

Global Constitutionalism and Its Challenges to Westphalian Constitutional Law

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The Challenges to Westphalian Constitutional Geometry in the Age of Supranational Constitutionalism, Global Governance and Information Revolution

MARTIN BELOV

I. TAKING CONSTITUTIONAL GEOMETRY SERIOUSLY¹

THIS CHAPTER AIMS to clarify the analytical concept of constitutional geometry, explaining the constitutional geometry of Westphalian statehood and demonstrating the evolution of the Westphalian constitutional geometry of the constitutional nation state into the post-Westphalian constitutional geometry of supranational and global constitutional law in the time of globalisation and information revolution. The chapter reflects on the challenges to constitutional semiotics² produced by the current early post-Westphalian situation.

Constitutional geometry is an important constitutional paradigm that has so far been underestimated by constitutional theory and overshadowed by more powerful and widespread analytical and constructive paradigms. In fact these paradigms are closely linked to the constitutional geometry serving as its background or supplement or exposing some of its aspects. Hence constitutional geometry is not a profoundly new concept. It has always been implicitly enshrined in the normative and institutional order—both

¹ Here I borrow that polemic construction from the title of Ronald Dworkin's book 'Taking Rights Seriously'. See R Dworkin, *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 2001).

² Examples of semiotic studies of constitutional law are the works of D Brion, 'The Semiotics of Constitutional Meaning' (1995) *Semiotics* 137–45 and P Ahonen, 'The Semiotics of Finnish Constitutional Law on Government Finance' in R Kevelson (ed), *Law and Semiotics* (New York, Plenum Press, 1988) 13 et seq.

constitutional and political—of the Westphalian statehood and has been indirectly used by modern constitutional theory. However, it has not been sufficiently emancipated as an independent analytical paradigm and as a key semiotic concept of constitutional law theory.

The concept of constitutional geometry has to be defined and discussed with a view to its general analytical role as a holistic phenomenon and its particular instantiations and manifestations in constitutional law. It has to be examined with regard to its features as both an analytical paradigm of constitutional theory and a constructive (ordering) paradigm of constitutional law.

Under ‘analytical paradigm’ I understand a system of interrelated analytical tools used by the theory to explain the constitutional law in its ideal dimension as a system of normative ideologies and ideas,³ in its positive dimension as a constitutional order composed of norms, principles and institutions, and in its empirical dimension as ‘constitutional law in action’, which actually shapes human and institutional behaviour in its socio-legal context. Actually constitutional geometry is a phenomenon which is at the same time constructed by the theory, enshrined in the normative order and objectively produced by the social life or objectively moulded by the historical process of advance and adaptation of the constitutional system to the socio-legal context.

On the other hand, constitutional geometry is also a constructive (ordering) paradigm of constitutional law because it allows for the arrangement of the constitutional institutions into typical broader shapes and forms unified on the basis of specific logic and criteria. This is the logic of rational visualisation and symbolic structuring of constitutional relations which is based on the cumulative criteria of durability, persistence, capability of formal representation and strategic importance for the constitutional order, the constitutional system or their sub-systems.

Indeed, constitutional geometry is built upon the precondition of rationality while at the same time rests and depends on its own visual-emotional persuasiveness derived from the broader socio-legal, ideal and factual context. Thus constitutional geometry as a constructive (ordering) paradigm allows for macro structuring of constitutional relations and of the constitutional order in a way that also appeals to the set of preconceptions developed in the broader societal context. Constitutional geometry allows an interdisciplinary study of the macro structures of the constitutional order taken in their broader historical, cultural and socio-legal context. That is

³ For the concept of normative ideology and normative idea see M Belov, ‘The Ideological Heritage of Magna Carta and Its Reception in the Bulgarian Constitutionalism’ in P Panayotov (ed), *Scientific Readings in Honour of Venelin Ganev and Nikola Dolapchiev* (Sofia, ‘St Kliment Ohridski’ University Press, 2017) 450–53 (in Bulgarian).

why it can be constructed and analysed also from the viewpoint and by using the achievements of other branches of human knowledge.

Just one example which might seem unusual and stunning at a first glance: the theory of Wassily Kandinsky on the methods for ascribing, objectivising and suggesting of meaning through artistic depiction of geometric forms⁴ may serve as an incentive for using geometrical shapes and forms as symbolic representations of constitutional macro structures and phenomena. Naturally the use of knowledge from the art sciences has its objective limits in the nature of the law and the legal science and in the objective characteristics of the constitutional phenomena that should be depicted. Moreover, that knowledge has to be used in combination with the knowledge from other sciences that may shed contextual light on the analysed constitutional phenomenon. For example, political science, philosophy, sociology and history may inform us regarding the ‘normativity of the facts and ideas’⁵ allowing for the establishment and continuity of certain durable constitutional geometric forms. Consequently these forms are to a great extent objectively predetermined by the socio-legal context in which they are produced. Moreover, the constitutional geometric forms are both product and result of the socio-legal context and at the same time shape and frame it after they have been established. Thus they are both preconditioned on meta-legal factors and aim to serve as their regulatory and explanatory paradigms.

Modern social and political philosophy, constitutional theory and theory of state and law have created several explanatory paradigms that are supposed to define the way we think about the macro structures of the constitutional system. They should predetermine not only the legal and political culture but also the imagination of both the citizens and the political elite and have to structure their durable beliefs about the state, the constitution and the constitutional order. The system of these durable ideas aimed at the establishment of the ideal constitution⁶ of the state can be defined as normative constitutional ideology.

Constitutional geometry is not only part of the normative ideology of constitutional law but it is also enshrined and objectivised in the institutional and normative dimensions of positive constitutional law. Constitutional geometry subsumes the institutions and the different sub-systems of the constitutional order under wider shapes on the macro and medium levels. Thus it builds upon and partially overcomes the traditional institutionalist systematisation of positive constitutional law.

⁴ W Kandinsky, *Point and Line to Plane* (Dover Fine Art, 1979) 1–179.

⁵ J Stalev, *The Normative Force of the Factual* (Sofia, Feneya, 2007) 1–280 (in Bulgarian).

⁶ For the concept of ideal constitution see, eg, J Blondel, *Comparative Government. An Introduction* (Hemel Hempstead, Prentice Hall/Harvester Wheatsheaf, 1995) and E Tanchev, *Introduction in Constitutional Law* (Sofia, Sibi, 2003) 112 (in Bulgarian).

Hence constitutional geometry is closely related but not limited to legal institutionalism. Constitutional geometry can neither be reduced to nor does it equal institutionalism. Institutional theory in its different variants is focused on the origin, shape, constitutional model and functioning of the institutions whereas constitutional geometry uses the outcomes of the institutional approach, but its attempt to frame constitutional knowledge is not limited to institutional design. Constitutional geometry builds upon the institutional approach since it presupposes the institutional order of the constitutional system. However, it targets all possible modes for typical depiction of constitutional phenomena predominantly with regard to the macro and medium levels of institutional design. Hence constitutional geometry is a semiotic phenomenon which aims to analyse the meaning of visual codes and visual representations of fully or partially institutionalised normative ideas which in some cases builds upon the achievements of other legal theoretical approaches.

Moreover, constitutional geometry derives some of its shapes and normative ideas, for example the normative pyramid, from legal normativism. However, this is rather exceptional because the normative construction of the legal order is neither symbolically and visually appealing nor capable of being sculpted into macro shapes and forms. That is why the use of Kelsen's normative hierarchical pyramid⁷ is one of the rare instances of borrowing of geometric metaphors from the theory of normativism. This is also due to the fact that the theory of legal normativism itself is not oriented towards production of such geometric shapes and forms which can consequently be used by constitutional geometry. One can speculate whether Kelsen's theory of international law is not open to the analytical extraction of some constitutional geometric forms, for example with regard to his approach to the centralisation and decentralisation of legal orders and to the problems of monism, dualism and pluralism.⁸ However, I will refrain from entering that discussion due to space constraints.

Last but not least, some of the most important ideas developed in the modern theory of state have served as key pillars of the constitutional geometry of the Westphalian statehood. These are the idea of the hierarchical structure of public authority defined by Jean Bodin, Thomas Hobbes, John Austin and Max Weber, Max Weber's concept of the hierarchical structure of executive power and its pyramid-like construction with government at the

⁷ For a critical analysis of Kelsen's theory of the hierarchical and pyramid-like structure of the legal order see F Ost and M van der Kerchove, *De la pyramide au réseau? Vers un nouveau mode de production du droit?* <www.dhdi.free.fr/recherches/theoriedroit/articles/ostvdkp-pyram.pdf> 1 et seq.

⁸ A Kalisz and M Zalewska, 'Hans Kelsen in a Multicentric (Legal) World' in M Belov (ed), *Global Governance and Its Effects on State and Law* (Frankfurt am Main, Peter Lang, 2016), 115–29.

top and administration at the bottom, the linear structure of state formation and constitution building based on social contract, dividing the time-space continuum into natural and civic phases, provided by John Locke, Thomas Hobbes, Jean-Jacques Rousseau, John Rawls etc.

The fact that constitutional geometry makes use of the achievements of different schools of thought in constitutional, legal and political theory, which have taken the form of visual representation of power constellations and systemic relations, demonstrates that it is based on a creative mixture of different approaches. However, this mixture does not lead to an eclectic result. This is due to the fact that the function of constitutional geometry is to serve as an additional explanatory paradigm that exemplifies the main structural features of the constitutional order and the constitutional system. Constitutional geometry does not pretend to be a fully consistent and all-encompassing approach for explaining the organisation of normativity, the structure and system of the constitutional order which is the aim, for example of legal institutionalism, legal positivism and legal normativism.

Actually constitutional geometry is not a separate and distinct legal theory. It is an additional analytical paradigm which visually depicts and explains via a semiotic approach selected fragments or basic aspects of the constitutional order. Moreover, it uses the results of different theories. Constitutional geometry structures the scientific understanding of the constitutional order through exemplification and visualisation. It organises the constitutional order predominantly on the most abstract and highest level of the normative ideologies and normative ideas and to a lesser extent on the level of the constitutional institutions.

That is why constitutional geometry possesses the very broad framework and indirect normativity typical also of constitutional ideologies and ideas. Its organising power consists in the imposition of ideas or cornerstone concepts and codes for structuring the constitutional order on the constitutional system with its sub-systems which have to be further developed on the institutional and normative levels.

Consequently constitutional geometry is a creative collection of supportive ideologies, concepts, paradigms and structural codes developed by different constitutional, legal and political theories throughout the Western Modernity which try to explain the state, the constitution and the constitutional order by using geometric metaphors. However, it cannot be reduced to the theories and approaches from which it borrows and on which it builds not in a systematic manner but in the form of 'cherry-picking'. Constitutional geometry is a framework concept and broad depot for formal and visually structured depiction and clarification of constitutional typologies. It is a form of constitutional semiotics.

All theoretically defined shapes and forms, such as hierarchies, pyramids, triangles, rectangles, polygons, circles and networks, which are borrowed from mathematics by social, political and constitutional theory, can be

defined as elements of ‘constitutional geometry’ if they possess an ordering and explanatory force with a view to the constitutional order. Thus constitutional geometry represents an intellectual enterprise and product addressing the need of the people to exemplify abstract constitutional concepts and to master the complexity of social and political life and of the constitutional discourse by reducing it to clearer and more easily comprehensible concepts, for example those of the illustrative and visual world of (constitutional) geometry. Hence constitutional geometry is a broad paradigm which has to conceptualise and render systematic the visual discourse of constitutional law and constitutional theory.

