

DISCUSSION

The Globalizing Turn in the Relationship Between Constitutionalism and Democracy

Some Reiterations from the Perspective of Constitutional Law

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1 Introduction

This paper tries to mirror in the field of constitutional law the reflective insights provided by Walker's essay on the relations between constitutionalism and democracy, not from a philosophical perspective but from that of constitutional law.

I largely agree with many of the conclusions and insights generated by his essay. As I understand Walker's essay, its main argument is that in order to understand the political nature of globalization we should not give up on the one hand the 'double edged' function of constitutionalism of enabling or realizing democracy and simultaneously of qualifying and restraining it, and on the other the consequent irreducibility of constitutionalism and democracy. To this I fully agree. What follows constitutes therefore merely a set of reiterations, which attempt to broaden some of the details of the reasoning in Walker's essay. These take their cue in particular from the third section of Walker's essay, in which he distinguishes seven sub-themes on the 'empirical' and 'normative' incompleteness of democracy and constitutionalism. I suggest that precisely in the globalizing context these can and should be viewed from a broader perspective than offered in the third section of Walker's essay.

As is evident from many of the points raised by Walker, in particular the assumption that the relationship between constitutionalism and democracy is iterative, which is to say that the meaning of these concepts changes within their contextual dynamics over time, our concern is with a topic which is historical in nature, as all politics is essentially historical. Constitutions, constitutionalism and democracy are historical phenomena, both in practice and in the manner in which we can understand and theorize them. Hence, it is important to trace the historical constitutional configurations in discourse on constitutionalism and democracy.

The specific formulation of the problems in the relations between constitutionalism and democracy raised in the third section of Walker's essay, finds its origin in a particular tradition of continental European constitutional thought rooted in late 18th and early 19th century ideology, which Walker calls 'modern constitutionalism'. I submit that these questions when posed in the context of globalization bedevil thought that remains within that tradition, making globalization intractable to constitutional analysis. An alternative constitutional tradition – which in the vocabulary proposed by Walker would perhaps be dubbed 'ancient

constitutionalism' – may be less perturbed by the challenges posed by globalization at least with regard to some of the dimensions of the relationship between constitutionalism and democracy.

2 The Historical Nexus of Constitutionalism and Democracy

Walker sketches the development of constitutional thinking on the relations between constitutionalism and democracy from the quasi-organic, biological metaphor of the 'constitution' as the state of the commonwealth understood as a body politic to a more abstract notion leading to a situation in which the 'constitution' was associated with a legal document summing up the principles governing the political community ('documentary constitutionalism'). This provides, Walker asserts, the key to understanding how in its original conception modern constitutionalism came to stand in tension with democracy, in as much as the law and the constitution in the age of absolutism were an instrument rather than the source of sovereign power, whereas modern constitutionalism reversed this relationship.¹

If I understand the paper correctly, the beginning of this modern constitutionalism in this sense is historically located in the 18th century with the rise of constitutional documents towards the end of that century and in the early 19th century.

There can be no doubt about the contrast between absolutism and modern constitutionalism as sketched, but I firstly submit that the tension antedates the 18th century and goes back to earlier roots, and secondly that the tension is inherent in the nature and object of constitutions.

To argue this, I recall that as an institutional arrangement democracy is not only about creating and modifying political decisions, but one manner of dealing with how one government is succeeded by another; but earlier forms of constitutionalism had the same concern. The very notion of 'absolutist' rule is based on the distinction which was made between rulers (kings) who are 'legitimate' because they have come to power in accordance with pre-established *leges* and those that are *legibus ab solutus*. These *leges* are rules concerning their election or rules of inheritance – what we would now call constitutional legal norms. Essentially then, the ruler is legitimate who is governed by such 'constitutional' norms.

