. 606.

20 N. Walker, *Intimations of Global Law*, Cambridge, Cambridge University Press, 2015.

21 M. Kumm, 'The Cosmopolitan Turn in Constitutionalism. An Integrated Conception of Public Law', *Indiana Journal of Global Legal Studies*, Vol. 20, 2013, p. 605.

22 W. Sadurski, 'Supra-national Public Reason. On Legitimacy of Supra-national Norm-producing Authorities', *Global Constitutionalism*, Vol. 4, 2015, p. 396.

Supranational constitutionalization refers to a specific legal formalization of decision-making processes and the spreading of myriads of legal rules across the board and national borders.[23] Yet this happens without the guarantees of an underlying normative commitment to common constitutional values and principles. Public law technicity spread by legal rules does not magically acquire the quality of constitutionalism without a genuine political community backing it up. Describing multilayered governance structures and processes in terms of constitutionalism is not only a misnomer: it is dangerous for constitutionalism itself. After all, the constitution is not simply an instrument of national government; it affords all the protection that can be provided in (and against) a sovereign nation State. In theory, supranational constitutionalism would be a most welcome development providing an independent control mechanism over national abuses. In practice, multilayered constitutionalism affords an opportunity to bypass that supreme instrument of sovereignty. Classic, sovereignty-based constitutional terminology falters, as it cannot capture the essence of conflicts between the nation State and the other weavers of the multi-layered web.

In the contemporary climate of backlash against constitutionalism and globalization, the fluid multilayered arrangement has become an easy target for political attacks with legal consequences.

One of the vulnerabilities of multilayered constitutionalism is that the disparate patterns that constitute it did not have an 'engine room' with a single design and political actors implementing it. Instead, it was a matter of happenstance driven by odd interdependencies of particular constitutional actors. Of course, at least in the beginning, a genuine vision of a Kantian constitutionalism lingered even in the corridors of power. In the 1990s there was an unstated expectation in Europe that peer pressure would gradually bring constitutional actors to build an ever closer union based on shared values and political commitments. But major gaps existed in this envisioned new reality: participants had different aspirations and expectations about the future.[24] The enthusiasm and commitment of international and dominant national political and constitutional actors suggested, nonetheless, that these gaps would be bridged over time. Supranational institutions were meant to coordinate the actions of Member States and hold them to their initial commitments when and where they strayed.[25]

In practice, it turned out that the holes were not that easy to patch: once the initial euphoria gave way to regular days in the office, mechanical copy-pasting of existing solutions became the standard working method. Obstacles resulted from the inability to bridge national differences, unexpected irreconcilable differences between various actors, lack of a common political and constitutional imagination, as well as lack of political (electoral) support for the multilayered experi-

23 M. Loughlin, 'What is Constitutionalization?', *in* P. Dobner & M. Loughlin (Eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press, 2010, p. 67.

24 For formative dynamics in the EU context, *see* J.H.H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, Vol. 100, 1991, pp. 2478-2483.

25 The European Union keeps insisting that its Member States curb public sector corruption. In Romania and Bulgaria, post-accession monitoring mechanisms keep tabs on reforms in the administration of justice.

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ment.[26] With the myriads of constitutional actors and their intended and unexpected interconnections, the multi-layered constitutional sphere is not transparent. Thus, to keep up with the mirage of the initial commitment a hope-filled narrative was much needed. Scholarship came to the rescue when it predicted, increasingly against the odds, global constitutional convergence and contributed to the spreading of the myth of multi-layered constitutionalism, where there were mostly only webs of murky powers. Noble hopes and wishes cannot always make dreams come true. For this reason alone, hope should not be abandoned.

It remains a matter of disagreement whether or not there is a traceable convergence of patterns, at least between democratic constitutional regimes. If there is an internationally recognized and shared expectation at least with regard to certain elements of constitutionalism, it may still have a regulatory impact.[27] Such a development may enrich constitutionalism just as much as it may relocate its centre. Alternatively, it may undermine all the protection the national constitution granted against the might and arbitrariness of sovereign state power. As explained by Dieter Grimm, the internal erosion resulting from the transfer of sovereign powers

> endangers the capacity of the constitution to fulfil its claim of establishing and regulating all public power that has an impact on the territory where the constitution is in force. ... [The transfer of sovereignty] prevents the situation from being unconstitutional. But it does not close the gap between the range of public power on the one hand and of constitutional norms on the other.[28]

C Supranational Constitutional Actors and Their Interactions

Multilayered constitutionalism is the product of interactions among national and supranational constitutional institutions and mechanisms (networks and processes). On the one hand, constitutionally relevant decisions are taken beyond the reach of competent domestic constitutional bodies. On the other hand, interactions at a supranational level may generate a supranational dimension of power where both international and national power will be limited in a multilayered constitutional space.

