

*Martin Belov\**

## THREE MODELS FOR ORDERING CONSTITUTIONAL ORDERS

**Abstract:** *The article explores constitutional transitions from the viewpoint of three explanatory and ordering paradigms proposed by the author. These are Westphalian constitutionalism, post-Westphalian constitutionalism and neo-Westphalian constitutionalism. The analysis focusses on the crisis of the two main paradigms of Westphalian Modernity – the territoriality of power and the hierarchy having projections on constitutional supremacy and political sovereignty. It explores how these two main forms of Westphalian constitutional geometry are challenged by globalism and neo-regionalism. The paper revolves around the metamorphoses of the pillars of constitutionalism in the context of globalization, as a holistic and universal project that has been unfolding in recent decades, and the current trends toward redefining globalization in terms of global regionalism and post-territorial technocratic governance.*

**Key words:** crisis of territoriality, hierarchy, sovereignty, transition, constitutionalism beyond statehood, supranational constitutionalism, global constitutionalism, constitutionalization of international law, internationalization of constitutional law, regionalism.

### 1. INTRODUCTION

The ordering of constitutional orders<sup>1</sup> was not a central issue until the late 20<sup>th</sup> century. Constitutional orders have been confined within the territorial statehood, organized as nation states or as multicultural societies. Coordination between the national territorial constitutional orders has been necessary, but it was achieved through traditional means of

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This research was funded by the Priority Research Area Heritage under the program Excellence Initiative – Research University at the Jagiellonian University in Krakow.

1 For the concept of “ordering of constitutional orders”, see Tanchev, E., *The Contemporary Supranational Constitutional Pluralism or the Ordering of Constitutional Orders*, in: Kirov, P., (ed.), 2014, *Constitutional Studies 2012–2013*, Sofia, St. Kliment Ohridski University Press, (in Bulgarian), pp. 171–198.

bilateral and multilateral diplomacy and engagement in global or regional international organizations. The ordering schemes of “constitutionalism within statehood” have been gradually developed for centuries and the issues of coordinating national and international law have been solved via established schemes of dualism and monism, based on the principles of state sovereignty, supremacy of the constitution and *pacta sunt servanda*.

The emergence of “constitutionalism beyond statehood”<sup>2</sup> in the late 20<sup>th</sup> century and its unfolding and enhancement at the beginning of the 21<sup>st</sup> century has challenged key concepts of traditional modern constitutional and international law. The “constitutionalization of international law” and the “internationalization of constitutional law”, the rise of global governance, the progressive development of open statehood, the deconstruction of secure identities, the challenges to Westphalian space and time due to time–space compression, the blurring of the “public–private” divide and the crisis of territoriality and hierarchy have intensely destroyed reliable schemes and principles of constitutionalism and constitutional law. Thus, they gave rise to the search of new epistemic instruments and for conceptual matrixes for “ordering of constitutional orders”.

Nevertheless, the “constitutional polycrisis” that we are experiencing since 9/11 and which has gained momentum in 2009 with the financial crisis, in 2015 with the migration crisis, in 2019–2022 with the global health pandemic crisis, and in 2022 with the war in Ukraine, was paralleled by the rise of emergency constitutionalism. Both the constitutional polycrisis and emergency constitutionalism produced a constitutional transition to global constitutional disorder. This disorder, resembling a Schmittian *Ernstfall* needs to be reordered. A trend toward transitory constitutionalism and the rise of neo-Westphalian constitutionalism are visible in this state of emergency of constitutional and international law.

This paper offers an outline and critical assessment of three conceptual models for ordering of constitutional orders. These are Westphalian constitutionalism, post-Westphalian constitutionalism, and neo-Westphalian constitutionalism. It provides concise exploration of the main legal and socio-legal challenges to Westphalian Modernity, but also to global Post-Modernity, and includes an attempt at deconstruction, critical reconstruction, and prediction of future developments of constitutionalism of the European Union.

The paper should be interpreted as a kind of response to the proper observation of S. Benhabib that:

2 See Dobner, P., Loughlin, M., (eds.), 2010, *Twilight of Constitutionalism?*, Oxford, Oxford University Press; Walker, N., 2008, Taking Constitutionalism beyond the State, *Political Studies*, Vol. 56, Issue 3, pp. 519–543.

*“We are like travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world-society of states, has changed, our normative map has not.”*<sup>3</sup>

Hence, the paper attempts at providing novel epistemic and ordering tools for the global constitutional disorder. This is done via deconstruction of the constitutional past and some of the pillars of constitutional Modernity, and the subsequent reconstruction and construction of possible paradigms that offer a conceptual explanation of globalist and neo-regionalist versions of constitutional Post-Modernity.

This paper is only an outline of the author’s theory. Due to space constraints, it will not engage in detail with the multitude of literature that concerns the transitions on the boundary between national, international and supranational orders, and the range of schemes, conceptual and institutional design that has been suggested as their explanation and ordering.<sup>4</sup>

## 2. WESTPHALIANISM, POST-WESTPHALIANISM AND NEO-WESTPHALIANISM – A THREEFOLD APPROACH TO “ORDERING OF CONSTITUTIONAL ORDERS”<sup>5</sup> AND TO “FEDERALISM BEYOND STATEHOOD”

We are living on the edge of epochs and on the crossroad of civilizations. Time is speeding up, promoting a multitude of overlapping challenges to constitutional orders. Space is not the ultimate determinant of power, as it was only decades ago. It is neither the only plain on which power games unfold nor is it the ultimate factor in social government that framed some of the constitutional pillars of modernity, such as the principle of (territorial) sovereignty, and the paradigms of (territorial) validity of law and institutional jurisdiction. Decompression of the “territorial container of the state”<sup>6</sup> and the emergence of post-territorial, transterri-

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3 Benhabib, S., 2005, *Borders, Boundaries and Citizenship*, *Political Science and Politics*, 38, p. 674.

4 See e.g. Poiares Maduro, M., *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, in: Walker, N., 2003, *Sovereignty in Transition*, pp. 501–538; Klabbers, J., Palombella, G., 2019, *The Challenge of Inter-Legality*, Cambridge, Cambridge University Press.

5 For the concept of “ordering of constitutional orders”, see Tanchev, E., 2014, pp. 171–198.

6 See Taylor, P. J., 1994, *The State as Container: Territoriality in the Modern World-System*, *Progress in Human Geography*, Vol. 18, Issue 2, p. 2; Taylor, P. J., 1995, *Beyond Containers: Internationality, Interstateness, Interterritoriality*, *Progress in Human*

torial and atterritorial forms of power are diminishing the role of territory as the ultimate basis and territoriality as the fundamental modality of power.<sup>7</sup> State authority, state power and the state as focus of the legitimate violence<sup>8</sup> are deeply challenged by time–space compression,<sup>9</sup> the crisis of territoriality,<sup>10</sup> and the novel digital public spaces of power resulting from the IT revolution<sup>11</sup> and “platform capitalism”.<sup>12</sup>

“Platform capitalism” and the rise of the political role and power of digital social platforms are paving the way toward the emergence of digital federalism. Digital federalism is a power system and power grid where big digital monopolies perform public power functions competing with state and other territorially based political players and even creating additional power realities – augmented reality or mixed reality. They establish a power reality of shared power dominance of big digital cartels, leading to the federalization of the digital space.