The monarchomach literature of the 16th century built on this older distinction between 'legitimate' and 'absolute' rulers when considering the issue of when resistance and deposition of a ruler could be legitimate and began (hesitantly) to discuss – mostly 'representative' – 'democratic' justifications of government. The Act of Abjuration of the Spanish king by the Netherlands States General in 1581 and a rich body of 16th and early 17th century pamphlets built on these themes in order to justify the Dutch Revolt and the foundations of the 'Dutch Republic'.²

1 Walker, in this issue, 208-209.

2 The term 'Dutch Republic' used in English language literature beautifully confounds the Republic of the Seven United Provinces with the hegemonic sovereign Province of Holland, which was one of the seven.

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‘Governmental’ issues were obviously only one side of the coin. The other was that of what we would now consider ‘constitutionalist’ values, such as the liberty, life and goods of the citizens: political power had to be supplemented as well as qualified by substantive values which required their constitutional recognition, and which were not as such governmental in any institutional sense of the word. The constitutional order was indeed thought of as incomplete without recognition of such values.

In France as well as in the Low Lands religious liberty was a major issue, spawning the wars of religion in France and the Dutch Revolt in the Low Lands. Neither the monarchomach literature nor the Dutch pamphleteers and Act of Abjuration can be understood separately from the issue of religious liberty, which were the object of the Edict of Nantes (and its predecessors, either by granting or refusing it) and in the Low Lands became constitutionally enshrined as liberty of conscience (thus limiting religious liberty to the *forum internum*) in the Union of Utrecht of 1579, which was to function as the constitution of the ‘Dutch’ Republic of the United Provinces until 1795.

The point here is not so much that late medieval and early modern polities were effectively ‘constitutionalist’ polities, but, firstly, that the issue of legitimate forms of government was connected with being bound by a legal instrument legitimating rather than merely instrumentalizing public power. Secondly, issues of liberty of citizens which were not governmental in an institutional sense (‘liberal’ rather than ‘republican’) were – at least in 16th century France and the Netherlands – values requiring constitutional recognition precisely because they were thought of as supplementing as well as qualifying the nature of government in its institutional aspect (Walker’s ‘normative incompleteness’, the fifth of the sub-themes distinguished in his essay).

So from the beginning constitutions have been about legitimate forms of government, especially the transition of government between rulers, but at least since the 16th century, they have also been concerned with the manner of exercising that power in a ‘constitutionalist’ sense, equally legitimating that public power.

3 Two Archetypal Constitutional Traditions

In order to enable a broadening of the intellectual horizon with a view to the development of constitutional thought in the context of globalization, I insist on the distinction between two archetypal constitutional traditions.

The continental European constitutional tradition on which Walker leans, is mainly of French revolutionary pedigree. It has strong inclinations towards exclusivism and sovereigntist thought, based as it is on the nation and popular sovereignty. The revolutionary constitution aims to do away with (some crucial contrasting aspect of) the past and forms a blueprint for the future; exclusiveness and autonomy are two of the core concepts within this constitutional paradigm.

There is a different constitutional tradition as well. That is the tradition in which constitutions are incremental, take up the historical events into an overall longer term constitution that codifies rather than modifies. The prototype is the British

constitution. I would argue that the Netherlands constitutional system fits not into the French revolutionary type of constitution, but belongs to the British incremental type, while probably the Scandinavian constitutions, though not uniformly, are varieties of the evolutionary type. Elsewhere I have argued that the EU constitution is bound also to belong to this type.³

4 The Relative Irrelevance of the *pouvoir constituant* (1)

It would seem that some of the first four of the seven dimensions of the relationship between democracy and constitutionalism as distinguished by Walker are articulated in a manner that is predicated on the particular continental European constitutional tradition. As this specific tradition has particular problems with globalization in its various manifestations (including European integration within the context of the European Union), it would seem that reiterating them from the perspective of this tradition in the context of globalization will not yield relevant insights. To the contrary, these problems do not apply to constitutions belonging to that other constitutional tradition, and hence these should not pose a problem for theorizing globalization either from the point of view of this alternative tradition. This criticism would seem to me to apply at any rate to the issue of 'authorship' and the *pouvoir constituant* (constituent power) in particular.

