Globalized Constitutionalism under Scrutiny

Total constitutionalism in different contexts under scrutiny Introduction to the Special Section

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Introduction

This Special Section sets forth the thesis that European constitutionalism is evolving towards what many call 'total constitutionalism'. This evolution is driven by civil society's demand for government services, elite special interests, economic globalisation, and judicial activism. The process is far advanced, with courts rendering judgments across a wide range of political and policy domains, to the point now of substituting themselves for legislatures and even constitutional conventions, with far-reaching implications for majoritarian democracy. Yet, little critique of this trend can be found in the academic literature. This Special Section begins to address this gap with critical analyses undertaken from an eclectic spectrum of contextual perspectives by our contributors: Martin Loughlin, Alexander Somek, Anna-Bettina Kaiser, Gaëtan Cliquennois and Simon Chaptel, and Graziella Romeo.

We examine the total constitutionalism thesis in the overall context of the global expansion of judicial power, instanced by phenomena like in Europe a cosmopolitan constitutionalism privileging rights over democratic self-government, as Loughlin concludes. The European Court of Human Rights has delivered

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'landmark' (i.e. quasi-precedential) decisions like *KlimaSeniorinnen*, an act of 'judicial alchemy', as Somek puts it, by which it has conjured a 'right to effective protection against climate change' out of Article 8 (protection of private and family life) of the European Convention on Human Rights – an epitome of the total constitution's tendency to convert a vague moral demand into a purported legal command. The German Constitutional Court can review emergency powers in a highly constitutionalised framework, as seen in its interventions during the COVID-19 crisis, as Kaiser documents. Romeo discusses how the Court of Justice of the European Union could spearhead European integration by gradually *constructing* a total constitutionalism at supranational level; and yet populist and right-wing movements can repurpose the same doctrines to quite different ends. And a network of NGOs and their tax-exempt funders (mostly American) are driving the long-term total constitutionalisation of the Council of Europe and its human rights system via campaigns featuring a quasi-legislative 'pilot judgment' that has even mandated that certain members must revise the organic law of the state; and are planning the Convention's future in activist conferences, as Cliquennois and Chaptel reveal. Of interest in themselves, these phenomena illuminate the relevance, limits, and implications of total constitutionalism. In this perspective, we examine first the total state and total constitutionalism; second the relations between total constitutionalism, total constitution, democratic deficit and judicial activism; third and lastly, the literature gaps and the new insights into total constitutionalism.

The total state and total constitutionalism

To elucidate the basic nature of total constitutionalism before proceeding, it will help to contrast it with the classical perspective on the state, and with Carl Schmitt's concept of the 'total state',[1] before examining Mattias Kumm's 'total constitution' as a contemporary counterpoint. Ernst Forsthoff develops an opposite conception of the total state by asserting that the total state is hierarchical and transcendent – a source of authority beyond or outside the immanent democratic will of the people and the processes bringing it to light. This implies a sovereignty above the people rather than coterminous with it, and a clear distinction between rulers and ruled. The total state is an 'order of domination', the authority of which is not derived from the people's consent (as in democracy)

[1]C. Schmitt, 'The Guardian of the Constitution', in L. Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) p. 79; C. Schmitt, *Positionen und Begriff im Kampf mit Weimar – Genf – Versailles 1923-1939* (Duncker & Humblot 1988) p. 151-153, 187-189. *See also* E. Forsthoff, 'The Total State', in A. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) p. 321.

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but exists autonomously above the mundane, pluralistic demands of society, wedded to a unitary Volk. It transcends the present day and maintains an authority spanning past and future, ensconcing itself 'above society'. Authority is possible only from transcendence. The people do not grant it but respect it. It is a metaphysical authority which entails a *Weltanschauung* ('worldview' or perhaps something like Christian faith or Hegelian history or incorporating them) which legitimises the state with a 'special dignity of statehood and government'. The total state accommodates personal, hierarchical leadership, exemplified by a Führer, if this rounds out its metaphysical authority. The Führer reinforces it, yet the total state transcends personalism, which requires a metaphysical justification to perdure. Forsthoff's emphasis is on the homogeneity of the Volk as a unified political community, but achieved through authoritarian means, not by serving current civil society demands. Consequently, Forsthoff's focus is on authority and hierarchy. His total state is not subordinate to society nor concerned with serving 'interests'. Forsthoff looks to the Volk with its racial and/or national solidarity, explicitly rejecting pluralism. These ideas originated in the context of German intellectual and legal debates corresponding to the failures of Weimar's putative democracy. Forsthoff describes the Weimar Republic as 'a state without a people',[2] implying a lack of political unity, let alone a *raison d'être*. Forsthoff may have been providing a theoretical framework for a 'total state' model that addresses these failures by emphasising *völkisch* transcendence over democratic pluralism.[3]