The interactions between the regional courts, national courts and other national and international instances offer a good example of multilayered consti-

26 On further reasons for resistance, *see* V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford, Oxford University Press, 2010, p. 18-30.

27 For example, a nation's democratically accepted position not to care about the global environmental impact of its policies and actions will not be acceptable when it goes against the internationally agreed upon and democratically legitimized principles of other nations in their community. Once central players in the international playground decide to disregard the agreed upon system, the system is unlikely to sustain itself.

28 D. Grimm, 'The Achievement of Constitutionalism and Its Prospect in a Changed World', *in* P. Dobner & M. Loughlin (Eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press, 2010, p. 4 and 16.

tutionalism.[29] Regional human rights courts set minimum standards and thus affect the content and application of constitutional provisions in the Member States. In addition, the judgments of human rights courts impact on separation of powers and checks and balances on the domestic level. For example, when the ECtHR finds a violation because national courts' judgments are not enforced at the national level, the ECtHR's judgment affects the power relations of the executive and the national judiciary.[30] Furthermore, the Court of Justice of the European Union (CJEU) may redraw domestic relations within and among branches of power in the name of the supremacy of EU law, even before an apparent conflict surfaces between EU law and national law.[31] The supranational decisions may even force Member States to abandon traditional constitutional arrangements, as it happened in the UK, where parliamentary sovereignty had to yield before the supremacy of EU law. At the same time, participation in an international regime may reinforce national constitutional structures. In the EU the Commission as a supranational constitutional actor, supervises public law reforms necessary for accession (*i.e.* membership in a supranational club).

The problem EU membership poses for constitutionalism originates in the limited control national legislature (or any other elected representative body) can exercise over key decisions and those who make them on the domestic level (checks and balances at best), while the representation of people in the European Parliament is considered insufficient. The European Stability Mechanism (ESM) is an intergovernmental organization established by EU Member States with a separate international treaty in response to the financial crisis; its purpose is to provide financial assistance (loans) to countries in the eurozone. When it reviewed the conditions of Germany's participation in the ESM in 2012 and 2014,[32] the German Constitutional Court insisted on preserving citizens' self-determination and equal participation in government:

> 107. As representatives of the people, the elected Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing ... If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German Bundestag, or if supra-national legal obligations were created without a corresponding decision by free will of the Bundestag, parliament would find itself in the role of mere subsequent enforcement and could

29 G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, Cheltenham, Elgar Publishing, 2012; M. Claes, *The* National Courts' *Mandate in the European Constitution*, London, Hart Publishing, 2006.

30 *Burdov v. Russia (no. 2)*, Application no. 33509/04, Judgment of 15 January 2009, similarly, *Yuriy Nikolayevich Ivanov v. Ukraine*, Application no. 40450/04, Judgment of 15 October 2009.

31 C-106/77, *Amministrazione delle Finanze v.* Simmenthal *SpA*, Judgment of 9 March 1978.

32 Judgment of the Second Senate of 12 September 2012 – 2 BvR 1390/12 (temporary injunction) and Judgment of the Second Senate of 18 March 2014 – 2 BvR 1390/12.

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Every member nation will have to provide the same package of rights protection. I think that this harm may be especially pronounced in Europe, where the member nations have significantly different ways of promoting human flourishing so that the loss of this distinctiveness would be profound.

III Mechanisms to Preserve Federalism

However, the European Union has options available to it to avoid at least some of this harm to federalism while, at the same time, securing some of the benefit that might be occasioned by incorporating the Charter. First, the Union could adopt the legal doctrine that incorporates the Charter's rights against member nations, but it could do so at a relatively low baseline. This way, the Charter's rights are respected, while member nations may, if they wish, protect the Charter significantly more robustly. This would be like how many American states have treated the Fifth Amendment's Public Use Clause, prior to and after *Kelo v. New London* ruled that public use included increased economic activity, tax base growth, and improved aesthetics.[100] This is a very slight limit on government takings, and most states have gone beyond that baseline. The CJEU might make a similar move regarding Article 17(1) "except in the public interest".

Second, the Union could incorporate the Charter and the CJEU could adopt rules of construction for their implementation that protect federalism. A rule of construction is an interpretative guide[101]; it pushes or pulls an interpreter to choose one reasonable interpretation instead of another. For example, the U.S. Supreme Court frequently uses a "clear statement rule" to protect federalism.[102] Under this rule of interpretation, Congress can only pre-empt state authority over an area of traditional state governance if it states its intent clearly.[103] Similarly, the European Court of Justice could employ a rule of construction under which a member nation's interpretation of the Charter is illegal only if it is a clearly erroneous interpretation. Given the vagueness of many of the Charter's rights, this rule of construction should frequently protect member state interpretative independence.