A German questionnaire prepared for a study on comparative constitutional law contained as one of the first questions 'what was and from when dates the original constitution?'⁴ This is a question that cannot be answered for the British constitution.⁵ And the same goes for the Dutch, who have a series of prototypes on such different moments that it is impossible to tell which is the first. Some say the prototype is that of the *Grondwet* (Constitution) of 1814, as the Netherlands Ministry of the Interior claims, while others say it is the Constitution of 1815. And in fact, we have celebrated anniversaries of the Constitution of 1848 as if that is still the original of the present constitution as it celebrated its 150th anniversary; while recently we celebrated the anniversary of that of the fully revised Constitution of 1983 which changed its text unrecognizably as compared to that of 1848 (only two clauses are the same except for spelling and punctuation).

The reason that the dates of 1814 and 1815 are disputed is because the amendment of 1815 was not in accordance with the procedure prescribed in the Constitution of 1814. The same is true of the *Grondwet* of 1848. In fact, the *Grondwet* of 1836 also was truly revolutionary in as much as it was the consequence of the Revolt of the Belgians against the Dutch in 1830 and no Belgian participated in it, contrary to what the amendment clause required; yet nobody would claim that

3 J. Wouters, L. Verhey and Ph. Kiiver (eds.), *European Constitutionalism beyond Lisbon*, Antwerp/Oxford/Portland: Intersentia 2009, p. 261-281.

4 This is the project of the Heidelberg Max Planck Institute on the *Ius Publicum Europaeum*, dealing with the *Grundlagen und Grundzüge staatlichen Verfassungsrechts*, see Armin von Bogdandy, Pedro Cruz Villalón and Peter Huber (eds.), *Handbuch Ius Publicum Europaeum*, Band I, Heidelberg: C.F. Müller Verlag 2007.

5 Martin Loughlin, Großbritannien, in: *Handbuch Ius Publicum Europaeum*, Band I, 220.

the *Grondwet* of 1836 is the 'original' constitution – and for obvious reasons no anniversaries have been celebrated of this Constitution.

These were no mere accidents inspired and justified by historical contingencies. The issue of the power to amend the constitution (which is nearest to the original constitution making power) is not taken to be a serious issue in present-day Dutch constitutional politics either. Thus, with the exception of a handful of senators who in the end swallowed their criticisms by not acting upon them, nobody really cared much that the amendments eventually adopted in 2005 and 2006⁶ were not dealt with by the competent Lower House elected for that purpose in May 2002 as the *Grondwet* seems to stipulate,⁷ but by a next Lower House which was elected in 2003 but not on the basis of a dissolution under the amendment clause of the *Grondwet* (Art. 137, third paragraph).

This goes to show that in this constitutional tradition, the question who possesses the original 'constituent power' is of little importance, while little attention is devoted to the question of the constituent or constituted power to amend the constitution. The irregular amendments have neither been based on nor led to revolts or any other constitutional stalemate, while the one revolt (the separation of the Belgians) has been quietly passed over.

The *redemptive power of historical reception* seems in these cases much stronger and more decisive than the question of the credentials of who had the original power. In this respect it does empirically not matter too much whether this concerns the alleged 'constitutionalist' deficits of either an 'original' constituent power or those of the authors with amending power. Historical effectiveness outweighs the intellectual plumbing work that in one tradition may require 'original' constitutive powers. This is because in this constitutional tradition constitutions have, instead of the ambition to modify the polity, the more modest role of codifying changes.

This proves the relative irrelevance of *the pouvoir constituant* argued from outside the classic continental European constitutional tradition.

I take this two steps further by firstly pointing out that this same irrelevance is borne out by pointing to the drafters of the two archetypes of 'revolutionary' constitutions, the United States of America and the present-day German *Grundgesetz* (Constitution). These constitutions, after all, originated in a situation of which it is hard to say that they were determined by the democratic mandate of the makers of the constitution: they had none.

