

# Transnational networks and constitutionalism

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*The phenomenon of internationalization, combined with the internal process of state fragmentation, has challenged the Westphalian model of sovereignty, replacing it with a “disaggregated sovereignty” in which transnational networks have become the primary vectors of international cooperation as well as the primary actors in international policy making. This evolution poses a multifaceted challenge to state-centered constitutionalism since the networks are capable of emancipating themselves from the latter’s requirements by creating parallel sets of norms. With their growing autonomy, the networks can gradually replace state action, which raises issues of accountability and legitimacy. Effectively addressing these challenges implies a paradigm shift—from the state-centered approach to constitutionalism toward a broader vision of a constitutionalism beyond the state. At the same time this shift articulates the reflections around notions such as pluralism and polycentricity. This state of affairs requires further examination of the legitimacy of the two faces of these networks—the new model of expert governance, with efficiency maximization, as well as the new paths of solidarity and cooperation that they imply.*

It hardly seems necessary to point out that Westphalian sovereignty, based on territoriality and the exclusion of external actors from domestic institutions as sources of authority, has eroded considerably. The concept of nation-state sovereignty and its practical relevance are called into question by the phenomena of internationalization and globalization, which challenge government and bring about new forms of governance beyond the territorially defined state. One must keep in mind, too, the phenomenon of Europeanization, which provides, at the same time, numerous examples of these challenges and numerous clues as to how to tackle them. The changing nature of international relations and increasing interdependencies among nations, indeed, have rendered governing autonomously without external interference, as advocated by the

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Westphalian model, as impracticable as it has become undesirable.<sup>1</sup> This is due, in large part, to the significant expansion of the scope of international law, which now reaches well into the realm of domestically addressed concerns, thus creating an overlap (and ultimately a blurring or confusion) between the issues traditionally addressed by constitutionally designed state bodies and issues relegated to the international sphere. The global technological revolution adds a further impulse to the process and, in the end, as technologies spread on a global scale and grow more complex, social problems formerly addressed internally by state organs are increasingly transferred to the transnational sphere, where governing becomes more and more a matter of international cooperation.<sup>2</sup> At the same time, the state is undergoing a process of fragmentation at the internal level, which, when coupled with similar phenomena on a global scale, contributes to a decentralization and denationalization of decision making. Many issues traditionally entrusted to a national legal process are increasingly addressed beyond the state and its organs—a process that, as such, challenges constitutionalism in many ways.

This is not to say that the state is disappearing from the international scene. Rather, as international relations scholars formulate it, the state is disaggregating in order to achieve better cooperation—figuratively meaning that it splits up “into its component institutions, which are increasingly interacting with their foreign counterparts across borders.”<sup>3</sup> In other words, a paradigm shift is taking place, from Westphalian sovereignty to a “disaggregated sovereignty” in which networks—essentially the realm of regulators but also, to a lesser extent, of judges and legislators—become the main vectors of international cooperation and, more problematically, the primary actors in international policy making. This evolution is echoed in legal thought through the parallel hypothesis of a paradigm shift in law from a “pyramidal model” to a “network model”

<sup>1</sup> Hélène Ruiz Fabri, *Immatériel, territorialité et État* [*Immaterial, Territoriality and State*], in *L'IMMATERIEL ET LE DROIT* [THE IMMATERIAL AND THE LAW] 187 (Archives de Philosophie du Droit 1999).

<sup>2</sup> The financial sector provides an obvious illustration of this evolution; as states were increasingly less capable of addressing issues of financial stability at national level, they resorted to networking via the Financial Stability Forum (FSF) whose institutional composition—comprising government representatives, officials from international financial institutions (International Monetary Fund, World Bank, Bank for International Settlements, and Organization for Economic Co-operation and Development), officials from various regulatory agencies (Basel Committee, International Organization for Securities Commission, International Association of Insurance Advisors, and International Accounting Standard Board), alongside experts from central banks—is representative of the hybrid structure typical of networks. For an illustration of the network model in the financial area, see the analysis of the institutional and normative functioning of the Financial Stability Forum in Régis Bismuth, *Le système international de prévention des crises financières* [*The International System for Preventing Financial Crises*], 134 *JOURNAL DE DROIT INTERNATIONAL* 57, 68 (2007) (Fr.).

<sup>3</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 18 (Princeton Univ. Press 2004).

(“droit en réseau”),<sup>4</sup> a hypothesis that inspires both enthusiasm<sup>5</sup> and resistance.<sup>6</sup>

Since the nation-state’s traditional bedrock is to be found in constitutional law—a model that has prevailed at least in Western countries and has been more or less successfully exported all over the world, mainly through decolonization—this shift in sovereignty intrinsically involves a concomitant shift in terms of constitutionalism. Constitutions were designed to frame the use of public power and the organization and functions of the main government bodies; constitutionalism expresses the idea that government power should be limited by legal means.<sup>7</sup> What is sought here is a notion of constitutionalism that could be labeled as minimalist, one that fits “into a *liberal* conception of public law, according to which public powers are essentially *limited* in order to guarantee the individual’s primary liberties.”<sup>8</sup> This notion of constitutionalism is distinct from that of constitution *per se*,<sup>9</sup> insofar as “constitutionalism does not refer simply to having a constitution but to having a particular kind of constitution, however difficult it may be to specify its content,”<sup>10</sup> and this distinction allows

<sup>4</sup> See FRANCOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RESEAU—POUR UNE THEORIE DIALECTIQUE DU DROIT* [FROM THE PYRAMID TO THE NETWORK—FOR A DIALECTIC THEORY OF LAW] 14 (Publications des Facultés Universitaires Saint-Louis 2002).

<sup>5</sup> See Gunther Teubner, *Un droit spontané dans la société mondiale* [A Spontaneous Law in Global Society?], in *LE DROIT SAISI PAR LA MONDIALISATION* [THE LAW SEIZED BY GLOBALIZATION] 197 (Charles-Albert Morand ed., Bruylant 2001); and, more recently, *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM: INTERNATIONAL STUDIES IN THE THEORY OF PRIVATE LAW* (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., Hart 2004).

<sup>6</sup> On the inertia of legal thought, especially legal positivism, see GUSTAVO ZAGREBELSKY, *LE DROIT EN DOUCEUR: IL DIRITTO MITE* [LAW WITH CARE: GENTLE LAW] 42 (Michel Leroy trans., Economica 2000).

<sup>7</sup> According to Joseph Weiler, “[m]odern liberal constitutions are, indeed, about limiting the power of government vis-à-vis the individual; they articulate fundamental human rights in the best neo-Kantian tradition; and they reflect a notion of collective identity as a community of values that is far less threatening than more organic definitions of collective identity.” J.H.H. Weiler, *On the Power of the Word: Europe’s Constitutional Iconography*, 3 *INT’L J. CONST. L. (I•CON)* 185 (2005). See also Neil Walker, *European Constitutionalism and European Integration*, 1996 *PUB. L.* 266.

<sup>8</sup> Original text in French: “dans une conception libérale du droit public, qui veut que les pouvoirs publics soient essentiellement limités afin que soient garanties les principales libertés de l’individu.” Philippe Raynaud, *Constitutionnalisme* [Constitutionalism], in *DICIONNAIRE DE LA CULTURE JURIDIQUE* [DICTIONARY OF LEGAL CULTURE] 266 (Denis Alland & Stéphane Rials eds., Presses Univ. de France 2003).

<sup>9</sup> Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *LEIDEN J. INT’L L.* 579, 582 (2006); Olivier Beaud, *Constitution et constitutionnalisme* [Constitution and Constitutionalism], in *DICIONNAIRE DE PHILOSOPHIE POLITIQUE* [DICTIONARY OF POLITICAL PHILOSOPHY] 133 (Phillipe Raynaud & Stéphane Rials eds., Presses Univ. de France 1996).

<sup>10</sup> Gerhard Casper, *Constitutionalism*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 474 (Leonard Williams Levy, Kenneth L. Karst & Dennis J. Mahoney eds., Free Press 1986), cited in Peters, *supra* note 9, at 582.

us to argue that very different constitutions could be subsumed under the same concept of constitutionalism.<sup>11</sup> In a polycentric order, however, state boundaries have become permeable, actors are less dependent on territory, technologies transcend the nation-state, and state-centered constitutionalism loses ground to independent regulatory agencies and government networks. In Mattias Kumm's words: "Globalization has not led to a world in which borders are irrelevant. But it has led to a world in which decisions on how borders are relevant are increasingly made outside of the national domestic process."<sup>12</sup> It is unsurprising, then, that the nation-state gradually cedes control over many decisions traditionally concerning the public sphere, and that constitutionally designed state organs are no longer the sole wielders of public power.

