

Book Reviews

The Politics of Coalition: How the Conservative-Liberal Democrat Government Works, by R. Hazell and B. Yong, (Oxford: Hart Publishing, 2012), 278pp. + xii, hardback, £19.95.

A political and constitutional development as significant as the creation of the Conservative/Liberal Democrat Coalition Government in May 2010 should be studied by academic lawyers, historians and political scientists. But when? And how?

Professor Robert Hazell and his team at the Constitution Unit at UCL have built up a deserved reputation over the past 20 years of producing authoritatively researched reports on recent and possible constitutional developments. They have not just analysed but have also played a part in the process of constitutional reform, notably in examining how proposals can be made workable. As the authors acknowledge in their preface:

“In academic literature generally, there are few studies of how coalition government works in practice, That is part because of difficulties of access, and in part because of the academic predilection for theoretical modelling for studying the formation and termination of coalitions, but not their actual operation.”(p.vii)

The Constitution Unit work through obtaining the trust of insiders, whom they interview (nearly 150 for this book). The support of Sir Gus, now Lord, O’Donnell, the Cabinet Secretary of the time was crucial to opening doors.

I should declare an interest as Director of the Institute for Government which has been active in working with politicians and civil servants in the Coalition Government. Our focus is more on how the coalition has operated in practice, identifying obstacles to its work and recommending possible changes which might improve its effectiveness, such as strengthening the resources available to the Deputy Prime Minister.

There are two related risks in the Constitution Unit’s approach. First, that the authors are too close to their sources. There is a whiff of a Panglossian best-of-all-possible-worlds inhabited by well-intentioned civil servants, ministers and advisers. It is the view of the ministerial and mandarin class rather than the backbencher. There is sometimes a bit too much about structure and machinery, which are over-taken by events, and not enough about the rough and tumble of politics and the jealousies, ambitions, and dislikes of politicians. Moreover, while the book is comprehensive in describing the operations of the centre, and relations between David Cameron and Nick Clegg, and their offices, its survey of other departments is patchier, and, unfortunately, does not cover the Treasury in any detail. Many of its underlying judgments are sound, notably the view of Dr Ben Yong, the main co-author, quotes a Liberal Democrat peer that: “What we have is a coalition government, not a coalition parliament” (p.92). Dr Yong argues that Parliament has seen unprecedented rebellions from the government’s supporters, from both parties. The Government has survived so far thanks to its majority. But,

he warns, that if the coalition collapses, it will be in Parliament that it happens (pp.114–15 and p.134).

Secondly, that events quickly render their work out-of-date. *The Politics of Coalition* is an account of the first 18 months or so up to December 2011; and, even by the time of its publication in June 2012, some of its initial judgments looked over-optimistic, as the authors themselves acknowledge. The picture of a harmonious and collegial government in its relationships and working practices was less convincing by mid-2012, let alone by spring 2013. The fair conclusion on the first 18 months—the period of far-reaching initiatives on health, tuition fees, schools and welfare reform, and organisation of the police—that Coalition Government can be bold and decisive does not hold after three years, when coalition produces a mutual checkmate and indecision. Moreover, the acquiescence by the Liberal Democrats in 2010 in many radical Conservative policies on health and education has not lasted and the ideological differences have surfaced, preventing further reforms.

Nevertheless, even if this is a preliminary view, a first draft of contemporary history which will be revised in future years, it is invaluable in providing a well-researched anatomy of the structure of the coalition in its early stages. This will be a crucial building block for academics seeking to analyse the period in the years ahead. Interviews with participants done at the time will be hard to replicate in five to ten years' time when memories have faded and e-mails may well have been deleted.

The immediate, as well as lasting, value of the book lies in some of the lessons it draws from the process of coalition formation in May 2010 which may be relevant in 2015 or in later parliaments if no single party gains an overall majority. It cannot be stressed often enough that, while as Dr Yong argues:

“the hung parliament following the 2010 general election was widely predicted, what came as a surprise to many was the formation of a Conservative-Liberal Democrat coalition determined above all by parliamentary arithmetic and political contingency.”(p.48)

Conspiracy theorists on the left and right see the formation of the coalition as a plot involving Lord O'Donnell and people like Professor Hazell and myself who supported the publication before the election of a chapter of the Cabinet Manual setting out the conventions on the formation of governments in a hung parliament. That did not directly cause the formation of a coalition. The civil service played virtually no part in the negotiations over the long post-election weekend, apart from providing a room in the Cabinet Office in 70 Whitehall. Other outcomes, such as a Conservative minority government, were as, if not more, likely and remain the retrospective favoured option of the Conservative right. David Cameron's offer to the Liberal Democrat on the day after the election is the reason the United Kingdom has its first peacetime coalition government since the 1930s.

Yet, despite not being expected, the process of coalition formation went smoothly during May. The authors set out the various stages—deciding the balance of ministers, and allocating portfolios; and the writing of the 3000 word interim coalition agreement and, then, the nearly 16,000 word programme for government. Civil servants in the Cabinet Office were involved with preparing the latter

document in drafting, policy advice and, above all, costing. But other Whitehall departments were only shown relevant chapters shortly before publication. At the time, the emphasis was on how well everything had gone; how well ministers from both parties got on, and how much they agreed. There was also a third procedural agreement, setting out how policies were to be determined, in particular the Deputy Prime Minister's right to be consulted about all government policies and over ministerial appointments from his own party. As important as the formal structures for dispute resolution were informal contacts and meetings between key ministers and advisers.