Secondly, they were neither guided by legally valid substantive constitutionalist rules nor by principles guiding their operation. This confirms that not only there

6 Concerning the temporary replacement of ill and pregnant members of parliament and of provincial and municipal councils (2005), the provision on public education in mixed public and private school premises (Art. 23) (2006).

7 Art. 137 *Grondwet* reads: '1. An Act of Parliament shall be passed stating that an amendment to the Constitution in the form proposed shall be considered. [...] '3. The Lower House shall be dissolved after the Bill referred to in the first paragraph has been published. 4. After the new Lower House has assembled, the two Houses of the States General shall consider, at second reading, the Bill referred to in the first paragraph. The Bill shall be passed only if at least two thirds of the votes cast are in favour.'

‘remains something *democratically* unfilled and merely self-fulfilling about the original constituent act and signature in its own time’, but that the same must be said about the constitutionalist aspect. *There is no empirical necessity that the incompleteness of democracy is supplemented by constitutionalist rules or principles either.* After all, even if there were a truly revolutionary, constitutional moment, then that is the moment at which the makers of the constitution are unbound by previous constitutional arrangements, rules and principles.

5 A Constitutional Aside

This point is central in the controversy among German constitutional lawyers as to whether the so-called *Ewigkeitsklausel* (eternity or perpetuity clause) of the *Grundgesetz* also binds the makers of the true Constitution (*Verfassung*) provided for under Article 146 of the *Grundgesetz*. Article 146 *Grundgesetz* states that the *Grundgesetz* ceases to be valid on the day on which a *Verfassung* enters into force which has been adopted by a free decision of the German people as *Verfassungsgeber* (a true *pouvoir constituant*). The *Ewigkeitsklausel* stipulates that any amendment of the *Grundgesetz* by the *Verfassungsgesetzgeber* (a *pouvoir constitué*) that affects the federal principle and the fundamental rights and principles set out in Articles 1 to 20 *Grundgesetz* is invalid.⁸

In its *Lissabon Urteil* on the constitutionality of the Lisbon Treaty⁹ in light of the democracy principle enshrined in Article 20 (2) GG¹⁰ together with Article 38 GG¹¹, the *Bundesverfassungsgericht* (BVerfG) (Federal Constitutional Court) ostensibly leaves open the question whether the *Verfassungsgeber* is bound to the *Ewig-*

8 Art. 79 (3) *Grundgesetz* reads: ‘Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig’.

9 BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), <www.bverfg.de/entscheidungen/es20090630_2bve000208.html>.

10 ‘Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.’

11 ‘(1) Die Abgeordneten des Deutschen Bundestages werden in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt. Sie sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihrem Gewissen unterworfen.’

keitsklausel or not.¹² The BVerfG, however, also held that Article 146 GG constitutes a constraint upon Germany's integration in the EU as allowed under Article 23 GG, and suggested that a choice to give up the statehood of Germany is only possible if this is brought about by an act of the German people under Article 146 GG.

In the case law of the BVerfG the democracy principle expressed in Article 20 and 38 GG entails the requirement of the continued existence of substantive powers of the *Bundestag* (German Parliament) under the EU Treaties.¹³ Reducing these by transfer of powers to the EU in which case the *Bundestag* would no longer be in a meaningful way the subject of legitimating activity, would put an end to the Federal Republic as a sovereign democratic state. If this, as the BVerfG suggests in the same judgment, could only be brought about by an act of the German people under Article 146 GG, then this amounts to saying that the democracy principle can be set aside by the *Verfassungsgeber*.