Thus, to an important extent, networks are becoming decision makers.<sup>13</sup> However, it is not the mere existence of networks that is a cause for concern but the transnational dimension in which their activities unfold and which enables them to remain beyond the reach of state control, thus adding an unprecedented dimension to the challenge those networks pose to state-centered constitutionalism. This challenge is multifaceted and raises questions from various angles and for diverse disciplines, even though, in the end, it boils down to renewing an "old" question. Legal scholars, indeed, have long been concerned with whether states, understood as the primary models for a political organization, may be increasingly outdated and whether constitutionalism, as predicated on a state-centered model, may consequently be on the verge of marginalization. Certainly, the question is troublesome, as long as a comprehensive alternative to statehood and state-centered constitutionalism is not easily identified. This difficulty confronts both constitutional lawyers and international lawyers, although the terms of the problem are not identical for both disciplines. Section 1 of this paper will seek to give insight into the challenges posed by networks and the governance model of which they are part. It appears that networks, whether they are essentially private or trans-governmental in nature, do not pose the same challenges to constitutionalism, which is accounted for by the dialectic trends of their relationship with the state and state organs. The difficulty of properly addressing the current challenges to constitutionalism proceeds from the problem that scholars, more precisely constitutional scholars, have in conceiving of network governance as

<sup>11</sup> J.H.H. Weiler & Marlene Wind, *Introduction*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 3 (J.H.H. Weiler & Marlene Wind eds., Cambridge Univ. Press 2003).

<sup>12</sup> Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT'L L.* 913 (2004).

<sup>13</sup> This is also problematic from the perspective of the principle of subsidiarity, according to which any infringement by the "higher" level of the autonomy at the "lesser" level needs to be justified with good reasons, thus implying that any norm elaborated in the international/transnational sphere should be justified.

a real and unconstrainable phenomenon rather than as a mere anomaly in the face of state constitutional tradition.

However, to reflect properly on these challenges and come up with conceptual tools as viable alternatives to traditional constitutionalism implies an acknowledgement beforehand of the loss of control by the state and the role played by network governance, particularly in the transnational field. Once such an acknowledgment of the trends stemming from networks has set in motion this paradigm shift, then the issue confronting scholars is how to apply constitutionalism, if it should be applied at all, to post–nation-state polities and to spheres where less binding and constraining modes are operating, for instance, via new governance mechanisms. It then appears, as will be discussed in section 2, that scholars from both disciplines, namely, international law and constitutional law, tend to project a conceptual apparatus—that of constitutionalism in its traditional sense—into a sphere for which it has not been designed and to which it would, in any event, need to be adapted. What is at stake is the desirability of this adaptation, considering the fact that constitutionalism carries a language of values, as well as the feasibility and the modalities of such an adaptation, which will require imagination.

## 1. From dualist trends to a paradigm shift

As a starting point, it seems useful to circumscribe properly what is meant by the phrase “transnational networks,” to allow for a better assessment of the challenges they pose to constitutionalism. This is also a way of identifying the ambiguities and ambivalences that affect the issue, which will be further explored in section 2 of this article. In order to address more accurately the issues raised by network governance, the generic notion of transnational networks must be broken down into two different categories—those whose participants are essentially private actors and those whose participants originate primarily in the disaggregated state. Once this distinction is established, and the impact of those networks is examined further, it appears that these two categories of networks set in motion two parallel trends as regards the state, while challenging constitutionalism from different angles.

The transgovernmental sphere needs to be differentiated from the broader category of the transnational. The latter term refers merely to transboundary operations, whereas Robert Keohane and Joseph Nye have defined transgovernmental relations, more distinctly, as “sets of direct interactions among subunits of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.”<sup>14</sup> Transnational networks can thus be broken down into two more distinct categories on the basis of the nature of their participants; on the one hand, we find networks of

<sup>14</sup> Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POL.* 43 (1974).

primarily private ordering that one could call private transnational networks, composed of private actors, while, on the other, there are networks of national governmental officials—components of the disaggregated state—that may be characterized as transgovernmental networks. Furthermore, Kal Raustiala has identified transgovernmentality as referring to

the involvement of specialized domestic officials who directly interact with each other, often with minimal supervision by foreign ministries: They are “networks” because this cooperation is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. Thus defined, the phrase “transgovernmental networks” captures a strikingly wide array of contemporary cooperation.<sup>15</sup>

Subnational units thus become actors in the international sphere, and the traditional distinction between international and national is increasingly blurred.<sup>16</sup> At the same time, the distinction between transgovernmental networks and intergovernmental cooperation through various bodies is similarly blurred, for the sake of a continuum from sporadic interaction to institutional cooperation.

The first category—private transnational networks—is better known than the second. It fits with the long-standing reflections that led Philip Jessup to suggest the concept of “transnational law”<sup>17</sup> as early as the 1950s. While he had in mind a broad category—including public international law, private international law, domestic law with international scope, and the legal relations undertaken among private persons of varying nationalities—the phrase is nowadays “more commonly used to refer to the purely private rules implemented by private—and essentially economic powers (transnational corporations)—among themselves and, in this sense, is basically synonymous with ‘*lex mercatoria*.’”<sup>18</sup> The latter point of view is probably too reductive, considering the focus of this paper. Undoubtedly, private economic actors are those whose activity is the most structured, legally speaking, and thus the

<sup>15</sup> Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 5 (2002). For a similar definition of transgovernmental networks, see Anne-Marie Slaughter: “networks of national government officials exchanging information, coordinating national policies, and working together to address common problems,” in *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1043 (2003).

<sup>16</sup> See Kumm, *supra* note 12.

<sup>17</sup> PHILLIP C. JESSUP, *TRANSNATIONAL LAW* (Yale Univ. Press 1956).

<sup>18</sup> Original text in French: “est aujourd’hui plus couramment utilisée pour désigner les règles d’origine purement privée qu’appliquent les pouvoirs privés, principalement économiques (‘entreprises transnationales’) dans leurs rapports inter se; en ce sens, elle est synonyme de la ‘*lex mercatoria*.’” PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW]* 38 (7th ed., Librairie générale de droit et de jurisprudence 2002).

most identifiable, as such. On the other hand, the sphere of private transnational actors extends not only to all those that can be gathered under the catchall concept of international nongovernmental organizations, regardless of name or purpose, which are, in fact, networks, but also to the dark side—such as organized crime. However, mentioning *lex mercatoria* also recalls endless debates, at least among French legal scholars, on its capacity to create a “third legal order” (*tiers ordre juridique*),<sup>19</sup> reflecting and stemming from the private actors’ capacity to circumvent domestic as well as international law. It is precisely this issue—namely, the potential evasion of the requirements of constitutionalism—that is raised by the spread of networks, including transgovernmental networks.

One matter of concern regarding transgovernmental networks concerns the difficulty of distinguishing them from international cooperation bodies; their legal classification is difficult to determine as long as it is uncertain, for example, whether they are merely less formal, or have a full-fledged legal status of their own. In the end, one is confronted with the hypothesis of third legal orders replete with elements whose legal status is unclear, which may cause concern whenever decision making or the exercise of normative powers is at stake.

### 1.1.

With respect to the state, two dialectic trends stem, simultaneously, from these networks’ activities insofar as the nation-state seems to find a competitor in and to be complemented by network governance. Private transnational networks operate in transboundary contexts, where power is diffuse and virtually impossible to locate, even as they set up—at the same time—parallel private sets of norms that ultimately escape constitutional law and territorially defined constitutional supervision (the “competing” trend). Private transnational networks can do this because they do not confront an existing international framework that would modulate their activity; insofar as states fail to come to terms with this threat at the national level, they increasingly develop techniques of international cooperation in order to address the challenge posed by regulatory measures autonomously decided by private actors.

