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## From Constitutional Pluralism to Global Law: Reading Neil Walker's Postmodern Constitutionalism

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### ABSTRACT

Neil Walker, one of the foremost constitutional theorists of our time, is perhaps best known for his work on constitutional pluralism and global constitutionalism. Having first pioneered the study of constitutional pluralism in the context of the European Union, and developed epistemic constitutional pluralism, Walker has since extrapolated these ideas onto the global plane. What are the key arguments Walker has made regarding constitutional pluralism and global constitutionalism, and how are we to understand this body of work? This article attempts to answer this question by way of reading Walker's work in light of philosophy, sociology and critical theory. Parallels are drawn especially with the ideas of functional differentiation and governmentality, but also other ideas prevalent in postmodern scholarship. This article concludes by highlighting the similarities between Walker's constitutional pluralism and Michel Foucault's governmentality, and by proposing to combine these two in the study of European constitutionalism.

**Keywords:** constitutional pluralism, global constitutionalism, epistemology, postmodernism, critical theory, sociology

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## 1. Introduction

What better place than a new journal dedicated to sovereignty, international law, democracy and global constitutionalism to publish an article on the writings of Neil Walker. Walker, who holds the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh, is undoubtedly one of the leading constitutionalists of our time. Walker has contributed to several central themes in constitutional law and political theory, but he is perhaps most well-known for his work that relates to sovereignty and global constitutionalism.

With regards to sovereignty, Walker is renowned for his pioneering work on constitutional pluralism. He first presented his conceptualisations on this theme in the article *The Idea of Constitutional Pluralism* (Walker 2002), which sought to map out the causes and consequences of the waning of Westphalian<sup>1</sup> state-based sovereignty and the subsequent change that is best captured by the term constitutional pluralism. At the same time Walker also edited the compilation *Sovereignty in Transition* (Walker 2003a), which brought together most of the then pre-eminent scholars in European constitutionalism to reflect upon this change in our constitutional landscape.

Although *The Idea of Constitutional Pluralism* discussed the issue in general terms and the European Union was just the primary example (see Walker 2002, 336-339), Walker's work has been closely associated with the European constitutional experience (see, e.g., Walker 2003b; 2016). However, Walker has since broadened his approach from the European to the global. Considering global constitutionalism, his main publication is certainly the monograph *Intimations of Global Law* (Walker 2015). This book sought to describe the emergence of global law, something that goes beyond

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<sup>1</sup> The current concept of state sovereignty in international law was established with the Peace of Westphalia treaties in 1648. This is the basis for the distinction between state-based constitutional law and international law. When international law or other forms of non-state law start acquiring constitutional features, Westphalian constitutionalism changes into post-Westphalian constitutionalism.

international law or transnational law, and to explain how this emerging legal phenomenon questions our understanding of law and legal authority.

Epistemological questions have been central in both strands of Walker's work. The paradigmatic *sui generis* theory of European constitutionalism meant that a theoretical assessment of the European Union's constitutional credentials was not possible on the basis of the old, state-based constitutional language. The most well-known example of this is perhaps what has been called the "problem of translation" (Weiler 1999, 270) and the underlying "invisible touch of stateness" (Shaw and Wiener 1999, 2). This means that our conventional understanding of constitutional law and everything that relates to it is based on the idea that only nation-states can have constitutions. To tackle this, a new constitutional language, and along with that, a new constitutional way of thinking became necessary (see Walker 2003c). Simply put, to talk of sovereignty in any other context than the nation-state is not possible unless and until we adopt a new epistemological starting point regarding sovereignty, and whilst doing so, also a new language with which to conceptualise this new version of sovereignty. A truly *constitutional* pluralism is only possible if we assume a pluralist epistemology. The same goes for global law, which in its still emergent form can only be "intimated"<sup>2</sup> but not yet grasped in practice. Thus, regarding global law we are also required to refine our epistemological starting point in order to comprehend it.

Such epistemological questions have deeper roots than just what terminology we should use when describing the constitutional status of the European Union or the nature of global law. As Marxists historical materialism tells us:

a change in thinking is a change in the social totality and thus has an impact on other social processes; a change in the social totality will provoke change in the process of thought. Hence, the process of

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<sup>2</sup> Intimation (noun): the action of making something known, especially in an indirect way.

thinking is part of a ceaseless dialectic of social being (Gill 2008, 22).

A similar point is made by Foucauldian critical theory which informs us how:

systems of thought and knowledge (epistemes or discursive formations, in Foucault's terminology) are governed by rules, beyond those of grammar and logic, that operate beneath the consciousness of individual subjects and define a system of conceptual possibilities that determines the boundaries of thought in a given domain and period (Gutting and Oksala 2019).

This epistemological point serves as an inroad into the main point of this article, namely the perspective through which I will be reading Walker's writings. Such epistemic issues are central in various strands of philosophy, sociology and critical studies, all of which can be grouped under the general heading of postmodern scholarship. My aim is to present a short reading of Walker's writings through the lens of such postmodern scholarship. Whilst doing so, I will also try to argue that Walker's project on epistemic constitutional pluralism is rooted in such postmodern thinking, or at least a product of such thinking to a certain extent.