- 12 *Ibid.*, para. 216-217: 'Das demokratische Prinzip ist nicht abwägungsfähig; es ist unantastbar (vgl. BVerfGE 89, 155 <182>). Die verfassungsgebende Gewalt der Deutschen, die sich das Grundgesetz gab, wollte jeder künftigen politischen Entwicklung eine unübersteigbare Grenze setzen. Eine Änderung des Grundgesetzes, durch welche die in Art. 1 und Art. 20 GG niedergelegten Grundsätze berührt werden, ist unzulässig (Art. 79 Abs. 3 GG). Mit der sogenannten Ewigkeitsgarantie wird die Verfügung über die Identität der freiheitlichen Verfassungsordnung selbst dem verfassungsändernden Gesetzgeber aus der Hand genommen. Das Grundgesetz setzt damit die souveräne Staatlichkeit Deutschlands nicht nur voraus, sondern garantiert sie auch. [217] Ob diese Bindung schon wegen der Universalität von Würde, Freiheit und Gleichheit sogar für die verfassungsgebende Gewalt gilt, also für den Fall, dass das deutsche Volk in freier Selbstbestimmung, aber in einer Legalitätskontinuität zur Herrschaftsordnung des Grundgesetzes sich eine neue Verfassung gibt ([...] vgl. auch BVerfGE 89, 155 <180>), kann offen bleiben. Innerhalb der Ordnung des Grundgesetzes jedenfalls sind die Staatsstrukturprinzipien des Art. 20 GG, also die Demokratie, die Rechts- und die Sozialstaatlichkeit, die Republik, der Bundesstaat sowie die für die Achtung der Menschenwürde unentbehrliche Substanz elementarer Grundrechte in ihrer prinzipiellen Qualität jeder Änderung entzogen.'
- 13 BVerfG, 2 BvE 2/08, para. 175: 'Das Grundgesetz hat [den] legitimatorischen Zusammenhang zwischen dem Wahlberechtigten und der Staatsgewalt durch Art. 23 Abs. 1 Satz 3 in Verbindung mit Art. 79 Abs. 3 und Art. 20 Abs. 1 und Abs. 2 GG für unantastbar erklärt. Art. 38 Abs. 1 Satz 1 GG schließt es im Anwendungsbereich des Art. 23 GG [the European Integration clause] aus, die durch die Wahl bewirkte Legitimation von Staatsgewalt und Einflussnahme auf deren Ausübung durch die Verlagerung von Aufgaben und Befugnissen des Bundestages auf die europäische Ebene so zu entleeren, dass das Demokratieprinzip verletzt wird (vgl. BVerfGE 89, 155 <172>).' *Ibid.*, para. 210: 'Das jedem Bürger zustehende Recht auf gleiche Teilhabe an der demokratischen Selbstbestimmung (demokratisches Teilhaberecht) kann auch dadurch verletzt werden, dass die Organisation der Staatsgewalt so verändert wird, dass der Wille des Volkes sich nicht mehr wirksam im Sinne des Art. 20 Abs. 2 GG bilden kann und die Bürger nicht mit Mehrheitswillen herrschen können. Das Prinzip der repräsentativen Volksherrschaft kann verletzt sein, wenn im grundgesetzlichen Organgefüge die Rechte des Bundestages wesentlich geschmälert werden und damit ein Substanzverlust demokratischer Gestaltungsmacht für dasjenige Verfassungsorgan eintritt, das unmittelbar nach den Grundsätzen freier und gleicher Wahl zustande gekommen ist (vgl. BVerfGE 89, 155 <171 f.>).'

