Constitutionalism and pluralism: A reply to Alec Stone Sweet

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Disputes are often most telling on what they are not about, on what they leave undisputed—the common ground on which the disputants stand. In the case of Alec Stone Sweet’s review of my book, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, this common ground is vast, and perhaps more so than a first look at his—thoughtful and direct—critique may suggest. Stone Sweet does not question the main theses of the book—namely, that we are faced with a pluralist legal order in the European and global realms, and that pluralism is actually an attractive model. In a sense he suggests that (mostly) everyone is a pluralist now, and that disputes on how to understand and describe the pluralist order are in fact disputes within the family, not between pluralists and others. His approach is one of a “constitutional” pluralism, but it is explicitly pluralist in its main thrust. There is no single decision-maker, applying overarching conflict rules to settle the relationship of different layers of law in the global order. Instead, the different layers interact in an open context, structured in part by overlapping norms around which principled contestation, especially among courts, becomes possible.

Pluralism has indeed gained much ground in recent years, as an analytical tool and as a normative vision, both in Europe and beyond. It has become prominent not only in European Union law, but also in public international law, private international law, European human rights law, and in the analysis of domestic legal systems.¹ Does this mean, as Stone Sweet suggests, that the contrast I focus on in the book—that between pluralism and constitutionalism—is mistaken, or that it builds up a “pallid strawman” in the form of a strong, “foundational” constitutionalism which nobody actually believes in? I don’t think so. In my view, a much stronger form of constitutionalism than the one Stone Sweet and other constitutional pluralists defend still appeals to many, and perhaps increasingly so—and for good reason. Central protagonists of a constitutionalization of international law—just as those striving for a Constitution for Europe—describe their project as one in which unity

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¹ See, e.g., Ralf Michaels, Global Legal Pluralism, 5 ANN. REV. L & SOC. SCI. 243 (2008); Peer Zumbansen, Transnational Legal Pluralism, 1 TRANSNAT’L LEGAL THEORY 141 (2010).
and centralization are key. Faced with fragmentation and competing regimes, constitutionalization “carries the promise that there is some system to the madness after all; there is something which helps keep the system together.” It also promises a center of authority: “in a constitutional global order, it is clear who can issue what norms and standards, and what the effect of such standards will be.” This provides a lens for describing the global order and a normative compass to guide its development. It highlights commonality over difference, firm rules on the distribution of powers over processes of contestation. And it self-consciously continues a tradition of constitutionalism—foundational constitutionalism—that regards an overarching legal frame as crucial for the Enlightenment project of establishing political order through reason rather than have it established through accident and force. It speaks to the strength of this constitutionalist project that many critics of Beyond Constitutionalism have taken me to task for abandoning its emancipatory ideal. And instances such as the recent outcry at British defiance of the European Court of Human Rights, or at the German Constitutional Court’s insistence on having the last word in EU matters, may testify to the strength of a strong constitutionalism not only as an intellectual construct but also as a social and institutional discourse on law and politics beyond the state.

In the book, I pitch this strong version of constitutionalism against its pluralist counterpart, both analytically and normatively. To an extent, the idea behind this move is to stress difference, to bring out contrasts between competing visions in an ideal-typical way. Stone Sweet, like other critics, finds this dichotomy overdrawn and stresses the existence of a middle ground, present especially in a constitutional pluralism that is characterized not by radical conflict between orders but by common—overarching, overlapping—norms and shared techniques regarding rights and their adjudication. Institutionally, there is certainly room for such a middle ground—in a decentralized world, there will be variation in the strength of institutional conflict and the density of normative convergence among sub-orders, and some orders will display greater convergence or overlap, others less. Such gradual differences on an institutional level should, however, not conceal the binary contrast that exists between orders with a shared frame of reference—such as a common constitution that serves as a basis of authority—and those without. For many legal and political theorists, the latter provoke significant anxieties, and one aim of the book is to examine whether radically pluralist orders—those without a common frame of reference—are indeed

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2 Jan Klabbers, Setting the Scene, in The Constitutionalization of International Law (Jan Klabbers, Anne Peters, & Geir Ulfstein eds., 2009).
3 Id.
especially problematic. The book argues that they are not: both in a broader normative sense and in more practical terms, they often have significant advantages over hierarchically constructed, constitutionalist orders, especially in the highly diverse and contested social and political structure of the post-national space.