Constitutional geometry comprises normative models—both ideal and legal—for shaping, framing and describing the constitutional order and its particular sectoral, institutional and power aspects. It is a form of constructive imagination aimed at rational cognition, inventive and creative description of the constitutional system and rational prescription of the best way for systematising, ordering and typifying constitutional relations. The attempt to represent constitutional relations through the use of geometrical shapes and by depicting the constitutional order as a quasi-volumetric phenomenon which resembles the geometric relations of the physical world is a common denominator for all forms of constitutional geometry. Thus constitutional geometry tries to conceptualise the constitutional system, the constitutional order and constitutional relations by the use of analogy with geometry as a branch of mathematics.

Actually constitutional law and political science make use of non-legal concepts derived from the scientific apparatus of the natural sciences in general and of mathematics in particular due to their desire to rationalise and capture the diversity and changeability of socio-political reality and to reduce the complexity of the constitutional and political order. Modern constitutionalism was born during the ‘long nineteenth century’⁹ and developed throughout the ‘short twentieth century’¹⁰ as a phenomenon that strives to rationalise the structure and functioning of public power through formalisation, institutionalisation and proceduralisation of socio-political relations.

Hence the constitutional geometry of modern constitutional law is a device for rationalisation via formalisation and abstract and symbolic depiction of the constitutional order, the normative order, the institutional sub-systems of the constitutional system and the inter-institutional dynamics in it. Moreover constitutional geometry aims at rationalisation via simplification and reduction of the complexity of the public power and its constitutional

⁹ E Hobsbawm, *The Age of Revolution: 1789–1848* (New York, First Vintage Books, 1996) and E Hobsbawm, *The Age of Capital: 1848–1875* (New York, First Vintage Books, 1996).

¹⁰ E Hobsbawm, *Age of Extremes: the Short Twentieth Century, 1914–1991* (London, Abacus, 1995) 3.

foundations and the representation of the different power constellations through the use of visual depiction. Sometimes constitutional geometry appears as system of normative ideas which are imposed on and interpolated in the constitutional system or are extracted from the constitutional order. However, constitutional geometry is frequently not an all-encompassing and fully systematic phenomenon. Thus constitutional geometry cannot pretend to be an either all-organising scheme of the constitutional order or a coordinated and coherent scheme of normative beliefs resulting in a fully integrated system for visual representation of constitutional institutions and their inter-institutional dynamics.

Constitutional geometry has to be differentiated from constitutional symbolism. Constitutional symbolism targets the collective emotions of society through representative and symbolic metaphors of statehood provided by the constitution or constitutional law such as the flag, the anthem, the state motto etc. It aims to establish a constitutional pantheon that can serve functions of symbolic representation and integration of the political community. That is why constitutional symbolism is part of emotional constitutionalism—the constitutionalism based on the collective beliefs and emotions of the political community and on the constructed or inherited collective constitutional imaginary.

Constitutional geometry, in contrast to constitutional symbolism, is part of rational constitutionalism. It is a key strategy for rational comprehension of the most important schemes enshrined in the constitutional order. Constitutional geometry is part of the scientific collective imaginary of constitutional and political scholars. It is based on rationally proven or rationally constructed (geometric) metaphors and strives to delimit rationally convincing but also symbolically appealing matrixes of the structure of the constitutional order and its particular parts. Hence constitutional geometry, as with many elements of the constitutional discourse, comprises a mixture of rational and emotional elements. However, in the case of constitutional geometry the rational elements clearly dominate the emotional ones.

It should also be mentioned that constitutional geometry allows for an abstract analysis of the systemic adaptation of the constitutional system and the constitutional order to the structural and functional changes in the socio-legal context. It is a concept that detects the shifts and mutations of the structural matrixes and codes which both frame the constitutional dynamics and reflect the systemic alterations in the macro structures and schemes of the institutional design and the constitutional order. Thus the transition of the constitutional systems from Early Modernity (seventeenth to eighteenth centuries) through Modernity (nineteenth to twentieth centuries) up to Post-Modernity (the current age) produces fundamental structural changes in the socio-legal context. They result not only in different constitutional axiology and constitutional design but also in different matrixes for ordering and

explaining the structural shapes and features of the constitutional order, or, in other words, in different constitutional geometries.

The definition of the concept of constitutional geometry sheds some light on this novel approach for framing classical constitutional issues relating to the question of how to master and comprehend the durable and fundamental structures of the constitutional order. However, the theory of constitutional geometry needs further elaboration by presentation of the constitutional geometry of Modernity, the reasons for its emergence in that concrete design and outlook and its most important structures, shapes and forms.

II. GEOMETRICAL EXPLANATORY PARADIGMS IN WESTPHALIAN CONSTITUTIONAL LAW

Constitutional geometry has been ever-present although in latent, implicit and semi-exposed ways since the emergence of constitutionalism in the eighteenth and nineteenth centuries and even since the emergence of some of its predecessors in the late pre-constitutional era of the early Westphalian epoch from the second half of the seventeenth century onwards. Hence the intellectual traditions of constitutional geometry can be traced down to the absolute monarchy and the early phase of the emergence of the territorial nation state with their corresponding and supporting political philosophy. In other words the roots of some of the main schemes, shapes and forms for visual geometric representation of power relations spread as far as early Modernity. With regard to the ‘invented tradition’¹¹ of the ideal heritage of the Antiquity on which the modern Western civilisation, the constitutional civilisation included, has been built one can speculatively even go further back in political history.

However, until the emergence of the first constitutions the use of the term ‘constitutional geometry’ is incorrect. One can define the ways the constellation of public power has been visually exposed as either political geometry or constitutional geometry of the factual constitution, which are related to the theoretical or the empirical but not to the legal dimension of public power. This is due to the fact that the shapes and forms in which public power has been demonstrated, structured, moulded and described have been the product of either the collective imagination of the political community negotiated by the people or imposed on them by state officials and the intellectual elite or the theoretical depiction of the power constellation by the political and social philosophy.

The modern constitutions are the first systematic, rational and written attempts at establishing durable power schemes and long-lasting patterns of

¹¹ E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983).

inter-institutional relations that can be structured around the achievements of political and social theory. Hence constitutional geometry is a modern concept that has implicitly emerged in the context of Westphalian constitutional theory and positive constitutional law. An important part of the normative ideology of modern constitutionalism concerns the shapes and forms in which the people are supposed to conceive the constitutional reality and some of the central phenomena of the constitutional discourse. The system of sources of law, the system of power and authority, the territorial structure of the state and the system of state institutions and inter-institutional relations are typically defined by the constitutional theory and imagined by the political community in the shapes of constitutional geometry.

Thus constitutional geometry is closely related to some of the most important concepts of Western Modernity and modern constitutional law and constitutional theory. These are the concepts of state institution as a normative model and legal framework for public officials' behaviour, sources of law as formal and usually written repositories of legal normativity and public power and state authority as phenomena which are emancipated from other forms of social power and authority and thus from their pre-modern syncretism. Even the concepts of state understood as either a system of territory-based socio-political relations of the nation structured by public power and state authority¹² or as an impersonal normative order¹³ are essentially modern. That is why constitutional geometry has been born out of the general pathos of Western Modernity to rationalise, systematise and construct socio-political relations and the realm of public power.

Westphalian constitutional geometry is predominantly organised in hierarchies and pyramids.¹⁴ Triangles and rectangles are also used but not as framing categories on a macro level that aim to explain the general characteristics of the constitutional order. Triangles and rectangles are typically put in practice as schemes for analytical-symbolical depiction of inter-institutional relations between the central state bodies—the monarch or the president, government and parliament, eventually the constitutional courts and the supreme courts and in some cases also the second chambers conceived as individual institutional actors. Other forms of constitutional geometry such as lines, trees and spirals are also present and have some epistemic and symbolic importance in the context of modern constitutional law.

The constitutional geometry of Westphalian constitutional law and statehood rarely uses circles and networks as analytical matrixes for the description and representation of institutional, normative or power relations. The network has failed to serve as either analytical or normative concept of

¹² G Jellinek, *Allgemeine Staatslehre* (Nabu Press, 2010) 1–835.

¹³ H Kelsen, *Allgemeine Staatslehre* (Gehlen Verlag, 1966).

¹⁴ For these 'traditional models' for organisation of the legal system see F Ost and M van der Kerchove, above n 7, 1 et seq.

Westphalian constitutional law with the victory of the territorial state over the city-state confederations such as the Hanseatic League or the global network-based trade empires as the predominant model for structuring the state and public power in Western Modernity.¹⁵ The clear advantages of the territorial state in political, military and economic terms structured on the basis of hierarchy and pyramid-like power relations doomed the circle and the network to disuse for several centuries. The network and the circle regained their explanatory and normative importance only with the development of the international legal order in the second half of the twentieth century and with the pluralisation and constitutionalisation of that order at the end of the twentieth and the beginning of the twenty-first centuries.¹⁶

Hence Westphalian constitutional theory has created its own visual world of constitutional geometry. It is primarily structured around the hierarchy as universal explanatory scheme of the world in general and socio-political relations in particular. The hierarchy is used both normatively and analytically as the natural power matrix, explanatory and ordering scheme and intellectual and ideological code of Modernity from the age of the absolute monarchy until the second half of the twentieth century.

Here I will focus predominantly on the hierarchy and the pyramid as the most important normative shapes and analytical tools of modern constitutional law and constitutional theory. That analysis, however, should be preceded by a presentation of the line as a deeper and not immediately visible but fundamental concept of modern constitutional geometry.

The line is a powerful analytical tool around which the evolution of the constitutional and political order has been organised by many political theories. Moreover, the line is presupposed by constitutional theory and constitutional law as an initial ordering scheme serving for allocation of the institutions on the same level of the territorial structure of the state and public power. Here the line denominates one of the segments of the hierarchical pyramid, namely the institutional level which symbolises formal institutional equality.

Last but not least the line serves as a temporal axis depicting the temporal dimension for the unfolding of political power relations and for construction, deconstruction and reconstruction of institutional design through which the constitutional system adjusts itself and adapts to the changing socio-political, economic and most importantly technological and

¹⁵ For a critical analysis of the mainstream view of the definitive advantages of the territorial state over such network-based political regimes see JG Ruggie, 'Territoriality and Beyond: Problematising Modernity in International Relations' 47 (1993) *International Organization* 155–56.

¹⁶ For the challenges of the network to the pyramid, the effects of the dynamic interplay and competition between these constitutional semiotic concepts and the chances of the network to replace the pyramid see F Ost and M van der Kerchove, above n 7.

information context. Apart from this macro temporal aspect the line may symbolise coequal and synchronic or asynchronous institutional timelines determining symphony or polyphony of temporal institutional horizons.

Consequently the line has two main functions and typical meanings in modern constitutional geometry. First, it is a way of depicting institutional relations. Second, it is a device for representation of the historical development of the socio-political process and of the emergence and evolution of its constitutional dimension. Thus it is a temporal axis for exposure of the institutional development of the constitutional order. This second meaning of the line is the more important one, both from the viewpoint of theory and of praxis. It is much more frequently used and persistent in constitutional theory and bears much richer symbolic meaning.

In addition a third and lesser known function and meaning of the line can be interpretatively extracted from Saskia Sassen's theory of the 'transversally bordered spaces'.¹⁷ In the context of her theory the line implicitly functions as a symbolic representation of the cross-cutting claims for authority raised by the actors of global governance such as global religions, transnational corporations, supranational courts, sovereign funds etc, which penetrate the 'bordered space'¹⁸ of the Westphalian statehood and constitutional order. This issue will be examined again in the context of the analysis of the current challenges to the Westphalian constitutional order and its constitutional geometry.