Classically, the family and civil society precede the state as life's primordial pillars, then the state is raised up to overcome the *mêlée* of self-interests and assert a unitary public interest. Once society begins to overleap national boundaries, however, through the progress of the industrial arts, the power of non-state actors grows, and the state is gradually influenced by their enterprise and ambition – a process that might be traced as far back as the voyages of discovery but definitively culminate with twentieth-century capitalism and socialism. Schmitt developed *his* total state in response to the Weimar Republic's political fiascos, exemplifying a process of capture in the case of a liberal democracy. The legacy boundary between state and society is breached, pluralistic actors, like destitute claimants on the fisc and special interests rush in to 'colonise'. This state is no longer paramount over all constituencies with capacity to assert a public interest uniting the governed over and above civil society's particulars; *au contraire*, it becomes a serviceable instrument for civil society with its informal private self-organisation to pursue 'special' interests more effectively.[4] Unlike totalitarian Party-states, which flatten civil society through terror, the total state subordinates legal norms to a gamut of

[2]Forsthoff, ibid., p. 322.
[3]Ibid., p. 320-323.
[4]Schmitt (2015), *supra* n. 1; Schmitt (1988), *supra* n. 1.

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particular interests, reflecting the dominance of the political over the legal,[5] so becoming 'an economic state, a cultural state, a caring state, a welfare state, a providing state' that encompasses all social life.[6] The total state, in brief, rises to master every domain, public and private, general and particular, ending up obliged to respond to pressures exerted on it from every quarter, as stressed by Sartori who elaborated Schmitt:

> While we still may value privacy and the 'small state' we are also aware that in some form a trend towards 'more totality' characterises our time. Demographic pressure, the continually increasing interdependence of all aspects of the industrial and service society, the demand for welfare and for more rational, functional, and planned societal forms, to mention only the more conspicuous reasons, lead present-day governments, whether they like it or not, to concern themselves increasingly with everybody and everything. . . . we could well say, therefore, that all modern states are somehow developing in the direction of a 'total state'. The democratic state is no exception. If anything, it is more legitimised to become an all-pervading, total state than any other regime. For, in principle, no political formula can justify a total expansion of power as easily as democracy.[7]

All this may well be beyond any state's actual capacity. What appears to be a surrogate for God (or the fairy godmother) becomes, in the face of boundless responsibilities, incompetent, prone to oversight failures, and left wide open to whomever can muster the clout to redirect its vast resources their own way.

This is in stark contrast with the classical 17th and 18th-century theory of the state as a platform on which to realise a *common* good, a 'commonweal' or commonwealth. Our contemporary politicisation would be caused by the ascendance of private or public-private interests, who grow 'too big to fail' and/or too big to jail. This development has certainly tended to thwart and undermine the classical ideal of limited government, superseded by the total state in which the public-private boundary is blurred by self-organising interests.[8] This is why the total state is nowhere neutral any longer, so as to constitute a domain of personal freedom, but invaded by the 'violence of faction', which classical constitutionalists like the U.S. Founders had taken pains to dampen. Thus, the strengthening of the state's competences paradoxically weakened it to such a

[5]Vinx, *supra* n. 1, p. 5.

[6]The guardian of the constitution: Schmitt on pluralism and the president as the guardian of the constitution Translation of Carl Schmitt (1931a) *Der Hüter der Verfassung*, 4th edn (Duncker & Humblot 1996) p. 73-91, 129-140, and 149-159, p. 132.

[7]G. Sartori, *The Theory of Democracy Revisited* vol.1 (Chatham House Publishers 1987) p. 189-190.

[8]Schmitt (2015), *supra* n. 1, p. 132.

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degree that it cannot resist the proliferation of special interests and single-issue stakeholders[9] *qua* bearers of 'rights' (entitlements would be the accurate term) that are no longer immunities from state power, but *claims* on it, *against* other private parties, if need be.

We come now to the matter of constitutionalism as such. The question arises: If we refer the state to the constitution as a form of government, if a total constitution is to mirror the total state's reality, what might total constitutionalism be? For instance, H. Kelsen coequates the government, the constitution and the state: 'The central problem of political theory is the classification of governments. From a juristic point of view, it is the distinction between different archetypes of constitutions. Hence, the problem may be presented also as the distinction between different forms of State'.[10] Likewise, according to Stourzh,

> The term 'constitution' was apparently rather a latecomer in early modern political discourse. English-speaking people began to speak of 'constitution' in connection with bodies corporate and the body politic around the turn of the sixteenth to the seventeenth century [but] the older forms of speech, particularly those connected with 'forms' and also 'frames' of government coexisted or survived [for a] long time, even as people with increasing frequency began to avail themselves of the term 'constitution'.[11]

What ought the Constitution to be? Should the Constitution not 'represent people' in all respects ideally, beyond abstract principles like separation of powers which civil society does not regard? This is the issue underlying this Special Section like a matrix. Our tentative probe does not attempt a direct answer, but using as a foil Mattias Kumm's idea of total constitutionalism as total constitutionalisation, we offer sundry indirect or contextual critiques of our pivotal concept.