The constitutional civilization shift currently taking place is changing traditional, modern, Westphalian concepts of space and time. “Crisis of territoriality” produced by the decompression of the “state as territorial container”<sup>13</sup> due to open statehood, “constitutionalism beyond statehood” and migration is paralleled by forms of “hyper-territoriality”. More precisely, this is the reintroduction of territorial burdens and restraints caused by the emergency territorial regimes imposed as a result of the migration and health (pandemic) crises. “Time-space compression”<sup>14</sup> produces a phenomena with simultaneous effects and global impacts triggering constitutional crises, constitutional emergencies, revolutions and constitutional transitions resembling the “butterfly effect”.

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*Geography*, Vol. 19, Issue 1, p. 1; Brenner, N., 1999, Beyond State-Centrism? Space, Territoriality and Geographical Scale, *Globalization Studies in Theory and Society*, Vol. 28, Issue 1.

- 7 See Belov, M., Territory, Territoriality and Territorial Politics as Public Law Concepts, in: Belov, M., (ed.), 2021, *Territorial Politics and Secession. Constitutional and International Law Dimensions*, London, Palgrave, pp. 15–45; Belov, M., Rule of Law in Space of Flows, in: Belov, M., (ed.), 2018, *Rule of Law at the Beginning of the Twenty-First Century*, The Hague, Eleven, pp. 97–141.
- 8 Weber, M., 1968, *Soziologie. Weltgeschichtliche Analysen. Politik*, Stuttgart, Kröner Verlag, p. 151 etc.
- 9 For the concept of “time–space compression”, its main proponents and thesis, see e.g. e-tags/time-space-compression (10.11.2022).
- 10 See Benhabib, S., 2005, p. 674.
- 11 See Belov, M., (ed.), 2021, *The IT Revolution and Its Impact on State, Constitutionalism and Public Law*, Oxford, Hart, pp. 1–344.
- 12 Srnicek, N., 2016, *Platform Capitalism*, Cambridge, Polity Press, pp. 1–120.
- 13 See literature cited in fn 5.
- 14 Kivisto, P., Time-Space Compression, in: Ritzer, G., (ed.), 2012, *The Blackwell Encyclopedia of Globalization*, Malden, MA: Wiley-Blackwell.

Constitutional civilization is transiting toward a new stage of its development. The constitutional design that we have inherited from the past seems to be outdated, increasingly dysfunctional and incapable of properly explaining the new reality of the global order of the world risk society<sup>15</sup> in the context of the intense and massive information and technological revolution. Constitutional ideas, paradigms and institutions, which were launched during the “long 19<sup>th</sup> century”<sup>16</sup> and thrived during the first 70–80 years of the 20<sup>th</sup> century, are becoming increasingly dysfunctional since late the 20<sup>th</sup> century, but especially after the beginning of the new millennium. However, we do not have ready and approved solutions for the future.

Thus, we are in dire need for the discovery and implementation of new ideas, paradigms and constitutional models that would help us master the complexity of constitutional disorder in times of the interference of globalization, IT revolution and a range of crisis phenomena. Order has to be made out of disorder with the help of new normative maps and concepts, which would be adequate for the global and postmodern society that is fragmented into a range of narratives and explanatory and ordering paradigms.

This paradigmatic crisis – with axiological, institutional and conceptual implications – has its particular manifestation in the sphere of territory, territoriality, and territorial politics.<sup>17</sup> Thus, it has important repercussions also on the territorial structure of power and consequently – on federalism within and beyond statehood. Current constitutional orders have been experiencing “crisis of territoriality” for decades. Since the COVID-19 pandemic, territoriality has reemerged in the form of territorial restriction to free movement and the reintroduction of border control within the Schengen Area, but to an extent, paradoxically, it is combined with forms of post-territoriality and aterritoriality. Moreover, the spread of spaces of flows<sup>18</sup> has been paralleled with the reintroduction of regimes of “territorial austerity” that promoted different forms of territorial restriction of free movement of people.

Crisis is a sign of transition. The current transition has civilization-al dimensions. They have huge impact on territoriality as the concept of

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15 Beck, U., 1999, *World Risk Society*, Cambridge, Polity, pp. 1–192.

16 Hobsbawm, E., 1996, *The Age of Revolution: 1789–1848*, New York, Vintage, pp. 1–368.

17 See Belov, M., (ed.), 2021, *Territorial Politics and Secession. Constitutional and International Law Dimensions*, London, Palgrave, pp. 1–316.

18 See Castells, M., 2009, *The Rise of the Network Society*, Oxford, Wiley-Blackwell, pp. 407–460; Belov, M., Rule of Law in Space of Flows, in: Belov, M., (ed.), 2018, pp. 97–141.

constitutional, administrative, EU, and international law. Thus, the civilizational transformation can be conceptualized also from the viewpoint of territory, territoriality, and territorial politics.

Westphalian, post-Westphalian and neo-Westphalian constitutionalism are explanatory and ordering schemes for constitutionalism both “within” and “beyond” statehood.<sup>19</sup> In fact, this is one of their main advantages. It consists in their ability to jointly frame, order and explain common issues of national, sub-national, supranational and international constitutional law produced by the constitutionalization of international law and internationalization of constitutional law.<sup>20</sup> Thus, Westphalian, post-Westphalian and neo-Westphalian constitutionalism are theories on the edge of constitutional, international and EU law, having relevance for all of them.

Westphalian, post-Westphalian and neo-Westphalian constitutionalism are models that address central issues of constitutional and international law. They attempt to explain and order the constitutional geometry<sup>21</sup> of constitutionalism, exploring the interplay, competition and cooperation between the pyramid, the network and the circle, as the main epistemic and normative schemes of Westphalian Modernity and post-Westphalian and neo-Westphalian Post-Modernity. They explore the conceptual challenges to the normative ideologies that have constituted constitutional Modernity produced by a range of global, technological, technocratic and post-modern factors. These are the normative concepts of temporality and spatiality of the territorial nation state, hierarchy as key ordering matrix, the “public-private” divide, the state-centered approach to constitutionalism “within statehood” and, last but not least, the deconstruction of traditional and secure identities with constitutional relevance.

Westphalian, post-Westphalian and neo-Westphalian constitutionalism are all phases in the historic development of constitutionalism and forms and prototypes of constitutionalism. Westphalian, post-Westphalian and neo-Westphalian constitutionalism are historic phases in the unfolding of constitutionalism, as a conceptual explanatory and ordering scheme of constitutional orders that has impact also on the international community and international law.

Westphalian constitutionalism is the initial phase in the development of constitutionalism, constitutional law, and the constitution. In fact, the

19 See Dobner, P., Loughlin, M., (eds.), 2010, *Twilight of Constitutionalism?*, Oxford, Oxford University Press; Walker, N., 2008, *Taking Constitutionalism beyond the State*, *Political Studies*, Vol. 56, Issue 3, pp. 519–543.