However, the requirements of cooperation are such—in both quantitative and qualitative terms—that they are addressed not only in the political sphere but also in the so-called technical spheres, a state of affairs that is likely, ultimately, to bring about specialization and compartmentalization (discussed below). As a result, transgovernmental networks are increasingly taking

<sup>19</sup> See Alain Pellet, *La Lex Mercatoria, “tiers ordre juridique”? Remarques ingénues d’un internationaliste de droit public* [*Lex Mercatoria, “A Third Legal Order”? Ingenious Remarks of a Public International Lawyer*], in *SOUVERAINETÉ ÉTATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU 20<sup>ÈME</sup> SIÈCLE, MÉLANGES EN L’HONNEUR DE PHILIPPE KAHN* [STATE SOVEREIGNTY AND INTERNATIONAL MARKETS AT THE END OF THE TWENTIETH CENTURY: ESSAYS IN HONOR OF PHILIPPE KAHN] 53 (Litec 2000) and works cited therein.

away traditional governmental functions, such as regulation, adjudication, and enforcement, where domestic measures are incapable of reaching the transnational sphere. State action thus appears to be complemented by the international cooperation produced by transgovernmental actors (the “complementing” trend).<sup>20</sup>

One is struck by a sense of inevitability, here, in the dialectic between these trends when observing that the process of liberalization implies, invariably, that more and more of the traditionally public sphere, including even some functions traditionally reserved to a monarch, is being taken over by private actors, with a tendency developing toward subcontracting these functions.<sup>21</sup> The Iraq war has provided a spectacular demonstration of this process, serving to raise awareness of long-standing practices, while shedding light on new paths for cooperation where private and public actors are simultaneously involved. International trade law, for example, provides the example of developing countries lacking adequate customs services and, thus, having recourse to the services of private companies in such areas as preshipment inspection, where opacity and corruption have prompted the setting-up of an international framework.<sup>22</sup>

In the end, the two trends appear to be profoundly entwined, resembling a circle in which one cannot clearly distinguish which elements are virtuous and which vicious. Private transnational networks escape state control, which

<sup>20</sup> The utility of such an answer appears obvious, considering the capacity of transnational actors, themselves structured according to the network model, to create competition between the domestic systems. The *Yahoo!* case—in which a company located in the United States tried to convince an American court to contradict a French court’s prohibition against posting links to online auctions of Nazi memorabilia—demonstrates the relevance of such networks among judges, if only for purposes of mutual information. See Benoît Frydman & Isabella Rorive, *Regulating Internet Content through Intermediaries in Europe and the USA*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 41 (2002) (F.R.G.); Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT’L L. 673 (2003). See also recent complaints against Google, concerning its subsidiary, Orkut, a social network that also hosts content relating to terrorism, violence, and child pornography. Charged by the Brazilian government with hindering investigations by protecting the anonymity of users, Google claims it is unable to reveal personal client information since customer data are stored in servers located in the United States and are thus subject to U.S. law, which, according to the First Amendment to the U.S. Constitution, protects freedom of speech, including “the thought that we hate.” See *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). The company has had access to its web site blocked on Brazilian territory. See Sylvain Cypel, *Le Brésil somme Google d’aider la justice sous peine de fermeture [Brazil Orders Google to Cooperate with Justice on Penalty of Being Shut Down]*, LE MONDE, Oct. 23, 2007, at 16.

<sup>21</sup> For a denunciation of this process, see BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS AND SWALLOW CITIZENS WHOLE* (W.W. Norton 2007). See also FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnhardt eds., Oxford Univ. Press 2007).

<sup>22</sup> See Agreement on Preshipment Inspection, Sept. 30, 1986, Annex 1A, Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994).



the state tries to address and correct via transgovernmental actors that set up informal structures of cooperation; these may even be joint groups, much as partnerships are formed between private individuals to enhance effectiveness. At the same time, transnational activities are fueled, incidentally, by the phenomenon of liberalization, and so forth.

The ambiguity of this evolution is apparent: on the one hand, the state seems outmatched by network governance and no longer capable, at the national level, of addressing the challenges emanating from the transnational sphere. On the other hand, state action is complemented by transgovernmental networks that help quasi-powerless government bodies to regulate the activity of private actors and face the challenges arising from multiple cooperation commitments. Thus, while the transnational sphere lies outside the realm of state control, the transgovernmental sphere assists the state in responding to this challenge.

## 1.2.

Both categories of network call into question the relevance of traditional state-centered constitutionalism, albeit from different angles. In this context, the aspect of private transnational networks that is of particular concern is the ability gradually to replace state law with the networks' own sets of norms—private “constitutions,” codes of conduct, and standards—the legality of which is not subject to government control. This process may be disguised when these networks appear to pay lip service to fundamental requirements arising from human rights or social norms. The question, ultimately, is whether the corresponding “codes of conduct” amount to anything more than mere public relations schemes.<sup>23</sup> Furthermore, this process is incidental to, and may appear as the counterpart of, requests to governments to adapt their domestic legislation in order to enable or facilitate international investment. Competition among states in the field of investment attraction enhances the impact of such pressures and can lead, even without changing the rules, to a reinterpretation of constitutional requirements. Thus, in the long run, transnational networks are increasingly shaping those areas that remain in the public sphere. As a result, the borders of the public sphere appear to be delineated no longer by constitutional law but, progressively, by private actors. This implies that private transnational networks, to some extent, may determine which areas remain subject to state control and so are submitted to constitutional values.

Transgovernmental networks, on the other hand, raise concerns in terms of democratic control insofar as the national government officials who participate in them have a dual loyalty—both to their national constituents as well as to

<sup>23</sup> Consider such examples as Nike, Decathlon, Wal-Mart, or Total, whose “codes of conduct” have been under heavy criticism as being mere public relations exercises. *See* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Oliver de Schutter ed., Hart 2006); *see also* THOMAS BERNS ET AL., RESPONSABILITÉS DES ENTREPRISES ET CORÉGULATION [CORPORATE ACCOUNTABILITY AND COREGULATION] (Bruylant 2007).

their commitments in respect of solving border-transcending problems. However, networks form and operate in a transnational setting that lies outside the control of nation-state authorities. As a result, the possibility of government control over state actors involved in transgovernmental networks becomes remote; this has two implications that are not contradictory.

One implication is that, due to these networks, executives become able, to an increasing extent, to elude control by other state actors, since it is largely impracticable to hold executives democratically accountable at the national level for actions in the transnational sphere. The policy-making activities of these networks also raise concerns in terms of the institutional unbalancing of state powers that they set in motion. By transferring policy decisions affecting the public sphere to transnational networks and allowing them to elaborate regulatory solutions, the executive ultimately bypasses the legislative power. As a consequence, national parliaments lose their relevance and their constitutionally allocated and specified powers,<sup>24</sup> which calls constitutional democracy explicitly into question.<sup>25</sup> The challenge is not new. It has long been common knowledge that the primary function of parliaments lies not in their legislative activity, which is increasingly constrained and conditioned by international law—and in Europe by European law—but in their control function.<sup>26</sup> It is precisely this control function that is at issue, and the difficulty of updating its modalities as well as the powers that should support it and enable its exercise. There are two hypotheses as to how to approach this challenge. Either there is a systematic delay in the updating of this function, which has been extended to activities in the international sphere in many countries, or else this function is outmatched by international cooperation and thus insufficient concerning activities unfolding beyond state borders, particularly once highly technical areas are involved.

The other implication of the lack of government control over state actors involved in transgovernmental networks is that, given their dual loyalty, these networks can cause an erosion of state consent<sup>27</sup>—as regards, for example, all the processes involved in the creation of secondary law as well as the processes of norm

<sup>24</sup> Although this observation needs to be attenuated insofar as, even at the national level, the legislative power has significantly lost ground in areas such as monetary or environmental policy.

<sup>25</sup> For an analysis of this process from the perspective of democratic legitimacy, see Kumm, *supra* note 12, at 916.

<sup>26</sup> CONSTANCE GREWE & HÉLÈNE RUIZ FABRI, *DROITS CONSTITUTIONNELS EUROPÉENS* [EUROPEAN CONSTITUTIONAL LAWS] 550 (Presses Univ. de France 1995).

<sup>27</sup> Which is already under challenge by the evolution of the process by which international law is generated—many treaties delegate powers to treaty-based bodies whose jurisdiction is expansively interpreted and states lose their influence once they have signed the treaty, while international customary law is increasingly detached from the requirement of a long and consistent state practice in favor of statements. The proliferation of nonconsensual international obligations created by diffuse sets of actors only adds to this increasingly blurred picture.

making that are entrusted to experts due to the technical nature of the area concerned. This raises the issue of the endorsement by states of the norms and decisions elaborated and taken by networks; one may wonder, for instance, whether states are “trapped” or whether they preserve a certain leeway for maneuvering.

### 1.3.

Once the challenges to “classical” constitutionalism are identified, the question is how most efficiently to address them. Here, again, there seem to be two levels of analysis from which to proceed.