Total constitutionalism, total constitution, democratic deficit and judicial activism

In contrast to Schmitt's politicised total state, Kumm's total constitution *qua* state seeks to guide and constrain 'the resolution of any and every political question'[12] through the lens of judicially overseen rights that substitute for sovereign

[9]Schmitt (1988), *supra* n. 1.

[10]H. Kelsen, *General Theory of the Law and State* (Harvard University Press 1949) p. 283.

[11]G. Stourzh, 'Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century' in T. Ball and J.G.A. Pocock (eds.), *Conceptual Change and the Constitution* (University Press of Kansas 1988) p. 38.

[12]M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006) p. 343.

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command the rationalised preferences of juridical hierarchs, a 'juristocracy' in brief.[13] Kumm would have it that the total constitution inverts the total state, reducing politics to a continuation of law.[14] Kumm defends this as 'complete constitutional justice'.[15] Constitutional rights are to 'radiate' out until they touch all legal domains; *viz.*, private law *via mittelbare Drittwirkung* (indirect horizontal effect),[16] as seen in the Federal Constitutional Court's wardship of Germany; reaching even to organic law *via* certain landmark and pilot judgments of the European Court of Human Rights, as discussed below.

Kumm is describing and rationalising the total constitution as an existing practice, defending it as a positive development while acknowledging concerns about democratic deficits, which Martin Loughlin critically examines in *Against Constitutionalism*, arguing that the total constitution empowers an 'insulated elite ... able to perpetuate its authority to rule', prioritising judicial values over popular representation and enabling interest groups to appropriate governance through constitutional litigation.[17] The total constitution will empower certain elites and their representative claims, paradoxically in the teeth of the expressed popular will.[18] In this state of affairs, we can see that coercive leverage and treasure is on offer for appropriation by the strongest interest groups vying for their own piece of the state.[19] The state continues to 'govern' but hardly by applying constitutional constraints even-handedly.[20]

These are concerns that this Special Section addresses, pleading to the problematic aspects of this sea-change; in particular, a core issue is, if we admit the observable fact that constitutional review is a political jurisdiction and is swayed by special interests and civil societal stakeholders, we may no longer presume courts to be independent and impartial, unmoved by non-juridical interests. Moreover, the scope of constitutional review has widened so far already as to cause disquiet about the legitimacy of so much power in so few hands (see Loughlin; Cliquennois & Chaptel, below). Martin Loughlin gives it a sharp point herein: 'the total constitution being espoused is not simply a response to the emergence of the total state: it is an attempt to displace the authority of the state by subjecting it to the discipline of supranational bodies immunised from political control'.[21] Immediately misgivings arise not only about a structural deficit in democratic

[13]Ibid., p. 345.
[14]Ibid., p. 343.
[15]Ibid., p. 345.
[16]Ibid., p. 350-359, p. 356.
[17]M. Loughlin, *Against Constitutionalism* (Harvard University Press 2022) p. 11.
[18]Ibid., p. 191-202.
[19]*See* the article by Somek in this Special Section.
[20]*See* the article by Somek in this Special Section; *see also* Kumm, *supra* n. 12, p. 343.
[21]Loughlin, *supra* n. 17, p. 16.

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accountability but also about sovereign unity. The total constitution of the total state, being dubiously neutral, is unlikely to stay so aloof from particular interests and private powers. It falls to fragmentation and runs into disunity. In line with Loughlin's and Somek's take on total constitutionalism,[22] a major takeaway of the Special Section is that a range of constitutional regimes in Europe will evolve towards total constitutionalism,[23] and will be subjected to – if not indeed captured by – non-state influences; a process that will directly spur the growth of judicial activism. The Special Section addresses diverse aspects, effects and implications of this trend, but in context.

But how did we get here in the first place? Are there historical forces in play that redirected judges as well as jurists to effectively abandon a constitution conceived as rising above special interests to safeguard general interests, and to embrace a constitutionalising judiciary that supervises in detail the operation of the political branches of government? Several long-standing judicial trends may have contributed to our contemporary constitutional epoch.