I am not using the label postmodern in a pejorative sense – as is currently often done in political debates and which has also been done in academic circles (see, e.g., Sokal and Bricmont 1999) – but rather in a descriptive and explanatory sense. This is because at least for me, understanding Walker's work in this way has made a lot of sense. Furthermore, postmodernism is perhaps, for lack of a better word, the best umbrella-term to bring together the various issues through which I try to read Walker's work.

I argue that Walker's constitutional pluralism, and subsequently his global constitutionalism, is best understood through two basic sociological and philosophical concepts or ideas: functional differentiation (present in sociology since Emile Durkheim) and governmentality (present in critical

theory since Michel Foucault). In addition to these ideas, Walker seems to constantly use analogously also other ideas taken from postmodern scholarship whilst developing his constitutionalism. I will also try to highlight this in my reading of his work.

Functional differentiation refers to the idea that society consists of independent yet interdependent systems. Luhmannian systems theory is a continuation from this tradition (see Stichweh 2013), and perhaps the most well-known example for legal scholars. In recent legal scholarship, especially two works representing this approach stand out. Kaarlo Tuori (2015) has conceptualised the European Union's constitutional development through the functional constitutions of the political, juridical, economic, social and security realms. Gunther Teubner (2012), for his part, has discussed the changes brought about by globalization in reference to the systems of technology, education, media and health. What is common to such legal approaches to functional differentiation is that they usually study specific societal systems and the legal rules regulating them, and their interaction between various systems and the norms associated with each system. This way they usually aim at some sort of a comprehensive account of the role of law in the regulation of the various societal systems.<sup>3</sup>

Governmentality, in contrast, is a term made famous by Michel Foucault as it played a central role in his theory on biopolitics (see Foucault 2008). Governmentality refers to the techniques of power used in the modern world, whereas government is more a synonym for power: the church is an expression of government as it uses power over its followers; it deploys this power through various techniques, such as for example the confession (Gutting and Oksala 2019). Legal scholars have utilised Foucault's ideas on governmentality in a variety of ways. In the context of the European Union, Foucault's ideas have been especially suitable for analysing the actions of the

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<sup>3</sup> See e.g. Tuori (2015, 7): "My ultimate purpose is to contribute to a *general theory of the European constitution*, rather than to participate in dimension-specific debates which are an object for my reconstructive enterprise."

European Central Bank and the role of the markets, but they have also provided a fruitful basis for an analysis on union citizenship (see Hurri 2014).

As Mitchell Dean, a leading Foucault scholar pioneering the study of governmentality has explained, our thinking about “government” is conditioned by our understanding of “the state”: we somehow assume that governing is something done by states and only by states. Moreover, that such a state is sovereign. Thus, when we are searching for the sources of power, we naturally look at states, and whether the power utilised by states is legitimate or not. Language often has a central role in our analysis of government because language “is constructed as ideology, as a language that arises from and reflects a dominant set of power relations.” While governmentality continues on this path of theoretical assumptions, it does not accept the exercise of power and its sources as self-evident. Furthermore, governmentality signals a “break with many of the characteristic assumptions of theories of the state, such as problems of legitimacy, the notion of ideology, and the questions of the possession and source of power” (Dean 2009, 16).

We can thus observe a clear parallel between Walker’s constitution pluralism and Foucauldian governmentality: in the legal realm we talk about the waning of sovereignty, which is replaced by constitutional pluralism; in the realm of governmentality, we talk about sovereignty being recast by governmentality. In both strands of scholarship epistemological questions play a key role. The idea of functional differentiation, then, is linked to Walker’s ideas in that sovereign power is dispersed from the nation-state to other constitutional actors, be they national, international, or global. Legal authority that has a constitutional nature is often used by functionally limited polities, for example the European Union.

This article is structured as follows. The second section discusses Walker’s earlier work on European constitutional and attempts to sketch the epistemic turn in his work, that is, how he discarded other avenues of constitutional conceptualisation and decided to focus on constitutional pluralism. In the third section attention is shifted specifically to Walker’s ideas about

constitutional pluralism. *The Idea of Constitutional Pluralism* and several other articles are discussed here with the purpose of explaining what Walker's epistemic constitutional pluralism is about and from where it has perhaps drawn inspiration from. The fourth section focuses on *Intimations of Global Law* and tries to explain how this book is a continuation of Walker's earlier ideas about epistemic constitutional pluralism. Here, too, parallels between Walker's constitutionalism and certain ideas in postmodern scholarship are highlighted. The fifth section concludes by highlighting the similarities between Walker's constitutional pluralism and Michel Foucault's governmentality, and by proposing to combine these two in order to further deepen the study of European constitutionalism.