On the first level, the issue can be addressed in terms of normative evolution. The face of the law is changing in an era where networks increasingly take over regulatory and policy making functions and where the outcomes of their decision making are widespread in areas such as financial stability, environmental regulation, trade policy, debt management, poverty reduction, corporate accountability, sports,<sup>28</sup> international crime, and terrorism.<sup>29</sup> The example of internet regulation illustrates the process quite clearly: the transnational nature of digital communication renders national law virtually helpless, especially in terms of enforcement. International law does not provide meaningful solutions either, given the actors’ inability to reach an agreement via classical international treaties. When both national and international law fail to deal effectively with the issues, the system resorts to self-regulation, which, ultimately, translates into autonomous lawmaking by transnational networks. This is camouflaged by a discourse on the virtues of self-regulation—its flexibility, its adaptation (in the sense that it matches clearly defined needs), its efficiency, and so forth. This characterization merely reflects trends, which means that counterexamples could probably be given. Moreover, there are several ambiguities, where, for example, the inability to reach an international agreement may be due, nonparadoxically, to the will of one powerful state to retain control, as is illustrated vividly by the United States’ approach to governance of the internet and retaining a monopoly over the domain names managed by Internet Corporation for Assigned Names and Number (better known as ICANN).<sup>30</sup> And although states may be able, at some point, to regain control

<sup>28</sup> The area of sports has always been rather autonomous concerning its normative development (an autonomy which even extends to the creation of an arbitral tribunal) and bears witness to the difficulty of efficiency encountered by those states that try to regain a certain extent of control, as is illustrated rather obviously by the struggle in the field of antidoping. For an extensive analysis of the network phenomena in the field of sports, see FRANCK LATTY, *LA LEX SPORTIVA: RECHERCHE SUR LE DROIT TRANSNATIONAL [LEX SPORTIVA: RESEARCH ON TRANSNATIONAL LAW]* (Martinus Nijhoff 2007).

<sup>29</sup> See Melanie Conroy, Book Note, 19 HARV. HUM. RTS. J. 306 (2006) (reviewing ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2004)).

<sup>30</sup> See Evelyne Lagrange, *L’Internet Corporation for Assigned Names and Numbers: Un essai d’identification [The Internet Corporation for Assigned Names and Numbers: An Attempt at Identification]*, 2004 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 305(Fr.).

over such activity as internet communications, it is true, nonetheless, that they can do so only by coercive or other exceptional means (censorship, for example) that, as such, challenge the values of constitutionalism. Another anomaly stems from the fact that, although transgovernmental networks are designed to restore a degree of state control, it remains unclear whether there is a corresponding desire to recover the “constraints” of constitutionalism—a loss for which the actors try to compensate by claims of heightened efficiency and by a discourse on “regulation export.”

A second level of analysis approaches the topic in terms of legal theory, and the concepts that legal scholars bring to bear when addressing a loss of control by the state. The current trend seems particularly extreme from the standpoint of constitutional lawyers who view network governance—to the extent that it competes with state legislation—as an aberration. András Sajó has pinpointed this problematic trend very accurately by observing that “[w]here legislation is delegated to nongovernmental bodies, constitutionalists prefer to regard it as anomalous”; he further pointed out that

[w]here the state gives up (or has never achieved) control over the “private,” constitutional law simply turns away its gaze, claiming that no relevant norm generation is taking place. Hence, it accepts that private risk allocation, injustice, and so forth are being generated, sometimes within the confines of constitutionally protected private autonomy.<sup>31</sup>

The dilemma is easy to conceptualize: constitutional law is faced with norms that, although they affect matters belonging to the public sphere, in fact are elaborated by private actors. This tendency to eliminate checks and balances seems to lead to a sterile process through which an entire dimension of policy making—policy making by nongovernmental actors—is disregarded and, at the same time, implicitly tolerated, if not supported, since no deliberative process positively addresses the issue. This is also pointed out by Sajó, who observes that constitutional law has always reacted to so-called anomalous evolutions by undertheorizing them, or by “characterizing the problem as irrelevant to constitutional law.”<sup>32</sup> As a matter of fact, constitutional lawyers indeed have neglected to address the problem of transnational network governance, leaving it to international legal or international relations scholars.

The difficulty arising from the unwillingness—particularly on the part of constitutionalists—to acknowledge an uncomfortable process such as this is that it creates a discrepancy between the actual state of the law and its assessment by legal thought. However, in the long run, legal thought cannot persist in

<sup>31</sup> András Sajó, Book Review, 3 INT’L J. CONST. L. (I•CON) 699 (2005) (reviewing TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM: INTERNATIONAL STUDIES IN THE THEORY OF PRIVATE LAW (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., Hart 2004) and ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton Univ. Press 2004)).

<sup>32</sup> *Id.*

considering the problem as irrelevant to constitutional law—and failing to ring alarm bells—without, ironically, running the risk of contributing, albeit passively, to rendering constitutional law itself irrelevant. As constitutionalism and constitutional values are threatened with marginalization by governance through transnational networks, the nation-state suffers a loss of constitutional control, and constitutional and democratic legitimacy is called in doubt as regards activities in the transnational governance sphere. Furthermore, the prevalence of network governance is unlikely to diminish; thus, to confront this rising challenge to constitutionalism, it is necessary to acknowledge these challenges as a normality rather than as an anomaly. In the context of legal theory, advancing any analysis requires a realistic assessment of the normative process that is taking place under the aegis of transnational networks and a recognition of the ongoing evolution of international norm making as the foundation on which legal thought and argument can develop.

But here lies the problem: legal thought remains focused on an approach conceived in terms of state-centered constitutionalism. As a consequence, any development that does not fit into the frame of traditional constitutionalism, that challenges constitutionally designed structures or values, is considered not as a provocation to which constitutionalism must rise but as an anomaly to be disregarded by constitutional scholars. To acknowledge this development as a normal state of affairs presupposes a paradigm shift—from a traditional state-centered constitutionalism to a broader vision that admits the idea, in an increasingly interwoven yet fragmented world order, that there is no ultimate point of reference or authority, and thus acknowledges the possibility of a constitutionalism beyond the state.<sup>33</sup>

However, as will be discussed at greater length in section 2, this new circumstance raises the question of “translation,”<sup>34</sup> which suggests that the key features traditionally attached to state-rooted constitutionalism may be “translated” to nonstate or poststate spheres and polities.<sup>35</sup> Such a paradigm shift is within reach if we admit that the explanatory power of constitutional theory has evolved. Constitutions were designed to provide a legal frame for government action, to control government. Today, however, “government” is increasingly rivaled by “governance,” which proceeds from a loosely structured network of constitutionally invisible actors to which the aims of constitutional

<sup>33</sup> See Neil Walker, *The Idea of Constitutional Pluralism* 21–25 (European Univ. Institute, Working Paper, 2001); Gráinne de Burca & Jo Beatrix Aschenbrenner, *The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights*, 9 COLUM. J. EUR. L. 355, 360 (2003).

<sup>34</sup> Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, *supra* note 11. See also J.H.H. WEILER, THE CONSTITUTION OF EUROPE ‘DO THE NEW CLOTHES HAVE AN EMPEROR?’ AND OTHER ESSAYS ON EUROPEAN INTEGRATION 264 (Cambridge Univ. Press 1999).

<sup>35</sup> Nico Krisch suggests that the features of a translation process may render the word inappropriate and prefers the term “transplantation.” See Nico Krisch, *Europe’s Constitutional Monstrosity*, 25 OXFORD J. LEGAL STUD. 326 (2005).

law do not extend. As governance becomes transnational, the model of the constitutionally regulated state is proportionally marginalized. Thus, the justification for an exclusively state-centered constitutionalism is lacking, opening the door to a paradigm shift that, incidentally, raises the question of whether an exclusively political constitution is still viable—a disputable issue considering the decreasing capacity of government bodies to carry out their constitutionally designed functions. In any event, only after such a paradigm shift has taken place will legal scholars be able to acknowledge transnational network governance and policy making by nongovernmental actors and, consequently, the loss of state control over the public sphere as a normality in a context of globalization and transgovernmentalism. The stakes are high: constitutional law runs the risk of being increasingly marginalized until it becomes irrelevant. This raises the question: When lawmaking is measured against constitutional yardsticks, but these measurement tools do not reach the sphere of transnational networks, do constitutional values ultimately become irrelevant? This question and the underlying fear that constitutionalism might gradually become an empty concept—at least in international and transnational spheres—leads one to wonder whether constitutionalism may be adaptable to different parameters, allowing it to be transposed and, at least in part, to become “thinkable” in the sphere of network governance.