The line is not very productive as a device for representation of relations between institutions on the same level of the territorial structure of the state, for example on a national or local level. Such relations are visually sufficiently clear and easy to comprehend also without the use of constitutional geometrical forms. The inter-institutional lines, in contrast to the inter-institutional triangles or rectangles, usually neither bring more clarity nor produce additional meaning. That is why they are rarely used in constitutional theory as a device for visual representation of institutional behaviour, institutional relations or institutional dynamics.

The line symbolising institutional equality has been useful for emphasising the lack of superiority and institutional domination of the monarch in constitutional-parliamentary and parliamentary monarchies and of the parliament in post-communist systems which have rejected the Soviet type of government. Here the line is a sign for the reflexivity and reactivity¹⁹ of the new democratic constitutions towards the previous constitutional order which was based on the supremacy of the monarch, the supreme council

¹⁷ See S Sassen, *When Territory Deborders Territoriality* (2013) 1 *Territory, Politics, Governance* 23.

¹⁸ *ibid.*

¹⁹ For the concept of reactivity of constitutions see, eg E Tanchev, above n 6, 198.

or the parliament. Thus the line has served some role for reforming the constitutional and political culture in systems undergoing transition from a concentrated authority enshrined in a dominant institution such as the monarch or the parliament (serving as supreme council in the context of Soviet systems) to separation of powers based simultaneously on institutional dispersion and sharing of the public authority.

In such cases, however, the line equals the level which is a concept with different semantics. The use of the line as a synonymous concept for the level is grounded on the only common aspect of their semantics—the semantics of equalisation, and on the pursuit of the aim to align institutions allocated on the same axis of the constitutional design. It has to be taken into account that both the line and the level are rarely enshrined in positive constitutional law as legal terms. The line and the level are concepts of constitutional theory. They are either extracted through systematic and teleological interpretation of the constitution and constitutional law or imposed on them as explanatory paradigms or even as tools for constitutional modernisation via conceptual reform.

The line is used as an instrument for geometrical visual depiction of institutional relations also with regard to other aspects of horizontal power polycentrism and of relations concerning representative democracy. The line may represent the genetic and functional relations²⁰ between parliament and government in parliamentary systems. Here the line denominates the complex linkage between these key institutions of parliamentary republics and monarchies. The line may be used as a device for visualisation of the inter-institutional relations between the organs of the legislative and the executive power also in systems with rigid separation of powers such as some versions of the constitutional monarchy and presidential republics. Here the line serves as a tool for geometrical representation of institutional independence and to a lesser extent of institutional interdependence.

However, such use of the line is not of great epistemic benefit. Indeed it emphasises the legal relation or the system of legal relations between state institutions which are central for the constitutional system. However, their visual representation via geometrical metaphors does not bring much additional meaning and knowledge regarding their functioning.

In the context of parliamentarism the line may be used also for visual depiction of the system of representative relations between the people,

²⁰ For the genetic and functional relationship between the Parliament and the government see, eg, P Kiiver, European scrutiny in national parliaments. Individual efforts in the collective interest? in O'Brennan and Raunio (eds), *National Parliaments Within the Enlarged European Union. From 'Victims' of Integration to Competitive Actors?* (London and New York, Routledge, 2007) 73 et seq; A King, 'Modes of executive-legislative relations: Great Britain, France and Germany' in (1975) 1 *Legislative Studies Quarterly* 11–34; and G Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes* (Houndmills, Macmillan Press, 1994) 101.

the electorate, parliament and other state institutions elected fully or partially by parliament. An excellent example of the function of the line as a form of constitutional geometry capable of visually representing chains of political representation of political will and interests rooted in the people as sovereign, mediated through the parliament and spreading through the institutional system with parliamentary endorsement, is one decision of the German Constitutional Court.²¹ According to it there is an ‘uninterrupted democratic chain of legitimation’ that stems from the people, concentrates the ‘input’ democratic legitimacy²² in the Bundestag, which then distributes it to other state institutions. This symbolic presentation of the constitutional geometry of the representative parliamentary systems is not limited to the German constitutional model, but has universal significance.

The constitutional geometrical metaphor used by the German Constitutional Court is the chain and not the line. However, the chain can be reduced to a line for analytical simplification. And again, the chain may be used as an independent form of constitutional geometry, if its specific semantics can contribute to the better visual exposure of the characteristics of the constitutional design. Actually the constitutional geometrical form which has been drawn by the German Constitutional Court is not only a chain reduced to a line but also resembles a tree depicted by the use of a system of lines.

The line might seem a more appropriate device for description of the system of inter-institutional relations in the representative parliamentary republic. This is due to the fact that the tree seems to be insufficiently universal, durable and clearly shaped. Moreover, it can be reduced to a system of lines. On the other hand, the tree as a form of constitutional geometry has the advantage of visualising systemic relations which stem from one ideal, normative or empirical power source and spread in different branches of the institutional system. The tree is especially adapted to represent the relationships of the pure parliamentary republics where the source of law is the people and the main distributor of ‘input’ democratic legitimacy is the parliament as national representative institution. Hence the tree exemplifies the fact that the forms of constitutional geometry may stand in complementary but also in competitive and alternative relation to one another.

The line may also be employed as a representation of the time-space continuum, the emergence and development of the constitutional statehood and authority and for depiction of the temporal dimension of the evolution of the constitutional order. The line as a device for depiction and representation of the historical process of the development of the constitutional system

²¹ BVerfGE 83, 60, 73.

²² For the input democratic legitimacy see, eg P Craig and G de Búrca, *EU Law. Text, Cases and Materials*, 4th edn (Oxford, Oxford University Press, 2008) 65; and P Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (The Hague, Kluwer Law International, 2006) 95.

has two main forms and displays. First, the line can serve as an arrow pointing at some definite political end or indefinite constitutional future. Second, the line may turn itself into a spiral denominating the uneven development of the constitutional system and combining the evolutions with the revolutions and showing the gradual process of gaining of shape and substantial meaning of the constitutional order.

The shift of the line into a spiral similar to the turning of the line into a tree which has been analysed above demonstrates again the transformation and mutation of the forms of constitutional geometry which are dependent on the best way of visual representation of constitutional systemic relations and of the broader framework of the constitutional order. Hence the spiral may be used as either a specific manifestation of the line or can be defined as separate form of constitutional geometry.

One of the most popular temporary-historical dimensions of the line is based on the presumption for the continuous and evolutionary character of constitutional history which has its beginning, intermediate stops, aim and eventually an end. The end might be constructed differently, such as the Hegelian state as final destination in the journey of the 'world spirit' throughout history,²³ as class-free Marxist society, or as Fukujama's liberal end of history.²⁴

The line may also be infinite. This is the case of the social contract theories in which the line visualises the development of mankind from a gathering of people into society and from non-constitutional pre-modern society into constitutionally organised modern society. Here the line is important not as an arrow reaching a definite end but as an arrow demonstrating the direction which is accentuated somewhere in the course of its development in the moment of conclusion of the constitutional social contract.

Most of the above-mentioned theories do not explicitly use constitutional geometry in general or the line as a form of constitutional geometry in particular. However, the systematic reading of their core ideas can be visually described well through the use of the line. Hence the line is implied by the meaning provided by the above-mentioned theories and can serve as a tool for visual representation of their temporal constitutional dimension.

The hierarchy is the most widespread, typical and frequently used form of constitutional geometry in Westphalian constitutional law. It has been the natural model for ordering political power relations during the whole history of mankind with some negligible exceptions. With the emancipation and differentiation of public power from the broader category of social power and with the emergence of the state as governing system and

²³ GWF Hegel, *Outlines of the Philosophy of Right* (Oxford, Oxford University Press, 2008).

²⁴ F Fukuyama, *The End of History and the Last Man* (New York, Free Press, 2006).

mechanism for introduction and maintenance of social order, the hierarchy has become the universal code for structuring power relations.

Consequently the hierarchy is a durable, persistent, logical and efficient structure for organising the state's institutional system throughout history. However, with the increase in the role of the state during the age of Modernity as an ordering and governing mechanism of human society resulting in the attribution of new functions to it, such as management of large parts of the social fields defined as social policies, governing of public finance and economy, application of a nationwide unified model for conflict resolution etc, the importance of the hierarchy and later the pyramid as institutional framing and representation schemes considerably increased.

Several factors have contributed to the universal recognition of the hierarchy as the main shape of modern constitutional geometry. The victory of the territorial nation state over alternative models for organising the public power, for example the empire, the networked confederation of city-states or the aterritorial religious-based realms and communities, and its establishment as the dominant form of statehood in Western Modernity has been paralleled by the necessity of providing a conceptual model for accomplishment of public authority. The need for maintenance of the interstate equilibrium, for sustainable and durable legitimation of public coercion and for rational explanation of the constitutional ontology has led to the emergence and constitutional entrenchment of the principle of state sovereignty especially in its form as monarchical sovereignty that marked the beginning of Westphalian statehood.

Thus the need for constructing the territorial structure of the state power provoked by the emergence of the sovereign territorial nation state objectively triggered the use of the hierarchy and the pyramid as dominant forms of modern constitutional geometry. The territoriality of public power itself was an objective determinant of the increasing importance of the hierarchy and the pyramid as ordering schemes of Westphalian statehood and as explanatory and analytical paradigms of Westphalian constitutional and political theory.

Indeed the modern territorial nation state has inherited the hierarchy from the multicultural empires—both pre-modern and early modern. However, in this imperial context the hierarchy has been complemented and has been partially competing with the asymmetric and mosaic structure of the estate-based medieval society. Moreover, the medieval and early modern hierarchies were not based upon constitutionally entrenched rationality and they did not make systematic use of the hierarchy as a holistic ordering scheme of the constitutional geometry.

With that background in mind, it seems proper to conclude that Westphalian constitutionalism has additionally reinforced the hierarchy as an instrument for national unification, centralised political domination and rational government in different aspects. The establishment of efficient

central government including, but not limited to, general administration, tax administration and military and police administration, the development of unified national written law applied and safeguarded by well-ordered, rationally constructed and efficient courts' and state prosecutors' systems required the hierarchy as a universal ordering model. The medieval heritage of networked clientelistic power relations, autonomous cities, estates, guilds and local communities has been partially deconstructed and replaced by formalised, rationalised, proceduralised, legally institutionalised and then constitutionalised universal power schemes applicable for the whole territory and for a wide range of spheres of socio-political relations.

These processes of deconstruction, construction and reconstruction were accomplished under the banner of modernisation. One important but not immediately obvious aspect of this political, administrative, legal and constitutional modernisation resulted in 'hierarchisation'. The latter consisted in the introduction of the hierarchy as universal ordering code and of the pyramid as key matrix for the rational-emotional visualisation of the structure of the public order. The constitutional entrenchment of the hierarchy led to the establishment of the pyramid as the central form of the modern constitutional geometry.

That is why the hierarchy, which also existed in pre-modern times, has been used to its furthest extent as a rationalising and modernising matrix during Westphalian pre-constitutional and then constitutional Modernity. Thus the hierarchy and the pyramid as its more evident and visually convincing form have served as both bearers of order and tradition and as key modernising strategies and tools in the hands of the central state government and the emerging national political elite. Hence the hierarchy has become a point of interception and intertwining of both tradition and modernisation with regard to the models for structuring the public power and the shapes of political geometry which was later transformed into constitutional geometry. The hierarchy has proved to be the most useful and natural matrix for restructuring power relations in the early modern period (sixteenth to seventeenth centuries) and then for their constitutionalisation in the form of written constitutions and modern constitutional law from the eighteenth to nineteenth centuries onwards.