Yet the very speed and harmony of early coalition formation were deceptive. The Liberal Democrats quickly recognised that they needed more support if they were to play a full role both at the centre and within departments. But proposals to address this asymmetry of advice—for instance, in the Institute for Government's "United We Stand" report in September 2010—met with an initially cool response at the top of Whitehall from officials worried about creating rival power bases, and they were not accepted until the following year.

The passage of time has also exposed flaws in the process of coalition formation, and especially in the two initial policy statements. Many participants, from both coalition parties, say they would behave differently in future. Professor Hazell offers a valuable chapter of reflections on "Lessons for the Future", being both cautious and prescient about the mid-term renewal process, arguing against a comprehensive review. By the mid-term of the parliament, both parties, and especially the Liberal Democrats, were keen to emphasise their distinctiveness rather than being willing to compromise on contentious issues, and thereby risking further dissent from their party supporters.

Many MPs, and political journalists, particularly those of a more partisan bent, regard the coalition as an aberration—a result of freak electoral arithmetic and special political factors which neither party now wants to repeat. But the critics of the coalition—notably on the Tory right who long for a single party government—forget that party leaders are not in charge but have to manage with the cards which the electorate deals them. No one knows whether there will be another hung parliament in 2015, or what the balance of parties will be.

Professor Hazell rightly quotes Lord O'Donnell, "Prepare for all possible outcomes ... Don't assume the future is a reflection of the past" (p.190). If a hung parliament is a possibility, then the parties need to prepare and behave on that basis. To keep open, or least not rule out, the possibility of coalition, the parties need to maintain working relations with each other, as Labour had failed to with the Liberal Democrats in 2009–10. In addition, all parties should, Professor Hazell maintains, write their manifestoes with coalition in mind, as well as single party government (p.198). One of the curious features of the pre-2010 period was that, despite the Liberal Democrats' thorough preparations for coalition negotiations, they had included a pledge on scrapping tuition fees which in the economic circumstances of 2010 clearly could not be honoured in practice in any coalition, with Labour let alone the Tories. There is a fine balance between parties establishing their distinctiveness on their values and policies, and putting forward unattainable pledges which may subsequently lead to charges of betrayal.

Professor Hazell also rightly argues (p.199) that the parties also allow more time after an election for negotiations to occur. The five days in May of 2010 was long by the traditional British standards of an instant transfer of power, but short by the standards of most European democracies, including both Scotland and Wales. Some of the problems which have subsequently emerged over the initial policy statements might be avoided in future if there was more time for negotiations, even a few days. There is also a strong case, as the book argues, for holding a formal vote of confidence in the new Prime Minister, an investiture vote, as happens in the Scottish Parliament, which would confirm the outcome of the negotiations. This would occur before the formal State Opening of Parliament and the Queen's Speech debates on the new government's programme. That would remove any uncertainty.

So far the British political system has adapted to the existence of the coalition in a typically pragmatic way—changing procedures informally rather than formally. The Fixed Term Parliaments Act, setting a five year term with restricted over-ride procedures, is linked to the existence of the coalition in political terms but not legally. You could have a coalition without a fixed five year term and a single party government with it. However, if there is another hung parliament or parliaments, then the conventions which have proved flexible and adaptable since 2010 may have to be revised. *The Politics of Coalition* is only the first edition. Other, later, editions will be needed.

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Democracy and Constitutionalism in India—a Study of the Basic Structure Doctrine, by Sudhir Krishnaswamy, (Oxford University Press India, New Delhi, 2011), 229pp. + xxxiii, paperback, £12.

Sudhir Krishnaswamy has put forward one of the most comprehensive and convincing defences of the basic structure doctrine and its application in India. He traces the development of the doctrine from the *Kesavananda Bharati* case¹ up to the present day and argues that basic structure review is an independent form of judicial review that applies not only to constitutional amendments and primary legislation at large, but to all forms of state action. He backs this argument by contending that the doctrine has a “sound constitutional basis” in India, by which he means that it is legitimate. The book's greatest strength is the analytical clarity and focus with which Krishnaswamy has explored and defended the doctrine against the charges that are usually levelled against all forms of constitutional judicial review. The sophistication with which he argues in favour of a reconciliation of democracy and constitutionalism is equally commendable. In what follows, I shall outline his principal arguments and rejoinders to general criticisms. Although I agree with most of Krishnaswamy's contentions, I believe that there are some significant questions that he has left unanswered in assessing the doctrine's legitimacy.

¹ *Kesavananda Bharati A.I.R.* 1973 S.C. 1461.

At the outset, Krishnaswamy clarifies that his arguments only apply to Indian constitutional adjudication. While some of his arguments may be relevant in other jurisdictions, he offers no *general* theory of judicial review of constitutional amendments (pp. xxxii–xxxiii). He then begins his exploration of the doctrine’s constitutional basis in Ch.1 by critically evaluating the two separate arguments *initially* accepted by Indian courts for reviewing constitutional amendments. The first is what he calls the “express limits” argument whereby it is contended that, like all other legislation, constitutional amendments too must comply with art.13 of the Indian Constitution—which requires “laws” to be consistent with the Constitution’s fundamental rights provisions. Krishnaswamy convincingly rejects this argument by showing how it would be problematic to not differentiate between legislative power and amending power (contained in art.368), given the differences in their nature and scope (pp.5–11). The tenor of his disagreement with contrary views lies in their inability to be consistent with the Indian Constitution as a whole; while he does see some force in the *Marbury v Madison*-type justification for an inherent power of review, Krishnaswamy rightly points out that accepting such a justification requires textual support from the constitution itself (pp.13–14).

