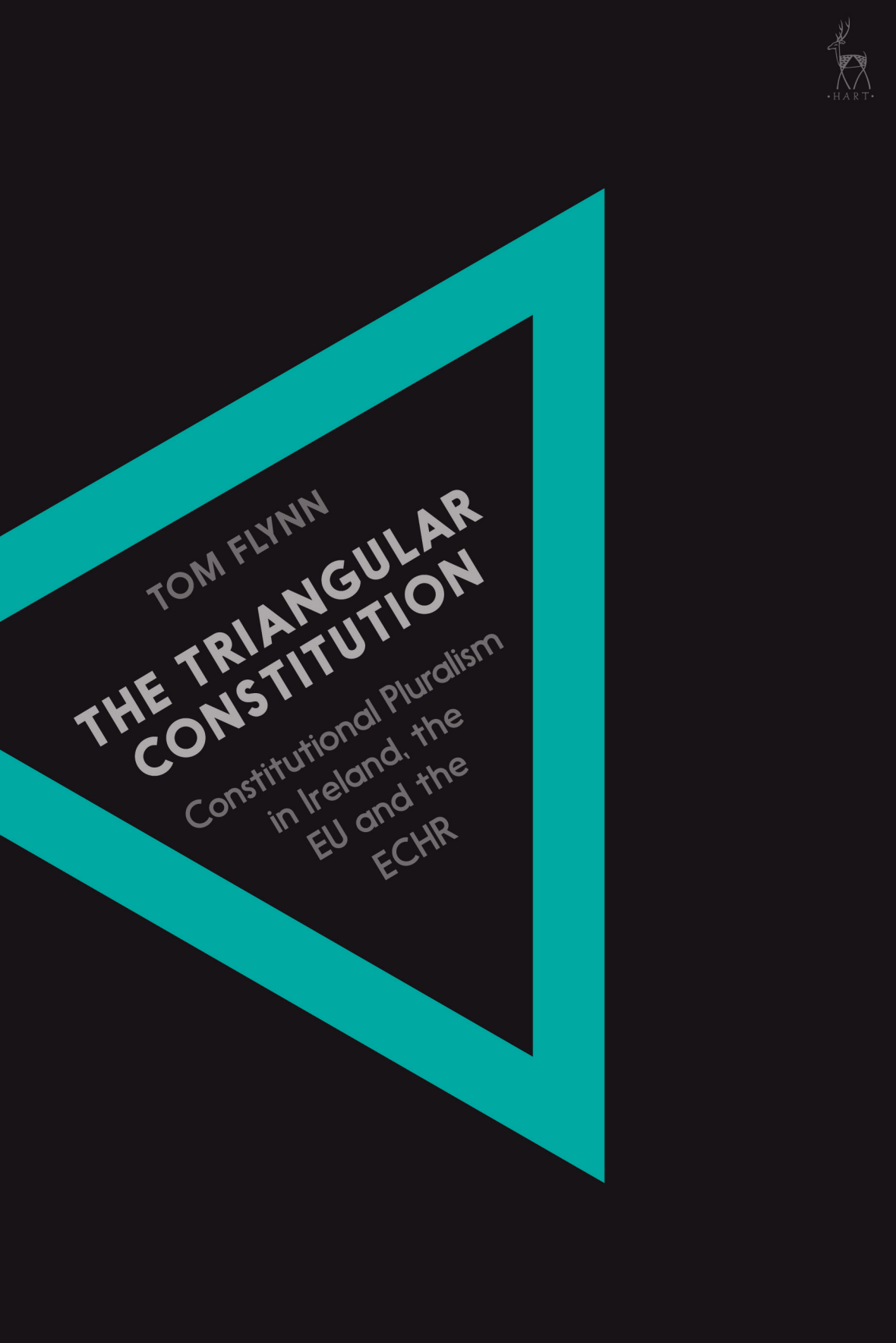
TOM FLYNN
THE TRIANGULAR CONSTITUTION
Constitutional Pluralism in Ireland, the EU and the ECHR

THE TRIANGULAR CONSTITUTION

This book offers a new account of modern European constitutionalism. It uses the Irish constitutional order to demonstrate that, right across the European Union, the national constitution can no longer be understood on its own, in isolation from the EU legal order or from the European Convention on Human Rights. The constitution is instead triangular, with these three legal orders forming the points of a triangle, and the relationship and interactions between them forming the triangle's sides. It takes as its starting point the theory of constitutional pluralism, which suggests that overlapping constitutional orders are not necessarily arranged 'on top of' each other, but that they may be arranged heterarchically or flatly, without a hierarchy of superior and subordinate constitutions. However, it departs from conventional accounts of this theory by emphasising that we must still pay close attention to jurisdictional specificity in order to understand the norms that regulate pluralist constitutions. It shows, through application of the theory to case studies, that any attempt to extract universal principles from the jurisdictionally contingent interactions between specific legal orders is fraught with difficulty. The book is an important contribution to constitutional theory in general, and constitutional pluralism in particular, and will be of great interest to scholars in the field.