Here are some examples of the universal creative application of the hierarchy and the pyramid as central organising and ordering schemes of modern constitutional law, key concepts of modern constitutional theory and the most important figures of modern constitutional geometry. They demonstrate not only the rationalising results of modern constitutional law and constitutional theory, but also the continuity and inheritance of some of the key normative ideologies of medieval public law and the political philosophy which have been reconstructed in order to serve as ordering schemes and normative ideologies of Modernity and as forms of its constitutional geometry.

The hierarchy was also the central organising scheme for medieval political orders. The God as supreme source of the political order and the monarch as divinely appointed supreme leader of the community inaugurated by recourse to sacred tradition were key normative ideologies of medieval statehood. The Pope was an institution which merged both medieval concepts for legitimate hierarchical domination—the religious and the secular. Westphalian constitutional law as well as constitutional and political theory have partially reconstructed and laicised these traditional ways for legitimising the power hierarchy.²⁵ They have also additionally reinforced the hierarchy as an explanatory scheme of modern constitutional geometry.

The supremacy of the monarch was initially overemphasised and strengthened in the early Westphalian age. Absolute monarchy drove the concept of the supremacy of the monarch to excess by merging the figure of the monarch with the concept of the state. This strategy led to legitimisation of the monopoly of the monarch and the state over the accomplishment of hierarchical public coercion and superimposed policy making. In that way the political power resting upon hierarchy and subordination has been emancipated from the other forms of socio-political governance, some of which have been achieved in non-hierarchical but in horizontal or networking ways.

Examples of such more horizontal and network-based forms of governance were the relationships in the Protestant political communities which were grounded on the idea of equality of all people in front of God, for example the Protestant colonists' town meetings in North America, the confederal unions of free cities such as the Hanseatic League, the world trade empires such as Netherlands and the confederations. However, even in systems which were governed basically in accordance with the principle of hierarchy there were social power centres, such as the estates and the free cities, which achieved horizontal and network-based forms of governance.

Thus, to some extent paradoxically, the absolute monarchy has paved the way for the partial emancipation of the state from society, for the delimitation of state power from other types of social power and for the establishment of its formal neutrality and hierarchical supremacy. The second kind of emancipation—the emancipation of the state as an impersonal and increasingly formalised institutional system from the figure of the monarch—became possible with the adoption of the first constitutions. They transformed the monarch from unlimited demiurge into state institution with constitutionally provided competences. The modern constitutional territorial state required a hierarchical and pyramid-like structure of its constitutional geometry as an all-encompassing ordering scheme

²⁵ For the traditional legitimacy see M Weber, *Soziologie. Weltgeschichtliche Analysen. Politik* (Stuttgart, Kröner Verlag, 1968) 151.

especially due to its de-personalisation and increasing constitutional institutionalisation. However, the need for hierarchical structuring of modern statehood concerned all its dimensions—the state as factual power relations, the state as institutional system and the state as normative order.

Sovereignty as one of the central and key concepts of Westphalian constitutional law has been typically defined in hierarchical terms. It is a concept that both requires and reinforces the hierarchy as ordering scheme of the political and constitutional order. Sovereignty is both the hierarchical top and the hierarchical source of the authority of the Westphalian state, which system has been structured as a power pyramid.

Westphalian constitutional modernity has been stretched between several extremities. Its rationalist pretention and pathos had to be balanced with the need for assuring the emotional persuasiveness of its institutions, principles, values and ideologies. The enhancement of the socio-political pluralism which has been required by the increasing complexity of modern society triggered by the emergence of the mass society as a result of the industrial revolution and urbanisation should not have been provided to the detriment of the efficiency and authority of the state. In that context the sovereignty, hierarchy and pyramid-like structure of the institutional, normative and power order have been necessary preconditions for safeguarding the authority and efficiency of the public power, for its emancipation from the private sources of socio-political governance and for generating both rational legitimacy²⁶ and emotional comprehensiveness of the constitutional model. Moreover, they proved to be mutually interdependent phenomena.

That is why an important part of modern constitutional theory is based on the idea of hierarchy as an explanatory scheme of modern constitutional geometry. Sovereignty as key principle of modern constitutional law and as fundamental organising tool for the constitutional order is grounded on and preconditioned upon the hierarchy. Even many of the social contract theories which are capable of explaining the constitutional system and political order in non-hierarchical and more horizontal ways actually presuppose the hierarchy. This is especially evident in the Hobbesian *pactum subjectionis*, but is also clearly recognisable in John Locke's theory of the legitimate king which served a pivotal role in the establishment of the constitutional monarchy as the predominant constitutional model of the 'long nineteenth century'.²⁷ Jellinek's 'three element theory',²⁸ which is maybe the most important socio-legal theory of the state elaborated in the age of late Modernity, also suggests the hierarchical scheme of the political order structured by the public power. Moreover, in his theory the hierarchy is preconditioned upon the territoriality of the nation state.

²⁶ *ibid.*

²⁷ E Hobsbawm, above n 10.

²⁸ G Jellinek, above n 12.

The mutual interdependence of sovereignty, hierarchy and pyramid-like structure of the constitutional order can be well exemplified by the comparison of two seemingly antagonistic theories—Carl Schmitt’s political decisionism and Hans Kelsen’s legal normativism. Schmitt defines sovereignty as an empirical existentialist category which predetermines the legal order and (re)creates the constitutional and other legal rules in a situation of anomy. Thus the sovereign will is actually a secular version of the will of God and the sovereign as a secular God can structure and restructure the constitutional order and the socio-political world to his liking. The sovereign will has total hierarchical supremacy in the constitutional, political and social system. On the other hand, Kelsen uses the Grundnorm as functional equivalent of God. Similarly to the function of God in medieval scholastic theory, the Grundnorm is an axiomatic suggestion which is used for hierarchical deduction of the legal order.²⁹ In Kelsen’s theory the world is limited to the legal system in its reductionist version as normative system. Both Schmitt and Kelsen use the hierarchy as a universal ordering scheme for their conceptual models of the statehood and its constitutional and legal order.

Both theories compared lead to several conclusions. Both sovereignty and the Grundnorm presuppose and are grounded on hierarchy. The normative hierarchy and more precisely the supremacy of the constitution safeguard sovereignty. Sovereignty is the source and safeguard for constitutional supremacy and for the hierarchical order of the constitutional system. Thus sovereignty and the pyramid-like structure of the constitutional order based on the axiomatic suggestion of the existence of the Grundnorm are interdependent concepts which perform a mutual safeguarding function. Sovereignty and the supremacy of the constitution are the two sides of the coin named ‘hierarchy’ and are both cornerstones of Westphalian constitutional law.

Naturally these conclusions oversimplify the theories of Kelsen and Schmitt and neglect some of their postulates. However, they prove the fact that sovereignty and constitutional supremacy are interdependent central phenomena of Westphalian constitutionalism with strategic importance for modern constitutional law and theory. And they are both based on the concept of hierarchy as a key figure of Westphalian constitutional geometry. Last but not least, it should be noticed that Kelsen further develops the idea of hierarchy as a form for organising the legal and constitutional order by virtue of providing the pyramid as a powerful and convincing form of modern constitutional geometry.

Consequently a very important intellectual heritage which has contributed to the establishment of the hierarchy as a predominant ordering and

²⁹ According to R Tashev, ‘the basic norm is methodological suggestion with operational character’ which allows for the establishment of self-referential system based on deduction. See R Tashev, *General Theory of Law* (Sofia, Sibi, 2004) 19–20 (in Bulgarian).

explanatory paradigm of Westphalian constitutional law consists in the conceptual organisation of the constitutional system around the axiomatic presumption of the existence of a supreme ordering power. This power is supposed to be the source of the constitutional system's ontology and to some extent also to its teleology thus being the driving force for the maintenance of constitutional equilibrium and a key source for legitimation. During the Middle Ages this function has been performed by the God. In the context of Western Modernity and Westphalian constitutionalism the God has been replaced in its function as source of the validity of the legal order and of the legitimacy of the political order by the sovereign in its different manifestations and later also by the Kelsenian Grundnorm. Hence both the Grundnorm and sovereignty are concepts based on hierarchy. Thus they have massively contributed to the centrality of the hierarchy in modern constitutional geometry.

It has to be taken into account that the hierarchy has not always been depicted and represented directly as a pyramid being the natural or at least the most popular shape for hierarchical subordination of people, office holders, institutions, legal norms or whole institutional or normative orders. In many cases it has been demonstrated in the mediated forms of attribution, ascription or deduction of authority. The authority is deduced from the God, the sovereign, the supreme ruler, the natural order of things and—at a much later stage—from the Kelsenian Grundnorm. It is induced from the will of the people based on their collective rationality in the context of national or the people's sovereignty. Thus it takes the presumed shape of a deductive or inductive hierarchy.

So far, the development of the hierarchy as fundamental concept of Westphalian statehood and constitutionalism with its roots in the pre-constitutional age and with its strategic importance for maintaining the order of modern complex societies has been traced down. The hierarchy has been explored as normative paradigm and as dominant form of constitutional geometry with historical, socio-legal and theoretical implications. Now let us turn to some of the most important examples of the application of the hierarchy and the pyramid as both ordering and representation schemes of Westphalian constitutional geometry. They concern the hierarchical structure of the normative order, the institutional order in general and some of its branches in particular. More concretely they have formative influence and visualising function with regard to the system of sources of law, the territorial structure of the state, the general structure of the executive power,³⁰ the system of the state administration, the court's system and the state prosecutor's system.

³⁰ According to Jean Blondel the concept of government is usually related to the ideas of hierarchy and pyramid. See J Blondel, above n 6, 271.

The organisation of the system of sources of law as hierarchy and its visual representation as hierarchical pyramid is a universal model for all modern constitutional systems. The pyramid as constitutional geometric form for representation of the system of sources of law was introduced by Hans Kelsen. However, it has gained universal recognition in modern constitutionalism even without explicit recourse to legal normativism. This is for two main reasons.

First, the hierarchy is the clearest and most efficient way for the resolution of conflict of sources of law. It assures predictability and consistency of the application of law by the institutions that perform law-implementing and conflict-resolution functions—the courts, the administration etc.

Second, the pyramid reflects the hierarchy of the substantial and political importance of the sources of law produced by both the socio-political relevance of the legally regulated social relations and the legitimacy of the state institution to regulate them through their institutionalisation in sources of law. In other words the superiority of the constituent over the legislative and of the legislative over the executive power and of the will of the sovereign over the will of the parliament and the will of the government are reflected by the normative pyramid of the sources of law. Thus the institutional hierarchy is reflected in the hierarchy of the sources of law visually represented as a pyramid.

The pyramid is also used for explanation of the system of sources of law of multilevel constitutional systems. In the multilevel context the system of sources of law is usually represented as a system of subordinated and interrelated pyramids. The lower pyramid which denominates the system of sources of law of the federated units is semi-autonomous from the pyramid of the national or federal law but is inferior to it. Indeed even in classical nation-state multilevel systems such as the federations the pyramid metaphor cannot easily give explanations to two main questions. The first concerns the way the national and the subnational pyramids are linked whereas the second is related to the appropriate allocation of the subnational constitutions presumed as the top of the subnational pyramid in relation to the national or the upper pyramid of sources of law.