First, politics has been extended to all social spheres with the advent of universal suffrage and universal partisanship in democratic regimes. The constitution was always subject to factionalism; it not only rules politics but is ruled by it. It shields the residual sovereignty of individuals in their lives, liberties, and property yet touches on matters related to the pursuit of happiness.[24] This has entailed constitutions separating state power into co-equal departments to keep the state small, overall, lest state power be drawn into taking sides between factions. This is when judges overreach in the belief that their own rationalisations on one side or the other are the best solution. Re-politicisation like this undermines the *constitution's* legitimacy in a democratic state,[25] especially as it rests on the assent (*viz.*, ratification) of supermajorities, not the victory of this faction or that (in this context, consider the fate of *Roe* v *Wade*). The proliferation and polarisation of factionalism is what unchecked democracy is prone to; each faction grows impatient with the checks to its own will.

Second, therefore, the profusion of civil society organisations in democracies is observed to exert an overpowering influence on the state. They run the gamut from trade unions to local or national civic associations to worldwide NGOs and INGOs funded by tax-exempt foundations ruled by economic elites,[26] all mobilising human capital to claim rights. Every right (or 'entitlement', namely privilege) that is

[22]Ibid.

[23]B. Ackerman, 'The Rise of World Constitutionalism', 4 *Virginia Law Review* (1997) p. 771.

[24]R.H. Bork, *The Tempting of America. The Political Seduction of the Law* (Sinclair-Stevenson 1990).

[25]Ibid.

[26]G. Cliquennois, *European Human Rights Justice and Privatisation. The Growing Influence of Private Funds* (Cambridge University Press 2020).

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extracted from judges is a residue of the pre-state *individual's* sovereignty; it is an immunity from or indefeasible claim on the state's police power. The state's courts are solicited by these cause activists to serve their will.[27] Right by right, the state is potentially at length influenced by non-state actors, with big business in the lead. This dynamic of leading elites is understood by political theorist Sheldon Wolin as a sort of 'inverted totalitarianism', a 'managed democracy' which demobilises citizen participation when elites usurp political (and judicial) processes to secure the state for themselves, their 'fair share' of the state fisc.[28] The upshot is that any idea of a *common*-wealth flounders, to the detriment of the citizens still practising democracy.

Third, the rise of globalisation and the correlative development of international organisations tends to displace the state from its paramount role in modern legal developments. This acts to subvert the authority of the constitution in regulating political life.[29] Private actors and interest groups are better fitted than the state for globalisation; they are bound to impinge on the state and constitution. Some theorists believe that a world constitution may be the answer to this dilemma, and world constitutionalism may well emerge from globalisation.[30] Bruce Ackerman raises the spread of constitutionalism the world over to states like Germany, France, India, and Japan, but does not predict a framework 'world constitutionalism'. Even so, the lack is felt, and a global trend of constitutional courts gaining authority through the constitutionalisation of rights and the correlative 'templatisation' of the rule of law, judicial independence, and secularism might reflect a spontaneous emergence of constitutionalism on a worldwide scale.[31]

Fourth, the judges, as the unique interpreters of a total constitution, have become lightning-rods for the pursuit of non-state interests through the lens of

[27]Concerning more particularly the role played by NGOs at the European Court of Human Rights, *see* the articles by Somek and by Cliquennois and Chaptel in this Special Section.

[28]S.S. Wolin, *Democracy Incorporated – Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton University Press 2010).

[29]T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism', 7 *Max Planck Yearbook of United Nations Law* (2003) p. 261; I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?', 36 *Common Market Law Review* (1999) p. 703; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) p. 579; E. de Wet, 'The International Constitutional Order', 55 *International & Comparative Law Quarterly* (2006) p. 51.

[30]Ackerman, *supra* n. 23.

[31]M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? International Law, Global Governance, Constitutionalism* (Cambridge University Press 2009) p. 258; Kumm, *supra* n. 12, p. 344; C. Parau, *Transnational Networks and Elite Self-Empowerment: The Making of the Judiciary in Contemporary Europe and Beyond* (Oxford University Press 2019).

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human rights and, because of their access to the state's coercive power, a major player in this turn. Rights jurisprudence is to sort out claims made on state power to coerce third parties alleged to be causing detriment to the claimants.[32] A total constitution constitutionalises such social conflicts by reorienting their resolution towards the invocation of *rights*.[33] Courts are positioned to decide, outside the constitution-framers' intent, its 'real' meaning, pliable to 'new social and political realities' (as new political tools).[34] Judges guard 'public reason' through constitutional interpretation, transmuting constitutions into social engineering roadmaps with neither a framers' warrant nor the ratification of any governed.[35] Judges set aside mere legality to apply the constitution as a universal solvent of social conflict.[36] In the pursuance of this, as often as not, they could worsen conflict. This tendency (the central feature of total constitutionalism) has been cast under the rubric of 'juristocracy', also known as government by courts;[37] judicial monopoly,[38] judicial supremacy, judicial activism, and judge-made public policy. Total constitutionalism differs from juristocracy only in that it is a formal, more general concept helping to theorise, perhaps to instrumentalise multiple informal evolutions, which may also be understood as the outcomes of the full integration of civil societal interests into constitutional justice: 'Conflicts involving contentious political issues are treated as primarily legal questions rather than political ones, with the concomitant assumption that national high courts, instead of elected representatives, should resolve them'.[39] It is an evolution that is premised on the presumed omnicompetence of the judicial branch as an institution. This, too, is a problem in itself.