20 *Ibid.*

21 See Belov, M., 2022, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart, pp. 241–315.

concept of Westphalian constitutionalism denominates the modern constitutionalism that has emerged within the territorial state. It has made its history mainly in the context of the nation state and to some extent also in multicultural states and societies. The term Westphalian constitutionalism is used here because of its emphasis on hierarchy with its legal dimension concerning constitutional supremacy and political dimension resulting in different versions of sovereignty, as well as due to the fact that it reflects the territoriality of modern statehood. These are all concepts that are currently undergoing deep, conceptual, substantial and structural transformations.

Westphalian constitutionalism is presently massively challenged by post-Westphalian and neo-Westphalian constitutionalism. Thus, we are in a situation of constitutional and international “state of exception” or *Ernstfall*, in terms of C. Schmitt, with civilizational clashes between competing models, concepts and paradigms for reshaping the world of tomorrow. A range of models coexist in a specifically post-modern way. This means that there are severe competition and clashes, but also partial coexistence and even overlapping between the abovementioned models for ordering constitutional and international law.

Post-Westphalian constitutionalism visibly started to unfold in the 1990s, especially following the adoption and entering into force of the Maastricht Treaty. Nevertheless, some preceding conceptual, political and geopolitical decisions, which have predetermined the initiation of the neoliberal globalization and globalism and thus of post-Westphalian constitutionalism, were made in the late 1970s and the 1980s. Moreover, the intellectual roots of post-Westphalian constitutionalism can be traced back to Immanuel Kant’s *Zum ewigen Frieden*<sup>22</sup>, the intellectual heritage of Richard von Coudenhove-Kalergi and the attempt by Altiero Spinelli to promote a pan-European constitution. Thus, post-Westphalian constitutionalism coincides with the period of unfolding of the last phase of neo-liberal globalization and encompasses the least three to three-and-a-half decades, despite being rooted in durable intellectual traditions such as the Pan-European Movement and global humanism.

Neo-Westphalian constitutionalism has started to gradually emerge during the past decade in the context of the constitutional polycrisis,<sup>23</sup>

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22 For an English version of the book, see Kant, I., 2019, *Eternal Peace: And Other International Essays*, Wentworth Press, pp. 1–214.

23 For the concept of polycrisis, see e.g. Belov, M., *Rule of Law and Democracy in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?*, in: Belov, M., (ed.), 2023, *Rule of Law in Crisis Constitutionalism in a State of Flux*, Abingdon, Routledge (forthcoming);

which has been experienced by most societies since the end of the first decade of the 21<sup>st</sup> century. It been shaped in the context of rather troublesome events, such as the global spread of terrorism, the financial and migration crises, and the COVID-19 global pandemic. Thus, neo-Westphalian constitutionalism is the most novel phenomenon and the most recent phase in constitutional development.

Westphalian, post-Westphalian and neo-Westphalian constitutionalism emerged one after the other, as consecutive phases of constitutional history. Thus, it seems logical to construct a constitutional history based on their sequential unfolding. Nevertheless, after their emergence, as mentioned above, all three forms of constitutionalism have started to overlap and coexist. Post-Westphalian globalism has been the antipode of Westphalian nationalism and has applied huge political, societal and intellectual pressure for its deconstruction. Nevertheless, it has also used the infrastructure and political capacities of Westphalian constitutionalism in order to develop its institutional system and boost its socio-political performance. The past three decades were an age of difficult coexistence of Westphalianism and post-Westphalianism which were to an extent antipode concepts competing for monopoly over the explanation and ordering of constitutional orders. Such a clash was apparent in all constitutional discourses – theoretical, symbolic-imaginary, normative-institutional and socio-legal. Simultaneously, the past thirty years were also a period of mutual coexistence. Interestingly and to an extent paradoxically, post-Westphalian constitutionalism was also dependent on the capacity of the states to promote globalization and of their constitutional orders to sustain global constitutionalism and tolerate “constitutionalism beyond statehood”.

The past decade has witnessed even more complex power, institutional and conceptual relationships, which included not only Westphalian and post-Westphalian but also neo-Westphalian constitutionalism. The tense and uneasy coexistence of Westphalian nationalism and post-Westphalian globalism has been transformed into an even more complex and perplexing relationship. The fragile mutual adjustment of constitutionalism “within” and “beyond” statehood, the ordering of a complex system of national, subnational, supranational and international constitutional orders, the balancing between government and governance, between global constitutionalism and global administrative law,<sup>24</sup> and, last but not least, between

Zeitlin, J., Nicoli, F., Laffan, B., 2019, Introduction: The European Union beyond the Polycrisis? Integration and Politicization in an Age of Shifting Cleavages, *Journal of European Public Policy*, Vol. 26, Issue 7, pp. 963–976.

24 See e.g. Casini, L., Global Administrative Law, in: Dunoff, J., Pollack, M., (eds.), 2019, *International Legal Theory: Foundations and Frontiers*, Cambridge, Cambridge University Press, (<https://ssrn.com/abstract=3328120>, 10. 11. 2022); Lopez-Claros, A.,



state-centered and societal constitutionalism,<sup>25</sup> has become even more complex with the rise of neo-Westphalian regionalism. Neo-Westphalian regionalism appeared as both a trend for de-globalization and as a scheme for the continuation of globalization in the form of regionalization.

### 3. WESTPHALIAN CONSTITUTIONALISM

Westphalian constitutionalism has emerged during Western Modernity and has been the main model for “ordering the constitutional order”<sup>26</sup> until the second half of the 20<sup>th</sup> century. Indeed, there have also been alternative projects, such as the imperial statehood, with no fixed territoriality, the coexistence of territorial state jurisdictions with “transversally bordered spaces”<sup>27</sup> and the networked statehood of the trade empires and city-states. However, they have lost their appeal in the intellectual competition for ordering modern constitutional orders during early Modernity, mostly due to contextually predetermined economic and military weaknesses.

Initially, Westphalian constitutionalism was exclusively a Western phenomenon that spread to the global North in the course of the “long 19<sup>th</sup> century”.<sup>28</sup> Due to decolonization and subsequent globalization, it has become, at least formally, a universal phenomenon. In the past decades, this model has been experiencing increasing pressure stemming from its competitors – post-Westphalian and neo-Westphalian constitutionalism.

Westphalian constitutionalism is structured on the basis of two main explanatory and ordering schemes of statehood and constitutional order. These are first, the hierarchy and pyramid-like structure of power and authority, and second, the “container-like”,<sup>29</sup> squared-polygonal structure of the closed Westphalian territoriality. These macro shapes and forms of

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Dahl, A., Groff, M., 2020, *Global Governance and the Emergence of Global Institutions for the 21<sup>st</sup> Century*, Cambridge, Cambridge University Press, pp. 1–558.

25 See Teubner, G., 2012, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, Oxford University Press, pp. 38–42; Přibáň, J., 2020, *Constitutional Imaginaries. A Theory of European Societal Constitutionalism*, Abingdon, Routledge, pp. 1–251.