Third, the Union could incorporate the Charter and reduce the CJEU's supervisory authority over member nation courts. To the extent member nation courts wield interpretative independence from the CJEU, their interpretations of the Charter will differ, because reasonably different interpretations of the Charter's vague rights are plausible. This interpretative independence would allow the member nations to practice interpretative federalism. The trick would be to provide sufficient CJEU oversight, so that a member nation could not eliminate Charter protection. This could be done through relatively simple institutional means. For example, if the CJEU could not take a case without a high percentage of the justices supporting it, this would limit the number of cases and ensure that only cases about which there is an interpretative consensus are taken. Or, the

100 *See generally Kelo v. New London, Conn.*, 545 U.S. 469 (2005).
101 *See, for instance, In re Binghamton Bridge*, 70 U.S. 51, 74 (1865).
102 *See, for instance, Bond v. United States*, 134 S. Ct. 2077 (2014).
103 *Ibid.*, at p. 2093-2094.

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D Weaving the Multi-Layered Constitutional Web: Convergence Revisited

In the 'post-national' era, lateral (horizontal), as well as hierarchical (vertical), forces shape constitutional developments across the globe. The most often studied instance of horizontal (State-to-State) interaction is probably transnational judicial borrowing. Empirical evidence, however, suggests that only ideas of a select few courts travel widely and that even strategic borrowing from foreign sources has a moderate effect on the overall jurisprudence of a national court.[38] While these findings do not question the existence of transnational judicial conversations or the emergence of transnational judicial networks,[39] they are sufficient to cast doubts on the depth and intensity of global constitutional convergence.

While convergence along the horizontal axis depends a lot upon the will and whims of similarly situated constitutional peers, convergence along vertical lines seems almost taken for granted. After all, when nation States join international organizations they agree to be bound by the terms of membership, including the obligation to give effect to the decisions of supranational bodies created by them. The picture is colourful.

First, the development of regional and international standards of human rights through judicial intervention is fraught with competing forces: the desire for setting a generally applicable minimum standard clashes with the cherished (and fuzzy) principle of subsidiarity.[40] Subsidiarity advises that no level of government be called to perform any task if it can be performed better at a more local level.[41] This follows from respect for State sovereignty in international law and results in broad national discretion (a wide margin of appreciation in the ECtHR terminology). Subsidiarity makes human rights protection at the national level the default rule, and the supranational standard-setting mechanism becomes the exception.[42] Multilayered constitutionalism invites the consideration of national specificities, even if such claims can be (and in fact are) abused.

This kind of deference is in sharp contrast to reasons that inspired regional and international human rights instruments in the first place: the recognition

38 M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', *in* M. Andenas & D. Fairgrieve (Eds.). *Courts and Comparative Law*, Oxford, Oxford University Press, 2015, p. 200; T. Groppi & M.C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, London, Hart Publishing, 2013.

39 D.S. Law & W.-Ch. Chang, 'The Limits of Global Judicial Dialogue', *University of Washington Law Review*, Vol. 86, 2011, p. 523; A.M. Slaughter, 'A Global Community of Courts', *Harvard International Law Journal*, Vol. 44, 2003, p. 191.

40 M. Jachtenfuchs & N. Krisch, 'Subsidiarity in Global Governance', *Law and Contemporary Problems*, Vol. 79, 2016, p. 1.

41 "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Art. 5 (3) EU Treaty.

42 E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', *New York University Journal of International Law and Politics*, Vol. 31, 1999, p. 843.

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that human rights are universal and that a supranational mechanism should give effect to these shared values even if it ultimately results in curbing national governments' options to pursue their political agenda. Caught between these competing visions, and especially in the face of backlash from national governments striving to preserve their constitutional identity and as much sovereignty as possible (among others, to continue to hide shortcomings of domestic constitutional control and abuse of power), regional courts are prompted to make strategic choices. The options include recognition of generally applicable principles and stating of narrow rules that are applicable to the very specific facts of the case before them, or hiding behind subsidiarity that allegedly requires respect of whatever domestic courts did, especially if enough ink was used to explain (away) deprivation of liberties. In these circumstances, the supranational network of promised multilayered constitutionalism becomes another level of hiding shortcomings. It is telling that the ECtHR grants disappointingly wider and wider margins of appreciation to national authorities when it comes to permissible limitations on rights, giving itself up to "the insidious temptation to resort to a 'variable geometry' of human rights which pays undue deference to national or regional 'sensitivities'".[43]

This is not the only strategy. In sharp contrast to the ECtHR's deference to national differences in its jurisprudence, the Inter-American Court of Human Rights (IACtHR) insists on national adherence to the supranational minimum and requires national courts to perform 'conventionality control' of legal rules on the national level,[44] arguably even in instances where national law expressly bans courts from performing judicial review of legislation.[45]

The judgments of regional human rights courts are to be enforced by Member States, more precisely, national governments. Giving effect to a judgment rendered against a particular State is an obligation under international law. In light of the naked numbers of constitutional and statutory amendments or reopened judicial proceedings, the story of national compliance with supranational obligations is an unfinished one. National sovereign power remains overwhelming almost by default, at least in terms of authoritative power. In part, compliance depends on the black letter law question concerning the status of international instruments (and their interpretation) in national law.