6 The Relative Irrelevance of the *pouvoir constituant* (2)

Returning to the argument of paragraph 4, a different matter is that makers or amenders of a constitution are part of the 'moral order' in which constitutionalism and democracy find a place, with the normative implications this has when making, amending, interpreting and applying constitutional arrangements and acting within them. Saying this is implying that democratic thought as well as constitutionalist thought are part of and embedded in broader moral discourses. If I understand Walker's essay correctly, this is what he means in his concluding remarks on Taylor's 'moral order of modernity'. I venture to think, however, that perhaps it comes closer to the meaning of neo-Kantian 'cosmopolitan norms of justice' in 'jurisgenerative processes' as developed by Benhabib, from which Walker took his cue as to 'democratic iterations'.¹⁴

7 Globalization's Challenge to Democracy: The Problem of Representation, 'Stakeholders' and Demarcation

The greatest challenge of globalization to national constitutional orders is the issue of democracy.¹⁵ Clearly, globalization has by definition challenged the territorial dimensions of government inherent in most state forms of government. As I see it, the major problem in this connection is the representational issue. This cannot be disengaged from the issues concerning membership and stakeholder-ship, which are inextricably wound up with issues of demarcation in the globalizing context (I will remark on this below).

Many questions arise that are very hard to answer. At what 'level' do we aggregate power? Who is responsible? Who is accountable and towards whom? Who is to be regarded as the democratic representative and who are the concrete represented 'stakeholders'? At its broadest: what is the *res publica*, the generality of the general interest or *volonté générale*?

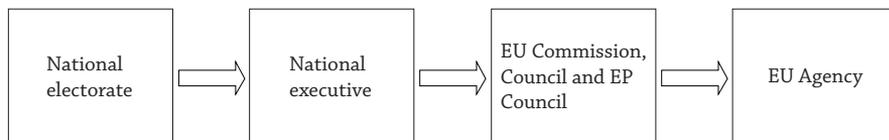
Mostly, democratic representation is conceived of in terms of what political scientists now call 'principal-agent' relations, in which accountability is owed by the agent to the principal. Within discrete and mutually exclusive polities this may provide a satisfactory manner of fitting in ideas typical for the continental European tradition, like that of the popular will and popular sovereignty.¹⁶ It may also work within political federations in which powers are clearly divided and distributed between levels while the political institutions are designed in accordance with that power distribution.

14 Seyla Benhabib, *Another Cosmopolitanism*, Oxford: Oxford University Press 2006.

15 This may also be true (as I think is the case) with regional manifestations of globalization such as the European Union. Although Walker's paper provides many clues for applying its analysis to the EU, I will not elaborate on this point, but instead take the liberty, as Neil Walker does in his paper, to refer to it in some of the examples below.

16 Cf. the delegation (or mandating) construction in Art. III of the Déclaration of 1789: 'Le principe de toute Souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.'

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It becomes more complicated in what is often referred to as a ‘multilevel’ context in which those to whom powers have been mandated and delegated (in public law typically (members of) the executive) further delegate or attribute the exercise of powers to other entities (e.g. the Council of the EU) with a geographically or functionally larger remit than that of the original *mandans*, and to that larger extent are beyond the remit of the original *mandans* (e.g. the national parliament – which is itself mandated by an electorate). The situation is even the more difficult if we are not dealing with a ‘mandate’ or ‘delegation’ of existing powers but the attribution of new powers. Is the empowerment of the EU institutions, which have a remit that at least geographically is larger than that of any of the Member States, to be classified as delegation of existing powers originally residing in Member States, or is it the attribution of new powers that the Member States did not originally possess? It may well be argued that it is the latter because no Member State was able to take decisions binding on the others, whereas the EU institutions can. Taking this view, I surmise, would run counter to typically continental European constitutional approaches which cannot go beyond the idea that power can only derive from a delegating act of a people or a nation, as is confirmed both by the *Lissabon Urteil*¹⁷ and also by the constitutional headaches that thinkers within this constitutional tradition have concerning the absence of a European Nation, *Volk* or *demos* and how to deal with that.