A corollary problem is that under the rule of a judiciary catering for non-state actors, even the total constitution risks turning evanescent, even imaginary or

[32]Kumm, *supra* n. 12, p. 344.

[33]Ibid.

[34]Loughlin, *supra* n. 17; A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

[35]Loughlin, *supra* n. 17.

[36]Ibid.

[37]Böckenförde was the first one to put forward the concept of 'constitutional juristocracy'. *See* E.W. Böckenförde, 'Grundrechte als Grundsatznormen', in *Staat, Verfassung, Demokratie* (1991) p. 185.

[38]R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) p. 1. *See also* M. Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press 2000); R. Kahn and K. Kersch, *The Supreme Court and American Political Development* (University Press of Kansas 2006) for a study of bidirectionality in which legal doctrine, *stare decisis*, and internal court norms are as significant as the social, cultural, political, and economic world outside the Supreme Court.

[39]Hirschl, *supra* n. 38.

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invisible,[40] submerged in the omnicompetence of revision at any time without notice to accommodate any evolving social interests.[41] The more it is 'invisible', unpredictable even by legal professionals, the more labile a constitution becomes, levers for self-seeking groups. Recent examples of this trend are striking: the inclusion of several fundamental rights like a right to abortion in the French constitution, and frequent revisions to other European constitutions. Even juridification, the displacement of informal social practices and norms by formal legal rules, is subject to judicial review; contrariwise, so also can judicialisation speed juridification.

While parliamentary sovereignty is subverted by the expansiveness of judicial review,[42] this does not entail a diminution of Executive power, as most revisions of old and inclusions of new rights into a constitution are directly made by the Executive or on behalf of it. Even so, the executive also acts increasingly under judicial supervision.

The literature gaps and the new insights into total constitutionalism

The drift towards total constitutionalism is sometimes examined normatively in the literature. Critics highlight the rampant constitutionalisation of political life,[43] and cite the 'democratic deficit' that constitutional courts create by overriding legislative powers.[44] However, the bulk of the literature emphasises positively the expansion of individual rights, the constitutionalisation of private law,[45] and the emergence of doctrines of deference (e.g. the national margin of appreciation, the principle of subsidiarity) through which courts self-correct and mitigate the

[40]M. Walters, 'The Unwritten Constitution as a Legal Concept', in D. Dyzenhaus and M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) p. 33; R. Dixon and A. Stone (eds.), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press 2018); L. Solum, 'Originalism and the Invisible Constitution', in Dixon and Stone, ibid., p. 61; J. Goldsworthy, 'The Implicit and the Implied in a Written Constitution', in Dixon and Stone, ibid., p. 109; J. Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge 2022).

[41]Loughlin, *supra* n. 17.

[42]Stone-Sweet, *supra* n. 34.

[43]Loughlin, *supra* n. 17.

[44]C.R. Sunstein, *How to Interpret the Constitution* (Princeton University Press 2023); J. Waldron, *The Constitutional Conception of Democracy, in Law and Disagreement* (Oxford University Press 1999).

[45]Kumm, *supra* n. 12.

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impact of judicial power,[46] while also hedging national discretion.[47] Some scholars deny that total constitutionalism in Europe is real.[48] Certain fundamental aspects of total constitutionalism have been overlooked or neglected by jurists, in actuality; notably, the importance of well-funded interest groups and of legal doctrine for total constitutionalism has been ignored, largely because constitutional studies, scholarship on legal mobilisation, and critical legal studies do not really intersect. The literature on strategic litigation and legal mobilisation[49] tends to ignore the constitutional constraints on constitutional courts, neglecting the effects of evolving constitutional revisions (typical of total constitutionalism) on interest groups' strategic litigation. Conversely, neither does constitutional doctrine integrate interest groups' litigation with constitutionalism. The relation between constitutionalism and legal mobilisation and its effect on the expansionist interpretative doctrines (such as the living instrument doctrine) have also been overlooked by constitutional scholars who for most have involved themselves in these developments by either advancing them (via direct or indirect participation) or commenting on them, usually in a positive way,[50] or by resisting it, may partly explain this. The objective of this Special Section is to begin to fill this gap which is of interest to the understanding of the evolution towards total constitutionalism.