The second argument for reviewing constitutional amendments—and the one that Krishnaswamy endorses—is the essence of Chief Justice Sikri’s interpretive approach in the *Kesavananda* ruling, i.e. that there are *implied limits* on Parliament’s amending power that can be derived through a “structural interpretation” of the constitution (pp.31–40). Krishnaswamy also illustrates how courts have subsequently shied away from answering certain “foundational questions” vis-à-vis the basic structure doctrine’s constitutional basis (pp.40–42). In this respect, he must be commended for developing a coherent constitutional basis that derives implied limits from within the constitution’s express provisions. In Ch.2, the author explains and supports the broadening scope of the basic structure doctrine, particularly its gradual extension to the exercise of emergency powers and to “state action” (which encompasses both ordinary legislative and executive action). Although currently Indian law does not allow the basic structure doctrine to apply to ordinary legislation, the author argues that this position is unsatisfactory and that it ought to be changed, especially since arts 245 and 246 of the Indian Constitution require all powers to be exercised “subject to the provisions of the constitution” (pp.60–68).

In the next chapter, Krishnaswamy sets out the types and intensity of basic structure review. He argues that when the doctrine is applied to constitutional amendments, it should be viewed as an “independent substantive judicial review that evaluates whether constitutional amendments damage or destroy overarching constitutional principles central to the identity of the constitution” (pp.80–86). The author uses the *Ismail Faruqi* case² to illustrate how the basic structure doctrine ought to apply to the exercise of ordinary legislative power; he emphasises that the challenge to the constitutionality of the statute in that case was based on constitutional *principles* that “cannot be traced to particular provisions of the constitution” and that represented what the court had identified as “basic features” of the constitution (pp.102–107). Krishnaswamy further contends that when it comes to the requisite level of scrutiny, the prime concern in every case “is the

² *Ismail Faruqi* (1994) 6 SCC 360.

maintenance of the normative identity of the constitution by ensuring that the core constitutional principles are not damaged or destroyed” (pp.118–119). In Ch.4, he argues that Indian courts are committed to identifying “basic features”—through a common law adjudication technique—as key constitutional *principles* (as opposed to constitutional *provisions*) that shape its “normative identity” (pp.133–137). The central argument he makes here is that basic features ought to be identified at “an appropriate level of abstraction” for ease of management and preservation of the right standard of scrutiny; identifying “democracy” as a basic feature is likely to give more flexibility to both courts and amendatory mechanisms (therefore, the “right” level of abstraction) rather than identifying that feature as “*parliamentary* democracy” (pp.141–142). Moreover, he concedes that identifying basic features is inherently prone to disagreement and adds that such disagreement in itself is not fatal as long as the identified features are grounded in the text of the constitution (pp.151–164).

The fifth and final chapter of Krishnaswamy’s book presents perhaps his most useful contribution, for it is here that he argues how and why the basic structure doctrine is legitimate. The analytical clarity with which he discusses legitimacy is praiseworthy; he divides his discussion on legitimacy into three parts: legal, moral, and sociological. The doctrine’s legal legitimacy is based by and large on a “structuralist interpretation” of the constitution that takes due account of “multi-provisional implications” that are sensitive to context (pp.178–185).

With moral legitimacy, the author responds to three primary criticisms of the doctrine: that it is an undemocratic constraint, an illegitimate use of judicial power, and an instance of judicial supremacy over a sovereign legislature. Krishnaswamy rejects the first by asserting that the basic structure doctrine envisages what Bruce Ackerman put forth as a “dualist” model of democracy, distinguishing between a decision by *Parliament* and a decision by the *People* (pp.192–198). In reply to the charge that judicial review is illegitimate, the author contends that such a view “overemphasizes the representative character of political institutions and underplays the democratic pedigree earned by non-representative institutions” (p.221; pp.198–206). He counters the third criticism by asserting that parliamentary sovereignty is a concept that is alien to the Indian Constitution inasmuch as it finds no support from the text of the constitution. He submits that India has “clearly adopted the American model of constitutionalism with limited government and strong judicial review” (pp.207–210). The author criticises views that equate the basic structure doctrine with judicial supremacy for being misguided and divorced from the doctrine’s “true nature and practice” (pp.211–213); as a corollary of the “damage or destroy” standard of review and the “general level” at which basic features are identified, only very extreme cases are amenable to basic structure review (pp.213–215). This is backed up by the very small number of cases where the doctrine has been used to strike down state action. Finally, he contends that basic structure review promotes dialogue between institutions, thereby making it democratic (p.214).

Despite postulating a very elaborate justification of the doctrine, I believe that Krishnaswamy has left some critical questions unanswered. My main concern here is with his discussion of the doctrine’s legitimacy. In terms of legal legitimacy, Krishnaswamy has ignored the pitfalls that usually arise when one is trying to give

a “structuralist interpretation” to the constitution. By endorsing a contextual approach, he has overlooked the *problems* that can arise when there is considerable disagreement over the history and ‘true meaning’ of a constitutional provision. The more difficult issue here lies in the fact that the constitution already confers a democratic mandate for *some* types of interpretation, but not expressly for the basic structure doctrine; it is not easy to accommodate the doctrine even by implication because an elaborate amendment procedure is already provided for without any express substantive limitation. To this extent, the doctrine inevitably strains the reconciliation between democracy and constitutionalism. Moreover, an investigation into “multi-provisional implications” arguably leaves the law in too high a degree of uncertainty.