26 See Tanchev, E., 2014, pp. 171–198.

27 See Sassen, S., 2001, *The Global City*, New York, London, Tokyo, Princeton, Princeton University Press, pp. 1–480; Sassen, S., 2013, When Territory Deborders Territoriality, in: *Territory, Politics, Governance*, Vol. 1, Issue 1, p. 23; Sassen, S., From National Borders to Embedded Borderings: One Angle into the Question of Territory and Space in a Global Age, in: Been, W. de, Arora, P., Hildebrandt, M., (eds.), 2015, *Crossroads in New Media, Identity and Law*, London, Palgrave Macmillan, p. 17.

28 See Hobsbawm, E., 1996, pp. 1–368.

29 See Taylor, J. P., 1994, p. 2; Taylor, J. P., 1995, p. 1; Brenner, N., 1999.

the Westphalian constitutional geometry<sup>30</sup> have paradigmatic importance for the ordering of the institutional design of Westphalian constitutional modernity. They also influence the range of normative ideologies on which it is based. This is due to the fact that the shapes and forms of the Westphalian constitutional geometry are mutually intertwined with fundamental principles of Westphalian constitutionalism and constitutional law such as sovereignty, constitutional supremacy, territoriality of power, public/private divide, etc.

Hierarchy is used extensively and has seminal and paradigmatic importance for Westphalian Modernity. It is the key in the strategic, epistemic and pragmatic, explanatory, cognitional and ordering matrix of Westphalian constitutional geometry.<sup>31</sup> Hierarchy has been a quasi-natural matrix for ordering power, compulsion and authority relations also in pre-modern societies. It was especially visible in the Middle Ages, but was used also in Antiquity and in both Western and non-Western contexts. Thus, it seems that the hierarchical ordering of political order has preceded and predetermined the hierarchical ordering of modern constitutional and legal orders.

The late medieval orthodox, especially catholic political theory, including the catholic theory of federalism, has paved the way for the use of hierarchy as a power ordering matrix. Nevertheless, hierarchy has become the key masterplan for ordering power relations in the early modern period when it was used in its secular version as the underlying scheme of the absolute monarchy as the first instantiation of the contemporary territorial state, which has subsequently been nationalized and constitutionalized.

In a sense, Westphalian constitutional Modernity is contained in hierarchies and pyramids. It is impossible without the hierarchical structuring of the legal, political and constitutional order. Different competitors for performing the role of the explanatory and ordering scheme of modern power relations and serving as the explanatory and ordering matrixes, *e.g.*, the network and the circle, which emerged in the late Middle Ages and early Modernity, have been visibly and clearly pushed aside by the hierarchy and the pyramid.

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30 For the concept of constitutional geometry, see Belov, M., 2022, *Constitutional Semiotics. The Conceptual Foundations of a Constitutional Theory and Meta-Theory*, Oxford, Hart, pp. 241–315.

31 See Belov, M., The Challenges to Westphalian Constitutional Geometry in the Age of Supranational Constitutionalism, *Global Governance and Information Revolution*, in: Belov, M., (ed.), 2018, *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, Oxford, Hart, pp. 13–55.

Westphalian constitutionalism is entrenched in sovereigntist thinking.<sup>32</sup> It is grounded on sovereignty, conceived as an absolute, holistic, non-transferrable and indivisible concept. This version of sovereignty is the prevailing one in modern constitutionalism. It is defined by seminal authors offering foundational normative ideologies of Westphalian sovereignty, such as Jean Bodin, Thomas Hobbes, Jean-Jacques Rousseau, and John Austin. This Westphalian version of sovereignty is a “black-and-white” and “either-or” concept. According to it, the state can be either entirely sovereign or not sovereign at all. If parts of sovereignty are transferred, then the entity seizes to be sovereign at all.

Absolute political supremacy goes together with absolute legal supremacy. In that regard, the absolute version of sovereignty is naturally bound to the absolute supremacy of the constitution. In fact, they are both dimensions and projections of the hierarchy, as the predominant explanatory and ordering matrix of Westphalian constitutionalism. Absolute constitutional supremacy is both the result of and the safeguard for absolute and holistic sovereignty. Absolute sovereignty is the ultimate source of the supreme and undisputed authority of the Westphalian constitution.

Naturally, such absolute and holistic versions of sovereignty and constitutional supremacy have been reconciled with huge difficulty, even with multilevel constitutional orders “within statehood”, such as the traditional national or multicultural federations. This variant of sovereignty has been even more problematic in the context of the “constitutionalization of international law” and the emergence of “constitutionalism beyond statehood”, in the form of supranational and international constitutional law. Theories of sharing and pooling of sovereignty, residual sovereignty, and relative primacy of EU law over the constitutions of the EU Member States, which are so widely spread in constitutional theory and in the political discourse, have been only partially successful in providing a reasonable ordering model and explanatory matrix for the increasing plurality of constitutional levels, and thus for “ordering of constitutional orders”.<sup>33</sup>

The second most important matrix for explaining and ordering the constitutional orders of Westphalian statehood is squared-polygonal, “container-like” territoriality. It is the form of Westphalian constitutional

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32 See Klabbers, J., Palombella, G., 2019, *The Challenge of Inter-Legality*, Cambridge, Cambridge University Press.

33 See MacCormick, N., 1993, Beyond the Sovereign State, *The Modern Law Review*, 56, pp. 1–18; Poiares Maduro, M., Three Claims of Constitutional Pluralism, in: Avbelj, M., Komarek, J. (eds.), 2012, *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart, pp. 67–84.

geometry that shapes the closed Westphalian territoriality and maintains the model of closed statehood.

Westphalian constitutionalism is based on the exclusive territoriality of public power. Power is confined within statehood while statehood is preconditioned on territoriality. Thus, public power is mainly state power framed by the squared-polygonal structure of the state, conceptualized as a “territorial container”. This means that transterritorial forms of power are an exception reserved mainly for global and regional religious institutions. Aterritorial and post-territorial forms of power do not exist. The territorial map of power relations is framed and confined mostly in the squared-polygonal shapes of constitutional geometry.

Westphalian statehood is a closed statehood. In its initial forms, during the “long 19<sup>th</sup> century”, it did not contain rules of recognition of international law. Such rules emerged and started to be provided by constitutions during the 20<sup>th</sup> century, mostly after the Second World War. Thus, from a legal viewpoint, closed statehood prevailed until that moment of history. Moreover, Westphalian statehood was not supportive of migration. It was very preventive against migration flows. Consequently, closed statehood has been preserved also in this second, socio-legal aspect.

The combination of hierarchy and closed “container-like” territoriality led to the sustainment of exclusively vertical and state-centered constitutionalism. Supranational constitutionalism is incompatible with the Westphalian statehood and scheme of power. Westphalian constitutionalism is preventive of both “constitutionalization of international law” and “internationalization of constitutional law”. Furthermore, Westphalian statehood sustains only meagre societal constitutionalism, restrained within the confines of the nation state’s jurisdiction and limited mainly to the horizontal effect of human rights. Human rights and private actors’ opportunities are enabled, limited and granted only via national constitutionalism and through the national institutions of public power. Westphalian constitutionalism limits public power to state power. There is a clear public/private divide, where only government is possible, but not governance. In other words, the borderlines between the realms of the state, the economy, the private and the public sphere have been clearly defined and – at least in theory and in principle – well-guarded and observed.