The organisation of the territorial structure of the state—the form of territorial distribution of power—is built around two main forms of constitutional geometry. These are the hierarchy, conceived usually as a pyramid, and the polygon, perceived as a container. A classical paradigm of Westphalian statehood is the conception of the state as ‘closed territorial container’.³¹ The territoriality of the state is an invented theoretical and normative category which did not exist in the empirical realm. Thus the territoriality of the state

³¹ N Brenner, ‘Beyond state-centrism? Space, Territoriality and Geographical Scale. Globalization Studies’ in 28 (1999) *Theory and Society* 55.

became a legal and constitutional quality of the state preconditioned upon the existence of the territory as a fact. Consequently territoriality became in a sense a legal and ideal quality of the territory, which is itself a physical-geographical notion,³² and usually goes together with several other normative ideas. These are the linear character of the state borders,³³ the existence of ‘perfect territory’ in which the elements of the statehood pertaining to Jellinek’s theory—the nation, the territory and the public power—quasi-naturally coincide and the spreading out of the borders of territoriality to other spatial dimensions such as the air, water and subterranean spaces.

Hence the polygon is the initial and in some sense the preliminary form of constitutional geometry of Westphalian statehood. This is due to the fact that it precedes the structuring of the territorial dimension of the public power in other forms and especially in hierarchies. Moreover the polygonal preliminary shaping of the state territory is of essential importance for the Westphalian statehood since it delimits the sovereign space from the other sovereign spaces, tries to exclude or at least to limit extraterritorial and aterritorial ‘cross-cutting’ jurisdictional claims³⁴ and serves as a natural precondition for further structuring of the territorial jurisdictions of the different state layers and state institutions. To a certain extent the polygon is the typical shape in which the modern territorial state gains its territoriality.

The geometry offers also many insights for structuring the territorial dimension of the state, especially when it comes to multilevel constitutional systems such as federations, confederations or decentralised unitary states. However, the predominant form of Westphalian constitutional geometry with regard to the territorial structure of the public power is the hierarchy and the pyramid as its more concrete visual representation.

The pyramid and the hierarchy are used as general models for the territorial structure of the state. They offer the principal constitutional framework of the territoriality of the Westphalian state. The pyramid and the hierarchy visualise and order the number of public power levels and their interrelation. They also allow for the recognition of the existence of exceptions from the general pyramidal model of constitutionalised territoriality such as territorial or national-cultural autonomies, federal territories, associated territories, capital city territories etc. The hierarchical model of shaping the territorial structure of the Westphalian state is objectively predetermined by the need to organise large territories with complex societies and wide-ranging public functions accomplished by institutional actors on

³² JG Ruggie, above n 15, 139–74.

³³ D Newman, ‘Boundaries, Borders and Barriers: Changing Geographic Perspectives on Territorial Lines’ in M Albert, D Jacobson and Y Lapid (eds), *Identities, Borders, Orders: Rethinking International Relations Theory* (Minneapolis, University of Minnesota Press, 2001) 137–51.

³⁴ S Sassen, above n 17, 21–45.

different levels and in different spheres of government. The power spatiality of the Westphalian state cannot be organised either in alternative forms of constitutional geometry, for example in a circular or networked way or in non-territorial models for public power accomplishment.

Apart from their use as general models for ordering the sources of law and for organisation of the territorial structure of the state the pyramid and the hierarchy are also employed to structure and visualise the specific institutional design related to the different branches of state power. Thus the hierarchy organises the general structure of executive power, the system of state administration, the court system and the state prosecutor system.

Typically the executive power of the state in the context of Westphalian constitutional law is structured as a pyramid with two main layers—the government at the top and the administration at the bottom. The most comprehensive concept of this hierarchical model based on the principle of the hierarchy of the political government, the civil service and administrative levels has been provided by Max Weber.³⁵ That is why it is also known as the Weberian model for the structuring of executive power. On the other hand, the model was first put into real practice in nineteenth-century British constitutionalism, which is why it is also known as the Westminster model.

According to the Weberian or Westminster model for organising executive power the government is the party political top of the pyramid. It is elected on party political lines by the people, which allows the democratic control and the arbitration of the political elites by the electorate via ascription of political responsibility to the government. The government must be a party government in order to be democratic and responsible. On the other hand, the administration or state bureaucracy is the non-political and apolitical expert fundament of the executive power which is placed below the government at the bottom of the hierarchical pyramid. The staff of the administration has to be recruited on the basis of education, expertise and duration of service and not on party political lines. The administration should be immune from direct democratic control because the latter requires elections or recall which are by necessity grounded on party political influence.

The balance between governmental party political democratic leadership and administrative technocratic capacity is actually a balance between the principles of democracy and rule of law. The appropriate equilibrium between these two constitutional principles and functional aims which is reflected in the pyramidal structure of the executive power is of crucial importance for safeguarding that the efficiency of the Westphalian executive is not to the detriment of the democratic legitimacy and the legality of its functioning.

³⁵ M Weber, *Wirtschaft und Gesellschaft* (Tübingen, Mohr Siebeck, 2002).

The hierarchical pyramidal structure of the executive not only concerns the relationship between the government and the administration. It is also reproduced and reflected in the organisation of the government itself and in the structure of the different branches of the executive power encompassing the most important socio-political fields.

The typical primacy of the prime ministerial principle over the collegiate and resort principles for organisation of the government which reflects the domination of the will and the competences of the Prime Minister over the governmental collegium and the distinct ministers is again based on hierarchy. It can be visually represented as a pyramid topped by the Prime Minister where the government is placed on the intermediate layer and the ministers at the bottom.

Moreover, each minister heads a separate power pyramid framing the policy making and institutional design of the specific policy field. The instruments for administrative control achieved by the ministers over their administrations and by the Prime Minister and the government over the ministers are based on the hierarchical and pyramidal structure of the executive. The competence of the Prime Minister to determine and impose the guidelines of the policy to the government and the responsibility of the Prime Minister for the whole governmental activity and of the ministers for their subordinate administrations are also preconditioned upon the hierarchy and pyramid as ordering schemes of Westphalian constitutional geometry in the executive power domain.

Indeed the hierarchy and pyramid are the universal forms of constitutional geometry of the executive power in modern constitutional systems. However, their application is not limited to the executive branch alone. The hierarchy and the pyramid are also the ordering schemes and forms of constitutional geometry for judicial power. The subordination of the courts is structured in a pyramidal way. This also holds true in the case of specialised courts since they are also organised in a pyramidal shape. The existence of specialised courts only introduces plurality of pyramids in the institutional design and constitutional geometry of the judiciary.

The pyramid is even the explanatory paradigm in the constitutional geometry of the legislative power in relation to the bicameral structure of a parliament. The interrelation between both chambers is usually depicted as a pyramid. This is also the case when the second chamber is weaker than the first or is even nominal. The very terms 'lower' and 'upper' chamber, which are frequently used for denomination of the houses of parliament, demonstrate their pyramidal and hierarchical exposure in the constitutional geometry of Westphalian constitutional law.

The intermediate conclusion is that the hierarchy is the widespread, dominant and almost universal model of the constitutional geometry of Westphalian statehood. It has shaped the institutional and normative

systems of the Westphalian constitutional order and has predetermined the territorial structure of the state. The hierarchy as the key modernising ordering concept and most central form of the constitutional geometry of Westphalian constitutional law has been objectively predetermined by the territoriality of power relations, by the emergence of mass society and the establishment of the national territorial state as the universal model for organising the economy, finance and politics. The hierarchy as macro model and general constitutional geometric shape has been reproduced and replicated in the different branches of state power and thus has become the matrix for organising Westphalian constitutional design.

Finally it has to be mentioned that the power concentration or the power polycentrism of the modern constitutional systems legally defined as monism, corporatism or pluralism, or as unity or separation of powers, is also related to constitutional geometry. The degrees of concentration or dispersion of public power is reflected in the different schemes and models for shaping the institutional design of the constitutional systems. The system of constitutional relations stemming out and concretising the above-mentioned basic principles for organisation of the public power in general and the state power in particular are rather complex. That is why they are usually reduced to general schemes for institutional design such as the different models for horizontal and vertical separation of powers. Thus Westphalian constitutional law typically provides for theoretically elaborated and constitutionally enshrined models for the relations between state institutions belonging to different branches or levels of state power while the models for societal power unity or power polycentrism based on the principles of monism, corporatism and pluralism remain to a high degree under-institutionalised in written constitutional law.

Constitutional and political theory also makes an attempt to use constitutional geometry as an explanatory paradigm of the inter-institutional relations with regard to both the constitutional statics and the constitutional dynamics by virtue of classifying them in institutional axes, triangles or rectangles. The institutional triangle is frequently used to explain the most important features of the relationships between parliament, government and head of state. Sometimes it turns into an institutional rectangle due to the inclusion of the Constitutional Court or the Supreme Court in the analysis. These forms of constitutional geometry are indeed theoretical constructs which, however, have a solid basis in written constitutional law. This is due to the fact that they actually consist in theoretical typologies which have to visually represent in order to better analyse and explain the systemic relations between the most important constitutional institutions on the basis of interpretation of the constitutional provisions. The increasing dysfunctionality of these analytical shapes of Westphalian constitutional geometry in the early post-Westphalian context caused by several complex

but to a large extent objective factors related to the emerging supranational and even global constitutionalism will be explored in the next section.

III. POST-WESTPHALIAN CHALLENGES OF SUPRANATIONAL CONSTITUTIONALISM, GLOBAL GOVERNANCE AND INFORMATION REVOLUTION TO THE CONSTITUTIONAL GEOMETRY OF WESTPHALIAN CONSTITUTIONAL LAW

The explanation of constitutional geometry as an analytical and constructive concept, the tracing down of its historical development and its most important shapes and forms established and sustained during the Westphalian Modernity is the background against which its structural changes produced by several key phenomena of the post-Westphalian age should be exposed and analysed. The challenges to constitutional geometry—initially a modern and thus constructive phenomenon based on rationality and aimed at rational simplification of the constitutional and political world—which are produced by the emergence and development of post-Westphalian, post-national, supranational and even global constitutionalism and constitutional law are in great need of explanation.

Several processes and phenomena emerged and started to evolve during the last decades of the twentieth and the beginning of the twenty-first centuries. They pose a considerable challenge to the classical constitutional geometry of the Westphalian state and Westphalian constitutional law and theory. These phenomena are globalisation, global governance, supranational and global constitutionalism and the information revolution.

The challenges are deep and structural and not just functional. The current early post-Westphalian situation in which we live not only produces new shapes and forms, thus enriching traditional constitutional geometry; it also shakes the structural foundations on which modern constitutional theory and theory of the state are built. It is not only a matter of new rectangles, triangles, pyramids and hierarchies that emerge and have to be taken into account: the whole conceptual system of modern constitutional theory—constitutional geometry included—has to be redefined, restructured and adapted to this new socio-political reality. This is necessary in order to keep it capable of retaining its explanatory force and to allow for further shaping of both the normative dimension of the written constitution and the collective political and constitutional imaginary of the people enshrined in the ideal constitution of the state and society. Hence the above-mentioned factors produce structural changes in the ordering and organising schemes of the public power and in its constitutional design and start to change the constitutional geometry of modern statehood.