With moral legitimacy, Krishnaswamy’s endorsement of a dualist democracy is more controversial: how do courts go about distinguishing a decision by “the People” from one by Parliament? This is especially problematic since—notwithstanding procedural shortcomings—the latter is believed to be an expression and representation of the former’s will. Furthermore, the author does not fully elaborate on what authority courts may have to declare that India is a dualist democracy—if indeed they made such an implied declaration by adopting the basic structure doctrine. After all, there are a number of other interpretations of the Indian Constitution, a popular one being Lijphart’s “consociational democracy”. The objection here arises due to the author’s open-ended account on why courts are (democratically) the right institution to make such a declaration. Greater elaboration of the “democratic pedigree” of non-elected institutions would have been welcome. By leaving the question of where sovereignty truly lies unanswered, Krishnaswamy has perhaps left his account too open-ended:

“I have proposed that the best understanding of the basic structure doctrine and sovereignty in a political and legal sense will require the development of a new account of sovereignty itself and this is a task that I will take up on another occasion.”(p.220)

Moreover, reliance on the *practice* of infrequent intervention is perhaps not enough to justify the doctrine *theoretically*.

Despite these criticisms, Krishnaswamy must be commended for the manner in which he has made his enquiry. There is great merit in his proposals as to how the doctrine can best operate without being inimical to democracy. The objections to his thesis are by no means enough to make one abandon the basic structure doctrine; but they do warrant a more detailed exposition so as to insulate the doctrine from more theoretical objections. In totality, the book is very well written and insightful for all who are interested in constitutionalism and its compatibility with democracy.

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EU Counter-Terrorism Law—Pre-Emption and the Rule of Law, by Cian C Murphy, (Oxford: Hart Publishing, 2012), 258pp. + xvi, hardback, £50.

More than 11 years have passed since the devastating attacks on New York and Washington, DC, and tremendous global efforts have been made to contain the equally global threat of international terrorism. Over time, counter-terrorism law has become a part of the standard body of laws in the national, European and international context, accompanied by a “proliferation of [...] literature” (p.4) on the issue. It is time to shift focus from the original emergency to the creeping normality of counter-terrorism.

Cian Murphy’s book *EU Counter-Terrorism Law—Pre-Emption and the Rule of Law* recognises this need. It offers a comprehensive treatise of the European Union’s tightening net of legal instruments aiming to contain terrorism. The book delves into the necessary legal detail to substantiate its claims and presents the law within its political and philosophical context. It is divided in three parts and a total of eight chapters. The first part (Introduction and two chapters) sets the scene by outlining the European rule of law as the theoretical background against which the rest of the book must be read and by introducing the European Union’s response to counterterrorism both in law and policy, with a particular focus on the European Council’s Action Plan Against Terrorism, adopted on September 21, 2001 (pp.27–32). Murphy successfully draws attention to less familiar angles in a familiar discussion—for instance, that the war of terror “gave the status of soldiers to mere criminals” (p.8) and that it allowed President Bush to “invoke his special mystique as Commander in Chief” (p.8). Contrasting pre-emption and prevention, the author develops how the former challenges established legal principles and reshaped criminal justice, e.g. by lowering the standard of proof (p.30). He gives a differentiated account of the European Union’s reaction to the threat of international terrorism, pointing out how public opinion has changed from a sense of solidarity to anti-war demonstrations in 2003.

The second part is the heart of the book. It contains the core of the legal analytical work. Five chapters examine different areas of EU counter-terrorist action. Each case study can be read self-standing and sheds light on one complex area of the European Union’s response to terrorism. Chapter 3 discusses the 2002 Framework Decision on Combating Terrorism. This is the first comprehensive EU legislative instrument addressing the fight against terrorism and setting out a general definition of what constitutes “terrorism”. Yet, the framework decision is not an operational instrument and even though it sets up a framework for further EU counter-terrorist measures, it “stops short of causing harm itself” (p.51). Chapter 4 turns to the substantive area of anti-money-laundering and counter-terrorist finance. This chapter addresses the subject more in general, explaining the UN counter-terrorist finance regimes under Resolutions 1267 and 1373, the role of the Council of Europe, as well as the Financial Action Task Force and the bilateral cooperation between the European Union and the United States. The chapter distinguishes the pre- and post-9/11 era of EU anti-money-laundering policies. In the 1990s and

hence pre-9/11, the European Union already focused on effective money-laundering action both under the then first and third pillar (Anti-Money-Laundering Directive I (1991)¹ and II (2001)²; and a third pillar joint action, later replaced by a framework decision). In both areas, its internal policies were drafted in response to and in interaction with the previously discussed international organisations. After 9/11, the European Union stepped up its anti-money laundering efforts. The political deadlock that had halted the adoption of the second directive was broken and the instrument finally adopted in December 2001. Only four years later the bombings of Madrid paved the way for a greater EU commitment to support the Financial Action Task Force through intensified financial surveillance. This led to the adoption of the third Anti-Money-Laundering Directive (2005).³ The general discussion of counter terrorist finance measures in Ch.4 sets in many ways the scene for the following Ch.5, which turns to the more specific subject of counter-terrorist sanctions, i.e. the practice of freezing all financial assets of alleged terrorist. Sanctions are the cornerstone of EU counter-terrorist policies and they have attracted a great amount of scholarly attention. Murphy takes us through the discussion of the relevant EU legislative instruments, the case law and examines the far-reaching fundamental rights infringements in light of the conceptual rule of law framework of his book. Certain arguments may seem conservative considering that they have recently come under pressure from several national courts, as well as the General Court of the European Union. An example is the author's point that more than ten years after 9/11, sanctions that have been in place for a similar period of time do not constitute a criminal penalty. Chapter 6 analyses the European Union's approach to data surveillance. This includes an analysis of the SWIFT saga, and in particular of the role of the European Parliament therein, as well as the conclusion of the PNR agreements with the United States. Murphy stresses the impact of data surveillance on the population as a whole, rather than only those suspected to be terrorist supporters. The chapter quotes at the beginning art.8 of the EU Charter of Fundamental Rights, which states that "data must be processed fairly for specific purposes [...]" (p.150). It would be interesting to push Murphy's analysis of what this provision specifically requires even one step further in the particular case of the data transfer agreements with the United States. The European Arrest Warrant is the final substantive area that the book examines in Ch.7. It is a particular attempt of the European Union to integrate the different national justice systems of the Member States. In this regard the topic of the last substantive chapter stands out. Rather than extending executive power over legal subjects, the European Arrest Warrant aims at facilitating the prosecution of crimes across national borders based on mutual recognition. The rule of law problems resulting from such interaction, are hence particular to supranational or international cooperation. The chapter also discusses the proposed European Investigation Order, which would replace the European Arrest Warrant for the participating countries, addresses the principal counter arguments against mutual recognition (p.183) and