The reading I am offering of Walker's work in this article is very simplistic, in at least two senses. First, it is simplistic in that it is mainly descriptive. My aim is not to directly engage with Walker's ideas or to try to further develop them here. Rather, my purpose is to offer a popular reading of his work so as to perhaps raise interest in it amongst people who have not yet studied it. Second, the comparative aspect of my reading is simplistic, perhaps even naïve, in that I rather eclectically explain some of Walker's ideas through comparison with postmodern scholarship. The purpose of this article is not to construct an argument through combining Walker's ideas and those presented by philosophers and social scientists. Much like with the first point, my purpose is to just briefly highlight what types of ideas are present behind Walker's work and thereby perhaps to entice legal scholars to read more broadly into philosophy and the social sciences. At least on a personal level, my understanding and appreciation of Walker's work has grown considerably after I started reading philosophy and sociology.

## **2. The Epistemic Turn in European Constitutionalism**

The postmodern flare was present already in Walker's earliest writings on European constitutionalism. In an article on the unification of Germany,

Walker's (1994) inroad into the issue were constitutional discourses and identity politics. Specifically, the article was about how identity politics – as opposed to framing issues in light of the traditional left–right political spectrum – and constitutional politics mix, that is, how identity politics are articulated through a constitutional framework. This sounds like an issue that is even more topical today as it was then. Such an approach is distinct from the traditional doctrinal account, which focuses on constitutional texts and adjudication. Since law's, and thus the doctrinal method's capacity to explain our society is rather limited, one is naturally inclined to adopt a social scientific approach when discussing the role of constitutional law in a polity. This is also the note on which Walker ends his article (see Walker 1994, 159-160).

The fact that Walker's early approach was not that of doctrinal exegesis but rather a focus on broader political questions can be seen in his definition and role of constitutionalism, offered in an article on European constitutionalism:

By focusing upon attitudes towards and ideologies concerning the constitutional order, whether supportive or otherwise, constitutionalism promises to provide an explanatory nexus between constitutional doctrine and institutions on the one hand, and the broader socio-political dynamics of European Union on the other (Walker 1996, 267).

For according to Walker, constitutionalism must register both at the sociological and the normative level (*ibidem*, 267-268). What this means is that the constituents of democracy and the constitutional actors have to also regard something as constitutional in order for it to be constitutional. In this article, too, the question of identity is central. One aspect through which Walker discusses the possibilities of European constitutionalism is the question of how could a constitutional identity for the European Union be



established. Furthermore, he sees constitutional discourses as central in this development (*ibidem*, 283-289).

What is interesting to note, however, is how in this early article Walker still thought that whilst developing a constitutional identity for the European Union's novel political order, "an older vocabulary of design concepts could be drawn upon, including notions such as consociationalism, condominium, federalism, [and] confederalism" (*ibidem*, 289). Yet, these concepts were discarded rather soon when he adopted the idea of constitutional pluralism as the key to this polity-building.

The idea of differentiation comes into play first through the practical legal issue of differentiated integration.<sup>4</sup> Differentiated integration means, according to Walker, that a new set of analytical tools is required. These tools need to be such that they take into consideration that we have moved away from a two-dimensional Europe (Member States-European Union). A new theoretical language is needed to make sense of this constitutional setting (Walker 1998, 356). This leads Walker to the inadequacy of the traditional, state-based concept of sovereignty. According to Walker, not only does the Member State-European Union relationship question this traditional conceptualisation of sovereignty, but it is also put under pressure by the multi-dimensional Europe of differentiated integration. Walker does not, however, conclude that the concept of sovereignty should be discarded; on the contrary, he sees great potential in it, assuming that it be remodelled to our current context (*ibidem*, 356-360).

This seems to be the starting point for Walker's work on constitutional pluralism and epistemic constitutionalism. In this article Walker characterised sovereignty:

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<sup>4</sup> Schimmelfennig (2019): "Differentiated integration has become a core feature of the European Union. Whereas in uniform integration, all member states (and only member states) equally participate in all integrated policies, in differentiated integration, member and non-member states participate in EU policies selectively. At its core, differentiated integration is formally codified in EU treaties and legislation."

as a plausible claim to ultimate legal authority identifying and grounding a particular legal order, the articulation of which claim takes the form of fundamental practices, propositions or assumptions, which, *inter alia*, may allocate constituent legal authority to a particular agency or between particular agencies (*ibidem*, 360).

Such an understanding of sovereignty allows “to develop the idea that there may be a plurality of claims to legal sovereignty, and that these claims refer to a plurality of legal orders, each with their own architecture and fundamental ‘sovereign’ agencies” (*ibidem*, 361). This makes it possible to move beyond the traditional discussion on sovereignty in the European Union, in which sovereignty is attributed either to the Member States or to the European Union. Instead, “the claims of the Member States and the claims of the EU to ultimate authority within the European legal order are equally plausible in their own terms and from their own perspective” (*ibidem*, 362). Here, it is important to emphasise the last word – perspective.