How does “constitutional pluralism” change this picture? Is it really a middle ground that avoids the problems of both more extreme approaches? And what does it precisely mean? I would agree with Stone Sweet that much of what we see in European and global governance can be described as a pluralism “about ‘things constitutional’”—especially about rights—and in that sense as constitutional pluralism. Yet if constitutional pluralism is described in such broad terms, the concept may obscure more than it illuminates. The spectrum it captures reaches from “radical” or “systemic” pluralism—in which the relationship between sub-orders is entirely defined from within each of them—to forms of institutional pluralism in which a thick, common frame is (potentially) interpreted differently by different actors. If the concept is so broad, it risks losing its analytical value as it downplays differences in legal and institutional forms. Its “constitutional” dimension boils down to the fact that contestation in such pluralist orders concerns norms of constitutional (i.e., fundamental) significance; it is found in particular in the fact that many conflicts between layers of law center on the interpretation of a set of fundamental rights all more or less share (even if these rights have different formal origins in the different layers). This reflects a thin notion of constitution and constitutionalism: one that harks back to the “liberal” tradition of constitutionalism with its emphasis on rights and the rule of law, on taming (rather than constituting) power. This tradition has been historically very influential, and it may well be useful for post-national phenomena as well. But if one uses constitutionalism in this thin sense, it is important to stress discontinuity—to be explicit about the fact that this kind of constitutionalism does not carry forward the idea of foundational constitutionalism that has been key to domestic legal and political practice since the American and French revolutions, and has been especially dominant throughout the twentieth century. Such a liberal constitutionalism consists of limitations against arbitrary power, but does not embody a broader project of collective self-government. It may be all we can hope for on the global level, and it may certainly be desirable to strive for, yet the aspiration behind it remains much more modest than the one that animates most forms of domestic constitutionalism.


10 See, e.g., Jürgen Habermas, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, in JÜRGEN HABERMAS, DER GESPALTENE WESTEN 113 (2004).
However, Stone Sweet argues that such an image of discontinuity between the
domestic and the global spheres would be overdrawn because we should understand
domestic constitutional practices themselves as pluralist in nature. I have much symp-
athy for the latter part of this argument. The book does not focus on the domestic
side specifically, but it draws on theories first developed in the domestic context—legal
pluralism, early federalism, “common” constitutionalism—and it has affinities with
attempts made in recent years to reimagine national constitutional practices in a plu-
ralist vein.13 In many countries, accounts of legal practice attuned to (judicial) politics
would show us a much more sophisticated picture of interactions than the classical—
 hierarchical, pyramid-shaped—image of legal order. They would also bring to light
tensions and paradoxes within the supposedly unitary frame.12 But does this really
mean that the strong, foundational version of constitutionalism has ceased to be the
dominant domestic frame? I doubt it. Unlike in the global or European contexts, com-
peting domestic actors typically do not portray their stances as derived from different
legal orders. They tend to refer back to the same—constitutional—norms, even if they
interpret these norms differently. Except for more fundamentally contested cases (e.g.,
secessionist claims), the domestic contests Stone Sweet refers to are contests about
who is most faithful to the constitutional order—there is only one God, but different
priests (and no Pope). Institutionally, this may introduce a significant degree of plural-
ism; systemically, it remains within the classical, foundational frame. One may call this
kind of order “institutional pluralism”13 or “internal pluralism,”14 but perhaps it is best
described by the very term “constitutional pluralism”—to highlight both the continuity
of the constitutional frame and the distance to the more “radical,” “systemic,” “exter-
nal” pluralism that operates without a common, overarching frame of reference. As
I argue in the book, it is the latter that most cogently captures the situation in the post-
national realm—truly common norms are scarce there, and even where we observe
substantial proximity between different layers of law, these layers typically operate in
distinct frames of reference. Proximity and convergence do occur, no doubt, but they
are contingent, not seen as flowing from a common, constitutional framework.