Another important feature of Westphalian constitutionalism is the predominance of the political (*e.g.*, parliament, government, and head of state) over the expert (*e.g.*, courts and administration) institutions. Indeed, Westphalian constitutionalism has also been dependent on the balance between rule of law – requiring independence of non-elected expert institutions, such as courts and administrative agencies – and democracy,

imposing the supremacy of the political will of the nation, expressed through elective political institutions such as parliament, government and eventually president. It was preconditioned on the axiological balance between liberalism and democracy and the institutional balance between representation and democracy.<sup>34</sup> Nevertheless, Westphalian constitutionalism clearly promotes the primacy of political institutions over expert ones, in order to ensure the supremacy of the will of the people and thus of the principle of popular sovereignty.

#### 4. POST-WESTPHALIAN CONSTITUTIONALISM

Post-Westphalian constitutionalism is the phase of constitutional development that coincided with the spread of globalization in the decades after the fall of the Berlin Wall. Thus, post-Westphalian constitutionalism is also conceptually, historically, politically, and, last but not least, legally intertwined with global constitutionalism. Post-Westphalian constitutionalism also coincides with the emergence and spread of related phenomena such as global governance, transnational constitutionalism and, more recently, societal constitutionalism. Thus, it is embedded in an intellectual power grid and field of socio-legal tensions marked by the challenges to national territorial state and “constitutionalism within statehood”, as key political project of Western Modernity and constitutional superstructure of the Modern Western capitalist and industrial society.

The post-Westphalian age marked the period of a second Belle Époque of free movement of people and free exchange of information, knowledge, experience and values, which seems to have been if not ended, then at least largely impeded by the outbreak of the COVID-19 pandemic and the emergency regimes that have followed since 2019. The post-Westphalian epoch has been the time of promotion of global constitutionalism and the emergence of global governance. It was a period of endeavor to create supranational constitutionalism. Its positive side effects have been the promotion of human rights civilization beyond, above, and independently from state jurisdiction, the emergence of enhanced forms of

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34 See Brito Vieira, M., Runciman, D., 2008, *Representation*, Cambridge, Polity Press, pp. 29–63; Blokker, P., 2019, Populism as a Constitutional Project, *International Journal Of Constitutional Law*, Vol. 17, Issue 2; Blokker, P., 2019, Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism, *European Constitutional Law Review*, Vol. 15, Issue 3; Blokker, P., 2019, Varieties of populist constitutionalism: The transnational dimension, *German Law Journal*, Vol. 20, Issue 3; Blokker, P., Populist Constitutionalism, in: Torre, C. de la, (ed.), 2018, *Routledge Handbook of Global Populism*, London–New York, Routledge.

constitutional cooperation and the enhancement of horizontal, societal dimensions of constitutionalism. The ridding of the burden of territoriality, the rising awareness of the universal characteristics of the human being and the multitude of new opportunities for political cooperation, coordination and networking between both the people and the elites has been precious achievement of this phase of constitutional development. Nevertheless, post-Westphalian constitutionalism also gradually impeded and dismantled traditional roots, forms and procedures of democracy and parliamentarism, diminishing the chances for both popular (direct democratic) and parliamentary (political) control and accountability, and thus led to the establishment of an administrative-technocratic supranational governance. It also produced phenomena that have been difficultly reconcilable with some of the established constitutional principles, such as popular sovereignty, democracy, and separation of powers.

Post-Westphalian constitutionalism is characterized by the rise of power of technocracy in all of its forms – judicial technocracy, administrative-bureaucratic technocracy, and private technocracy. Judicial technocracy has been based on judicial activism and the gradual establishment of courts on national, international, supranational and global levels as a “global judicial empire”.<sup>35</sup> Administrative-bureaucratic technocracy has led to “agencification” not only in the EU, but also on the national and international levels. The administrative branch has acquired a political role (to the detriment of the political government and to an extent – parliament) mainly through next-step agencies. The bureaucratization and “technocratization” of politics and the politicization of bureaucracy stem out and are in line with the overall bureaucratization and the rise of the impact of technocratic knowledge on policy-making. These tendencies have been rather visible at the EU level, but have gained momentum also in the political orders of the states. The spread of global governance and the transfer of public functions to private actors has not only blurred the public/private divide, which has been of paramount conceptual importance for Westphalian constitutionalism, but has also led to the rise of public power accomplished by private technocracies. Thus, post-Westphalian constitutionalism has led to the predominance of the expert over the political institutions, which has created huge issues related to its democratic legitimacy from the viewpoint of traditional theories of representative constitutional democracy.

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35 Belov, M., Global Rule of Law instead of Global Democracy? Legitimacy of Global Judicial Empire on the Edge between Westphalian and Post-Westphalian Constitutionalism, in: Belov, M., (ed.), 2019, *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven, pp. 99–133.

Privatization and outsourcing of public functions to private actors has led to a situation where public power is not limited to state power, but includes also supranational, international and transnational sources of power. Moreover, with regard to human rights, they have been enabled, shaped and granted not only via national constitutionalism and through national institutions of public power, but also by actors of supranational constitutionalism and global constitutionalism. Imperial activist courts, promoting supranationalism, internationalization of constitutional law and constitutionalization of international law, such as the European Court of Human Rights and the European Court of Justice (CJEU), have played a special role in this.

Post-Westphalian constitutionalism has produced not only constitutionalization of international law and emergence of supranational and global constitutionalism, but also a rise of the sub-national levels and centers of power. Many sub-national units experienced a new appetite for secession. Specifically, the sub-national identities in the EU have been promoted for several reasons, one of them being the general impetus of the EU to promote diversity and pluralism of identities. Moreover, the EU could give size and scale to small and mid-sized communities which diminishes their desire to remain attached to the state in which they are historically included, and, due to this inclusion, also supposedly benefiting from military protection and access to a larger market. A clear example of such fostered regional and national identities, which experienced a push toward more autonomy and even independence, are Catalonia, Scotland, and, to a much lesser extent, Northern Italy.<sup>36</sup>

In addition, the post-Westphalian context allowed for the emergence of “societal constitutionalism”. It promoted the development of horizontal networks of constitutional relations between not only public, but also private actors of constitutional law. The horizontal effect of human rights is only one of the manifestations of this phenomenon. Much more important and groundbreaking have been the established possibilities for horizontal networking of power, authority and governance. The constitutional dimensions of society gained momentum during the post-Westphalian

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36 See Ragone, S., Territorial Politics of Regionalism in Italy between Integration and Disintegration, in: Belov, M. (ed.), 2021, *Territorial Politics and Secession. Constitutional and International Law Dimensions*, London, Palgrave, pp. 191–215; Solanes Mullor, J., The Catalan Secessionists’ Challenge: Reconciling Their Quest for Independence and Constitutionalism, in: Belov, M., (ed.), 2021, *Territorial Politics and Secession. Constitutional and International Law Dimensions*, London, Palgrave, pp. 215–243; Skoutaris, N., Between Two Unions: Brexit and the Secessionist. Challenges in the UK, in: Belov, M., (ed.), 2021, *Territorial Politics and Secession. Constitutional and International Law Dimensions*, London, Palgrave, pp. 165–191.

age and challenged the state-centered perspective of Westphalian constitutionalism. This has led to the fostering of the role of circles and networks as shapes of post-Westphalian constitutional geometry aimed at shaping and forming power relations.<sup>37</sup>

Post-Westphalian constitutionalism has been in a permanent search for a universal explanatory and ordering matrix for the emergent constitutional disorder, which followed the decreasing epistemic and normative forces of Westphalian constitutionalism since the end of the Cold War. This task has been complicated and impeded by a range of factors: the pluralism of legal orders that have to be ordered, the persistence of the Westphalian constitutional traditions (especially nationalism), the unfolding of Post-Modernity, with its lack of single, clear and established truths, the subsequent disbelief in universal explanatory and ordering models, etc.