### 3. Constitutional Pluralism

In descriptive terms, constitutional pluralism refers to the situation where two or more “constitutional” systems are in force in a given geographical area at the same time. The European Union is the pinnacle example of this since the Member States all undoubtedly have their own constitutions while according to the prevailing narrative the European Union too possesses constitutional credentials if not a written constitution (see Avbelj 2008). This state of affairs results in constitutional clashes between the national constitutions and the European Union’s constitutional order. The most recent and dire example being the German Federal Constitutional Court’s ruling in *Weiss*, whereby it deemed the European Court of Justice’s preliminary ruling in the issue as *ultra vires* and ordered the German Central Bank not to participate in the European

Central Bank's PSPP-program.<sup>5</sup> The existence of constitutional pluralism leads to a problem, since traditionally constitutional authority is understood as ultimate and exclusive, so therefore one system must be hierarchically on top of the others for there to be a "constitution" in any meaningful sense; anything else would be an oxymoron when it comes to constitutionalism (see Loughlin 2014). But as each constitutional system has its own *Grundnorm*, "there is no neutral perspective from which their distinct representational claims can be reconciled" (Walker 2002, 338-339).

Walker's epistemic constitutional pluralism is an attempt to overcome this stalemate. Epistemic constitutional pluralism is primarily about how to understand and conceptualise this unprecedented constitutional situation. Such epistemic constitutional pluralism can then also contribute towards the more normative aspects of pluralism (*ibidem*, 317), although Walker has personally focused more on the epistemic aspects.

*The Idea of Constitutional Pluralism (ibidem)* can be a daunting read for someone who is mainly familiar with just legal scholarship and not yet versed in philosophical and sociological language. Its 43 pages and 149 footnotes discuss several issues and draw on an extraordinarily broad scope of literature. Yet, the reader should not be shunned away by this since the basic point of the article is fairly simple.

In the article Walker offered a three-fold typology of descriptive, normative and epistemic constitutional pluralism. The descriptive element is fairly simple, and was already explained above: as we can observe the competing claims to sovereignty, we can conclude that descriptively speaking there exists *plurality*. Normative constitutional pluralism, then, is the appraisal of such plurality, which results in true *pluralism*. In other words, normative constitutional pluralism accepts and even embraces the somewhat incomplete constitutional nature of the European Union, which results in constitutional clashes between national constitutional courts and the

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<sup>5</sup> BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. 1-237, [http://www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html), accessed 1 July 2020.

European Court of Justice. There are varying accounts of normative pluralism, which are beyond the scope of this article, but simply put most of them see that such clashes result in the continued refinement of constitutional doctrine and therefore induce legitimacy into the European Union's constitutional order (see, e.g., Avbelj and Komárek 2012). The alternative for normative constitutional pluralism would be to settle such issues through political means, but as amending the EU Treaties in a way that would settle all open questions on the competence of the European Union (by turning it into a true federation) seems unlikely, giving the highest courts the responsibility to settle such issues seems like an attractive solution.

Taking normative constitutional pluralism seriously necessitates the adoption of epistemic constitutional pluralism. Epistemic constitutional pluralism simply means, that in order for us to truly acknowledge the constitutional nature of the competing claims by the national courts and the European Court of Justice requires for us to adopt a separate epistemic starting point to each of them.<sup>6</sup> As sovereignty implies ultimate authority and the exclusion of competing claims to power, to acknowledge the constitutional nature of the competing sovereignty claims means that all of them need to be treated individually. If we think about this in terms of traditional state-based sovereignty, this does not seem logical. Thus, epistemic constitutional pluralism calls for a new constitutional language that could tell us what such constitutional pluralism is.<sup>7</sup>

The aim of *The Idea of Constitutional Pluralism* was to rehabilitate the “language of constitutionalism” in order for it to be able to retain its relevance and to respond to the challenges posed by the new post-state constitutional entities, such as the European Union (Walker 2002, 317). By language, Walker is not referring to any linguistic philosophy, but mainly to the

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<sup>6</sup> This idea is similar to epistemic universalism, which is an often-used starting point in comparative law. According to Husa (2015, 20-22) comparative law scholars must abandon the nationally oriented, epistemically internal perspective if they are to truly understand the various legal orders or cultures they wish to study.

<sup>7</sup> Walker probably used the terms normative pluralism and epistemological pluralism for the first time already in an article from 2001: see Walker (2001, 560-570).

epistemology and ontology of constitutionalism. The answer to problems posed to constitutionalism by the new post-state entities is constitutional pluralism (*ibidem*, 319).

The article begins by an outline of five critiques of modern constitutionalism, as an answer to which Walker then proposes constitutional pluralism. These criticisms are: state-centredness, constitutional fetishism, normative bias, ideological exploitation, and the debased conceptual currency of constitutionalism. Instead of describing them here, let me just draw attention to how Walker is often inspired by postmodern scholarship in his constitutional analysis and the way he analogously uses terms taken from postmodern scholarship.