¹ Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77.

² Directive 2001/97 amending Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/26.

³ Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/15.

discusses the numerous judicial challenges surrounding the EAW in Poland, Germany, Cyprus and Czech Republic, as well as before the Court of Justice of the European Union (pp.188–196). It convincingly argues that the European Arrest Warrant empowers the judiciary and limits executive discretion (p.212).

Part three is entitled “The future of EU counter-terrorism” (p.217), and predicting the future is a difficult task. This last part reflects that the debate surrounding counter-terrorist measures has slowly been moving from furious prioritization of containment to a greater focus on long-term strategy and human rights protection. Roughly since 2008 when President Obama was elected as a change maker to move the United States beyond the politics of fear, the realisation has been gaining ground, in public opinion, as well as amongst judges and politicians, both in the United States and in Europe, that many counter-terrorist policies have become normality. These policies have been in place for more than a decade and many are here to stay, either because the threat continues to exist or simply because they are difficult to repeal. Today’s students do not remember a pre-9/11 world and the share of politicians and scholars without a pre-9/11 consciousness is growing. The two recent legal milestones of EU counter-terrorist policies, the Lisbon Treaty and the Stockholm Programme (both 2009), have emphasised respect for fundamental rights (e.g. art.75 TFEU and p.3 of the Stockholm Programme). Murphy reflects on the more recent turn towards the “normality” of counter-terrorist measures in the final Ch.8 and in the epilogue. This normality is what counter-terrorism research will have to address—whether it is normatively desirable or not. Any future research on EU counter-terrorist policies has to take into account that they have lost their exceptional character. Having been adopted with a sense of emergency they have over time changed our perception of what is required in the name of “security”.

Many aspects of this creeping normality call for more detailed investigation, which could take off where the author left us. This includes in particular reflection on how EU counter-terrorist policies interconnect with other EU policies, such as migration and broader EU external actions. The enmeshing of counter-terrorist and other policies can be seen in the European Union’s legal and political declarations but also increasingly in the case law of the Court of Justice of the European Union. Furthermore, the threat of international terrorism can no longer be considered an emergency that justifies action on the basis of pure effectiveness considerations. One core question should become whether the benefits of a counter-terrorism policy outweigh its costs. The European Union spends millions on counter-terrorism. Particularly in economically difficult times, this needs to be justified, including through a law and economics approach, which has already been adopted in other areas of law. Another aspect that counter-terrorist research of the future will have to address is the dependency on intelligence. The European Union is highly dependent on cooperation with its Member States when adopting specific counter-terrorist measures, such as sanctions. Suggestions would be welcome on how to control more effectively the use of intelligence in the EU context. Indeed, as Murphy explores in Ch.5, one of the central legal reasons for the Court of Justice to annul counter-terrorist measures has been the infringement of procedural rights of the terrorist suspects, predominantly because relevant information was not shared with the EU courts. However, setting up a legal framework that enables the Council to adopt counter-terrorist measures based on

confidential information without infringing the procedural and judicial rights of those targeted does not appear impossible, even in the light of the far-reaching human rights restrictions imposed by these measures. Legal research should be able to *consider* to what extent closed material procedures could allow a careful and differentiated approach to a strictly limited need for secrecy, which is legally and judicially determined.

EU Counter-Terrorism Law skillfully defends a widely shared thesis (“...that EU counter-terrorism is weakening the rule of law and bypassing safeguards in favour of a system emphasizing coercive control over individual autonomy.”). It is an excellent foundational work on the European Union’s fight against terrorism and highlights the need for research into a new normality of permanent counter-terrorist laws.

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Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law, by Luis I Gordillo, (Oxford: Hart Publishing, 2012), 378pp. + xxxii, hardback, £62.

Luis Gordillo’s book describes a problem. The constitutional orders of the world are in a tangle. Individuals are subject to a range of overlapping and potentially conflicting legal demands from national, supranational and international legal orders. If these legal orders choose to pull in different directions, the tangle risks tightening into a Gordian knot to the detriment of legal certainty, the rule of law and fundamental individual rights.

Interlocking Constitutions does not serve as the sword to cut the knot, though this is not necessarily the author’s intention. Inspired by Gráinne de Búrca’s seminal article, Gordillo proposes a form of soft constitutionalism, which he calls “interordinal constitutionalism” as a potential means to bring order and stability to global legal governance. However, it soon becomes clear that the development of a theory of interordinal constitutionalism is not the main aim of the book. Rather, the book is a first step in a broader project. The reference to interordinal constitutionalism operates to position the broader project as a quest for a middle ground in the current academic debate between “constitutionalism” and “pluralism” as competing structures for the contemporary international legal order. This academic debate can be characterised as one between vertical (legally-prescribed) relationships between the range of legal orders interacting at the global level or horizontal (politically-negotiated) ones.