The structural changes in Westphalian constitutional geometry can be ordered in three main groups. The first group encompasses challenges to

constitutional geometry imposed by the constitutionalisation of international and EU law that led to the emergence of supranational and global constitutionalism.³⁶ The second group includes changes in constitutional geometry produced by global governance as a broader governance paradigm that takes into account both the supranationalisation and globalisation and the privatisation of public power. The third group concerns the emergence of the Internet as a global virtual reality which fosters the ‘time-space compression’,³⁷ produces territorial detachment of the people and the elites, contributes to the global mobility of information and thus to the global mobility of social power resources, establishes global deliberative and participatory networks and provides for both a new structure and new context of the public power. Thus the Internet as the most important result of the information revolution both creates perils to democracy and the rule of law and brings new opportunities for global re-democratisation and re-establishment of the global rule of law.

Global constitutionalism is not a monolithic concept.³⁸ In its narrowest meaning coinciding with the supranational constitutionalism of the EU it is focused on EU integration.³⁹ Thus it denominates the transformation of the European communities into the European Union with the Maastricht Treaty and its constitutionalisation by virtue of the Amsterdam, Nice and especially the Lisbon Treaties as well as by the case law of the CJEU and secondary EU legislation.

The broader concept of global constitutionalism also encompasses the emergence of other supranational regimes which provide for human rights or contain a developed institutional system capable of governing constitutional or quasi-constitutional issues in an autopoietic⁴⁰ or semi-autonomous way from the Member States’ governmental systems. Apart from the EU, which is the most important supranational constitutional system, there are also other sector-specific forms of supranational constitutionalism in the spheres of human rights (the Council of Europe), public finance and economy management (the World Trade Organisation) etc. Prominent authors

³⁶ For the ‘external’ challenges to the hierarchy generated by the influence of the international on the national law see F Ost and M van der Kerchove, above n 7, 10.

³⁷ For the concept of time-space compression see TH Eriksen, *Globalization. Key Concepts* (London, Bloomsbury, 2014).

³⁸ CM Amhlaigh even stipulates that there is a ‘constitutional cacophony’ in the theoretical proposals aiming to propose definitions of the global constitutionalism. See CM Amhlaigh, ‘Harmonizing Global Constitutionalism’, (2016) 5 *Global Constitutionalism* 173–78.

³⁹ Some authors consider supranational constitutionalism not as a framework concept with different degrees of specificity but as one of the three main versions of the broader paradigm of ‘constitutionalism beyond the state’. See G Anderson, ‘Beyond ‘Constitutionalism Beyond the State’ (2012) 39 *Journal of Law and Society* 359–83.

⁴⁰ G Teubner, *Law as an Autopoietic System* (Oxford, Blackwell, 1993).

suggest that ‘global constitutionalism is an agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere’.⁴¹

In its broadest meaning global constitutionalism includes also the eventual emergence and development of a global government system capable of safeguarding human rights and providing for an institutional infrastructure able to produce sustainable legislative solutions, to accomplish policy management and to resolve conflicts through the global courts system. The UN is the closest example of such a global constitutional regime which is obviously sufficiently remote from that ideal model.

There are many theories which try to explain supranational and global constitutionalism. Two of them may be defined as predominant in the current constitutional discourse. These are multilevel constitutionalism⁴² and constitutional pluralism.⁴³ They both make use of different arsenals of constitutional geometrical forms.

Multilevel constitutionalism uses the classical shapes of Westphalian constitutional geometry as organisational and analytical schemes of the emerging supranational constitutionalism. It provides for federalist solutions to supranational constitutional problems and uses the achievements of the federalist constitutional and political theory in order to explain the constitutionalisation of the EU and to a lesser extent also of other supranational regimes. Thus multilevel constitutionalism uses the hierarchy and the pyramid as ordering paradigms and as visual analytical and organising forms. It applies it to systems such as the EU that do not match the characteristics of the territorial nation state in which these forms have emerged and evolved.

Many EU legal and political scholars who are not limited only to the proponents of multilevel constitutionalism use the triangles and rectangles as explanatory and visualising schemes when analysing the inter-institutional relations between the EU institutions or between them and the institutions of the Member States. Thus they follow a durable tradition established in the context of Westphalian constitutionalism. The problem is that these constitutional geometric forms are frequently put in practice uncritically and without taking into account the specifics of the supranational context in which they are applied.

⁴¹ A Peters, *The Merits of Global Constitutionalism* (2009) 16 *Indiana Journal of Global Legal Studies* 397.

⁴² I Pernice, ‘The Global Dimension of Multilevel Constitutionalism. A Legal Response to the Challenges of Globalization’ in *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (Engel Verlag, 2006).

⁴³ N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2011); A Stone Sweet, ‘Constitutionalism, Legal Pluralism and International Regimes’ (2009) 16 *Indiana Journal of Global Legal Studies*, 631 et seq; M Avbelj and J Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012).

Hence multilevel constitutionalism tries to transplant⁴⁴ the ordering schemes of Westphalian constitutional geometry which are adequate for the territorial nation state in a post-national, non-state and even in a post-territorial context. Basic normative ideologies of Westphalian constitutionalism such as the state as territorial container⁴⁵ composed of public power, territory and people,⁴⁶ representative democracy, parliamentarism, the existence of a fully fledged, politically active, integrated community with solidarity and mutual commitment among its members capable of sustaining territorial democracy, the hierarchical structure of the system of sources of law and the multilevel structure of the supranational and national institutions of the legislative, executive and judicial power are all transplants of the nation-state constitutional law in the supranational constitutional context of the EU.

The rather mechanical and artificial way that these concepts, principles and institutions are superimposed on the EU as an unprecedented supranational and post-national regime in human history without taking into account both its institutional design and socio-political context logically leads to democratic deficit and inefficiency. The ‘tree of representative democracy’ described above and exemplified by the already-mentioned decision of the German Constitutional Court faces several challenges in serving as a constitutional geometric form of EU constitutionalism. This tree has multiple roots—28 if the ‘peoples of Europe’ are counted or 29 if the democratic legitimacy of the EU can be grounded on the European citizens and the people of the 28 member states. Moreover, the European Parliament does not possess any monopoly over the input democratic legitimacy so as to serve as a source for its distribution to other EU institutions.

The same problems stemming out of the direct transplantation of the nation state constitutional geometry to the EU and its transposition as constitutional geometry of the EU can also be detected regarding the hierarchy, the pyramid and the triangles and rectangles. These modern forms of constitutional geometry are frequently misleading in a supranational and post-national context. They do not constitute sufficiently adequate ordering and explanatory schemes in the case of the EU. This is due also to the lack of a clear concept of territoriality of the EU produced by the inexistence of clear limits of its territorial expansion and by the emergence of networked atterritorial power structures and schemes in the European construction as a result of the information revolution and the crisis of territoriality.

⁴⁴ A Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (Atlanta, University of Georgia Press, 1993).

⁴⁵ N Brenner, above n 31, 55.

⁴⁶ G Jellinek, above n 12.

The constitutional geometry provided by the multilevel constitutionalism theory has two main deficiencies when explaining the ordering of the legal orders⁴⁷ of the EU and its Member States. They clearly demonstrate the increasing dysfunctionality of the hierarchy and the pyramid as normative ordering concepts of Westphalian constitutional geometry applied to the post-Westphalian constitutional law and socio-political context.

First, the use of the hierarchy and pyramid as ordering schemes requires either clear subordination of EU law under the constitutions of the Member States or the undisputed supremacy of EU law over the whole domestic law including the constitution. Since the abandonment of the absolute supremacy of the EU law doctrine developed by the CJEU in its earlier case law⁴⁸ the clear subordination of the national constitution under EU law is impossible. Since the development of the latest doctrine of relative supremacy of EU law safeguarding and respecting the constitutional identity of the Member States,⁴⁹ the absolute supremacy of the Member States' constitutions is also rather problematic and questionable.

Second, there are several systems for linking the national with the supranational legal systems or for 'ordering of constitutional orders'.⁵⁰ Usually modern constitutions provide for either a monistic or a dualist system for implementation of international treaties in the domestic legal order and for linking national with international and supranational legal systems. The monistic and the dualist systems predetermine the structural exposure and the modes of opening of domestic to supranational and international law. Thus they produce different institutional results moulded in divergent constitutional geometric forms. The monistic system allows for shaping a common hierarchy and pyramid of the sources of law which also includes international law. The dualist system preserves the formal closure of the domestic pyramid of sources of law. Thus it provides for two semi-independent hierarchies of sources of law—the international law pyramid and the domestic law pyramid.

Both monism and dualism seem to be increasingly dysfunctional in the context of constitutionalisation of international law which has led to the

⁴⁷ For the concept of 'ordering of constitutional orders' see E Tanchev, 'The Contemporary Supranational Constitutional Pluralism or the Ordering of Constitutional Orders' in P Kirov (ed) *Constitutional Studies 2012–2013* (Sofia, 'St Kliment Ohridski' University Press, 2014), 171–98 (in Bulgarian).

⁴⁸ See Case C-6/64 *Flaminio Costa v ENEL* [1964], Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963], Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970].

⁴⁹ See Case C-36/02 *Omega Spielhallen- und Automatenanstalt v Oberbürgermeisterin der Bundesstadt Bonn* [2004] and Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] etc.

⁵⁰ E Tanchev, above n 47, 171–98 (in Bulgarian).

establishment of EU constitutionalism and other less developed forms of supranational constitutionalism and eventually may cause the emergence of global constitutionalism. They have both conceptual and practical difficulties in explaining several key concepts of post-Westphalian constitutional and international law: the relationship between the EU law and the constitutions of the Member States; the functionality of the *pacta sunt servanda* principle in the context of activist supranational courts and national constitutional courts; the integration of the case law of the supranational courts in the domestic legal orders; the relationship between the UN Charter, EU law and the European Charter of Human Rights in the context of the case law of the CJEU⁵¹ and the case law of the European Court of Human Rights;⁵² the increasing importance of soft law etc.⁵³

Constitutional pluralism is among the few post-Westphalian paradigms provided by constitutional theory at the beginning of the twenty-first century. It aims to explain supranational constitutionalism from a pluralistic and polycentric point of view by virtue of applying the network and the circle as normative ordering and explanatory shapes of the post-Westphalian age and its constitutional geometry. Moreover, it goes beyond the network and the circle as shapes which have also been known to Westphalian constitutionalism although being underestimated and used scarcely by applying a pluralist approach. It consists in mapping the supranational and global constitutional reality by using no single ordering and explanatory scheme, for example the (territorial) polygon, the hierarchy, the pyramid, the circle and the network, but through a mixture of the above-mentioned shapes.

This mixing of constitutional geometric forms better reflects the plurality of organising models for the public power. It takes into account the existence of global and regional plurality of legal orders, some of which are organised in a hierarchical way whereas others resemble much more a network or circle. Moreover, there are inter-institutional triangles which are cross-cutting the territorial polygons and the jurisdictional hierarchies and ignore the initially layered structure of the Westphalian organisation of the supranational legal order. A clear example of such a 'jurisdictional cross-cutting inter-institutional triangle' is the so-called 'Troika' composed by the European Commission, the European Central Bank and the International Monetary Fund which has played a central role in financial crisis management in the EU since 2009.

⁵¹ See Case C-402/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008].

⁵² See *Nada v Switzerland* [GC], no 10593/08, Judgment, 12.09.2012 and *Al-Dulimi and Montana Management Inc v Switzerland*, 5809/08, Judgment, 26.11.2013.

⁵³ For both conceptual and comparative analysis of some of these issues see A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press, forthcoming 2018).