Fetishism, for example, is a term Karl Marx used when he talked about the effects of commodification and the capitalist system of production. According to Marx, in a capitalist system the production and selling of commodities functions so that people become alienated from social relations since they only perceive these social relations through the objects that they produce and sell to other people. In more general terms, this means that things that are actually socially constructed are thought of as naturally existing. As one can appreciate, this has severe consequences on our ability to conceptualise the society – and thus to change it. (Packer 2010, 277-279).

By constitutional fetishism Walker refers to how:

an undue concentration upon – even enchantment with – constitutionalism and constitutional structures overstates the explanatory and transformative potential of constitutional discourse and frustrates, obstructs or at least diverts attention from other mechanisms through which power and influence are effectively wielded and political community is formed and which should instead provide the central, or at least a more significant, focus of our regulatory efforts and public imagination (Walker 2002, 319).

Simply put, how we are accustomed to talking about constitutional structures – like parliaments, governments and courts – and by doing so fail to pay attention to the other ways in which power is used within our society. Or, if we revert back to Marxists vocabulary, how our constitutional tradition (our constitutional fetishism) has alienated us from the fact that how power is used in our society is largely based on socially constructed phenomenon, and how this state of affairs is not “natural” and thus unchangeable.

As an answer to the five critiques of modern constitutionalism, Walker proposes a revised concept of constitutionalism that would take into consideration the following six criteria (*ibidem*, 334-336). Spatially, constitutionalism should acknowledge the continued relevance of the state despite the current post-state paradigm, yet relevant constitutional discourses take place at non-state sites due to the emerging post-Westphalian paradigm. Temporally, we should secure historical continuity between this new constitutionalism and the old state-based constitutionalism, while at the same time securing discursive continuity between the old and the new when it comes to core ideas of constitutionalism. Normatively, then, we should strive to secure both inclusive normative coherence and external normative coherence. The first refers to how our definition of constitutionalism should be inclusive of other views, but there should nevertheless be a minimum requirement with regards to its content so that we can actually speak of constitutionalism; this entails a commitment to a reflexive understanding of democracy which can i) reconcile the different understandings of democracy within a *demos* and ii) be reflective towards itself as a *demos*. The second refers to how constitutionalism must not only convince the constitutionalists, but it must also offer something for those who are sceptical towards constitutionalism's capacity to offer something in the form of regulation of power in the post-Westphalian world; “constitutionalism must be capable of generating forms of explanatory knowledge and normative guidance which are relevant to other discourses of regulation and political imagination” (*ibidem*, 336).

Next comes Walker's core idea on constitutional pluralism, which he proposes as the solution that would take all of these six criteria into consideration:

Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age which we discussed earlier, namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of *inter-national* law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical (*ibidem*, 337).

Such constitutional pluralism would entail an explanatory, normative and epistemic claim, which were already explained in the beginning of this section.

Whilst developing his constitutional pluralism, Walker asks: “does the idea of sovereignty, of fundamental authority, have anything to contribute to our understanding of post-state constitutional polities, or, indeed, even to state polities in a configuration where their authority begins to be rivaled by these post-state polities?” (*ibidem*, 345). He answers this question in the affirmative. The reason being that:

in the emerging post-Westphalian order, it becomes possible to conceive of autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms. This is because of the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional (*ibidem*, 346).

Thus, we now have not just territorially limited claims to authority, but also functionally limited claims. Such territorially, sectorally and functionally

limited claims can “overlap without subsumption” (*ibidem*, 346). The point with regards to constitutional pluralism (heterarchy as opposed to hierarchy) is that “the advent of sectorally or functionally limited polities means that the assertion of authority around a disputed boundary does not necessarily impugn the integrity of the other polity *qua* polity” (*ibidem*). That is to say, that autonomy – as opposed to territorial exclusivity – has become the defining feature of sovereignty. Accordingly, under this view, constitutional regimes enjoying a degree of autonomy (authority) in a functionally separated area are sovereign. In practice, the European Union as the regulator of the internal market, for example, can be seen as a sovereign as it enjoys relative autonomy in this, functionally separated area or commerce.

That constitutional authority is not vested in nation-states but in functionally limited polities leads to the fact that the internal logic and relational perspective of such new sites and processes of constitutional authority are “metaconstitutional.” First, in that such “metaconstitutional discourse at post-state sites, however transformed in purpose and content, always can trace its historical and discursive origins in the actions and ideas of constitutional states” (*ibidem*, 356). Second, in that such new sites of constitutional authority usually engage in constitutional discourses with the intention of thus seeking “meta-authorisation – a deeper set of normative arguments for their position than would be required if, as in the one-dimensional state world, their constitutional constituency and mandate was purely self-contained” (*ibidem*). This means that when we think about the justification of constitutional pluralism – the plurality of unities – the role of metaconstitutionalism is to offer the required deeper normative justification that every polity and authority necessarily requires. A metaconstitutional justification is one which takes into consideration the competing authority claims, but does not compose a “*metaconstitution*” (*ibidem*, 356-357).