Under circumstances of delegation of powers to an entity with a larger remit than the original possessor of the power, or of attribution of new powers to an entity, the ‘forum’ in which agents are to be held accountable does not – and should not – necessarily coincide with the meeting place of the agent with its immediate ‘principal’. The forum may reach back to ‘earlier’ mandating or delegating instances (hence the involvement of national parliaments in (usually and most effectively *ex ante*) accountability in EU affairs), but often the forum is an unspecified ‘public’ in general (usually constituting an *ex post* accountability). This choice to render account to ‘the public’ in general through making available detailed reporting and through adherence to practices of transparency may – instead of rendering account to the original retainers and delegators of power – be viewed as a confirmation of the lack of clarity of whom the relevant members of the forum are, and who within the group of members of a potential forum are the stakeholders; questions of ‘membership’ and ‘stakeholding’, i.e. who are the ‘members’ and who are ‘stakeholders’, may not concern the same persons and institutions at all.

17 See n. 9 above.

This state of affairs may be intellectually dissatisfying, but it is practically much to be preferred over an accountability that rigidly adheres to principal-agent relations as privileged channels of communication.

8 Globalization's Challenge to Constitutionalism: Implementation and Demarcation

Globalization is also a challenge to constitutionalism at least as regards its claims to quasi-universality or cosmopolitanism and how this relates to the 'local' within the context of the global (the 'glocal'). In other words, also for constitutionalism the 'spatial' dimension is the crucial issue.

The substance of constitutional principles and values becomes exposed to questions of 'translating' them from universal to local situations – but also of 'translating' local values and principles into universal ones (examples are respect of cultural identity; and the principle of respect of constitutional identity, Art. 4(2) EU Treaty).¹⁸ Thus, it would seem that *also* putatively 'non-democratic' values become exposed to issues which may be considered to involve, or at least touch on 'democracy' (the ideal of self-government by the people as the essay puts it).

In this regard, it is my opinion that bounded communities (though with variously defined boundaries) can never be dispensed with either in principle or in practice. Among them is the state (too simply identified in much English language political theory and philosophy with the 'nation state'), which is there to stay for a while. This is for a number of reasons. The first is that the monopoly of violence – though its exercise and its regulation may be 'pooled' to a larger extent than previously thought possible – resides in states as their most distinctive political feature. Secondly, much of decision-making in or generated in non-state contexts requires implementation in state contexts, factually or because the state possesses means for enforcement which are lacking in non-state contexts. Thirdly, the state has been the source of democratic and constitutional thought, 'lending' ideas of constitutionalism and democracy to non-state political contexts.

9 Conclusion

Walker argues, correctly, that state constitutionalism as a response to the double incompleteness of state democracy is no more than a particular and ultimately contingent architectural formation.¹⁹ On the basis of Charles Taylor's notion of the 'moral order of modernity', he suggests that in the age of globalization we not only need to find, but '*crucially, we may be capable of finding* an adjusted architecture to accommodate the moral order rather than assume that there was only

18 '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.'

19 Walker, in this issue, 232.

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ever one political architecture fit for modernity'.²⁰ Walker claims on this basis that the ambivalence of constitutionalism in its (double) relationship to democracy remains vital to political understanding and regulation of the global age, because of democracy's 'nested centrality' to that moral order of modernity. This relationship, though, will be 'distributed unevenly over the networked space of global society', he asserts.²¹

That we may be capable of finding such an adjusted architecture in the context of globalization is probably true, just as it is true that the relationship between constitutionalism and democracy will be unevenly spread throughout the 'networked space of global society'. Reaching these conclusions, I submit, is not only possible by reference to a Taylorian moral order of modernity – appealing as this foundational approach is – but can also be achieved by means of a broader historical understanding of the varieties of available constitutional traditions, which do not all conceive of political power and order in a context of exclusive autonomous state polities. The relationship between constitutionalism and democracy remains open, ambivalent and contingent on the varieties of orders and the mutual relationships between these orders also on that analysis. That the tension between constitutionalism and democracy cannot be resolved in some established pattern is, I suppose, in the nature of the asserted 'iterative' nature of the relationship between constitutionalism and democracy. This is the most important of the many insights which Walker's essay has offered us.

20 *Ibid.*, 232.

21 *Ibid.*, 232-233.