Concerning international legal thought, although it has long since incorporated transnational law into its iterations—*lex mercatoria*, *lex electronica*, *lex sportiva*, and the like—and although it can quite easily take into account transgovernmental networks as a particular form of international cooperation, it has not yet managed to conceive complete analytical tools (dealing with the existence of “third orders,” the legal status of decisions taken by transgovernmental networks, and so forth). On the other hand, international legal thought has engaged in a reflection on the “fragmentation” of international law for more than a decade and, in contrast, on global governance, which appears to be a different perspective from which to tackle and analyze the mutations surrounding, accompanying, or fostering the development of transnational and transgovernmental networks.

In this context, legal thought particularly focuses on the “constitutionalization” of international law. This last trend contributes directly to the paradigmatic shift, especially when the constitutionalization of international law is considered from the perspective of a “compensatory constitutionalism,” which seeks to have international law ultimately acknowledge constitutional principles and standards within states and to take into account the growing participation of nonstate actors.<sup>36</sup> This obviously does not summarize the entire body of reflection on global governance. However, there appears to be, at least, an increasing awareness of the intertwining and complementarity of international

<sup>36</sup> See Peters, *supra* note 9, at 591.

law and national constitutional law and, thus, of the necessity to elucidate more clearly the objectives.

## 2. From anxiety to temptation: Projecting constitutionalism

The starting point of any such reflection—whether it is from the constitutionalist perspective or from the international law perspective—is with the issue of the legitimacy of network governance, as addressed by both disciplines and analyzed from several vantage points. The issue arises insofar as networks have a capacity for emancipation with respect to national orders, or even a capacity for autonomy; moreover, the question emerges not just from the perspective of a traditional, that is, a state-centered approach to constitutionalism. This is so because, while exiting the single legal order of the state, networks are not “recovered” or captured, as it were, by any other single or unified order. On the contrary, what they reveal (as well as participate in) is, depending on the perspective, the fragmentation of international law or the polycentricity of the international order (if it is indeed possible to speak in terms of order).<sup>37</sup> From this vantage they inspire a reflection on the possibility and the “thinkability” of multiple, possibly “organizable,” loyalties. Addressing the question of their legitimacy thus implies facing a double anxiety, the anxiety of traditional constitutionalism on the defensive and the anxiety of an international law in search of unity. While both disciplines have in common their respective anxieties in the face of the erosion of constitutionalism, their anxieties are not focused on the same issues but, nevertheless, provoke the temptation of a single answer to the issues confronting them. Despite their diverging anxieties, both disciplines ultimately join in the reflection on constitutionalization, and yet, on further scrutiny of this process, it appears that there remain gaps and ambiguities in the proposed alternatives.

The multiplicity of networks needs to be linked to the multiplicity of normative spaces, the latter term used to refer to bodies of rules, which, although they may never amount to more than a partial legal system, display an internal consistency. The proliferation of action programs and regulatory procedures entrusted to international bodies fosters a certain autonomy and creates possibilities for the development of norms that states do not necessarily want, with the participation of actors whom they do not necessarily wish to see involved. Each such program or procedure creates a different constellation of actors and interests. From the standpoint of networks, the issue requires us to consider the new effects of compartmentalization that can stem from their specialization and their autonomy; this compartmentalization appears as one aspect of the theme of fragmentation. The issue proves to be even more complex insofar as

<sup>37</sup> See Denis Alland, *De l'ordre juridique international* [*On the International Legal Order*], 35 *DRÖITS* 79 (2002) (Fr.).

one individual, by choice or due to particular capacities (such as personal or professional situation), and because he is not the exclusive subject of one state, may be interacting, simultaneously, with several of these networks and the norms they produce. Thus, the multiplication of normative spaces is, at the same time, a multiplication of opportunities for a competition of norms and allegiances and, although it may appear as an opportunity for private persons to recover a capacity for choice, one cannot ignore the extent to which these phenomena put constitutionalism on the defensive. One of the major challenges posed by these private actors is the ease with which they can evade laws or select the most advantageous option among applicable regimes (a problem that is particularly relevant to dematerialized activities), and this creates a competition among legal systems. This evasion is often achieved under the rubric of human rights,<sup>38</sup> which may also be invoked to enable the circumvention of public-order acts.

## 2.1.

Traditional constitutionalism is doubly on the defensive. On the one hand, it is faced with the loss of its own unity, of its endogeneity. What is at stake is the degree of openness of national legal orders, which raises the highly controversial issue of the import of external elements.

This phenomenon may be illustrated in the context of the ongoing process of judicial globalization that is set in motion by the occurrence of legal issues of a diverse nature—most prominently in the field of human rights and criminal law but also increasingly in economic law—arising within different jurisdictions at approximately the same time.<sup>39</sup> Consider, for example, the situation of judges who must render decisions whose scope reaches well beyond the borders of the domestic legal system in which the judges operate or that concern issues governed by (or at least involving) aspects of international or foreign law or issues that they know have already been addressed by a foreign tribunal. All these circumstances encourage these judges to look for solutions beyond their domestic legal system and to become acquainted with the relevant foreign bodies of law.

The phenomenon has been addressed, increasingly, by scholars in recent years and is defined as the “process in which judges around the world are working

<sup>38</sup> For instance, Google-Brazil bases its refusal to turn over user-information to Brazilian authorities on the claim that its operations are governed by U.S. law, which imposes on it a duty to protect its clients' freedom of expression. *See supra* note 21.

<sup>39</sup> A notorious example was provided by the lawsuits against the Italian fashion designer Benetton concerning its famous “shock advertising” campaigns, with such themes as the “Bosnian Soldier,” “Child Labor,” “HIV-Positive,” and “We, On Death Row,” advertisements that caused upset around the globe and triggered proceedings simultaneously in various countries. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 102 BVerfGE 347.



together transnationally to hone their performance, abilities, and expertise,”<sup>40</sup> or as

the phenomenon of high court judges (whether international, regional, or national) entering into a global conversation by referring to and borrowing from each other and—similar to political leaders—gathering information as they see each other at special meetings or even at summits.<sup>41</sup>

The trend has developed, gradually, on the basis of the increasing awareness of judges that they cannot shut out or disregard issues addressed beyond the borders of their own spheres of competence since these borders no longer serve to contain and delineate legal issues. As a result, judges around the world have begun to quote each other’s decisions, to seek information and even advice from one another, and, increasingly, to meet face to face. This shift from mere reception of information and foreign decisions to an active conversation bears witness to a parallel intellectual shift where judges are not only aware of the ongoing process of international influence but are actively supporting it.<sup>42</sup> This growing trend of legal transnationalism reveals the construction of what may be called a “global community of courts”<sup>43</sup> or a “judicialized world community,”<sup>44</sup> where judges are increasingly key actors of global governance.<sup>45</sup> In this regard, former chief justice Carsten Smith of the Norwegian Supreme Court even argues that “[i]t is a natural obligation that [...] we should take part in European and international debate and mutual interaction” and that “it is the duty of national courts [...] to introduce new legal ideas from the outside world into national judicial decisions.”<sup>46</sup> Another significant illustration of an understanding of the merits of the process is provided by section 39 of the South African Constitution, according to which a court or tribunal, when confronted with human rights cases, is required to consider international

<sup>40</sup> Kenneth I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOB. STUD. L. REV. 345, 357 (2005).

<sup>41</sup> Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 TEXAS INT’L L.J. 505 (2003).

<sup>42</sup> See Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

<sup>43</sup> See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003).

<sup>44</sup> See Kersch, *supra* note 40, at 350.

<sup>45</sup> As is suggested by the words “transnational” and “global,” the phenomenon is no longer limited to “borrowing” exclusively from neighboring or influential countries. The trend has moved up to a global scale where any decision of any jurisdiction—national, regional, or international—may be referred to.

<sup>46</sup> Carsten Smith, *The Supreme Court in Present-Day Society*, in *THE SUPREME COURT OF NORWAY* 134–135 (Stephan Tschudi-Madsen ed., Aschehoug 1998).

and foreign law.<sup>47</sup> This provision expresses very clearly the desire to participate in the global community of judges by aiming at producing decisions consistent with constitutional case law around the world, on the basis of a thorough consideration of foreign law and decisions. It seems that this phenomenon of “constitutional cross-fertilization,”<sup>48</sup> where foreign approaches are imported or resisted but, in any event, acknowledged and discussed, progressively reveals the emergence of a global constitutional jurisprudence.