Despite these obstacles, post-Westphalian constitutionalism has used mainly two theories for explaining and ordering the emergent “constitutionalism beyond statehood”. These are supranational multilevel constitutionalism,<sup>38</sup> which was furthered, paralleled and challenged by constitutional pluralism.<sup>39</sup> Multilevel constitutionalism has been the main model used for the construction of the institutional design of the EU. It had the advantage of being approbated in the context of the national and multicultural federations, but suffered from the general loss of explanatory and ordering power of hierarchy in the post-Westphalian context. Constitutional pluralism has been mainly used for explaining the judicial dialogue of international, supranational and national apex courts.<sup>40</sup> In fact, judicial dialogue and constitutional pluralism have been key features of post-Westphalian constitutionalism.

In the context of globalization and the emergence of supranational constitutionalism, more precisely in the form of EU constitutionalism,

37 See Belov, M., 2019, Revolution, Contestation and Transition: Towards a New Global Constitutional Order? *The Global blog of the Graduate Institute of Geneva*, (<https://theglobal.blog/2019/01/14/revolution-contestation-and-transition-towards-a-new-global-constitutional-order/>, 10. 11. 2022).

38 See Petersmann, E. U., 2017, *Multilevel Constitutionalism for Multilevel Governance of Public Goods*, Oxford, Hart, pp. 1–416; Cananea, G. della, 2010, Is European Constitutionalism Really “Multilevel”?, *ZaöRV*, 70, pp. 283–317; Pernice, I., 2015, Multilevel Constitutionalism and the Crisis of Democracy in Europe, *European Constitutional Law Review*, Vol. 11, Issue 3, pp. 541–562, doi:10.1017/S1574019615000279.

39 See Avbelj, M., Komarek, J., 2012, *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart, pp. 1–424.

40 For the concept of apex courts, see Schlegel, S., Activism as Defense: The Role of Courts in Shaping the Relationship between Constitutions and International Law: A Comparison of the Apex Courts of Switzerland, Germany and Austria, in: Belov, M., (ed.) 2021 *Courts and Judicial Activism under Crisis Conditions: Policy Making in a Time of Illiberalism and Emergency Constitutionalism*, Abingdon, Routledge, pp. 43–61.



sovereignty seems to cease to be the absolute, holistic, and exclusive concept that has been part of the Westphalian constitutional heritage. There are visible processes of fragmentation of sovereignty and emergence of “sector-specific” sovereignties (e.g., financial, humanitarian, military, etc.). This is especially true for the Eurozone member states that have transferred to great extent their financial sovereignty to the EU and the European Central Bank (ECB). Nevertheless, some recent decisions of powerful constitutional courts of the EU Member States, e.g., the *Weiss II* decision of the German Federal Constitutional Court, challenge the stability of such transfers.

Some powerful international courts, e.g., the European Court of Human Rights, *de facto* take sovereign decisions related to important human rights’ choices. They fill in the content of human rights provided by both the national constitutions and international treaties (e.g., the European Convention on Human Rights) via case law, which is formally inferior to national constitutions. Nevertheless, these courts, and particularly the European Court of Human Rights, are determining the substance of human rights standards especially in countries in which there is no activist constitutional court to give concrete shape and form of the rights provided by the national constitution. This leads to substantial preference and decisive substantial influence of international law over national constitutional provisions due to the open texture<sup>41</sup> of the constitutional provisions and the judicial activism of international and supranational courts challenging the formal hierarchical supremacy of the constitution over international law.

Such courts – more precisely the European Court of Human Rights and to a lesser extent the European Court of Justice – are in fact functioning as humanitarian sovereigns, taking sovereign decisions related to human rights without real democratic empowerment. In that regard, post-Westphalian constitutionalism features the emergence of a global judicial empire where legitimacy stems not from democracy but from rule of law.<sup>42</sup>

The principles of sovereignty and constitutional supremacy have been the pillars of Westphalian constitutionalism. They have been based on hierarchy as key explanatory and ordering matrix of Westphalian constitutional geometry. During post-Westphalian constitutionalism, in the context of the development of the supranational constitutionalism of the EU, the concept of constitutional identity has been promoted as a functional alternative to rigid, hierarchical, holistic and exclusive sovereignty.

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41 On the open texture of law, see Hart, H. L. A., 1997, *The Concept of Law*, Oxford, Oxford University Press, pp. 124–136.

42 Belov, M., Global Rule of Law instead of Global Democracy? Legitimacy of Global Judicial Empire on the Edge between Westphalian and Post-Westphalian Constitutionalism, in: Belov, M., (ed.), 2019, *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven, pp. 99–133.

Initially, constitutional identity was launched as an instrument for ensuring the co-existence of the national and supranational constitutional orders, both as safeguard of and softer replacement for sovereignty. Constitutional identity was a tool for safeguarding the constitutional core while promoting the relative primacy of EU law over the national constitution. Nevertheless, in its subsequent development, in the light of the practice of some constitutional courts, constitutional identity started performing the opposite function. It gradually began to be used as a hidden neo-nationalist device for securing sovereignty against standards stemming from international and supranational law. Such tendencies are visible in the *Taricco II* decision of the Italian Constitutional Court, the *Weiss II* decision of the German Constitutional Court, and especially in the recent case law of the Polish Constitutional Court.

The relative primacy of supranational law – the EU law – and “soft” and nuanced decisions with regard to sovereignty and hierarchy, such as “sharing” and “pooling of sovereignties”,<sup>43</sup> are one of the most important features of post-Westphalian constitutionalism. They are challenges to hierarchy as the key ordering and explanatory matrix of Westphalian constitutionalism. They are also attempts at establishing a less hierarchical scheme of power, capable of ordering and explaining the co-existence of a multitude of power centers. It seems that this attempt has been only partially successful. It was capable of maintaining for decades the integrity, authority, legitimacy and efficiency of a composite quasi-federal constitutional order – the constitutional order of the EU – while, on the other hand, not offering an actually durable, clear and stable solution for the future of EU integration. Thus, it brought the European integration to a stalemate of a legal order in the transition toward constitutionalism, without being able to take further steps and in a position that can be metaphorically compared to a “frozen kingdom”.