Consequently constitutional pluralism takes into account the plurality of levels of public power both on a national and subnational level as well as the emergence of networked systems of private actors performing public functions. It preserves the hierarchical, pyramidal and layered Westphalian structure of power where appropriate while admitting the structural changes of the institutional design and constitutional geometry of the post-Westphalian age.

The ordering code of constitutional pluralism is toleration, differentiating mutual recognition and peaceful co-existence.⁵⁴ It combines the nation states' hierarchies and pyramids with the networks which are typical for the private actors of global governance and for the global civic society and public sphere players. Hence constitutional pluralism takes into account the mixture of circular, networked and hierarchical ways and matrixes on the basis of which the national, sub-national and supranational constitutional regimes and quasi-public power schemes are currently (re)organised.

Last but not least, constitutional pluralism allows for visual and analytical recognition of the existence of mutually supportive, parallel but sometimes also contradictory jurisprudence of the supranational and the national courts. The jurisprudential activity of the supranational courts in combination with the case law of the national constitutional and supreme courts regarding EU and international law matters led to the emergence of asynchronous and asymmetric supranational constitutionalism. It shapes the visual map of global constitutionalism as a realm of dots and spots marking the jurisprudential activity of the supranational and national courts which may be coordinated and systematically linked but also may emerge as non-synchronised and even opposing responses to the same or common constitutional issues. In other words the case law of the supranational and national courts and especially the judicial dialogue in which they engage with increasing intensity can only be partially explained by judicial hierarchies, judicial networks and judicial inter-institutional triangles. It much more resembles a scheme mapping different dots, spots and circles which visually depict the divergent 'epicentres' of jurisprudential activity. The courts' jurisdiction and the convincing power of their decisions determine the range of the circles and thus the 'magnitude' of their case law.

This polycentric case law is structured not in hierarchies but actually in constellations resembling star systems in which the planets are gathered around its sun—the key decision forming the centre of consequent judicial doctrine. In some cases these constellations co-exist in a dynamic equilibrium but in other cases they collide leading to the establishment of radically new trends, doctrines and case-law constellations or producing black holes as radical escapes from the established legal order. These phenomena might

⁵⁴ E Tanchev, above n 47, 172 (in Bulgarian).

have been explained in Kelsenian terms as a replacement of the Grundnorm or in Schmittian terms as a new supreme decision taken in the situation of anomy (the ‘Ernstfall’). However, this is less and less possible due to the lack of clear and monolithic hierarchy based on a single Grundnorm as well as because of the lack of supranational sovereignty and the increasing dysfunctionality of state sovereignty in the context of supranational constitutionalism.

Consequently the asymmetric and asynchronous character of global and supranational constitutionalism is produced to a great extent by the divergent case law of the supranational courts and the national constitutional courts. Although constitutional pluralism seems a less clear concept than multilevel constitutionalism, in fact it better reflects the current post-Westphalian constitutional situation. For example, the asymmetric character of the concept of constitutional identity⁵⁵ as key concept of the current EU constitutionalism debate and the existence of mutual cross-fertilisation of the jurisprudence of the different supranational and national courts based on vertical and horizontal judicial dialogue⁵⁶ leading to migration of constitutional ideas can be better explained by the theory of constitutional pluralism than by multilevel constitutionalism.

To sum up, constitutional pluralism is to a certain extent a postmodern concept since it does not try to provide for a holistic model or for a fully fledged and internally coherent and uncontroversial paradigm. Constitutional pluralism is much more a reflection of the plurality of legal orders. It emerged during late Modernity in the context of globalisation, which has produced the current asymmetric, multilayered and polycentric texture of the global legal order. Constitutional pluralism is much more a *modus vivendi* of shapes and forms with divergent ontology, teleology, pragmatics and institutional outlook rather than an elaborated scheme for uncontroversial ‘ordering of constitutional orders’.

Constitutional pluralism explains the constitutional nature and features of the EU in an asymmetrical way combining hierarchical with networked and circular constitutional geometric paradigms. The pyramid and hierarchy remain important ordering schemes of the EU constitutional design. They organise the principal type of interrelation between the supranational, national and subnational levels of the institutional and normative systems of the EU and its Member States.

The circle is the constitutional geometric shape in which ‘Europe à plusieurs vitesses’ is structured. The existence of the Eurozone as the hard

⁵⁵ A Saiz Arnaiz and C Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Mortsel, Intersentia, 2013).

⁵⁶ D Law and W C Chang, ‘The Limits of Global Judicial Dialogue’ (2011) 86 *Washington Law Review*; M Walters, ‘The Future of Transnational Judicial Dialogue’ (2010) 104 *Proceedings of the Annual Meeting (American Society of International Law)* 465 et seq.

core and internal circle of the EU is supplemented by the Schengen circle. The Member States which are neither part of the Eurozone nor of Schengen are included in the most external circle of the European construction.

The network is an appropriate geometric form for visualising the interrelation between the Member States' parliaments while performing controlling functions for the principles of subsidiarity and proportionality according to Protocols No. 1 and 2 to the Lisbon Treaty. It can be applied also to the judicial dialogue among the CJEU and the national constitutional courts producing the aggregate effect of both networked and multilevel constitutional jurisdiction. Here the network is both a complementary and concurring visual explanatory and ordering paradigm to the asymmetrical totality of dots and spots framed by jurisprudential circles. Moreover, the experts and activists in the EU are linked in pan-European networks. The European citizens' initiative and the European political parties as the key forms of participatory democracy in the EU also require the network as organising form of the constitutional geometry of the European public sphere.

Hence the federalist, institutionalist and multilevel vision of 'Europe of hierarchies' is paralleled and sometimes challenged by the pluralist visions of 'Europe of circles' and 'Europe of networks'. Thus the constitutional pluralistic version of the post-Westphalian constitutional geometry of Europe in general and of the EU in particular seems to really produce a 'Kandinsky painting'.⁵⁷

The circular and pluralistic shapes of constitutional geometry are applicable also for the explanation of the parallel membership of the states in different but partially mutually supportive forms of pan-European integration, such as the EU, the Council of Europe and the OSCE, based on partially coinciding ontology and teleology. The lack of a clear and predominant centre of the network of pan-European circles produces coordination and coherence issues which result again in a pluralistic constitutional design of pan-European constitutional geometry.

The theory of constitutional pluralism is one of the important attempts at creating a theory of post-Westphalian and globalised constitutional law. However, its main issue is that it does not provide for sufficiently clear and practicable criteria for giving preference to supranational sources of law and for solving of normative collisions. This is especially problematic when such activity is expected to be performed by the ordinary courts or administrations in their everyday praxis. From the point of view of constitutional geometry constitutional pluralism is a major novelty since it breaks with the monopoly of hierarchy and pyramid and introduces the circle and the network as explanatory and ordering paradigms of post-Westphalian

⁵⁷ I borrow the 'Kandinsky painting' metaphor from the keynote speech of Martti Koskeniemi at the 22nd IACL World Congress in Oslo, Norway.

supranational and global constitutionalism. However, the ‘Kandinsky painting’ produced as a result of the application of constitutional pluralism to the global and EU constitutional context is neither sufficiently clear and structured nor sufficiently emotionally and visually convincing, nor adapted for giving practicable solutions to the everyday legal and political praxis. The constitutional pluralism’s deficiencies demonstrate how far we are from having a coherent theory of supranational and global constitutional law in general and of its constitutional geometry in particular which is adequate to the challenges of the post-Westphalian situation and at the same time is applicable in legal and political practice.

Global governance is a socio-political phenomenon and theoretical paradigm which profoundly changes modern understanding of constitutional geometry. It reflects the privatisation and supranationalisation of the public power as processes which run in parallel since the last decades of the twentieth century. Taken in combination they lead to the outsourcing of public power to supranational and global actors, some of which are not public institutions but private entities. Global governance presumes that the main public functions are performed by a set of public and private, national, subnational and supranational actors. Thus global governance challenges the territoriality of the public power and the limitation of its institutional design to public institutions. What is more, global governance implies the use of networks and circles not only as a supplement but also as central ordering and explanatory schemes of the constitutional geometry of post-Westphalian constitutionalism. The constitutional geometry of the global governance cannot be reduced to either hierarchies and pyramids or levels and lines. It requires by necessity the introduction of new forms of constitutional geometry which can better represent the polycentric and complex order of the globalised world.

Global constitutionalism may be eventually reduced to hierarchies if it is explained in the multilevel constitutionalist trend of thought without recourse to constitutional pluralism. However, global governance, like constitutional pluralism, is an essentially non-hierarchical concept. It is based on the network, the circle and the asynchronous and asymmetrical realm of dots and spots as visual explanatory codes of the global constitutional order and its post-Westphalian constitutional geometry.

The most important difference between global governance and constitutional pluralism with regard to their constitutional geometry is that constitutional pluralism is much more diverse as regards its ordering schemes. Thus constitutional pluralism presupposes the existence of a constitutional dimension which implies the use of hierarchies but denies the possibility of transforming them into global or regional universally applicable supranational hierarchical and pyramidal models. It is based on the presumption that public functions are performed by constitutional and thus public actors. Global governance presumes the networked organisation of supranational

power relations as well as the existence of cross-cutting jurisdictions, some of which are performed by private actors.

The constitutional impact of global and territory-detached global governance actors implicitly brings to the fore the network and the circle as visualising schemes of its post-Westphalian constitutional geometry. Hence the visual world of global governance is much more focused on networks and circles than is constitutional pluralism. They indicate the increased political and thus constitutional importance of global religions,⁵⁸ transnational corporations,⁵⁹ global interest groups and lobbies and the global networks of experts and civic activists. The networked and circular visual world of global governance also demonstrates the diminishing importance of states visually defined as power pyramids.

The de-territorialisation of public power is one of the most important novelties produced by the information revolution. It constructs new power realities such as the Internet and deconstructs the monopoly of the territorial state over the governance of the policy processes framed by its territorial polygon, governed by its pyramidal normative order as applied by its hierarchical institutional system. Moreover, it reconstructs power relations on non-territorial and frequently on a global basis in circles and networks as shapes of the post-Westphalian constitutional geometry adequate to the emerging global constitutionalism.

The Internet produces several challenges to Westphalian constitutional law and its constitutional geometry. It establishes a new power reality which fosters the emergence and proliferation of deliberative and participatory forums and opportunities for political networking on a global scale. At the same time the Internet weakens the control of territorial power structures over the different policy fields and policy processes by raising the information independence—and consequently, the overall independence—of the virtually and thus globally acting local players. Thus the Internet increases power polycentrism, reorganises the global and virtual accomplishment of power not only in hierarchies but also in circles and networks and reduces the control of territorial power hierarchies and pyramids which leads to their increasing dysfunctionality. The malfunctioning of the hierarchical structure of public order and state power results in the general dysfunctionality of Westphalian constitutional law which is in dire need of new supportive ideologies, explanatory and ordering paradigms.

⁵⁸ M Saporiti, 'The Concept of Sovereignty and the Transnational Challenge of Global Religions. A Theoretical Framework' in M Belov (ed), *Global Governance and Its Effects on State and Law* (Frankfurt am Main, Peter Lang, 2016) 97–115.

⁵⁹ C Good, 'Corporate Human Rights Initiatives—From International Law to Global Governance and Back?' in M Belov (ed), *Global Governance and Its Effects on State and Law* (Frankfurt am Main, Peter Lang, 2016) 149–65.

The power reality created by the Internet as well as the deliberative and participatory networks and circles established by it are territory-detached and territory-independent as well as simultaneous, thus being also time-independent. Consequently the Internet profoundly changes the information context of public governance and policy making, which affects the activity of both the state institutions and the actors of civic society and the public sphere.