What is also sometimes overlooked is the specific context that might serve to 'litmus-test' the assumption of total constitutionalisation. An important objective of the Special Section is to test and document the existence of total constitutionalism

[46]D. Dyzenhaus, *The Unity of Public Law* (Hart Publishing 2004); M. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 3 *The International and Comparative Law Quarterly* (1999) p. 638; D. Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', 14 *Cambridge Yearbook of European Legal Studies* (2012) p. 381.

[47]Kumm, *supra* n. 12; for an overview of global constitutionalism, *see* A. Peters, 'Global Constitutionalism', in M.T. Gibbons (ed.), *The Encyclopedia of Political Thought* (Wiley Blackwell 2015) p. 1484-1487; A. Peters et al. (eds.), *Global Constitutionalism in Europe and East Asia* (Cambridge University Press 2018); A. Wiener and T. Lang (eds.), *Handbook on Global Constitutionalism* (Edward Elgar 2017).

[48]Kumm, *supra* n. 12.

[49]P. Blokker, 'Using Liberal-Legal Tools for Illiberal Gains: The European Court of Human Rights and Legal Mobilisation by Conservative Right-Wing Actors', 20 *International Journal of Law in Context* (2024) p. 401; N. Bürli, *Third-Party Interventions at the European Court of Human Rights* (Intersentia 2017); R. Cichowski, *The European Court and Civil Society Litigation, Mobilization and Governance* (Cambridge University Press 2007); G. de Burca, *Legal Mobilization for Human Rights* (Oxford University Press 2022); L. Hodson, *NGOs and the Struggle for Human Rights in Europe* (Hart Publishing 2011); H. Haddad and L.M. Sundstrom, 'Foreign Agents or Agents of Justice? Private Foundations, the Backlash against Non-governmental Organizations, and International Human Rights Litigation', 57 *Law & Society Review* (2023) p. 12.

[50]R. Alexy and J. Rivers, *A Theory of Constitutional Rights* (Oxford University Press 2009).

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specifically. The pandemic state of emergency analysed by Anna-Bettina Kaiser is such a context appropriate for measuring the vividness and the intensity of total constitutionalism. The rise of far-right populism in Europe, which Graziella Romeo considers, presents specific circumstances wherein the reality of total constitutionalism might be tested. The expansion of case law of the European Court of Human Rights assessed by Alexander Somek in the environmental litigation context may be another. Finally, Gaëtan Cliquennois and Simon Chaptel study the judicial ascendant in a context of successive reforms of the European Court of Human Rights; an expansive constitutional trend scrutinised in light of growing NGO-driven litigation. Lastly, current history seen as an evolutionary movement resulting in the total constitution is examined by Loughlin to determine whether it should be understood either as a realisation of the Enlightenment project and the culminating dynamic of an intertwined myth: reason and superstition, right and power or a result of globalisation.

The diverse contributors to this Special Section explore from a more analytic perspective new aspects of the potential turn of constitutionalism to total constitutionalism, under the rubric of making constitutions serviceable to civil society's competing interests. The first aspect is definitional. Most contributors concur in the value of total constitutionalism and its relation to human rights as promoted by liberal regimes, constitutional courts, and stakeholders. The question that arises is to know whether total constitutionalism is an ideology of modern liberal democracy. From that standpoint, the resurgence of interest in the ideological nature of constitutionalism may be understood not merely as a symptom of concern about the totalising trend on the practice of democratic government, but also as a sign of disaffection with the current state of constitutional theory, perhaps even as an expression of revolt against the restrictions on the freedom of constitutional thought in the actually existing constitutionalist regimes. The second aspect of this constitutional drift, and fully interrelated with the first one, is the way courts interfere in politics: delivering rulings that enlarge the positive obligations burdening states, often formulated in an open-ended manner. Kaiser shows the total constitution's weakness by critiquing judgments of the German Constitutional Court during the COVID pandemic, which did not reverse the state's derogation from rights, but merely imposed the condition that legislation must authorise derogation and reviewed legislation under the proportionality principle that balances liberty against 'public safety'. Besides these decisions that stuck more or less to the total-constitution narrative rather than withdrawing the court on the pretext of emergency, one notes more reliance by European constitutional courts on an approach to the rights to life and health that pits rights against rights. This clash of rights and its adjudication amid a proliferation of more cognition of rights is brought up by Somek and Loughlin. Certain decisions of the European Court of Human Rights

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reflect a politicisation of the constitutional – in particular, the recent *KlimaSeniorinnen* judgment, wherein the Court became a law-giver issuing abstract mandates for climate change mitigation. Developments of this kind narrow the margin of appreciation accorded to national legal traditions, even bypass legislation to advance constitutionalisation and its politicised moral readings of a constitutional imaginary, as Loughlin stresses. The articles by Somek and Cliquennois and Chaptel both make a similar point respecting the European Court of Human Rights specifically. Likewise, certain judgments of that Court under Article 8 (the right to private life) of the European Convention on Human Rights in particular extend the field of juristocratic intervention to new highs through the 'living' instrument doctrine promoted in so much contemporary legal discourse inspired by Dworkin, and now already applied by many constitutional courts. This reflects a shift of the system of the European Convention on Human Rights towards total constitutionalism and a quasi-constitutional court under the influence of private interests, as Cliquennois and Chaptel argue.