The more complicated question is whether national courts, and especially national governments, are meant to give effect to the case law of these regional courts when a position was reached in a similar case concerning *another* Member State. Strictly speaking, the holding in one case shall not apply in cases from other countries. It is, of course, likely that a similar issue will be decided similarly

43 Lord Lester of Herne Hill, The European Convention on Human Rights in The New Architecture of Europe, *in* A *Yearbook of the European Convention on Human Rights*, Vol. 38, 1995, p. 227.

44 Case of Almonacid-*Arellano et al v. Chile*. Judgment of 26 September 2006. (Preliminary Objections, Merits, Reparations and Costs), para. 124. The IACtHR indicated that a similar obligation of conventionality control applies to national governments.

45 A.E. Dulitzky, 'An Inter-American Constitutional Court? The Invention of Conventionality Control by the Inter-American Court of Human Rights', *Texas International Law Journal*, Vol. 50, 2015, p. 60 *et seq.*, esp. n. 92.

in a similar case. Thus, smart national players (courts and even legislators) may find it advantageous to follow the ruling applicable to another country in order to avoid blame, or even because of a sincere belief in common standards. Others may refuse, hoping for exceptions and forcing double standards. They may also choose to disregard those holdings in the name of defending constitutional identity or national sovereignty.[46]

It is in the nature of multilayered constitutionalism that there is a high level of flexibility and uncertainty here, which grants the actors choices that may not exist otherwise in the more rigid national constitutional systems. Uncertainty and instability cause inconveniences to the legal system and generate frictions that are not unknown in traditional domestic interbranch conflicts. Apart from conflicts of competence between constitutional actors, new layers and formats for contesting fundamental human rights added new ways for undermining the existing level of protection of fundamental rights almost by accident.[47]

The central tenet of multilayered constitutionalism is (was) that convergence occurs. In practice, the multilayered constitutional sphere is hardly the home of an emerging, new normative order. The evidence does not reveal more than regular interaction between multiple, somewhat interrelated constitutional actors with complex (and sometimes contradictory) motivations. This is certainly a lot less than what is suggested by the soothing chorus praising convergence on shared constitutional values. The days of institutional arrangements that would limit political powers (or at least policy options) both nationally and supranationally are still to come.

While similarities, as mutual reference points, may have a self-reinforcing effect, in and of themselves they do not guarantee a shared commitment to fundamentals. Unlike accounts on constitution-making, the metaphors on the forces driving multilayered constitutionalism do not give the impression of active political engagement with the multilayered constitution.

It is argued that for the multilayered system to work, its participants need to trust each other on a daily basis, unless a 'manifest deficiency' in the actions of their counterparts suggests otherwise.[48] The ECtHR explained that

> 102: ... [T]he United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms." ... [I]n interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most

46 On the changing authority and legitimacy, *see* M.R. Madsen, K.J. Alter & L. Helfer, 'How Context Shapes the Authority of International Courts', *Law and Contemporary Problems*, Vol. 79, 2016, p. 1.

47 S. Baer, 'A Closer Look at Law. Human Rights as Multi-level Sites of Struggles Over Multi-dimensional Equality', *Utrecht Law Review*, Vol. 6, 2010, p. 56.

48 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, [GC] Application no. 45036/98, Judgment of 30 June 2005, paras. 155-156.

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in harmony with the requirements of the Convention and which avoids any conflict of obligations.

Mutual trust between States sounds like a sensible premise for lasting cooperation, and our good fr iend, wishful thinking, may keep it strong for a while. However, when the premises of trust appear to be false, the consequences are not only spectacular, but also fatal – and not only for the multilayered constitutional experiment, but also for constitutionalism itself. To assume that one has to trust domestic authorities and then shift the burden to those who claim rights violation against States are gestures that indicate the unwillingness of the actors of the multilayered constitutional system to take their assumed job seriously.

This lack of direction at the supranational level reflects a new reality of the nation States. It may be time to admit that disagreement and conscious dissent on the national level remains an important factor explaining the operation of the multilayered constitutional reality.[49] Constitutional instability may result not from the shortage of building blocks from which lasting government can be constructed but from local political "inability to achieve stable agreement on any single design choice because each is a plausible option".[50] This would take the kind of commitment constitutionalism used to stand for prior to the haze of global aspirations. Giving up on the false promises of global constitutional convergence and starting to study how local oddities contribute to constitutionalism[51] would help in understanding what is left of constitutionalism in a post-national era.