What is especially important is that the Internet emerges not only as an alternative power reality but also as a 'cross-cutting jurisdiction'.⁶⁰ It is a de-territorialised and time-independent network of networks and circles that penetrates in the hierarchies and pyramids of state jurisdictions. Thus it contributes to the de-territorialisation of the public power and to the destruction of the 'territorial container'⁶¹ of the nation state. Hence the Internet boosts the importance of networks and circles and diminishes the role of the pyramid and the hierarchy as ordering and explanatory schemes of constitutional geometry.

In other words, the Internet provides for the first time since Early Modernity a power model that can compete with the domination of the territorial state as a universal model for organising, institutionalising and shaping the public power. The Internet challenges the territoriality of statehood and establishes a platform for development of virtual global constitutionalism based on information as a distinct power resource and on specific ordering and visual schemes of this immaterial global power reality. Hence it also brings with it alternative forms of constitutional geometry that compete and challenge the constitutional geometry of Westphalian statehood.

The Internet has an important constitutional dimension due to the fact that it directly concerns constitutionally enshrined human rights, produces the demand for the constitutional provision of new human rights, challenges the efficiency of the existing territory-defined safeguards of human rights and introduces structural changes in the functioning of state institutions as well as of the institutions of supranational constitutionalism. The problem is that the Westphalian constitutional law is rather insensitive to aterritorial power realities and to constitutional issues stemming out of non-territorial power orders. The territorial entrenchment of Westphalian constitutionalism and its structuring in polygonal territorial forms and in hierarchical and pyramidal institutional and normative orders prevents national constitutional law from giving adequate responses to both the issues and the opportunities created by the emergent aterritorial global Internet-based power reality structured in networks and circles and less frequently in hierarchies.

⁶⁰ S Sassen, above n 17, 21–45.

⁶¹ N Brenner, above n 31, 55.

Hence the clash between the aterritoriality of the virtual polyphony and polycentrism of networks and circles which are frequently sector-specific and the territoriality of the hierarchically and holistically structured Westphalian statehood creates fields of anomy which can be visually represented as holes of disorder or as spheres of clashing orders. That is why one of the main challenges to the Westphalian constitutional law is to provide for constitutional answers to the Internet-based power reality thus constitution-alising it also with the help of the visual world of constitutional geometry.

In fact the Internet can be conceptualised and organised as the first genuinely aterritorial form of global constitutionalism. The question is whether its constitutionalisation is possible on a national or even a regional level through national or regional institutional and normative hierarchies or can be fully accomplished only on a global level in the shape of global constitutional networks and circles. This is another aspect of the broader issue of how can we capture, organise and explain the emerging supranational and global constitutional reality—through multilevel constitutionalism resting upon hierarchy or via constitutional pluralism based on polycentric and networked analytical and ordering schemes.

The constitutional shape of the public sphere of Westphalian statehood has been broadly structured in the geometrical framework provided by the territorial nation state. Thus it has been defined as a system of forums for public deliberation, political engagement and civic participation in the political process limited by the territorial polygon of statehood and the hierarchy and pyramid of the territorial power unit composed by the subordinated levels of civil society, public sphere and state institutions. The territoriality of the nation state framed the forms of political communication on a macro level in the classical shapes and forms of Westphalian constitutional geometry even though the concept of public sphere⁶² allowed for non-hierarchical and polycentric engagement structured in networks and circles.

The technology and information revolution triggered by and based on the Internet allowed for the emergence for the first time in human history of essentially global forms of political communication which are structured in networked, polycentric and not only in hierarchical ways. The Internet itself is conceived as a network. Its network character and its territorial detachment and independence predetermine the communication and socio-political participation opportunities which it offers to its users. Thus the Internet emerges as a new type of ‘cross-cutting jurisdiction’⁶³ exempted from the hierarchical burden of territoriality and producing networked communities and networked forms for accomplishment of public governance and thus of public power.

⁶² J Habermas, *Strukturwandel der Öffentlichkeit* (Frankfurt am Main, Suhrkamp, 1999).

⁶³ S Sassen, above n 17, 21–45.

The Internet serves as a platform for pluralistic and networked political deliberation and participation. Thus it creates new opportunities for the development of global deliberative and participatory democracy. It allows for the territorial detachment of information and communication rights, for inclusion in networked forms of global democracy and for the emergence of a territorial deliberative citizenship.

The new social media such as Facebook, Twitter, Google + etc. have proved to be not only platforms for information exchange and public opinion formation but also devices for policy making. They change the structure not just of the vertical political communication between politicians and the people and the horizontal political communication between the people themselves but also serve as instruments for public governance and social change that predetermine key political decisions and even produce or foster revolutions. Thus the Internet and Internet-based platforms and networks challenge the territoriality of public power, the possibility for polygonal closure and hierarchical accomplishment of policy making and restructure the territory-based deliberative and participatory democracy framed in polygonal and pyramid forms. They enhance the emancipation of symbolic policy from substantial policy and communication power from overall state power and profoundly change the information context for policy making.⁶⁴ That is why in the context of the Internet the network challenges both the hierarchy and the polygon as shapes for framing the constitutional geometry of the public sphere and introduces structural changes in the modes for the accomplishment of state power.

The Internet creates threats to the Westphalian outlook of the constitutional principle of democracy. According to S Benhabib, democracy requires closure⁶⁵ whereas the Internet dismantles the territorial closure of the demos and public power. Hence the Internet erodes the preconditions for democracy in its only known form so far, namely as territorial democracy. However, in the current context of crisis of the representative democracy, the emergence of networked sector-based civic society and territory-detached deliberative and decision-making circles of experts, citizens and activists may commence to serve as a functional equivalent of the missing supranational, European and global demos.

The European or global nation is impossible. However, European or even global networked communities of sector-based activists checking both the public power and the private actors which accomplish public functions and

⁶⁴ M Belov, 'Separation of Powers reconsidered: a Proposal for a New Theoretical Model at the Beginning of the 21st Century' in A Geisler, M Hein and S Hummel (eds), *Law, Politics and the Constitution. New Perspectives from Legal and Political Theory* (Frankfurt am Main, Peter Lang, 2014) 54–59.

⁶⁵ S Benhabib, 'Borders, Boundaries and Citizenship' (2005) 38 *Political Science and Politics* 673–77.

publicly exposing the malfunctioning of government and governance may serve as a remedy for the democratic deficit of supranational and global constitutionalism. Hence the emergence of global networked communities shaped as an atterritorial and networked system of networks and circles and serving as a supplement to the territorial democratic communities and as a functional equivalent to territorial democracy may increase public control over the global forms of public power.

IV. CONCLUSION

Several conclusions can be drawn up regarding the legal institutionalisation and theoretical explanatory power of the constitutional geometry of post-Westphalian constitutional law. The hierarchy and the pyramid as natural shapes of Westphalian constitutional geometry are questioned, challenged and in some cases even partially dismantled by the network and the circle as ordering schemes of post-Westphalian constitutionalism. The emergent scheme of the global constitutional geometry resembles, in the words of Martti Koskeniemi, a 'Kandinsky painting' in which the hierarchies, pyramids and polygons co-exist and compete with the circles, networks, lines, dots and spots thus producing global asymmetric constitutionalism.

The hierarchy, the pyramid and the polygonal 'territorial container' were objectively produced by the emergence of the territorial nation state, by the need to govern mass society on a large territory based on developed separation of public functions and social labour and by the emergence of the national legal order. The industrial revolution, which itself produced the emergence of the mass society and triggered urbanisation and modernisation and later, with the emergence of the bourgeoisie, also constitutionalisation, have been the objective determinant of the establishment of the hierarchy as ordering scheme of Westphalian statehood. The hierarchy was needed in order to establish national, universal, formalised and hierarchical modern law reflecting the principle of sovereignty and safeguarding the rule of law.

In the same way, the information revolution and globalisation produced the rise of the importance of the network and the diminishing role of the hierarchy as ordering scheme of post-Westphalian supranational and global constitutionalism. The structuring of the public power exclusively in national power pyramids linked to the supranational legal order via the dualist or monist system is put in question. The international legal order gets fragmented into plurality of legal orders which co-exist without being hierarchically intertwined. Thus the fragmentation and the constitutionalisation of international law⁶⁶ and the emergence of constitutional or

⁶⁶ A Peters, 'On the Interaction of Constitutionalization and Fragmentation in International Law' (2015) *Working Paper 2 Centre for Global Constitutionalism St Andrews*, 1–42;

quasi-constitutional supranational regimes limit the explanatory and ordering power of the classical forms of Westphalian constitutional geometry.

In a world without a single power centre in which the hierarchically organised state power is partially dismantled and deconstructed whereas no new global or even regional hierarchy is reconstructed, the network and the circle start to seem more adequate ordering schemes for the supranational constitutional order than the pyramid and the hierarchy. They are objectively predetermined by the information and mobility revolution, by globalisation and the emergence of supranational constitutional regimes.

Post-Westphalian global constitutionalism is not always organised exclusively in territorial forms of public power. Thus the partial territorial detachment of the public power and the emergence of aterritorial forms of supranational and global governance are a product of globalisation and the information revolution. They are objectively produced by them in a comparable way as the hierarchy and the pyramid have been objectively put into practice by the rise of the territorial nation state, the industrial revolution and the emergence of the mass society.

The hierarchy diminishes in importance with the rise of supranational and global constitutionalism based on constitutional pluralism and with the emergence of global governance. However, it will not perish since it is needed as an ordering and explanatory scheme of the territorial state which preserves key and strategic functions even during the current phase of globalisation.⁶⁷

The post-Westphalian situation produces several pressing issues. The giving of proper and adequate answers to them is the key for putting global governance on constitutional roots and for restoring the constitutional government on a global scale. The adjustment of the national institutional pyramids and hierarchical constitutional and legal orders to the networked, circular and asymmetric character of supranational and global constitutionalism should reinstall some mechanisms for prevention of normative and institutional collisions and anomies. The adaptation of the constitutional ideology and the constitutional geometry to the asymmetric, polycentric and partially aterritorial post-Westphalian world order is an important step towards regaining the functionality of the national constitution which was

J G van Mullingen, 'Global Constitutionalism and the Objective Purport of the International Legal Order' (2011) 24 *Leiden Journal of International Law* 285; Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, United Nations, Geneva, 2006; M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–79; and J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalisation of International Law* (Oxford, Oxford University Press, 2011).

⁶⁷ S Sassen, *A Sociology of Globalization* (New York, WW Norton & Company, 2007) 45–97.

born in the context of the territorial entrenchment of public power and the hierarchical Westphalian national order.

The rise of the constitutional relevance of the Internet and the need for its constitutionalisation also brings new challenges to the traditional constitutional geometry. The existence of semi-institutionalised intergovernmental networks such as G-7 and G-20 increases the importance of the network and the circle and at the same time reintroduces the hierarchy into global political relations. This is also a phenomenon that needs some constitutional response. The eventual ratification and entering into force of trade agreements with huge structural constitutional implications such as the TTIP and CETA profoundly challenges the structuring of the constitutional reality, the key distinction between public and private, supranational, national and subnational spheres thus challenging also the constitutional geometry on global, supranational and national levels. Last but not least, the White Paper on the Future of Europe issued by the European Commission in 2017 demonstrates the competition of hierarchical, networked, circular and polycentric forms of constitutional geometry aimed at reorganising the EU on the basis of multilevel constitutionalist, functionalist, sovereigntist or constitutional pluralist basis.