Post-Westphalian constitutionalism has also been a phase in which open statehood has been promoted, thus contributing to the dismantling of closed statehood and the state as a “territorial container”. The opening of statehood was accomplished with view to the provision of rules of recognition<sup>44</sup> of international and supranational clauses in the constitutions. The EU integration clauses and the clauses that determine the system for

43 See Heise, V., Pooling of Sovereignty – A New Approach?, in: Biscop, S., (ed.), 2005, *E Pluribus Unum? Military Integration in the European Union* Academia Press, pp. 43–53; Peterson, J., 1997, The European Union: Pooled Sovereignty, Divided Accountability, *Political Studies*, XLV, pp. 559–578; Wallace, W., 1999, The Sharing of Sovereignty: The European Paradox, *Political Studies*, Vol. 47, Issue 3, pp. 503–521, doi:10.1111/1467-9248.00214.

44 See Hart, H. L. A., 1997, pp. 124–136.

implementation of international treaties and their hierarchical status in the domestic legal orders have been at the epicenter of this “legal opening” of the constitutional orders in the context of post-Westphalian constitutionalism. There has been also an empirical opening that has resulted in global and regional migration, in the deconstruction of the container-like territoriality, the increasing mismatch between state power, state people and state territory, as key elements of statehood,<sup>45</sup> and in the emergence of “spaces of flows”. The extreme version of the material and empirical opening of statehood has been the rise of forms of “fluid statehood”, global fluidity of the demos, alternative forms of territoriality, and the emergence of post-territoriality, transterritoriality and aterritoriality.

The development of global constitutionalism and global governance, during the post-Westphalian age, has conceptually and pragmatically challenged hierarchy. The emergence of a multitude of power centers, the blurring of the public/private divide and the establishment of networks of national, sub-national, international and supranational actors – both public and private – has partially dismantled old and promoted new matrixes for the ordering of power schemes and relations. The constitutional geometry of post-Westphalian constitutionalism has been based not only on hierarchies and pyramids (used, *e.g.*, to order national constitutional orders including federations), but also on networks and circles.

Thus, hierarchy, as the key form of Westphalian constitutional geometry, has been challenged twofold, by competitive ordering matrixes of the post-Westphalian constitutional geometry, *i.e.*, networks, circles, etc.: first, by the relative primacy of the EU, and second, by the schemes of global constitutionalism and global governance. Moreover, the hierarchy of sources of law has become a “pyramid with a broken peak”, not only due to the relative primacy of the EU law and the substantial primacy of international human rights standards in systems with activist jurisdictions, such as the European Court of Human Rights, but also due to the judicial activism of domestic constitutional courts and their performance as *de facto* positive constitutional legislators.

## 5. NEO-WESTPHALIAN CONSTITUTIONALISM

Neo-Westphalian constitutionalism seems to be the latest trend in the development of constitutional and international legal and political orders. It started unfolding in the context of the constitutional polycrisis<sup>46</sup> we

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45 Jellinek, G., 2010, *Allgemeine Staatslehre*, Nabu Press, pp. 1–835.

46 On the concept of constitutional polycrisis, its shapes and the challenges it poses to constitutionalism and constitutional law, see Belov, M., *Rule of Law and Democracy*

have been experiencing for years – quite visibly since 2009. It has gained momentum since 2019, in the course of the global reshaping of the world order through initial world disorder, which is in dire need of (re)ordering. Prior to 2019, it appeared that the clash is between nationalism and globalism, and the subsequent tension, resulted from the counter position between Westphalian and post-Westphalian constitutionalism. However, since 2019 it has appeared likely that the future does not belong to either nationalism or globalism, in their traditional, experienced and established forms. There are trends in global regionalism, combining features of both globalism and neo-nationalism, that produce a novel form of constitutionalism, as a cognitive and epistemic paradigm and ordering scheme for the global disorder. This is neo-Westphalian constitutionalism.

The pillars of a neo-Westphalian world would be the super states and the regional unions, while the traditional territorial nation state would continue its demise. It is likely that several big power blocks would be established, that would claim global dominance and strive for global power, oscillating between fellowship and hostility. The neo-Westphalian power puzzle would consist of big composite states – mostly federations or quasi-federal systems – which would have the features of regional unions. Such states might be the USA, Russia, China, India, Brazil, South Africa, etc. Additionally, there would be regional unions with enhanced integration, although preserving the overall outlook of an international organization (e.g., in Africa and South America), and supranational constitutional quasi-federal orders, such as the EU. Last but not least, the neo-Westphalian power grid would also most likely include non-state power centers, e.g., global religions, global corporations, etc. The neo-Westphalian power game would be played both in the realm of territoriality and in the new digital spheres of power, such as Internet, its social platforms and even emergent new post-territorial realities, such as the Metaverse.

Thus, one can expect trends toward societal and power singularity, where the power in the traditional spatial and territorial realm will coincide, overlap, compete and expand also into the digital world. Such societal singularity, leading to a novel complex and perplexed power grid, composed of power fields within and beyond the physical world, in the realm of the digital, requires novel paradigms and approaches. They should provide novel answers to the interdependencies of the normative, factual, digital, and imaginary, offering also new schemes for separation and control of power and accountability of power players. This will be one

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in Times of Transitory Constitutionalism, Constitutional Polycrisis and Emergency Constitutionalism: Towards a Global Algorithmic Technocracy?, in: Belov, M., (ed.), 2023, *Rule of Law in Crisis Constitutionalism in a State of Flux*, Abingdon, Routledge (forthcoming).

of the main tasks of a proper digital constitutionalism, going beyond the current emphasis on algorithms and big data.

Hence, the future seems to belong to a constitutional geometry of power, which would be composed not of exclusive jurisdictions but rather of webs, networks and a range of spheres. This will probably produce a bulk of cross-cutting jurisdictions and competing claims for power and authority. Different power levels will be cross-cutting different jurisdictions, raising divergent power claims. Territorial forms of power will co-exist in a tense relation with transterritorial, post-territorial and aterritorial forms of powers, with their distinct nets of political players, which will mostly overlap on the higher levels and differ on the lower levels of the power grid. To sum up, the neo-Westphalian constitutional world will resemble a Kandinsky painting,<sup>47</sup> where hierarchies and pyramids co-exist and are combined with networks, circles and other forms of constitutional geometry.

What is significant is that there will be no single or predominant model for ordering constitutional orders, as opposed to in Westphalian constitutionalism, where power was confined and channeled through the institutional scheme of the territorial nation state. Thus, we can expect a plurality of forms for mastering the global power (dis)order, some of which will build upon the heritage of the national state or the multicultural state, while others will lean toward systems of “power beyond the state”, ranging from international organizations to administrative unions, common markets and free trade zones, military unions and even quasi-federal supranational constitutional orders.

Hence, neo-Westphalian constitutionalism contains both Westphalian (actually neo-Westphalian) and post-Westphalian features, while having its own characteristics as well. The neo-Westphalian features of neo-Westphalian constitutionalism are currently exposed in the context of the ongoing clash between neo-nationalism and neo-liberalism, where sovereigntism is challenging globalism. We are witnessing the reemergence of the relevance of jurisdictional and territory-focused policies, leading to the partial reclaiming of ultimate jurisdictional control by the public power. The divorce between liberal, democratic and revolutionary-populist trends in constitutionalism is producing reemergence of identity politics.<sup>48</sup>

The post-Westphalian features of neo-Westphalian constitutionalism consist of the preservation and further existence of supranational constitutional orders, such as the EU, or supranational regimes with elements of sector-specific constitutionalism, such as the United Nations or the Coun-

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47 This comparison is borrowed from Martti Koskenniemi's speech delivered at the 2014 IACL World Congress, in Oslo, Norway.