A corollary question cannot now be ignored: how much have the politicisation of constitutional courts, judicial activism, and moralist readings of the total constitution really contributed to the transformation of political regimes? Would total constitutional courts be paradoxically too weak to transform politics, as claimed above? While the answers depend on the contributors, who differ, most concur that constitutional court output tends to be little more than symbolic in political terms. Somek considers the positivist obligations imposed by Strasbourg on member states to be so unspecific as to have changed not even environmental policy. In a different context, but reaching a contrasting conclusion, Kaiser demonstrates that the German Constitutional Court's interventions in the pandemic state of emergency effectively limited unconstitutional derogations from human rights, ensuring compliance with constitutional standards through judicial oversight and legislative reforms. Loughlin concludes that the politicisation of constitutional courts dilutes their strength to act against the rise of nationalist regimes:

> The early twenty first century claim that the total constitution is bringing about a paradigm shift in legal and political thought was soon to be tested against political developments. Subsequent events such as the financial crisis of 2008, the pandemic of 2020-21, the resurgence of nationalist policies and threat to internationalism posed by growing authoritarianism in various parts of the world most surely indicate that 'the age of statehood' is far from being over. In this respect, Joseph de Maistre – however controversial some of his views – was surely not wrong to claim that 'a constitution that is made for all nations is made for none: it is a pure abstraction, an academic exercise of the mind, according to some

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> hypothetical ideal'.[51] In advancing the total constitution as the enthronement of reason, its advocates remain bound up in their own mythical imagination.

Total constitutionalism may even provoke a counterattack by the far right, who view increasing judicial power as anti-democratic, allowing an elite class to veto both parliamentary and executive powers at will, and therewith the majorities who elected them.

But total constitutionalism's judicial empowerment also yields contradictory outcomes, simultaneously risking democratic overreach and exposing vulnerabilities against illiberal challenges. Loughlin critiques the total constitution's tendency to erode democracy by entrenching elite interests through judicial interventions in political disputes, electoral processes for example, bypassing majority will. The late annulment of the Romanian Presidential election by the Romanian Constitutional Court illustrates his concern. In Romeo's view, total constitutionalism is also ineffectual against the far right and illiberalism in Europe, casting doubt on Dworkin's paradigm of the constitution as general principles applicable by the Court of Justice of the European Union on behalf of integration. The growing criticism of Dworkin's paradigm is enabling total constitutionalism's premises to be contested in favour of a view of constitutionalism as simply so many historically contingent expressions of political will rather than an embodiment of universal moral principles. It is the approach of illiberal regimes in Europe using textualist interpretations to reassert national sovereignty, and so exposing the fragility of the EU's integrationist approach. Romeo calls for recalibrating constitutional discourse, one that resists the over-juridification of constitutional meaning and reaffirms the democratic and societal foundations of constitutional orders. Cliquennois and Chaptel, in contrast, argue that the living instrument doctrine applied by liberal interest groups enhances the European Court of Human Right's constitutionalisation and correlates with an expansion of politicised rights, towards the revision of national organic legislation and domestic jurisprudence. These divergent consequences – overreach and ineffectiveness – point to the need for future inquiry into whether total constitutionalism strengthens or destabilises democratic governance.

In his article, Martin Loughlin critically examines the turn to the 'total constitution', a paradigm shift in constitutional thought attributable to Mattias Kumm, such that every aspect of social and political life is subject to constitutionalisation under universal principles like rights, legality, and proportionality. This idea is already being realised in today's judicial review of indefinite jurisdiction. It can be traced to Enlightenment ideals of reason, which

[51]J. de Maistre, 'Considerations on France' [1797] in *Works*, J. Lively ed. and trans. (Macmillan 1965) p. 47 at p. 80.

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sought to establish government upon consent and to limit its power. But it has since devolved into a juristocracy that raises judicial reasoning over democratic self-government of peoples. Using Habermas's reconciliation of democracy and rights, and contrasting it with Schmitt's 'total state', the total constitution is shown to be a neoliberal and cosmopolitan construct that erodes state sovereignty and democratic accountability by entrenching elite interests and global market priorities. This 'progressive' narrative is challenged, its entanglement with myth and power dynamics – evidenced by judicial overreach and the insulation of governance from democratic accountability – is exposed. Historical and theoretical analysis yields a warning that the total constitution is an enormous risk. It is urged that a re-examination of its assumptions in light of contemporary political disorders is warranted.