E What Stays at the National Level: Enforcement Power

I More than a Coordination Problem?

Despite aspirations to the contrary, the nation State and its sovereignty are not that easy to replace or reinvent for the purposes of the multilayered constitutional regime. Diffuse social and legal systems are not good at coordination, and the complexity of multilayered constitutionalism in itself results in coordination problems, triggering destabilization. This can be documented in the EU, the supranational model that not too long ago was heralded as the prototype of a functioning, liberty-enhancing supranational entity.

Consider the litigation concerning the European Arrest Warrant. In the EU, the European Arrest Warrant first appeared as an ingenious tool of efficiency and expediency, making national criminal justice networks rely on each other in the spirit of mutual trust that is based on the assumption of the equivalency of rights

49 Theories of constitutional pluralism view disagreement between constitutional actors as opportunities to define the legitimate role of various actors within the multilayered constitutional experiment. M.P. Maduro, 'Interpreting European Law. Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, Vol. 1, 2007, p. 139.

50 M. Tushnet & M. Khosla, 'Unstable Constitutionalism', *in* M. Tushnet & M. Khosla (Eds.), *Unstable Constitutionalism, Law and Politics in South Asia*, Cambridge, Cambridge University Press, 2015, p. 5.

51 G. Frankenberg, 'In Verteidigung des Lokalen - Odd Details als globalisierungskritische Marker im Verfassungsvergleich',*Verfassung und Recht in Übersee*, Vol. 49, 2016, p. 263.

protection. Nevertheless, in 2016 the CJEU agreed with the concerns of a German court that had reservations about the prison conditions in Hungary and Romania, and therefore refused to surrender a Hungarian and a Romanian national back to the prison systems of the countries of their citizenship.[52]

The referring German court relied on the judgments of the ECtHR, which found that prison conditions in those countries amounted to degrading treatment due to prison overcrowding. The CJEU confirmed that a national court must postpone the surrender of an individual until it ascertains that prison conditions in the receiving country do not constitute inhuman or degrading treatment in violation of the EU Charter of Fundamental Rights (Art. 4). The lesson so far is that robust protection of human rights in Europe emerging from supranational interaction requires an increased level of care (and suspicion) between national institutions when they engage with each other through a pan-European criminal justice mechanism.[53]

Complications stemming from the principle of 'mutual trust' aside, in 2015 the German Constitutional Court indicated that the principles underlying the pan-European arrest warrant mechanism may violate a Member State's constitutional identity. The German Constitutional Court considers the principle of individual guilt to be part of German constitutional identity. What follows from the principle is not simply the inapplicability of certain measures of EU law, but also that German authorities cannot assist other States in violating human dignity.[54]

II A Very Special Conundrum: Listing Terrorists

A second element inherent in the self-destruction of the multilayered system results from the unfinished nature of the supra-constitutional structure.

Despite considerable global convergence on national security law,[55] the weaknesses of the multilayered system were aired in the open on account of the list of suspected terrorists and terrorist organizations prepared by the UN Security Council after the 9/11 attacks. The list was a measure in the global war on terror.[56] The global measure reflected genuine concerns for international cooperation and was devised on the approach previously used to address drug trafficking. The story illustrates how the security concerns of a few, directly affected countries (in the example, first of all the U.S.) compromised constitutionalism in

52 C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], Judgment of 5 April 2016.

53 It would be wrong not to see that the different networks may produce corrective mechanisms for the difficulties the system itself has created. In the fall of 2016 the Hungarian Parliament (like the Italian a few years earlier) adopted a prison reform that is hoped to satisfy the applicable human rights standards in response to the findings of the ECtHR. If the ECtHR finds this reform acceptable the obstacles of trust based on cooperation will diminish. Note, however, that trust is built on a case-by-case basis. A Member State that complies with one judgment does not necessarily comply with the next.

54 2 BvR 2735/14, 15 December 2015.

55 As discussed in K.L. Scheppele, 'The International Standardization of National Security Law', *Journal of National Security Law and Policy*, Vol. 4, 2010, p. 437.

56 K. Roach, 'Comparative Counter-terrorism Law Comes of Age', *in* K. Roach (Ed.), *Comparative Counter-terrorism Law*, Cambridge, Cambridge University Press, 2015, pp. 4-6.

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less affected countries (Switzerland, in the *Nada* case that follows). Constitutional openness, a prerequisite for the operation of the multilayered constitutional regime, resulted in spectacular constitutional vulnerability, undermining the very foundations of supranational cooperation.

