

INTRODUCTION

Presentation

Mireille Hildebrandt, Bart van Klink & Eric Tjong Tjin Tai

This special issue builds on the conference 'Constitutionalism and the Framing of Democracy: An Iterative Tension', held on 18 June 2010 at the University of Leiden, the Netherlands, that was organized by the Dutch Society for Philosophy of Law. The conference aimed at discussing the tension between constitutionalism and democracy in the face of post-national globalization, starting from a keynote paper by Neil Walker, Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh. Four scholars of law, political science and philosophy provided comments, followed by a reply to critics.

In the post-national era the idea as well as the practice of constitutional democracy faces a number of interrelated challenges. This confronts scholars of legal theory, political philosophy and constitutional law with the strenuous relationship between democracy on the one hand and modern constitutionalism on the other, while it is clear that their practical co-existence cannot be taken for granted. In the current debate two opposite positions are taken: either it is assumed that democracy and constitutionalism are fully compatible, or they are taken to be separate and irreconcilable ideals. Walker develops a third position by claiming that the relation between democracy and constitutionalism has to be conceived of as dialectic: there is an irresolvable tension between democracy and constitutionalism, but, at the same time, the two also depend on each other. He argues, however, that this dependence does not fully determine the outcome of democratic decision-making, which cannot avoid integrating both practical and normative considerations that are neither entirely determined by the ideal of democracy nor necessarily inferred from modern constitutionalism. Walker thus highlights the contingent nature of constitutional democracy and the vulnerability this implies, but in the meantime he does not endorse the radical relativism that may spring from framing democracy and constitutionalism as fundamentally incompatible value systems.

Walker starts from the premise that democracy embodies an ideal that is necessarily incomplete. On the one hand this ideal is empirically incomplete to the extent that it cannot provide the terms and conditions of its application, indicating what he calls the internal dimension of incompleteness. This relates, for instance, to the issues of *who* are included in the people that has decision-making power, and *when and for how long* this people is constituted. On the other hand, the ideal of democracy is incomplete in the normative sense because it cannot tell us what counts as good government, referring to what he calls the external dimension of incompleteness. This relates, for example, to the question of *which institutional*

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forms should organize the decision-making process and of *how* democratic practice should renew itself in the face of a changing environment.

Walker argues that by understanding the ideal of democracy as producing this twofold incompleteness, we can begin to account for the complex relationship between democracy and constitutionalism. First, constitutionalism responds to both types of incompleteness by empirically realizing democracy (thus satisfying the internal dimension of the ideal) and by providing normative guidance for democratic government (thus satisfying the external dimension of the ideal). As long as other means of answering the inherent open-endedness of the ideal of democracy are absent, this explains the *contingent necessity* of modern constitutionalism. Second, however, Walker notes that as a consequence of the indeterminate nature of the ideal of democracy it cannot, by itself, determine the content of constitutional guidance. That content, Walker claims, has to be worked out by means of practical and normative considerations that are not dictated by the democratic ideal.

Besselink connects the abstract philosophical debate to the specifics of constitutional law. He sketches the historical development of constitutions, constitutionalism and democracy, and provides examples from before 1800 where the question of legitimate government already involved limitations on the exercise of power. Besselink argues that Walker's argument is based on one particular, French, constitutional tradition. Alternative traditions, where constitutions are incremental, would not have the problems Walker identifies, as he illustrates by the vagaries of the Dutch *Grondwet*. He agrees that there is a challenge in globalization, where the main problem is the representational issue. This is illustrated by the contemporary debate on the powers of the European Union. Besselink suggests that the solution is not necessarily a foundation in the form of a Taylorian moral order, but may be found rather in a historical understanding of the variety of constitutional traditions.

Goodwin does not consider post-national constitutionalism to be a necessarily benign force. She raises the question whether constitutionalism is capable of replacing democracy as a legitimizing force at the European and international level. Against Walker, she claims that not only democracy is an incomplete ideal, but also constitutionalism is in need of further justification. The current spread of human rights discourse can be read as an indication that constitutionalism is not able to fill the legitimacy gap on its own. Generally, human rights are understood to legitimize the process of decision-making beyond the state. However, human rights are not uncontroversial and do not achieve the universality that is ascribed to them. Therefore, Goodwin concludes that neither constitutionalism nor human rights beyond the state can replace the legitimacy that is provided by democracy.

Rummens' focal criticism regards an alleged one-sidedness in Walker's analysis. Whereas Walker portrays the complex manner in which modern constitutionalism is capable of responding to the double incompleteness of the ideal of democracy, he disregards – according to Rummens – the fact that constitutionalism

itself suffers from a similar incompleteness. Instead of investigating how democracy could and does supplement this incompleteness, Walker seems to restrict his analysis to only one part of the complex interrelationship between the two. Precisely in post-national constitutional arrangements the lack of constitutive democratic processes creates problems that, Rummens holds, only democratic *practices* can overcome. Moreover, Rummens emphasizes that certain tensions within the political framework of modernity cannot be worked out in democratic or constitutional *theory* but must be resolved in the *practice* of democratic processes of decision-making, which requires the scaffolding of constitutional safeguards. Building on Habermas and Lefort, Rummens argues that Walker wrongly ignores the mutual complementarity between democracy and constitutionalism that is based on their co-originality, which is in turn grounded in the co-originality or mutual constitutiveness of public and private autonomy.

Werner casts doubts on Walker's claim that democracy and constitutionalism need each other. By referring to Searle's theory of speech acts, he distinguishes constitutive acts, constitutions and constitutionalism. Although Werner agrees on the *normative* incompleteness of democracy, he concurs with Besselink in hesitating whether democracy *empirically* needs constitutionalism. He then applies Walker's argument to the contemporary debate on international constitutionalism, arguing that Walker's paper helps to understand several of the issues there. However, he questions whether traditional notions of democracy will provide a solution, which he illustrates with several examples. Werner recommends searching for alternative forms of accountability and representations.

In his reply Walker focuses on four closely related questions raised by his critics. First, he replies to the critique that he takes the meaning of constitutionalism too much for granted. The question is: democracy might be incomplete, but is that not also true for constitutionalism? Second, he responds to the challenge that democracy cannot supply the terms and conditions of its own application. Third, he confronts the suggestion that the relationship between democracy and constitutionalism can be characterized as one of mutual complementarity instead of necessarily being one of both mutual support and mutual tension. And, finally, he explains how his conceptual analysis of modern constitutionalism is pertinent to developing a democratically adequate architecture of global constitutionalism, thereby responding to the critique that his analysis should take into account earlier forms of constitutionalism as highly relevant in the era of post-national globalization.