Although the general process has been described as “messy”<sup>49</sup> and, indeed, could appear so, at least in its beginnings, it is nowadays far more organized and structured and has acquired a particular relevance and even a certain degree of institutionalization, especially in the European Union,<sup>50</sup> where national judges have to establish a direct or indirect dialogue with international judges. It is, indeed, within the European Union that the most structured networks among judges can be identified, such as the Conference of European Constitutional Courts, the Network of the Presidents of the Supreme Judicial Courts of the European Union, or the *Association des Cours Constitutionnelles ayant en Partage l’Usage du Français*.<sup>51</sup>

The judicial conversation and interaction within this community of courts can be broken down into two different types of networks; on the one hand, the interaction at the transnational level—horizontal networks—and, on the other, the interaction among national, regional, and international judges—vertical networks.<sup>52</sup> The operation of horizontal networks can be demonstrated not only by the conversation among national judges but also, for example, by the constant dialogue between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), both of which seek to avoid conflict with one another and readily bring their decisions into line with each other’s approaches when crucial issues are concerned.<sup>53</sup> The implementation mechanism

<sup>47</sup> S. AFR. CONST. 1996, § 39.

<sup>48</sup> SLAUGHTER, *supra* note 3, at 69.

<sup>49</sup> Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000).

<sup>50</sup> However, the phenomenon of what Carl Baudenbacher calls the “European conversation” is not rooted in the integration process but in the *ius commune* tradition. See Baudenbacher, *supra* note 41.

<sup>51</sup> There exists, among others, an American counterpart, the Organization of Supreme Courts of the Americas.

<sup>52</sup> Guy Canivet, *Les influences croisées entre juridictions nationales et internationales: Eloge de la ‘benevolence’ des juges* [Crossed Influences between National and International Jurisdictions: In Praise of the “Benevolence” of Judges], 2006 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE [REV. SCI. CRIM. & DR. PENAL COMP.] 799 (Fr.).

<sup>53</sup> The WTO dispute-settlement bodies, especially the Appellate Body, provide another prominent example of an international court referring to the case law of other courts, for instance, the International Court of Justice.

of the EU legal system, on the other hand, provides a representative example of the functioning of vertical networks, where national courts more often than not rely on ECJ judgments,<sup>54</sup> sometimes even when these go against positions taken by their own higher court or government.

However, the underlying assumption is that the concerned community of courts is based on shared principles, such as a shared conception of checks and balances. In the EU legal system, which remains, one must not forget, a particular and, for the moment, unique case, this has brought about a relationship that acknowledges pluralism and legitimate difference—though always within a determined frame of common fundamental values—in the sense that neither the ECJ nor national courts hold the upper hand. Although the interaction between ECJ and national high courts was strained at the beginning, they have settled lately into a relationship that may well represent the most developed system of checks and balances in existence. It has been characterized as a “cooperative relationship” by the German Bundesverfassungsgericht in its *Brunner* decision, in which the Court suggested that its own role would be to establish the threshold of constitutional guarantees, while the ECJ, in turn, would examine the implementation thereof on a case-by-case basis.<sup>55</sup> On a broader scale, this particular “cooperative” relationship points to the polemical issue of European federalism insofar as national courts refuse to regard the ECJ as a superior federal court but consider it, instead, a supranational and coequal jurisdiction. The Bundesverfassungsgericht, traditionally one of the strongest advocates of the federalist approach, made this point clear when it qualified the European Union not as a confederation but as a “community of states” and its legal system as a community of courts in which each court is a check on the other, but not a decisive one (which is an expression of pluralism).<sup>56</sup>

However, the trend did not develop without meeting serious resistance, and it still raises important issues, especially in terms of legitimacy. The American judiciary, in particular—although it is not the only one—has traditionally been markedly reluctant to use comparative or international law in deciding domestic cases.<sup>57</sup> U.S. Supreme Court Justice Antonin Scalia, a prominent

<sup>54</sup> And even third-country high courts sometimes follow ECJ case law; there is, for instance, the Swiss Supreme Court, whose judges are very open to the analysis and quotation of foreign judgments in their own decisions.

<sup>55</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 BVerfGE 155; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 31, 1998, 97 BVerfGE, 350 (known as the *Maastricht Urteil*. For an English translation of the *Maastricht Urteil*, see 1994 COMMON MKT. L. REP. 57).

<sup>56</sup> See Miguel Poiares Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, *supra* note 11, at 74.

<sup>57</sup> See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997). This attitude toward the consideration of foreign law by domestic courts was even upgraded to the status of “legal xenophobia” by Kersch, *supra* note 40, at 346.

objector to the use of foreign law by national courts, has argued that “modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution,”<sup>58</sup> and many appear to agree with his position.<sup>59</sup> However, the gradual evolution toward a global judicial community seems, ultimately, to prove them wrong, given the increasingly global dimension of judicial reasoning whereby national courts openly refer to foreign law and court decisions and, even, to some extent, to public opinion. The willingness to look for solutions beyond U.S. borders when deciding domestic issues is seen, for instance, in the 1995 decision in *United States v. Then*, in which Judge Guido Calabresi observed:

[a]t one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our “constitutional offspring” and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.<sup>60</sup>

This trend has attracted public interest in the past five years, as the U.S. Supreme Court has referred directly to foreign court decisions with increasing frequency—all the more remarkably because it has done so in various decisions involving domestic policy issues.<sup>61</sup> Although scholars have long since been aware of the increasingly enmeshed global community of judges, these U.S. decisions have illuminated the existence of judicial networks. The effects of such networks have spread even to the most developed countries with the most consolidated legal systems, and this has sparked off a heated debate on

<sup>58</sup> Justice Antonin Scalia, Speech before the American Society of International Law (Apr. 2, 2004), cited in Anne Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, WASH. POST, Apr. 3, 2004, at A7.

<sup>59</sup> Many invoke ideological or more practical arguments (lack of time, of expertise, of materials, etc.) to justify their reluctance or even hostility toward the use of foreign law by national courts; however, as Basil Markesinis very persuasively argues, judicial mentality and intellectual unilateralism play a crucial role. See Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law*, 80 TULANE L. REV. 1325 (2006).

<sup>60</sup> *United States v. Then*, 56 F.3d 464, 468–469 (2d Cir. 1995). As Anne-Marie Slaughter remarks, “a good idea is still a good idea even if it comes from France,” cited in Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, (paper presented at the Program in Law and Public Affairs, Princeton Univ., Apr. 12, 2004), available at [http://www.law.columbia.edu/null/FlahertyCLS?exclusive=filemgr.download&file\\_id=94190&showthumb=0](http://www.law.columbia.edu/null/FlahertyCLS?exclusive=filemgr.download&file_id=94190&showthumb=0).

<sup>61</sup> See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *Groter v. Bollinger*, 539 U.S. 306, 344 (2003); *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

the legitimacy of national courts using foreign decisions and practices as yardsticks for domestic issues. In most cases, this was merely for support or confirmation and, in some instances, for gap-filling purposes.

The theme of legitimacy, at least from the standpoint of judicial globalization, entails two aspects. On the one hand, judicial networks contribute to a progressive harmonization or homogenization of constitutional jurisprudence insofar as an active conversation among judges enables them to bring their decisions into line with the approaches taken by foreign judges (so long as similar issues concerned, obviously). In the end, it seems that a global constitutional jurisprudence is emerging, one which calls for the recognition that participation in judicial networks and, thus, the further development of the phenomenon of judicial globalization is a crucial source of legitimacy—and that this holds true not simply for those states whose judiciaries appear “weak” and/or isolated, although the effect for those states is, clearly, of greater relevance.

The other aspect is the more problematic flip side of the legitimacy issue, where the question, put in simple terms, is whether it is legitimate for a judge to consult foreign case law to help decide a domestic case. This leads to the broader question of the legitimacy of the use of “persuasive authority,” in the sense of precedents that may be useful or relevant though not binding, due to their extraneous character, and, as a result, lack precedential authority before domestic courts. These precedents are considered persuasive because they offer original approaches or new perspectives that cast a different and possibly more convincing light on identical or similar issues. Given its prolific regulation by international treaties, the field of human rights serves as a laboratory for this process because courts seem particularly unified with regard to this topic, given that it touches a core function of constitutional courts.

The ECtHR, as the guardian of the European Convention on Human Rights, is particularly representative in this context since it is the exclusive interpreter of the convention’s provisions, which it considers to be a “constitutional instrument of European public order in the field of human rights” (to admit this, of course, presupposes an equal willingness to admit the constitutional status of the convention). An active vertical dialogue is thus taking place between national courts and the ECtHR, whose case law reaches well beyond the realms of its jurisdiction in the sense that many states not party to the convention still regard it as a source of authority (as did, for example, the South African Supreme Court in finding the death penalty unconstitutional).<sup>62</sup> This elevates the ECtHR to the status of a “sort of world court of human rights.”<sup>63</sup> However, in terms of legitimacy, this authority is solely based on the persuasiveness of its

<sup>62</sup> *State v T Makwanyane and M Mchunu* 1995 (6) BCLR 665 (CC) (S. Afr.).