The seemingly simple and efficient mechanism of 'listing' terrorists was initially based on UN Security Council resolution no. 1267, which pre-dates the 9/11 attacks and was developed to curb the financing of global terrorism.[57] A UN committee created especially for this purpose prepares a list from names proposed by Member States (*i.e.* national security services) on the basis of mere suspicion, and without prior court proceedings. As a result, listed persons became subject to an international travel ban and an asset freeze that UN members are required to enforce, using their national laws. When a Member State requests the removal of a person from the list, any other Member State can veto the request. 'Listed' people have no way to know why they are listed and, equally importantly, cannot provide reasons that would enable their delisting. They do not have the protection that follows from natural justice or the rule of law. As Franz Kafka would be pleased to learn, in the UN's terminology these measures are known as 'targeted sanctions', invented primarily to reduce the human cost of general sanctions, a generous gesture in the field of global security.

Over the years, various jurisdictions dealt with challenges against implementing measures imposed on listed persons.[58] While national or regional authorities are free to choose the manner in which they give effect to the UN sanctions, the implementation measures essentially give effect to a procedure that lacks most basic due process guarantees (but may have full national democratic endorsement in case the measure is implemented by legislation). So long as the underlying process in the UN's responsible committee is lacking basic human rights guarantees, the implementing measures continue to violate procedural human rights. Viewed from a different perspective, decision-making seemed to have been removed from the traditional constitutional frame: there is no legislative determination (and apparently no judicial either), and the national security establishment could make its wishes prevail through an international cooperation mechanism. The 'network', *i.e.* the international cooperation or even uncoordinated parallel thinking and action of information-hungry intelligence services, does not look particularly constitutionalism-friendly.

As it happened, the EU implemented the UN sanctions with a Regulation that is applicable in all Member States without additional measures at the national

57 S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct 15, 1999). The evolution of the process is described in C. Forcese & K. Roach, 'Limping into the Future. The U.N. 1267 Terrorism Listing Process at the Crossroads', *George Washington International Law Review*, Vol. 42, 2010, p. 221-227.

58 J. Genser & K. Barth, 'Targeted Sanctions and Due Process of Law', *in* J. Genser & B. Stagno Ugarte (Eds.), *The United Nations Security Council in the Age of Human Rights*, Cambridge, Cambridge University Press, 2014, p. 195.

level.[59] In 2005 in the *Kadi* case the CJEU found that the Regulation violated fundamental right as protected by EU law.[60] The CJEU emphasized that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty which include the principle that all Community acts must respect fundamental rights (§ 285).

This was a moment wherein the CJEU was more concerned with defending the integrity of EU law as a system based on human rights and not with the compliance of EU law with international law.[61] The revised EU Regulation was also found to violate EU law because the improved process in the UN that had kept Kadi on the terrorist list for over a decade continued to lack due process guarantees (especially the right to hearing and access to evidence).[62]

The *Kadi* case had a significant impact on the attitude of courts in subsequent cases. In 2012 in the *Nada* case, the ECtHR concluded that in implementing the UN sanctions the Swiss authorities did not manage to strike a proper balance within the powers they retain between the human rights obligations under the Convention and national security considerations.[63] Thus, regional judicial interaction questioned global forces, kicking back the ball to the national and regional constitutional actors' arena, adding a dose of rights' awareness to the multilayered architecture. A (regional) multinational player reinforced national sovereign constitutionalism (not absolutist sovereignty!) against another global network. This did not last long, as the ECtHR gave in, in the name of trusting the UN Security Council's good intentions of not wishing to violate human rights a few years later. In *Al-Dulimi* the Grand Chamber found that

> 147. ... in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.
>
> ...149. Switzerland was not faced in the present case with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN

59 Regulation (EC) No. 881/2002 *Measures against persons and entities included in a list drawn up by a body of the United Nations*, 27 May 2002.

60 Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council*, Judgment of 3 September 2008.

61 G. De Búrca, 'The ECJ and the International Legal Order: A Re-evaluation', *in* G. De Búrca & J.H. H. Weiler (Eds.), *The Worlds of European Constitutionalism*, Cambridge, Cambridge University Press, 2012, p. 108.

62 Case T-85/09, *Kadi v. Commission* (Kadi II), Judgment of 30 September 2010. This judgment already assessed the reformed process on the UN level.

63 *Nada v. Switzerland*, [GC] Application no. 10593/08, Judgment of 12 September 2012.

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> Charter. ... Consequently, the respondent State cannot validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it has taken – or at least has attempted to take – all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness.[64]

III The Return of the Sovereign

It may be too early to call, yet at the moment the winner of the trembling multilayered constitutional experiment appears to be the nation State with its cherished constitutional identity. National sovereignty is a diehard fighter. European integration seems to be the only form for the survival of a European way of life in the current international competition where the size, economic and military power of European States does not provide enough strength to any one of them to resist emerging economic powers of its own. This is what the short-term perception of large parts of the European public and (the lack of) statesmanly thinking do not seem to be ready to understand.