What are the limitations of the pluralist approach to post-national law? From the per-
spective of his own, rights-based account, Stone Sweet thinks that we will find properly
“constitutional” pluralism when rights are at issue and when rights-protecting courts
(especially European ones) are the main actors. This does indeed fit most cases typically
seen as expressions of pluralism in action, and it is plausible even if one does not think
that pluralism is all about rights. Court action is often triggered by rights claims, and

11 See, e.g., Olivier Braud, Théorie de la Fédération (2007); Christoph Schönberger, Unionsbürge-
leris Bürgerrecht in vergleichender Sicht (2005); Daniel Halberstam, Constitutional Heterarchy: The Centrality
of Conflict in the European Union and the United States, in Ruling the World?: Constitutionalism, International
Law, and Global Governance 326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).
12 See Miguel Maduro, Three Claims of Constitutional Pluralism, in Constitutional Pluralism in the European
Union and Beyond, supra note 9, 67, at 77–84.
13 Halberstam, supra note 11.
14 Miguel Poiares Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of
unlike most other political actors, courts need to give a principled account of what they do, so they need to clarify the relation of different levels of authority. It is through this clarification—and the conflicting accounts of different courts—that we can best gauge the presence of a pluralist order. Yet this does not mean that pluralism does not exist elsewhere. If understood as the competition of authority claims of different orders, we may find it wherever strong international structures are firmly linked with domestic politics and law and can thus provoke a reaction that goes beyond the traditional domestic/international divide. This may be the case in trade, investment or intellectual property, but potentially also in the environmental context. It may be most likely in Europe, with its strong supranational institutions, but can well be imagined in any context where firm rules are interlinked with the domestic sphere. The Andean Community or NAFTA would be obvious cases, but contestation over investment arbitration or World Bank policies may spark similar processes. In contrast, as Stone Sweet points out, informal governance—dominant in many regulatory areas, such as global financial regulation—is less likely to provoke pluralist interactions; when norms are informal, there is no authority claim that could be resisted, no reference frame to be challenged. In most areas, though, post- or transnational law, if it has gone beyond a classic sovereignty model but has not turned into full-scale integration, needs to calibrate relations between orders and will thus produce norms and institutional mechanisms at the interfaces. What these interface norms are, to what extent they converge or diverge between orders, what principles animate them, how they vary across issue areas and geographical regions, are questions that I hope empirical research will turn to increasingly in the future.

In this exchange, Alec Stone Sweet and I have emphasized what divides us, especially as regards the idea of “constitutional pluralism” as a potentially attractive alternative to both radical pluralism and foundational constitutionalism. As I have argued here, I am not convinced that constitutional pluralism can indeed deliver that much—either it is too broad and thin to present a distinct image of law and politics, or it is further specified as a form of institutional (rather than systemic, or radical) pluralism. Such institutional pluralism may often be found in the domestic context, but less in a global sphere characterized by more radical processes of contestation.

But as I indicated at the beginning, perhaps these are family quarrels that take for granted that we agree on the broader—pluralist—framework in which we conceive of law in the post-national space. Despite the recent surge in pluralist scholarship, such a framework still faces much skepticism from many lawyers and political theorists—and sits uneasily with the quintessential idea of law as a coherent system. How to rethink the idea of law and its relation with politics in a context where the boundary between both is less and less clear is a serious challenge for lawyers, political scientists and political theorists alike—a challenge we are forced to confront with tools and categories quite different from the ones we have been used to in the domestic sphere.

However, even though pluralism is less visible here, we may still understand the interaction of formal and informal norms as pluralist in nature—both operate in different realms and with different basic frameworks, and both make demands on their addressees, even if these demands are not equally made in formal legal terms. We can then also expect that both develop, in pluralist fashion, mechanisms to deal with the demands of the respective other.