The focus of the book is not the global context, or the broader academic debate. Instead, Gordillo narrows his aim to a description and analysis of the relationship between legal orders in the European context. This narrowing of the debate is both a strength and a weakness of the book. On the one hand, Gordillo’s detailed knowledge of and expertise in the law and literature of European law and politics is something that his readers (and particularly international lawyers) will gain a great deal from. On the other hand, Gordillo occasionally mistakes the customs

of Europe for universal law. This enables his conclusion that we should move toward a model of “interordinal constitutionalism” that:

“assumes the existence of an international or global emerging society, in which the principles underlying the different legal orders (national and international) shall be universalized and, finally, in which there are common rules or principles to readdress the inevitable conflicts that may occur, while the whole system slowly navigates to a kind of synchronization of the standards of protection of fundamental rights.”(pp.321–322)

The value of the book lies in its detailed and ambitious survey of three permutations of legal tangle in the European legal context. Part I examines the intersection between domestic constitutional orders within Europe and the law of the European Union. This part provides interesting insight into the manoeuvring and machinations engaged in by a range of European constitutional courts, moving beyond the oft-cited *Solange* jurisprudence¹ in the German context to examples of cases in which the constitutional courts of Italy, Poland, France and Spain have sought to temper the effect of European integration on fundamental principles of domestic constitutional orders.

In Pt II, the author looks at the relationship between EU law and the European Convention on Human Rights (ECHR) from the perspective of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). As the author points out, it is possible that the relationship between EU law and the ECHR will soon be formalised if the European Union accedes to the ECHR. However, the history of the power struggle between the ECJ and the ECtHR provides an interesting case study reflecting how two courts have sought to negotiate potential conflicts between different legal regimes that bind many of the same Member States.

In Pt III, the author folds a further legal order into the mix, and contrasts the way in which the ECJ and ECtHR have navigated conflicts between EU law, the ECHR and the UN Charter. The focus of Pt III is on the contrast between the *Kadi* jurisprudence of the ECJ² and the *Behrami/Saramati* jurisprudence of the ECtHR.³ In *Kadi*, the ECJ invalidated an EU regulation giving effect to a Security Council resolution on grounds it contravened European fundamental norms, while in *Behrami/Saramati* the ECtHR declined to find state conduct in violation of the ECHR where states were acting pursuant to Security Council resolutions. While Gordillo seems to praise the ECJ in *Kadi* for re-establishing “the traditional hierarchy of norms in the EC/EU legal order that the CFI had wrongly modified” (p.252), he criticises the decision of the ECtHR in *Behrami/Saramati* as further evidence of the “broad deference” approach he attributes also to the European Court of First Instance in *Kadi*. Ultimately, he assesses the decisions in terms of deference:

¹ Case *Solange I* 2 BvL 52/71 BVerfGE 37, 271 (German Constitutional Court, 29 May 1974); Case *Solange II* 2 BvR 197/83 BVerfGE 73, 339 (German Constitutional Court, 22 October 1986)..

² *Kadi v Council of the European Union* (Joined Cases C-402/05 P and C-415/05 P) [2008] ECR I-0000.

³ *Behrami v France (Admissibility)* (71412/01) 22 B.H.R.C. 477; (2007) 45 E.H.R.R. SE10

“the ECtHR showed strong and considerable deference towards the Security Council of the UN, the CFI showed modest deference, and the ECJ (and the Advocate-General) showed little or no deference at all.”(p.290)

The choice of deference as a measure of assessment is an interesting one. Though Gordillo describes the position in terms of institutional deference, it is clear that Gordillo’s preferred approach does not imagine an institutional hierarchy, but a normative hierarchy within which a European set of fundamental values would prevail. If this is right, it is unfortunate (though of course unavoidable) that the manuscript was evidently finalised prior to the decisions in *Al Jedda*⁴ and *Nada*,⁵ in which the ECtHR demonstrates that it is not as cautious nor as deferential to the UN Security Council as Gordillo assumes based on the *Behrami/Saramati* jurisprudence.

Part IV promises to be the most interesting section, announcing it will draw out the “main ideas derived from theories, cases and situations discussed throughout the book”. To an extent, Gordillo pays insufficient attention to his own theme in failing to establish sufficient interlocking connections between the various Parts of his book. In this Part, Gordillo explains the hallmarks of his preferred model of “soft constitutionalism” (namely, a commitment to a common international order, universal standards and common rules of coordination between legal orders), but could do more to fully exploit his rich and detailed survey of the interaction between legal orders in previous chapters in a way that justifies and develops his choice of model. There is a sense that he has introduced so many threads (theories, cases, situations) in the previous Parts that the thesis itself gets into a tangle. For example, in Pt IV, Gordillo resiles from his apparent praise in Pt III of the ECJ *Kadi* decision, inviting the ECJ to

“back off a little...[and] start to reintroduce international law arguments in its legal reasoning, ... fully recovering its credibility as the model of ‘good international citizen’ that it has always wanted to be.”(p.317)

It is not that such an argument cannot be justified, but just that the volte-face is not explained.