According to Alexander Somek, the 'total state' is a polemical concept. It was used by constitutional theorists in the 1930s to characterise a decline of state authority precipitated by various social groups availing themselves of its support. A state made to intervene in all areas of social life becomes, in their view, weak. It is possible to transfer the concept, for heuristic purposes, to the authority of constitutional law. Accordingly, a total constitution is omnirelevant. It is no longer meant to only curb state action, but to serve as a guideline for policy-making. Like the total state, the law of the total constitution is susceptible to becoming the prey of the forces ruling the day. Its weakness can be exacerbated if adjudicating bodies jump on the bandwagon of symbolic politics. A discussion of the *KlimaSeniorinnen* decision of the European Court of Human Rights elucidates this issue.

In Anna-Bettina Kaiser's view, the accusation against a total constitution aims at what it sees as the excessive constitutionalisation of political life and the narrowing of political processes. Decisions that should be entrusted to democratically legitimised legislatures are taken away from them under a total constitution on the pretext that they are already constitutionally predetermined. In the end, it is the constitutional courts, so the suspicion goes, that take the real decisions. From this perspective, the constitutionalisation of the state of emergency must prove to be particularly problematic, if we see the decision whether to declare and how to handle a state of emergency as the incarnation of the political. For historical reasons this contribution takes the highly constitutionalised German emergency constitution as an example to reflect on the accusation of a total constitution. It shows that even such a high degree of constitutionalisation can be made to work effectively, but that this result is closely connected to a specific set of cultural and historical circumstances. This dependence on context casts considerable doubt on any attempts to turn these high levels of constitutionalisation into a universalisable 'role model'.

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The article by Graziella Romeo critically examines the role of constitutional interpretation in sustaining and challenging the model of total constitutionalism within the European Union. It does not offer a general critique of total constitutionalism but instead highlights how its reliance on expansive judicial reasoning and morally charged principles can render it vulnerable in contexts where its normative assumptions are not shared or historically embedded, particularly in Central and Eastern Europe where formalist and positivist traditions have shown enduring resilience. Focusing on the jurisprudence of Hungary and Poland, the article shows how textualist and formalist interpretive approaches, while historically rooted, have been strategically mobilised to reassert state sovereignty under the guise of defending constitutional supremacy. These developments expose the fragility of a model that tends to conflate judicial authority with constitutional integration. The article argues for a recalibration of European constitutional discourse, one that resists the over-juridification of constitutional meaning and reaffirms the political foundations of constitutional orders.

The article by Gaëtan Cliquennois and Simon Chaptel studies, tests and measures two main features of the total constitutionalism trend as reflected in the influence of private interest groups (which are assumed to represent civil society) over jurisdictional expansion and interpretative advances realised by the European Court of Human Rights through its jurisprudence. They combine for the first time these two characteristics (of total constitutionalism) by positing that private interests' litigation in, and increasing involvement in the reform of, the Strasbourg Court bear potential to reinforce the trend towards total constitutionalism beyond the effects of internal factors (like internal reforms, internal organisation, European judges' will, principles of interpretation, etc). The existing framework of supranational rights jurisprudence aligns quite well with the litigation agenda pursued by NGOs and private foundations, whose contribution to the constitutionalisation process has been neglected by the literature. Cliquennois and Chaptel show that the influence played by private interest groups (liberal NGOs funded by private foundations and conservative NGOs) on the European Court of Human Rights is mainly exerted through the Pilot judgment procedure, the doctrine of the European Convention on Human Rights as a living instrument, the supervision of the execution of judgments delivered by the European Court of Human Rights, the European Court's dependency on NGOs regarding the quality of complaints and their advocacy at the High Summit Conferences of the Council of Europe which deal with structural reforms of the European Court of Human Rights.

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On the history of the Special Section. A few concluding remarks

This Special Section was conceived during the Workshop entitled 'On global constitutionalism and its limits' which was co-organised by the authors of this introduction together at Nantes University, within the context of a grant entitled JUST_MORAL and supported by the French research agency led by Gaëtan Cliquennois. This event took place on 21-22 March 2024. We are indebted to scholars from several European countries and at all career stages who participated in it. We would like to conclude with a wish: that many will engage with, challenge, question, and discuss what this Special Section deals with because we believe that total constitutionalism pertains to public and constitutional studies, as an integral part of them.

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Cristina Parau is postdoc and works on the ERC JUST PEN project. She works on conservative and liberal legal mobilisation and the role played by private foundations in particular. She has notably published a monography entitled *Transnational Networks and Elite Self-empowerment: The Making of the Judiciary in Contemporary Europe and Beyond with Oxford University University Press and more recently an article (with Gaëtan Cliquennois) on conservative legal mobilisation at the Strasbourg Court to be published in International Journal of Constitutional Law.*

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