In the latest wave of the undoing of the multilayered system (constitutional or not), a growing number of outliers – which paid lip service to the rules of the club for long – feel that they can afford to jump the fence and leave the international networks and treaty regimes *en masse*, often at the moment when an international body would express inconvenient truths about them. As long as the supranational normative expectations were disregarded only by some poor States of lesser significance, the deviation was easy to ignore as a problem of outliers (which do not count as proper constitutional democracies anyway). However, once the same outcasts became influential on the supranational scene, they could not be dismissed as outliers any more. They started to take part in setting the international norm, shaping it according to their preferences (and to the effect of levelling down). Finally, after tolerating the substandard behaviour of the former outliers, some of the members of the elite club jumped on the opportunity to liberate themselves of the inconveniences of an external control. The consequence is that these international bodies, fearing further loss (including the end of their own existence), lower the allegedly shared or common standards further in order to keep their 'customers'.

Compliance with the judgments, opinions and views of supranational institutions on the national level has long been recognized as the Achilles point of multilayered constitutionalism. The more complex the national implementing measure needs to be and the more it departs from local constitutional self-understanding (identity, culture or tradition), the more unwilling a government will be to disburse its local political capital on adopting a corresponding local measure that would please supranational actors. A recent example of such resistance is the UK's refusal to reconsider its blanket ban on the prisoners' right to vote in light of

64 *Al-Dulimi and Montana Management Inc. v. Switzerland*, [GC] Application no. 5809/08, Judgment of 21 June 2016, internal references omitted.

ECtHR judgments.[65] At least initially, this issue was much less contentious in other countries, but the UK's resistance encouraged courts and national governments to defy the voting rights principle and the authority of the ECtHR with it.[66]

National governments are not alone in defying regional and international obligations and human rights standards. National courts, especially constitutional courts, have been under pressure for decades to find a way to reconcile supranational constitutional and human rights standards with the requirements of national constitution. As already mentioned, ever since the *Maastricht* judgment the German Constitutional Court has been eager to reinforce its position for setting constitutional requirements in the face of mounting European pressure. Over the years, some constitutional courts took this as an encouragement to define those features of the domestic constitutional system that cannot be removed or amended away, at times sculpting constitutional identity out of political defiance.[67]

The multilayered constitutional experiment thrives on the interaction of its actors: without genuine commitment and cooperation supranational processes are a meaningless shell game. To make up for smaller cracks, theories on supranational constitutional developments often mask dissent and discord with putting these encounters in the frame of dialogue or, if the opposition of a particular State is too unambiguous, they credit disagreement to principled exceptionalism.[68] Of course, when a party formally exits an international organization, it is pointless to explain away disagreement.

Nonetheless, from the perspective of constitutionalism the main challenge comes from nation States reasserting their national sovereignty over supranational actors, standards or obligations. This could have a major negative impact on constitutionalism of those countries where constitutionalism has partly become anchored in the international web during the years of the multilayered experiment. It may also create a new hole in the national constitutional system by insisting on constitutionally incomplete national constitutional identity, because of what identity politics means for the democratic component of constitutionalism: disrespect of minorities, intolerance, security mania, censorship, suppression of civil society. This is troubling for constitutionalism in 'mature' democracies. The fear is the return to an unreflected, primitive national identity based on exclusion that disregards the surrounding, potentially global political community.

65 *Hirst v. the United Kingdom*, [GC] Application no. 74025/01, Judgment of 6 October 2005. A pilot judgment was entered in *Greens and M.T. v. the United Kingdom*, Application nos. 60041/08 and 60054/08, Judgment of 23 November 2010. In light of the UK's failure to act, in September 2013 the ECtHR ended the adjournment of the over 2000 pending applications from UK prisoners and started to process the cases.

66 For example, in 2015 Russia amended the Act on the Constitutional Court to permit the Constitutional Court to decide whether or not to comply with international human rights obligations Constitutional Court decision of 19 April 2016, in English translation, available at: www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf. The UK anti-Europe rhetoric is quite similar to the Russian approach.

67 *See* 22/2016 (XII. 5.) AB decision (Hungarian Constitutional Court).

68 G. Nolte & H.P. Aust, 'European Exceptionalism?', *Global Constitutionalism*, Vol. 2, 2013, p. 407.

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The national provincialism of constitutional identity claims limits the citizen to the narrow cell of lived (manipulated) personal experience without a horizon.