While the book is long, one senses this is because the author did not have time to write a shorter one. The project pursued is self-confessedly an exploratory one. The author makes clear at the beginning of the book that “it is not meant to be a perfect work (in the sense of being finished or completed)...[but] the start of a much broader research, which the author hopes to pursue in the coming years” (p.11). This is a book for readers seeking a nuanced and detailed depiction of the problem, rather than solutions. Solutions such as Gordillo’s proposed model of “inter-ordinal constitutionalism” are not fully developed in this text, but rather bookmarked for future reflection. As the book’s sub-title suggests, Gordillo’s research is moving “towards” an interordinal theory of soft constitutionalism, though this is not the book that gets us there. We must await Gordillo’s future work, in which he can weave the long threads revealed in *Interlocking Constitutions*

⁴ *Al-Jedda v United Kingdom* (27021/08) (2011) 53 E.H.R.R. 23.

⁵ *Nada v Switzerland* (10593/08) (2013) 56 E.H.R.R. 18.

into patterns that will undoubtedly assist in the complex project of understanding the organisation of the broader tapestry of international relations.

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Constitutional Fragments: Societal Constitutionalism and Globalization, by Gunther Teubner, translated by Gareth Norbury, (Oxford University Press, 2012), 213pp. + x, hardback, £50.

What are the dynamics, characteristics, and politics of a “constitutionalism beyond the nation state”—a constitutionalism not just outside state borders, but also outside the sphere of institutionalised politics, in the “private” sectors of global society? These are the questions Gunther Teubner sets out to answer in *Constitutional Fragments*. Teubner presents his analysis in the form of a “sociological theory of societal constitutionalism”, intended as a challenge to both familiar laments over the decline of constitutionalism under conditions of globalisation and to calls for an ambitious “compensatory constitutionalization of world society” (pp.2–3). At the heart of this theory lies a sociological view of the dual functions of constitutions as the “foundation of an autonomous order and its self-limitation” (p.18). State constitutions in liberal-democratic systems fulfil these functions for institutionalised politics. They constitute an autonomous political sphere by way of the reflexive application of power to power. That autonomy is then stabilised through law, which formalises the medium of political power (pp.17, 75). But this dual function of strengthening autonomy and capacities for self-limitation—the constitutional *genus*—Teubner claims, is equally relevant in other social sectors. There, “sectorial constitutions”—the constitutions of the economy, of science, the media, and the health system, for example—all perform a “parallel constitutive function” of “securing the autonomy of their own specific medium” (pp.10, 18, 75).

Constitutional Fragments offers an exhilarating grand tour among these sectorial constitutions, revealing unfamiliar facets to a wide range of canonical topics in public law along the way. But Teubner also goes beyond sociological description to set out an important normative agenda. If political constitutions constrain political systems, he asks, “does a societal constitutionalism have the potential to stem the current—and no less problematic—expansionist tendencies of numerous other social subsystems when they endanger the integrity of individuals and institutions?” (pp.4, 41). The combination of these two projects—sociological and political—constitutes one of the book’s main attractions. It is also, at least in the opinion of this reviewer, the source of some tensions, in ways to be discussed more fully below.

Teubner begins his account in Ch.2 by sketching the basic features of sectorial constitutionalism within nation states. The main concern for this chapter is to present a severely constrained conception of the role of the state in relation to civil society constitutions. Rejecting what he calls a “statist” societal constitutionalism, Teubner instead favours allowing different areas of society “a constitutionalization of their own”—a constitutionalization, which would respect their “independent

rationalities and normativities” (p.30). Chapter 3 extends this analysis to the transnational sphere. Here, Teubner rejects both the illusion of a “constitutional emptiness of the transnational” and the idea of a comprehensive constitutionalization through international public law (pp.7, 49–50). Instead, “[i]n the sea of globality, only islands of the constitutional will emerge”, by way of the “strange new phenomenon” of the “*self-constitutionalization of global orders without a state*” (pp.52–53; emphasis in original). The strongest potential candidates for such self-constitutionalization, Teubner argues, are “transnational regimes”—“sets of principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given cause-area” (p.58), and it is with these regime constitutions that the remainder of the book is concerned.

These constitutions, as shown mainly in Chs 3 and 4, are at once compellingly familiar and utterly strange to traditional public law conceptions. “Constitution”, on this systems-theoretical view, becomes “a living process: the self-identification of a social system with the assistance of the law” (pp.62, 71). In a description borrowed from Larry Catá Backer: “[c]ontract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator” (p.47). Regime constitutions are neither purely legal nor purely social, but always “double” phenomena (p.106). They do not obey to any either/or logic in terms of the public/private boundary, but rather “reconstruct” this distinction *within* each social sector, replacing an “outdated dualism with more complex models of a plural differentiation” (pp.29, 115). The “paradoxical relation of *pouvoir constituant/pouvoir constitué*”, far from being unique to political constitutionalism, has its equivalents in the way “other social systems, too, establish themselves through self-referential processes by which, *ex nihilo*, they constitute their own autonomy” (pp.60, 65). And although regime constitutions are, of course, political, theirs is a “politics outside politics”, not to be confused with, or modelled on, state democratic processes. “They are not part of society’s political constitution and yet they are a highly political matter for society” (pp.28–33, 114–122).

This broad overview of the characteristics of societal constitutionalism in both its domestic and transnational settings forms the background to the final three chapters of *Constitutional Fragments*. Chapter 4 looks in more detail at the functions and processes of transnational societal constitutionalism. Chapter 5 offers a case study on the reinterpretation of fundamental rights as means of societal constitutionalism. And Ch.6 deals with the topic of “collisions” between the constitutional fragments in the global sphere and the development of a new kind of constitutional conflict of law.