48 See the works of P. Blokker cited above.

cil of Europe. In a neo-Westphalian context one can expect the emergence of regional and global regulatory regimes, as elements of global administrative law, and the preservation of elements of global constitutionalism. New forms of imposed territoriality (e.g., territorial restraints due to pandemic or security reasons) would probably be combined with elements of open statehood and the continuation of the deconstruction of the state as a “territorial container”. The cumulative effect will be a rather perplexing and post-modern construction of co-existing forms with divergent ontology, teleology and axiology, and the further expansion of societal constitutionalism and post-territorial constitutionalism, in the context of constitutional pluralism.

The main aim of neo-Westphalian constitutionalism is to be able to manage and sustain a legal structure capable of maintaining a multi-centric global legal (dis)order. Such a system must be able to establish principles for global co-existence of power centers and actors with divergent axiologies, institutional designs, and structures of authority and legitimacy, leading to coherent legal orders within the power entities and coherent external relations capable of maintaining peaceful coexistence. Unfortunately, neo-Westphalianism might not necessarily be a variant of liberal-democratic constitutionalism. It may also take the shape of global administrative law (detached from claims for democracy), technocracy, post-democratic authoritarian formal constitutional order, or a non-homogeneous mixture of constitutionalism, authoritarianism, and administrative and judicial technocratic governance.

## 6. INSTEAD OF CONCLUSION: THE EU AS AN EXAMPLE OF COMPOSITE CONSTITUTIONAL ORDER, STRETCHED BETWEEN WESTPHALIANISM, POST-WESTPHALIANISM AND NEO-WESTPHALIANISM

The future will show whether post-Westphalian constitutionalism is only a transient and rather short-lived period in constitutional history, or whether it will have a deeper and long-lasting effect on the constitutional civilization. It will also show whether Westphalian constitutionalism is also model from the recent past and thus an artefact of constitutional history. It also remains to be seen whether the current halt of globalization is only a short break in its expansion, caused by the COVID-19 pandemic in combination with geopolitical instability of the neo-liberal scheme for ordering of constitutional orders, or whether it is in fact the end of the post-Westphalian constitutional civilization. It seems that in the forth-

coming years we will see whether post-Westphalian constitutionalism will last or be dismantled and deconstructed. In the latter case the question is whether we can expect it to be replaced by a novel universal explanatory and ordering matrix, e.g., the neo-Westphalian constitutionalism, or there will be a multitude of models with Westphalian, post-Westphalian and neo-Westphalian features, which will coexist – at least for a time. In other words, there are three main possible scenarios: neo-nationalism, further promotion of globalism, and neo-globalism in the form of neo-regionalism. The first scenario can be defined as Westphalian, the second as post-Westphalian, and the third as neo-Westphalian.

These scenarios are quite interesting, with view to the future of a particular system of federalism beyond statehood. This is the EU, as the most advanced form of supranational constitutionalism, stretched between Westphalian, post-Westphalian and neo-Westphalian constitutionalism.

It should be mentioned that the EU, despite its nature as the first well-developed form of supranational constitutionalism and thus of constitutionalism beyond statehood, has several important features that are typical of Westphalian constitutional and international law – and hence of Westphalian constitutionalism. The EU is a union of states. This makes it dependent on the principles *pacta sunt servanda* and state consent. The EU is based on hierarchy. Hierarchy is the key principle for ordering its system of sources of law, its institutional design, and also the relationship between the EU legal order and the constitutional systems of the EU Member States (although with modalities when it comes to the principle of the relative primacy of the EU law over national constitutions). This is due to the fact that, in principle, sovereignty and the “competence-competence” of the member states are still formally preserved, keeping their position and role as “masters of the treaties”. Hence, the relative primacy of the EU law is a compromise construction that still takes into account the principle of constitutional supremacy. The Member States preserve the predominant territoriality of their state power, framed in the traditional form of state jurisdiction. Furthermore, both the EU and its Member States are supposed to function on the basis of representative party democracy, where the democratic control and accountability of expert institutions is a key element.

There are also the several post-Westphalian features of the EU. The EU is preconditioned and dependent on the concept of open statehood. It is based on shared and pooled sovereignty, on the fragmentation of sovereignty and the existence of “sector-specific” sovereignties, and on the relative primacy of EU law over the domestic law of the EU Member States. The EU integration has led to the rise of the political role of elitist and

expert non-elected institutions, such as the ECB, the EU agencies, and the CJEU. It has further deepened the crisis of hierarchy, challenging both the national sovereignty and the constitutional supremacy. The EU integration, in conjunction with globalization and the mobility revolution, has furthered regional and global fluidity of the demos.

The near future will show how the EU will look and perform in the neo-Westphalian context and in a world where the clash of neo-liberalism and neo-nationalism, democracy, authoritarianism and technocracy will likely produce a patchwork of global regionalism. Thus, an increasingly technocratic and regionally entrenched EU, engaged in delimitation of its own identity in a rather hostile regionalized world, seems to be less of a promise and more of a challenge to constitutionalism, as we have inherited it from our ancestors. Another challenge will be the rise of alternative projects of federalism, beyond statehood, which might be unfolding within, in parallel or beyond the EU, on a multilateral or bilateral basis, such as *l'Europe à plusieurs vitesses* (e.g., as a union of “core European states”, speeding up their integration while disregarding the “periphery”), the Visegrád Group, or the Three Seas Initiative.

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## TRI MODELA ZA UREĐENJE USTAVNIH POREDAKA

Martin Belov

### APSTRAKT

Ovaj rad istražuje ustavne tranzicije sa stanovišta tri ponuđena modela. To su vestfalski konstitucionalizam, postvestfalski konstitucionalizam i neovestfalski konstitucionalizam. Analiza se fokusira na krizu dve glavne paradigme vestfalske moderne – teritorijalnoj moći i hijerarhiji koja se projektuje u ustavnoj supremaciji i političkom suverenitetu. Rad istražuje kako globalizam i neoregionalizam problematizuju ova dva glavna oblika vestfalske ustavne geometrije. Diskusija se vodi o metamorfozama stubova konstitucionalizma u kontekstu globalizacije kao holističkog i univerzalnog projekta koji se odvija poslednjih decenija, kao i aktuelnih trendova redefinisanja globalizacije u odnosu na globalni regionalizam i postteritorijalno tehnokratsko upravljanje.

**Ključne reči:** kriza teritorijalnosti, hijerarhija, suverenitet, tranzicija, konstitucionalizam mimo državnosti, nadnacionalni konstitucionalizam, globalni konstitucionalizam, konstitucionalizacija međunarodnog prava, internacionalizacija ustavnog prava, regionalizam.

#### Article History:

Received: 22 September 2022

Accepted: 25 November 2022