Again, to use the European Union as an example: the European Union’s possibility to make constitutional claims stems from the fact that the Member States (as constitutional states) have transferred it such competences. The



European Court of Justice then tries to seek normative justification for the European Union's constitutional system from the highest national courts when it engages in a dialogue with them through the preliminary reference procedure. According to Walker, this dialogue is an agonistic negotiation, rich with possibilities for mutual learning (*ibidem*, 359). A good recent example of such a dialogue are the Italian Constitutional Court's two references and the Court of Justice's answers to them in the so-called *Taricco saga* (see Piccirilli 2018).

The idea of functional differentiation is further developed by Walker in the article *Late Sovereignty in the European Union* (Walker 2003b). Specifically, this is done through the idea of functionally differentiated sovereignty. The purpose of the article is to further develop the concept of sovereignty within the framework of constitutional pluralism (Walker *ibidem*, 5). Walker starts his account by explaining how the concept of sovereignty has changed when we have moved from the Westphalian era to the post-Westphalian era. Previously, sovereignty was part of the meta-language of political science and law in that it provided a key reference point in the object-languages of political science and law (e.g. that politicians and courts referred to the concept, and that it was part of the social actors' self-understanding). Now, the concept of sovereignty is still used in the object-language but only rarely deployed in the meta-language because it has lost some of its explanatory and imaginary potential (*ibidem*, 10).

Walker then argues that sovereignty is still a useful concept also at the level of meta-language due to what Anthony Giddens has called double hermeneutics, which he presented as part of his theory of structuration (see Giddens 1984). The social constructivist nature of Walker's constitutionalism becomes apparent here. As Walker explains, the point of Giddens's double hermeneutics is to make seen the fact that scientific interpretations of society are actually interpretations of interpretations: the social scientist interprets what the social actor is doing, who is on their part already interpreting the world (Walker 2003b, 16-17). To give a legal example: when a constitutional

law scholar is studying the actions of constitutional courts, the constitutional courts' actions are already interpretations of constitutions, and thus the meta-language used by the scholars cannot drift to far from the object-language used by the courts (see Tuori 2015, 5). This is what Tuori (2002, 285-293) has called the dual citizenship of legal scholarship: how legal science is also part of legal practice and thus participates in the reproduction of the legal order. A good example of a disconnection between the two languages is how the European Court of Justice only uses the English language term primacy, yet in the literature instead of primacy often the term supremacy is used although these two terms have a different meaning (see Tuominen 2020).

According to Walker, constitutional pluralism is an attempt to retain the necessary connection between the meta-language and object-language of constitutionalism. In order to do this, constitutional pluralism must take seriously both “the resilience of unitarianism in the object-language of sovereignty” and “the persuasiveness of pluralism in the meta-language of explanation and normative commitment” (Walker 2003b, 18). Such unitarianism is most clearly observed in the argumentation of the German Federal Constitutional Court, for example in its recent judgment in *Weiss*.<sup>8</sup> The type of constitutional pluralism Walker is here advocating for should therefore take seriously the claims made by the German court, yet balance them out against other claims, both national and European.<sup>9</sup>

Walker then proceeds to outline the four characteristics sovereignty that would accommodate for such constitutional pluralism, which he calls late sovereignty: continuity, distinctiveness, irreversibility and transformative potential (*ibidem*, 19-25). Here, I will only briefly discuss two of these, again to highlight how Walker draws from postmodern scholarship in developing his constitutionalism.

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<sup>8</sup> See BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. 1-237, [http://www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html).

<sup>9</sup> The argument developed for example by Massimo Fichera seems to take this point seriously. See Fichera 2019, Fichera and Pollicino 2019.

By continuity Walker means that the new late sovereignty should be a continuation rather than a discontinuation of the old concept of sovereignty. When describing continuity, Walker refers explicitly to Michel Foucault's ideas on sovereignty.<sup>10</sup> Walker's point here is to try to square the circle between law and politics when it comes to the nature of sovereignty: how can sovereignty express "both the power that enacts law and the law that restrains power?" (*ibidem*, 19). That is to say, what is the relationship between the terms *pouvoir constituant* and *pouvoir constitué*, or those of constituted power and constituent power (see, e.g., Loughlin 2013). Although Walker uses Foucault's problematization as an inroad into this issue, he does not explicitly engage with Foucault's ideas on governmentality.<sup>11</sup> Walker's point is that by adopting a discursive understanding of sovereignty, the impasse between *pouvoir constituant* and *pouvoir constitué* can be overcome. This would also secure continuity, which is required when a new polity, such as the European Union, emerges (Walker 2003b, 19-21).

By distinctiveness Walker means that despite continuity, there are distinctive phases in the conceptual development of sovereignty. When talking about distinctiveness (*ibidem*, 21-24), he brings up the issue of functionally differentiated polities, and thus functionally differentiated sovereignty. While previously sovereignty was associated with territorial boundaries (i.e. states), now sovereignty can be associated with functional boundaries. In practice, "the political *societies* which non-state polities claim to constitute are no longer just territorial communities but also functional communities" (*ibidem*, 22). Through the emergence of such "functionally-limited" polities "it becomes possible to conceive of autonomy without territorial exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms" (*ibidem*, 23). Here we have the basic idea of functional differentiation adopted into a constitutional framework of sovereignty. In a

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<sup>10</sup> Walker cites Foucault 1991.