Chapter 4 begins with a simple enough summary of what has gone before: if political constitutions fulfil “the constitutive function of securing the autonomy of politics” by “formalizing the medium of political power”, then sectorial societal constitutions fulfil the parallel constitutive function of “securing the autonomy of their specific medium”, often on a global scale (p.75). But then the direction of the argument shifts somewhat. “What is striking about the constitutions of the functional global regimes”, Teubner writes, “is how exclusively they promoted [the] constitutive function in the last few years—that is, how their attention focused solely on the institutional conditions for their autonomy”. An overriding obsession with dismantling national boundaries, in Teubner’s view, has engendered nothing

less than a “worldwide “neo-liberal” constitutionalization, aimed at achieving the autonomy of social subsystems (and of global markets in particular)” (pp.76–77). In the longer term, however, this “one-sided ‘neo-liberal’ reduction of global constitutionalism to its constitutive function cannot be sustained” (p.78). And so, the central problematic of transnational societal constitutionalism emerges: “How can a sufficiently large degree of external pressure be generated on the subsystems to push them into self-limitations on their options”, in order to limit their “endogenous tendencies towards self-destruction and environmental damage”? (pp.84–86). On this point, Ch.4 discusses a number of different limiting strategies, especially in relation to the economy, such as the development of “sites of political reflection” to foster “internal politicization”, and changes to the “inner constitution” of global finance through direct intervention in the monetary mechanism (pp.119, 88, 97–102). Chapter 5 adds to this an analysis of fundamental rights as “social and legal counter-institutions to the expansionist tendencies of social systems” (p.143).

Chapter 6 describes how, “[i]n a world society with neither apex or centre, there is just one way remaining to handle inter-constitutional conflicts”. This is by way of a “strictly heterarchical”, “decentralized” method of conflict resolution; a “meta-constitutionalism” which puts pressure on different social subsystems “to develop a stronger regard for the overall social environment” (pp.152–153). In such a setting, the idea of a comprehensive, unitary “political formula of the public interest” is replaced by a multiplicity of formulas of “*ordre public transnational*”, generated within each individual regime (p.161). The guiding principles for this new form of conflict of laws, in Teubner’s view, should be those of “indigenous self-determination” and of “regime-specific sustainability” (pp.167, 173). “The high autonomy of global function systems”, Teubner concludes, “demands a new type of sustainability and a new sensitivity for their environments”. And it is precisely such an “intensified sustainability”—a “tightrope walk, along the border between system and environment, considering both equally in order to balance their reciprocal effects”—that societal constitutionalism aims to effectuate (p.173).

To call Teubner’s account rich and complex would be an understatement—its choice of a Homeric epitaph, referring to Odysseus’ strategy of self-constraint in navigating the songs of the Sirens, is entirely befitting the scale of its ambition, and its achievements. Both this richness and this complexity, as mentioned above, to a large extent stem from the audacious attempt to combine a rigorously sociological, systems-theoretical view of the institutions and processes of societal constitutionalism, with normative claims relating to its politics (see e.g. p.9). These two accounts do, however, pull in very different directions. Systems theory, on the one hand, has no space for individual and collective actors and their values and interests (Teubner warily notes the familiar objection that this perspective “de-humanizes”, at p.62). But it is precisely such authors, actors, values, and interests that Teubner’s political argument—his manifesto for instilling “environmental responsibilities” in out-of-control social subsystems—cries out for. The resulting tensions are visible in various ways throughout the book. One micro-level manifestation, for example, is that a relevant *subject* is often difficult to identify, either because of the frequent use of passive tenses (“combating unrestrained liberalization *has become indispensable*”), or because of rapid shifts

between the impersonal (“*sub-constitutions do not strive towards a stable balance*”) and the personal (“*Our objective would be to ... multiply the sites at which decisions could be seen and contested*”). Most often, though, it is “societal constitutionalism” itself that figures as subject—a subject with a dual “agenda” of “allowing” autonomy and “coercing” self-restraint. That agenda, of course, cannot be a neutral one. This much is borne out by the overall structure of *Constitutional Fragments*: Ch.2, on societal constitutions within nation states, heavily emphasises the case for their autonomy, while Chs 4 to 6, on transnational societal constitutionalism, are preoccupied with (self-)limitation. The formulas Teubner uses to integrate these two projects—the idea of “autonomy as constitutively linked to responsibility vis-à-vis the whole and others”; notions of “balance” and of “constitutional tolerance”—cannot hide the fact that value choices are required (pp.71, 84, 158). These choices, though, are not acknowledged explicitly. As a result, it is not always entirely clear whether Teubner is describing inevitable social processes, defending normative positions, or doing both. Consider, for example, the important question of whether “the political constitution of the state [should] not have the privilege of regulating the fundamental structures of social sub-spheres?”. Teubner’s answer slips from the empirical—the “fundamental structures of modernity” make political coordination impossible—to the normative—“[s]ocietal constitutionalism opposes the centralization of fundamental socio-political issues in the political system” (pp.115–121). But such slippage raises the question of whether the sociological account and the normative project could not both be strengthened by somewhat clearer distinctions.

Doing that, though, must be easier said than done. And to be fair: Teubner should certainly be allowed to demand some tolerance for causal uncertainty and familiarity with paradox from his sociologist and lawyer readers. *Constitutional Fragments* does recognise many of these difficulties, and at times adopts a noticeably modest tone. “Societal constitutionalism”, Teubner notes, “does a difficult balancing act between external intervention and self-direction”. “No one knows in advance how such a capillary constitutionalization might work in practice”—“there is no alternative but to experiment”. That experimentation will require “a bit of luck” and, most importantly, “institutional imagination” (pp.84–86, 166). It is this imagination that Teubner’s work can only be said to have profoundly enriched.

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