<sup>63</sup> John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1 (1996).

findings since the priority of one body of rules over the other remains unclear. Although national courts, more often than not, follow the decisions of the ECtHR and interact with it, they may decide to adopt a divergent approach when the ECtHR reaches a finding that appears to be too far out of line with a prevailing domestic preoccupation. This highlights the effectiveness of a system of vertical checks and balances, where no point of authority is clearly defined; it also emphasizes the point that a global legal authority does not yet (and perhaps should not?) exist under the current circumstances.

While the question of legitimacy has sparked various, quite controversial debates—not exclusively but with particular animation among U.S. judges—one can probably answer the charge that this importation of exogenous elements in the absence of democratic controls is illegitimate by arguing that this is usually done in the interests of strengthening fundamental rights. The importation remains a tool that is opportunistically applied to serve the purpose of a particular case. Furthermore, the example of the U.S. Supreme Court is, in certain respects, extreme and spectacular; one must bear in mind that, in many cases, the reference to foreign or international decisions is associated with the judges' pursuit of an increased legitimacy of their decisions (as was true of the South African Constitutional Court's reference to the case law of the ECtHR). In the end, it appears that at least two sources of legitimacy, admittedly of a different nature, can compete with or complement each other.

## 2.2.

At the same time, constitutionalism is confronted with its very definition, which implies the possibility that there may be something to defend within constitutionalism distinct from defending the state. This appears, first of all, in terms of its language of values and its modalities of diffusion.

In this respect, European law seems to serve as a laboratory. Indeed, the problem appears to be less “marginalized” in European law and European legal thought, not only because European cooperation generates an important number of transgovernmental networks but also because this development takes place within a strong institutional structure that can be conceived in terms of constitutional law and constitutionalism. It is notable that European law incorporated mechanisms to link private persons to public decision-making processes<sup>64</sup>—long before many domestic law systems had taken this step—through the mechanism of “comitology.”<sup>65</sup> However, it is worth mentioning

<sup>64</sup> Although such processes are obviously always subject to the criticism of the criteria according to which the participants in decision-making processes are “filtered,” since any participation process is *per se* selective and, consequently, exclusive.

<sup>65</sup> Comitology is the procedure whereby the European Commission involves national administrations in preparing implementation of EU legislation. Such legislation often instructs the Commission to work with a committee of representatives of member states to ensure that implementation measures are appropriate to the situation in each affected country.

that this massive shift of rule making to the comitology process also increases the magnitude of technocratic governance (already under heavy criticism in the EU) into which the Parliament has little insight and can give little input.<sup>66</sup>

Within the same range of ideas, European law has long been confronted—increasingly so of late—with the challenge posed by the lack of a unified polity.<sup>67</sup> Thus, it is quite unsurprising that it is legal theory regarding European law that provides the most promising avenues of reflection to address the issue of network governance and the evolution of constitutionalism. The European situation leads to thinking of constitutionalism beyond the state<sup>68</sup> and to articulating reflections around notions such as pluralism and polycentricity. Constitutionalism, indeed, is a concept not exclusively confined to a state-sovereignty context but may, on the contrary, extend all its relevance and purpose well beyond national borders and the scope of the corresponding constitutions. In this perspective, Neil Walker has explained that the concept of constitutionalism is actually “relevant to, indeed constitutive of, all polities—state or nonstate, mature or emergent.”<sup>69</sup> Working on this assumption, it appears that any polity can be endowed with or can acquire constitutional features,<sup>70</sup> provided that certain criteria are met. Among those, Walker has identified the development of an explicit constitutional discourse; the claim to foundational legal authority; the delineation of a sphere of competence; provision of institutional structures to govern the polity; the criteria, rights, and obligations of membership; and the terms of representation of the membership.<sup>71</sup>

<sup>66</sup> Renaud Dehousse suggests adding a “procedural avenue” to the process of bureaucratic governance in terms of transparency, openness, and participation of individuals. See Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 11, at 135. His proposal, however, would meet the above-mentioned difficulty of selective participation.

<sup>67</sup> According to Miguel Maduro, “European integration not only challenges national constitutions [...] it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution[...]. European integration also challenges the legal monopoly of states and the hierarchical organization of the law in which constitutional law is still conceived of as the ‘higher law.’” See MIGUEL MADURO, *WE, THE COURT* 175 (Hart 1998).

<sup>68</sup> See *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 11 (especially Walker, *supra* note 34, at 27, and Maduro, *supra* note 56, at 74); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 *Nw. J. INT’L L. & BUS.* 354 (1996–1997).

<sup>69</sup> Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 32 (Gráinne de Búrca & Joanne Scott eds., Hart 2001).

<sup>70</sup> See, for instance, the reflection on constitutionalism in and the constitutionalization of structures such as, most prominently, the World Trade Organization. See Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 *EUR. J. INT’L L.* 647 (2006); DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (Oxford Univ. Press 2005); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 73 (2003).

<sup>71</sup> Walker, *supra* note 69, at 35.

### 2.3.

As anxiety over international law translates into a crucial discussion of the issue of fragmentation, it becomes necessary to consider just what unity is threatened—and to inquire whether it may be just as appropriate, instead, to analyze the situation in terms of pluralism or polycentricity. However, accepting the notion of pluralism implies also acknowledging that the analysis of the international legal system will henceforth necessarily incorporate the notion of complexity.

In a polycentric legal system, whose actors have never before had to juggle simultaneously so many rules, the definition of more precise rules regarding the articulation of “normative spaces” is the jumping-off point for the debate on these new forms of constitutionalism. According to some, there is a choice to be made between “ordered pluralism” and “hegemonic unification.”<sup>72</sup> The latter characterization echoes concern over the imperialist tendencies imputed to powerful actors, such as the United States, though this concern is transcended if the analysis takes into account the fact that globalization and its impersonal, globally effective economic and cultural logic are equally binding on all states, including the most powerful. Indeed, this logic might even be regarded as constituting a new kind of empire—a “biopolitical” or “structural” empire.<sup>73</sup> At this point, we must acknowledge that the network problem has two faces.

The first face becomes apparent in connection with lawmaking being placed increasingly in the hands of experts, which is all the more problematic if these experts are autonomous. There has been a trend toward regarding efficiency maximization as a source of legitimacy insofar as networks aim to respond promptly to actors’ functional needs and special interests.<sup>74</sup> This view—that network governance derives its legitimacy from knowledge (that is, from decisions being taken by the “knowledge possessors”) and from the efficiency that supposedly ensues—was popularized in the 1980s, especially in the sanitation and environmental areas. Although it has eroded to some extent, lately, due to the occurrence of massive sanitary crises (such as the BSE [bovine spongiform encephalopathy or “mad cow”] debacle in Europe), this outlook has remained in vogue, particularly in the context of a “managerial” approach to decision making, which prevails at the international level as a mainly technocratic means of exercising power.<sup>75</sup>

<sup>72</sup> See Mireille Delmas-Marty, *TROIS DÉFIS POUR UN DROIT MONDIAL* [THREE CHALLENGES FOR A GLOBAL LEGAL ORDER] (Seuil 1998).

<sup>73</sup> Martti Koskenniemi, Comment, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 98* (Michael Byers & Georg Nolte eds., Cambridge Univ. Press 2003).

<sup>74</sup> The example of the financial sector is, again, representative of this process insofar as the selected best practices and standards have developed an unprecedented capacity for rapid evolution and adjustment to the quickly changing requirements of the sector.

<sup>75</sup> PIERRE LEGENDRE, *DOMINIUM MUNDI: L'EMPIRE DU MANAGEMENT* [DOMINIUM MUNDI: THE MANAGEMENT EMPIRE] (Mille et une nuits 2007).



However, leaving lawmaking in the hands of networks of experts serves only to promote a legally groundless efficiency myth and, according to Anne-Marie Slaughter, “[t]he merging and blurring of lines of authority are ultimately likely to blur the distinction between public legitimacy and private power.”<sup>76</sup> The rising power of expert governance thus gives rise to confusion concerning the possibilities of transferring constitutional values to the global sphere, since the shift from decision making by experts to technocratic decision making implies a shortcut that bypasses the political sphere. In constitutional terms, what is problematic here is the transition from a mere bypassing, which still could be counterbalanced, to a total dispossession. However, expert decision making hardly seems reversible, considering the general tendency to consider expert governance as a guarantee of knowledge and efficiency; there may even be an inclination to regard these as the sole and sufficient providers of legitimacy.