<sup>11</sup> On governmentality see Rose, O'Malley, and Valverde (2006), who also explain how Foucault's ideas about governmentality have affected other fields of scholarship.

sense, this is a description of the constitutionalisation of the various functionally separated systems that the society consists of.

In a later article, already anticipating his work on global constitutionalism, whilst describing the outcome of constitutional pluralism and what is in for us in the future, Walker wrote:

The future of the global legal configuration is likely to involve more of the same. It is likely we will not witness the reestablishment of a new dominant order of orders but, instead, will depend on the terms of accommodation reached among these competing models and among the actors – popular, judicial, and symbolic – who are influential in developing them (Walker 2008, 373).

In reference to the previous point, this is actually closer to what Foucauldian governmentality is about. This is a description of how Westphalian sovereignty is deconstructed by governmentality: constitutional authority is not used by the states through traditional juridical mechanisms but rather power is dispersed to a wider range of actors, perhaps sometimes even to the subjects of constitutional authority themselves through juridical subjectivation (see, e.g., Hurri 2014, 87-93).

#### **4. Global Constitutionalism**

Walker's monograph *Intimations of Global Law* carries forward the work that he begun already in the article *The Idea of Constitutional Pluralism*. Both try to conceptualise the role of constitutional law in the post-state era and both take epistemic pluralism as their perspective. According to Walker's own words, this book is about "how we might fruitfully think about global law" (Walker 2015, 1). Thus, the starting point of the book is descriptive rather than normative (see *ibidem*, 27, 31); it aims "to be diagnostic rather than prescriptive" (*ibidem*, 178).

What does Walker (*ibidem*, 15-24) mean by "global law"? The Westphalian distinction between national and international law is fairly

simple. Thus, “transnational law” is law that operates between states, while yet remaining in this binary conceptualisation of national-international. Whilst global law does not neglect the relevance of state-based national law, it moves beyond the confines of such a statist legacy. As Walker explains, “what qualifies laws as global law, and what all forms of global law have in common, *is a practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law*” (*ibidem*, 18).

The argument of the book comprises of three layers: rhetorical, structural and epistemic. All of these levels are linked to the claim that we should take the idea of global law seriously. Rhetorically, because the idea of global law has gained considerable weight in practice. Structurally, because we can observe changes in the way law operates at a global level. Epistemically, because such a change equally echoes and inspires a shift in the way we think about law and develop law (*ibidem*, 10). All in all, then, global law “speaks to a shift in how we think about and seek to develop and present law’s basic credentials *as law*” (*ibidem*, 26). Global law questions the state-centric and jurisdiction-centric features of law, both of which stem from the state-based Westphalian paradigm (*ibidem*, 26). In this sense, much like Walker’s earlier argument on constitutional pluralism, to fully understand global law requires for us to adopt a different epistemic starting point than what we have traditionally been accustomed to. The “intimated” character of global refers to this. I will return to it later.

In this book Walker explicitly explains the link between his ideas and those presented in postmodern scholarship, specifically in international relations theory. Previously, international relations scholarship discussed the waning role of the state-sovereigntist world-view, the move away from the Westphalian model of state authority, and simultaneously a statist legacy of law. Nowadays, this scholarship engages with the idea of global governance. According to Walker, his vision of global law can be understood as an analogy to the global governance scholarship (*ibidem*, 12-15).

The core descriptive argument of the book is a threefold typology of global law: convergent approaches, divergent approaches and historical-discursive approaches to global law (*ibidem*, 55-130). Again, the idea of functional differentiation is present in Walker's description of global law. One category of divergent approaches to global are functionally specific approaches. Such functionally specific approaches provide "a basis for highlighting what is distinctive and diverse and also what is consequential and derivative about the legal form of different policy sectors" (*ibidem*, 119). According to Walker, the role of law in global policy development is to serve policy functions as opposed to framing and generating such functional development (*ibidem*, 119).

As with most of Walker's work, this book too is rich with sociological language, sometimes used in an analogous manner. Take for example Walker's description of the "double normativity of global law" (*ibidem*, 132-135). Here, Walker again perhaps draws on Giddens's idea on the double hermeneutics of social sciences. Walker's typology of convergent and divergent approaches to global law functions in a similar manner. Both approaches aim to recognise the various strands of transnational law through more law and by containing them within law. The dual sides of global law are those of the global and the local (national):

Each and every species of global law responds to the diversity of other forms of law by acting upon some of these diverse other forms of law. Each and every species of global law, therefore, is predicated on the existence of these diverse other forms of law, and would lack both orientation and traction in their absence (*ibidem*, 132-133)

Let us then turn to the epistemic aspect of Walker's argument on global law, and the point which clearly connects the thoughts presented in this book with those he presented earlier in *The Idea of Constitutional Pluralism*. Here, we come to the name of the book, *Intimations of Global Law*. What does Walker mean with this? Why do we only receive intimations of global law

and not the actual thing? Instead of being directly visible and easily identifiable, global law can only be grasped from various smaller instances. In some sense, we can infer its existence from other factors, but we cannot fully envision it as such. Global law is not based on direct norm creation, such as national law or international law. Global law is, therefore, to be intimated. This, then, requires a certain epistemic approach (*ibidem*, 148-151).