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Tom Flynn

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Tom Flynn
Colchester
October 2018

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Introduction

This is a work of applied constitutional theory. It takes as its field of study three interacting legal orders – those of Ireland, the European Union and the European Convention on Human Rights – and posits them as a unified, yet non-unitary, whole: a triangular constitutional order. In doing so, it draws on the rich literature of the concept of constitutional pluralism in order to posit a new way of thinking about constitutionalism in Europe, one that refuses, as a matter of principle, to regard any part of the constitutional whole – national, Union or Convention – as the final arbiter of constitutionality, or the possessor of ultimate normative authority over the other parts.

These are inauspicious times for such a proposal. Though the proposed remedies differ, the diagnosis is widely shared: Europe is unwell. Ten years ago, as the Lisbon Treaty finally came into force, the hope was that the European Union's 'semi-permanent Treaty revision process'[1] was at an end, and the enlarged Union could settle into a period of stability and consolidation. It was not to be: the decade since has been one of multiple, overlapping crises – financial, economic, political and constitutional – which have strained the very sinews of the European project, and have resulted in an atmosphere of conflict and fragmentation. With the United Kingdom narrowly voting to leave the Union in 2016, and the electoral rise across the continent of political forces – reductively and unhelpfully grouped together as 'populists' – exhibiting various kinds of nativism, racism and authoritarianism, the question of how the Union and its Member States relate to one another has attained a new resonance. This book does not propose some all-encompassing solution, and, as we shall see, is suspicious of any universal constitutional master-theory by which all Europe's ills can be cured. Neither the Union nor its Member States have showered themselves in glory in the past decade, and in different ways each has been tried and found wanting. The proposal is therefore more modest: a constitutional worldview that acknowledges the advantages and disadvantages of constitutionalism at the national, supranational and international level, and attempts to institute a balance between these three levels, allowing the space for political and legal contestation required of any constitutional order worthy of the name, while still respecting the need for legal stability and certainty.

[1] B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing, 2002) 39.

I. CONTEXT: CONSTITUTIONAL PLURALISM

'National law' and 'international law' were once quite easily distinguishable. The former operated within the territorial and conceptual borders of the Westphalian nation state; the latter dealt with the interstices between these states. However, the years since 1945 have seen the rise of one of the defining features of modern public law: the non-state legal system or normative order. This phenomenon entails, as its logical corollary, a shift or transfer of institutional normative power away from traditional actors, such as states and governments, and towards various international, transnational and supranational organisations – public,[2] private[3] and sometimes a hybrid of the two[4] – with concomitant difficulties for received notions of public accountability and democratic legitimacy. Though frequently possessed of the kind of jurisgenerative authority once thought the sole preserve of state legal orders, non-state legal systems lack many of the features commonly thought essential for the legitimation of the exercise of public power. Furthermore, given that this transfer of power has occurred without states *relinquishing* their claims to sovereignty and autonomy (the 'transfer' in this sense perhaps better characterised as a 'pooling'), the prospect arises of legal conflict between the state and non-state orders in cases where their jurisdictions overlap.

Accordingly, much effort has gone into the attempt to conceptualise and to legitimise these orders – and to explain their relationships with each other and with more traditional legal orders – by transplanting the idea of *constitutionalism* (defined by Neil Walker as 'the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with')[5] from its state-based incubator and developing a theory to fit the post-state configuration,[6] while keeping that which made constitutionalism desirable in the first place. In this way, the United Nations Charter is reconceived as a kind of 'constitution' for the international community,[7] while attempts have been made similarly to 'constitutionalise' the international trade regime of the World Trade Organization.[8]

[2] Such as the United Nations.

[3] Such as the International Standardization Organisation or the World Anti-Doping Agency (N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373, 382).

[4] Such as the Internet Corporation for Assigned Names and Numbers (ICANN) (ibid).

[5] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317, 318.

[6] By 'post-state' here, I do not mean to imply that the State is no longer of any relevance – quite the contrary, as the book will demonstrate – but simply that the State can no longer be considered in isolation.