Since government-bound mechanisms for guaranteeing legitimacy do not reach transnational networks, it must now be assessed whether network governance can provide democratic control and democratic legitimacy functionally equivalent to what is offered by constitutionalism,<sup>77</sup> which traditionally has borne “the promise of setting up and taming the exercise of power.”<sup>78</sup>

The other face of the problem raised by networks appears when one considers that each “normative space” could be viewed as a place or opportunity for “counterhegemonic strategies,” the accumulation of which would reveal “new or emergent ideas about ‘international community.’”<sup>79</sup> Here, the networks could reveal new paths for solidarity, an element that is fundamental if constitutionalism is to work properly. This would shift the emphasis away from a law on globalization that is merely an expression of neoliberal concepts in legal terms and toward a globalized law that embraces material justice, defense of fundamental rights, and the common management of common property. This goes beyond the current reflection on the constitutionalization of international law—which remains disputed, because it reflects a recurring, albeit vain, temptation to transpose the supposed perfection of the domestic order to the international order or because it fails to reflect the reality of its own evolution.

At the same time, it is very interesting to note the development of important reflections on global administrative law, which are directly related to the topic of global governance. The starting point for such reflections is the same as that for those points of departure pertaining to constitutionalism, namely, an

<sup>76</sup> SLAUGHTER, *supra* note 3, at 224–225.

<sup>77</sup> See Jens Steffek, *Sources of Legitimacy Beyond the State: A View From International Relations*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 81, *supra* note 5.

<sup>78</sup> Krisch, *supra* note 35, at 332.

<sup>79</sup> Koskenniemi, *supra* note 73, at 99.

increased blurring of the distinction between domestic and international or transnational spheres; competition between new models of governance and statehood (and even the undermining of the latter by the former); and, ultimately, the basis of legitimacy being called into question. These phenomena appear to have been paralleled by the emergence of a global administrative space in which soft-law mechanisms and regulation gradually replace classical norm making. In addition, the actors and institutions from different normative levels are increasingly interwoven in transnational structures that take over functions traditionally exercised by state organs.<sup>80</sup> In this context, where transparency, accountability, and legitimacy are no longer founded on the safeguards of state-centered constitutionalism and thus seem easy to undermine, the question arises whether and to what extent domestic administrative law mechanisms could be used to address accountability issues in global governance.<sup>81</sup>

But beyond these trends, the hypothesis needing consideration, here, is the diffusion of the normative expectations of constitutionalism, simultaneously and cumulatively in several places or “sites,”<sup>82</sup> with a role for networks in this “translation.”<sup>83</sup> This hypothesis, outlined for Europe, has to be explored beyond Europe. Central to this inquiry is the question to what extent unity and hierarchy are and have been indispensable for constitutionalism, both in a historical and theoretical perspective. It also involves an investigation into the possibility of a legal concept of constitution without these elements, while acknowledging that if constitutionalism can play a role, it must be in the form of a political project and a language of values.

#### 2.4.

International law and constitutional law, although they are not implicated in the same ways, have parts to play in the current reflections on constitutionalization. Nevertheless, it appears that gaps remain between them, as well as ambiguities and ambivalences that need to be addressed. Indeed, transnational networks and the challenges they pose to constitutionalism imply a further reflection on the trends and evolutions these networks trigger and will trigger in the future. As Slaughter consistently argues, it is quite likely that such structures

<sup>80</sup> See Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

<sup>81</sup> The reflection on the relevance of a global administrative law, however, cannot but meet serious contestation since, while it aims at addressing accountability issues of global governance, it incidentally raises the question of to whom this accountability is owed and which accountability mechanisms, in a pluralist and multilevel order, should prevail. See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006).

<sup>82</sup> Walker, *supra* note 34, at 42.

<sup>83</sup> *Id.*

represent the primary model of an emerging efficient system of international cooperation.<sup>84</sup> Thus, one can quite safely assume that the trend will not go backward, and that networks will only develop further, since domestic government bodies are simply outmatched in dealing with global technologies on their own. As networks spread, this implies a parallel trend of pushing toward further specialization via experts emanating from the disaggregated state at the transgovernmental level and private actors at the transnational private level. This process, in turn, suggests the hypothesis that specialization necessarily is a positive and beneficial process.

Of course, networks of specialists and experts create policy convergence by, for example, elaborating common standards and codes of best practices, such as those compiled by the Financial Stability Forum or emanating from entities such as the Basel Committee on Banking Supervision or the International Organization of Securities Commissioners.<sup>85</sup> Through the cooperation system they set up, notably through capacity building in weaker states and vertical networks, such organizations contribute to improving compliance with international agreements. Through this system of cooperation, networks thus seem to offer a blueprint for states, crafted by the hands of the technocratic elites enmeshed in these networks. Kal Raustiala highlights this issue rather explicitly by arguing that transnational networks promote “regulatory export” from stronger states to weaker ones.<sup>86</sup> This trend is certainly laudable as long as the main objective behind the idea of blueprinting is to contribute to establishing constitutional democracy in all countries. In that sense, less developed states could benefit from the transnational network dynamic.

However, the regulatory export argument is obviously of no practical relevance for most of the developed countries; moreover, one should bear in mind, in this regard, that democracy is not an end in itself but merely a means to that end.<sup>87</sup> Furthermore, even if we can assume that the promotion of a blueprint for states by transnational networks is a beneficial trend under certain circumstances, there still is a flip side to the image of regulatory export. This flip side is apparent in the statement of a U.S. Securities and Exchange Commission (SEC) official who claimed that the objective of SEC networking within the International Organization of Securities Commissions (IOSCO) was

<sup>84</sup> *E.g.*, Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT’L L.* 283 (2004).

<sup>85</sup> See, for instance, the “Compendium of Standards,” a set of twelve standards, representative of the key areas concerned by financial stability, selected from the best practices in each area, gathered in one document and promoted by the Financial Stability Forum.

<sup>86</sup> Raustiala, *supra* note 15, at 51.

<sup>87</sup> In the words of Joseph Weiler, “a democracy, when all is said and done, is as good or bad as the people who belong to it.” Weiler, *supra* note 7, at 186.

the “dissemination” of “the ‘regulatory gospel’ of US securities law.”<sup>88</sup> This statement demonstrates, rather clearly, that networks definitely are about providing a blueprint for states in terms of democracy; it is also undisputable that they promote convergence and harmonization. And although the examples given highlight the United States, the U.S. is clearly not alone on this path. One cannot but wonder if there may not be a “dark side of virtue,” namely, the promotion of the participants’ particular interests and goals in these networks. One may question, for instance, whether network participants really share the interest and values of the people who will ultimately be affected by the outcomes of network policy making. In the end, the question may be whether not—as suggested by charges of lack of accountability, democratic deficit, and questionable legitimacy—network governance may gradually be turning into network dominance and hegemony.<sup>89</sup>

### 3. Conclusion: Toward “Society 2.0”?

Indeed, that is the challenge. The issue raised by networks regarding constitutionalism is merely one side of the broader issue posed by the movement toward what is called by some Society 2.0., an idea related, not least, to the rapid expansion of new means of communication. By these means, individuals integrate various circles that are all, in fact, networks that each generate their own loyalty or solidarity and even sense of community. And although individuals remain, first and foremost, participants in circumscribed societies rooted in national or regional entities—regardless of their efforts to break the boundaries of such national or regional polities—nonetheless, each network in which they mingle seems to be capable of inventing its own democracy. In fact, expression via networks is currently competing with the institutional expression of the will of the people in relation to democracy. For example, individuals are invited to express their votes on every imaginable topic; such a trivialization is inevitably a source of confusion. Individuals may have the impression that they were given the opportunity to express their opinion and, indeed, that is what they have done. Still and all, because of the lack of any institutional framework for such expression the exercise merely leads to a multiplication of pressure mechanisms by way of a more or less diffuse body of opinion whose acknowledgment mechanisms, while eminently empirical, are, at the same time, competitive with the institutional expression of democracy. Thus, what is sometimes too readily hailed as a new form of democracy may turn out actually to be a mere image thereof—idealized or distorted, depending on the viewpoint taken, in the manner of the avatars that are featured on certain websites. But then, what could or should be the avatar for constitutionalism?

<sup>88</sup> Raustiala, *supra* note 15, at 32.

<sup>89</sup> Which is all the more plausible since several networks, although legally “stateless,” are nevertheless technically rooted in the United States (ICANN, for instance).