There is also a clear substantive link between Walker's vision of global law and his earlier point on constitutional pluralism. As Walker informs us:

the intimated quality of global law connects closely with the particular kind of claim to authority that global law entails. Global law flows out of the decentring of a sovereigntist framework and the resulting challenge to conventional state-centred understandings of modern legal authority (*ibidem*, 148).

More importantly, in this passage there are not only parallels to constitutional pluralism, through the challenge to state-centredness, but also to Foucauldian governmentality and the deconstruction of sovereignty as power is no longer concentrated in a single state that is sovereign but dispersed to various actors, which might not even be "sovereign" or "constitutional." Walker continues:

Yet the form and process of global law's emergence reveal various special features of its own uncertain relationship to authority, a full appreciation of which requires a close examination of the role of all those who are involved in the endeavours to fashion and to authorize global law (*ibidem*, 148).

The intimated quality of global law, and especially to role that the academia has in realising global law, brings us back to its double normativity, already mentioned above. According to Walker, since global law is not a rigid system such as national law, this has resulted in academic writing amassing a greater role in "jurisgenerative activity." But the causality behind global law

works in both ways, which is part of its double hermeneutic qualities: the intimated structure of global law on its part invites academics from a broad spectrum to participate into its crafting (*ibidem*, 170-173). Again, let us remind ourselves of what Tuori has called the dual citizenship of legal scholarship, discussed earlier above, and the double hermeneutics of all social sciences.

## 5. Concluding Remarks

Let us still return to governmentality, and through it to the contribution that Walker has made to European constitutionalism.

By definition, governmentality deals with how we think about governing and the different rationalities of government (Dean 2009, 24). In a Foucauldian framework sovereign power and governmentality are different forms of power yet interrelated. Sovereign power is operated through mechanisms such as constitutions, laws and parliaments. It comprises of the juridical and executive arm of the state. Governmentality, then, is the bureaucratisation of all aspects of life. Central in this is are ideologies and knowledge. Take for example the economy: to govern the economy requires specific economic knowledge and simultaneously the economy becomes the guiding principle of our society, almost like an ideology. Modern governmentality does not replace sovereignty, but just recasts it (*ibidem*, 24-30). While traditional theories of government often ask “who rules?,” governmentality is more interested in “how do we govern?” (*ibidem*, 39).

Coming back to Walker’s constitutional pluralism, we can recall how sovereignty is no longer located in nation-states but rather functionally differentiated into various competing and overlapping sites of authority. Furthermore, how this does not negate the relevance of sovereignty as a conceptual tool but rather requires for us to imagine a new constitutional vocabulary that is suitable for the post-Westphalian constitutional order. Constitutional pluralism, then, much like governmentality, is a recasting of



sovereignty. In a pluralist setting, the question of “who rules?” becomes irrelevant, since true constitutional pluralism is based on heterarchy as opposed to hierarchy. That is to say, that there is no “*übersovereign*” to rule us all (see Walker 2005, 592). Thus, we should become more interested in the question of “how do we govern?”. From this perspective, constitutional discourses and constitutional identities become central. Indeed, this calls for mutual accommodation and learning by the competing constitutional authorities. In practice judicial dialogues between courts and other relevant institutions is one way to materialise this, whilst the activities of legal scholars are another.

To compliment the more doctrinal accounts on judicial dialogues – or, in a sense to fully utilise the apparent similarities between the study of constitutional pluralism and governmentality – a further step should be taken; a step, which would in an interdisciplinary manner combine both the legal study of constitutionalism and that of Foucauldian governmentality, or other similar postmodern approaches. There is of course already plenty of this type of scholarship (see, e.g., Tzanakopoulou 2018), but what would perhaps generate even more interest on such issues would be if the apparent links between such legal theoretical ideas and the broader philosophical ideas from which they draw from would be made more explicit.

Overall, it seems that although the postmodern flare has been present in Walker’s work from since the late 1990s, he has only more recently started to interact with this literature more explicitly. Being an expert in sociological prose and having the competence to contribute to philosophical and sociological discussions as well, this is welcomed. Methodologically European Union legal studies has a long history of learning from political scientific approaches to the study of European integration (see, e.g., Neergaard and Wind 2012). Perhaps something similar could be welcomed when it comes to postmodern scholarship, and especially critical theory. Critical theory – being a method of analysis basing on nonpositivist epistemology and employing the method of immanent critique (see Antonio

1981), much like constitutional pluralism – would be well-suited for analysing European constitutionalism and its pluralist characteristics.

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