[7] B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529; and B Fassbender, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law' in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007).

[8] See, inter alia, E-U Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19; DZ Cass, *The Constitutionalization of the World Trade*

The focus of this book is on one particularly promising, yet particularly controversial, manifestation of this discourse: constitutional pluralism. However, as Matej Avbelj and Jan Komárek point out, '[t]he concept has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means'.[9] These different understandings of the idea will be outlined in chapter one, but, at its simplest, constitutional pluralism is the notion that interacting legal systems that are (or claim to be) constitutional in nature need not – and should not – necessarily be regarded as being *hierarchically* arranged, with one 'on top of' the others. Rather, the relationships between the orders can be conceived of *heterarchically*, so that conflict between them can be avoided, managed and ultimately resolved interactively and dialogically, without necessarily relegating one legal order to an inferior status or, conversely, privileging it over and above the others. This is a significant departure from the tradition of state-based constitutionalism, which presupposes and requires a hierarchical arrangement of the legal order. Of the many different conceptions of constitutional pluralism in the literature, this book focuses on a particular subset: the 'metaconstitutional'[10] theories, which seek to posit or discover an overarching normative framework for the management and resolution of conflict between constitutional orders while still preserving their autonomy, and not integrating them into a new whole. This metaconstitutional framework – a system of constitutional norms about constitutional norms – serves a bridging function between the orders, providing certain adjudicative principles, or 'interface norms' by which they can accommodate and manage the competing claims of each other order in the given constitutional heterarchy. However, analysis of these interface norms reveals an interesting – and significant – problem.

II. PROBLEM: INTERFACE NORMS

It is important to distinguish at the outset between two different kinds of interface norm. First, there are the *substantive* 'norms-at-the-interface' between legal orders. By this, I mean the norm or norms around which a concrete case of interaction or potential conflict between legal orders revolve, such as the conflict between the right to human dignity and the freedom to provide services in the

Organization (OUP 2005); JL Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647; J Lawrence, 'Contesting Constitutionalism: Constitutional Discourse at the WTO' (2013) 2 *Global Constitutionalism* 63.

[9] M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism (symposium transcript)' EUI Working Papers LAW 2008/21, 1.

[10] See generally N Walker, 'Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart Publishing, 2000).

Court of Justice of the European Union (CJEU) case of *Omega*,[11] or between the right to property and a state's international obligations in the European Court of Human Rights (ECtHR) case of *Bosphorus*.[12] Any norm can become a norm-at-the-interface if its application in a given case gives rise to questions of jurisdictional overlap between legal orders; this book will consider many of them, but they are not its focus.

Secondly, and more importantly, there are the *metaconstitutional* norms – interface norms proper – which, according to Nico Krisch, 'regulate to what extent norms and decisions in one sub-order have effect in another … [and] are the main legal expression of openness and closure, friendliness or hostility among the different parts'.[13] Most notably, the principle of conditional recognition, epitomised in the *Solange*[14] jurisprudence of the German Bundesverfassungsgericht (BVerfG) recurs throughout different conceptions of metaconstitutional pluralism. It is this second-order type of interface norm that is the focus of the book, because while there is a certain amount of disagreement in the literature as to the *identity* of these norms, there is near unanimity as to their *nature* – a position that I argue to be problematic, and that a triangular conception of constitutionalism seeks to overcome.

Specifically, there is an always inherent – and sometimes explicit – claim in the literature that second-order interface norms are *universal* by nature: that however we classify them or frame them, their application need not be adjusted to any given institutional or jurisdictional circumstance. In their presentation and analysis of interface norms, scholars in the field draw on various sources – the jurisprudence of the CJEU, the ECtHR, and (especially) the BVerfG – but rarely consider whether and how the specific relations between the institutional actors in any given case may have influenced the choice and application of interface norms. In this regard, the 'founder' of constitutional pluralism, Neil MacCormick, wrote that '[t]he settled, positive character of law is jurisdiction-relative … Moral judgments, however personal and controversial, are not in this way relativistic … These judgments apply universally'.[15] But concerns relating to democracy and individual rights – the normative core of the principle of conditional recognition – are both legal and moral in nature. Are they (and should they be) universal or particular in their application?

[11] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, [2004] ECR I-9609.

[12] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440.

[13] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2010) 285–86.

[14] Reported in English as *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 2 BvL 52/71) [1974] 2 CMR 540 (*Solange I*); *Re the Application of Wünsche Handelsgesellschaft* (Case 2 BvR 197/83) [1987] 3 CMLR 225 (*Solange II*).

[15] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) 14–15.