A system that depends so much on the (often imaginary) momentum of convergence and mutual trust is malleable, and its collapse can be spectacularly fast. The Brexit shock, which sent a signal for lesser integration in other countries, illustrates the power of the nation State. It is ironic that the pretext of disintegration was the protection of national constitutionalism understood as untamed parliamentary sovereignty. Constitutional identity resonates with popular and populist sentiments on the domestic political scene.

Backsliding can take many forms. Although the reference to 'national identities' is not automatically interchangeable with 'national constitutional identity' recognized in the EU Treaty,[69] when governments in Hungary (in 2010) and in Poland (in 2015) took to rebuilding their domestic constitutional infrastructures, they relied on the escape hatch of the constitutional identity argument opened for creating departures from shared European constitutional understandings and values. Even in this most integrated supranational constitutionalist entity there was no institutional capacity to handle deviations from allegedly shared fundamental constitutional commitments. This suggests the deep ambivalence of key constitutional actors towards a European multilayered constitutional experiment.[70] Nonetheless, it appears that the success of multilayered constitutionalism continues to depend greatly on the most traditional of constitutional actors: national governments.

G Conclusion: Multi-Layered Constitutionalism Revisited

The initial hope informing the multilayered constitutional experiment to be able to constrain national constitutional actors via supranational procedures has fallen short. Multidimensional constitutional conflicts result in fragmentation and create easy opportunities for backsliding. Of course, the executive's acquisition of unchecked powers, complete with the intensification of national constitutional identity exceptions, remains a most worrying concern.

The much lamented democratic deficit of supranational legislative processes is a concern not only because 'the people' do not have a say in these specific processes. The national constitutional framework has largely lost its relevance for processing conversation and disagreement on issues of public concern. This happened partly because these issues are not transformed into legal rules any more on the national level and partly because national democratic processes have little impact on the supranational level where decisions are made. Sure, supranational judicial processes may have the occasional corrective moment. Yet litigation in a

69 *See* M. Claes & J.H. Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case', *German Law Journal*, Vol. 18, 2015, p. 917.

70 D. Kochenov & L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU. Rhetoric and Reality', *European Constitutional Law Review*, Vol. 11, 2015, p. 512.

select few cases cannot and should not (and does not) replace genuine public discourse and democratically legitimate decision-making.

For the time being it appears that wishful thinking, mutual trust and peer pressure were not sufficient for a bootstrapping that would have resulted in the consolidation of the multilayered constitutional experiment. The recent resurgence of national constitutional identity claims suggests that the high hopes of convergence were led by the creative force of, well, exactly that: high hopes.

The extent to which the existing institutions (like supranational courts) are capable or willing to resist, and mobilize resistance is unclear. Institutional interests of the multinational actors and even considerations of democratic politics at the national level may mobilize for further integration. There are stakeholders who have interest in furthering the multilevel system. Among them we find not just politicians and institutions, but businesses and citizens concerned about their livelihoods that they would lose *in the absence* of globalization. They are also concerned about the values they have cherished so far without doing much to preserve them. Alleged losses due to globalization triggered frustration, resulting in anger (which became, oddly, a respected sentiment in the hands of populists). Perhaps losing the benefits of globalization may have similar mobilizing effects.

Constitutionalism as a label appeared to be useful to explain a supranational constitutional experiment: it granted it gravity and (somewhat ironically) gave it a unique sense of identity and even the promise of a bright future. Yet once the genie of multilayered constitutionalism was set loose, it turned against its masters. It started to have a life of its own, threatening the very foundations it was meant to strengthen.

There is more to explaining the ways governments and their officials have with power than adopting fancy labels. Constitutionalism may be an abstract concept, but it is a concept about the limits of the daily exercise of political power in a political community. Interactions between constitutional actors in the multilayered environment resulted in the expansion of the powers of the executive branch without serious constitutional controls and generated new legal norms of uncertain democratic credentials. In the process the mutual trust on which the multilayered constitutional experiment was premised is slowly evaporating: clashes highlight ever-greater divides between nation States on fundamentals. The resulting backlash against globalization fills national sovereignty with new life. It may be time to lure the genie back into the bottle, before it undermines the one force that can keep the sovereign at bay: constitutionalism, as we knew it before the multilayered experiment. This is not simply a battle cry for restoring constitutional democracy as it was before the post-national constellation. A return to watertight national constitutionalism is unlikely in the present level of international interdependence. Owing to their openness to supranational influences, national constitutions offer little protection against the operation (and malfunctioning) of the multilayered web. Where national courts insist on a national standard that departs from the supranational one in the name of constitutional identity, national courts are running the risk of being ostracized for being uncooperative. When national courts adapt national constitutional standards in order to 'reconcile' national law with supranational standards, they may lower the level of

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protection the national constitution used to afford. This is how national constitutional identity becomes a blessing and a curse in the multilayered constitutional environment.