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The social acceleration of time and the social compression of space are today combining to produce changes in economic, political, and cultural relations. These changes have had consequential effects on legal relations, exhibited most obviously by the degree to which national legal orders are now permeated by international and transnational norms. Such developments are of major social and political significance, but their impacts on legal orders remain contentious. Some jurists—the avant-garde—claim that the changes are so profound that they register at the most basic epistemological level: they argue that they are bringing about a fundamental shift in the very idea of law. This is the jurisprudential question that Neil Walker examines in his new book on *Intimations of Global Law*.[1]

Many of the more innovative claims made by avant-garde legal scholars—that these changes signal a juristic 'paradigm-shift' or are creating a new era characterised by a radical pluralism of legal orders—are, I believed, misconceived and cannot be sustained. Contemporary developments may be important, but insofar as they unsettle received ideas about law and government, my own response has been to return to basics and examine the ways in which jurists have characterised the constitution of political authority.[2] In doing so, my objective has been to refashion such fundamental concepts as state, sovereignty and constitution to show that modern practice is more nuanced than post-statists, post-sovereigntists and hyper-constitutionalists imagine. But Walker's response presents those (like me) he labels 'statists' (pp180-1) with an intriguing and more challenging case.

Like avant-garde jurists, Walker seeks not only to analyse the range and nature of these changes but also to address the challenges they present at the most basic level of juristic reconstruction. But unlike Mattias Kumm, he does not assert that it is ushering in

[1] N Walker, *Intimations of Global Law* (Cambridge University Press, 2015): bracketed references in the text refer to this book.
[2] M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003); id. *Foundations of Public Law* (Oxford: Oxford University Press, 2010)

a paradigmatic shift in understanding;[3] unlike Miguel Maduro, he does not adopt a radical constitutional pluralism that can lead only to a hyper-constitutionalist monism;[4] and unlike Gunther Teubner he does not abandon the modern framing of the public and the political in order to replace it with the social and the regulatory.[5] Walker, by contrast, swaps an *emphatic* for an *interrogatory* style. His method is to map cautiously these developments and, rather than making some bold claim that they bring about a shift in law's meaning, to ask a number of rudimentary questions about their implications for the concept of law.

Walker's objective in his book is to advance an inquiry first laid out in his inaugural lecture on assuming Edinburgh's Regius Chair in 2008.[6] There, he identified unity, authority, effectiveness and situatedness as the basic structural characteristics of modern law against which the significance of recent developments are to be assessed. He claimed that these developments were leading to spatial and temporal displacement such that law's modern coordinates are now being placed in question. The emergence of 'certain increasingly prominent sites of jurisgenerative activity' are, he suggested, 'evocative of a break with the situational logic of the legal constellation of modernity'.[7]

Illustrations of such sites of displacement include an incipient 'pluri-constitutive law' in the European Union and the many varieties of 'Global Administrative Law' that have arisen because of 'the increasing propensity for the administration of collective goods, and in particular administrative rule-making, to take place on a transnational basis in the absence of direct authority from either national constitutional sources or international treaty sources'.[8] Such innovations, he contends, have a 'transformative potential' because of 'the novel ways in which they configure themselves' and they are leading to 'the further erosion of the Westphalian pillars'.[9] But his inaugural discourse remains exploratory in tone and it ends with two questions: 'Does the fact that much of

[3] M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), 258-324.
[4] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), 67-84.
[5] G. Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization* (Oxford University Press, 2014).
[6] Neil Walker, 'Out of Place and Out of Time: Law's Fading Co-ordinates' (2010) 14 *Edinburgh Law Review* 13.
[7] *Ibid* 38.
[8] *Ibid* 42.
[9] *Ibid* 44.

this new uncharted law seems at least in some respects out of place with our received understanding of law mean that law as we know it in that received understanding is running out of time? And to the extent that it is, the unavoidable but impossible question with which we must end is whether this is a good or a bad thing.'[10]

These are big questions and we turn to *Intimations of Global Law* in the hope of receiving answers. The book is a tour de force. It provides a concise and comprehensive overview of the range of juristic consequences of globalising developments. It engages in careful analysis, warning of the dangers, on the one hand, of overreach generated by the impulse to latch on to a trendy label and, on the other, of scepticism born of nostalgia for a lost world. It is erudite, relentlessly abstract, and remains focused on the key jurisprudential question. As Walker now formulates it, that question is whether these developments are not only of empirical or rhetorical significance but also 'speak to a shift in how we think about and seek to develop and present law's credentials as law' (p.26). But although the book leaves us much better informed, it does not answer the question. We are left only with the sense that law is 'a less grounded and less embedded form, a more malleable and more precarious category' (p.205).

Some would say that, given the present state of affairs, this is the only sensible answer that can be given. But from what Walker calls the sceptical statist stance, I want to suggest that answers cannot be found because the entire exercise of the avant-garde jurists is misconceived. It is misconceived for four related reasons: first, because, contrary to what they seem to believe, the juristic claims they make are not new; secondly, because they seek inappropriately to convert a series of empirical issues into conceptual claims; thirdly, because they are able to promote such conceptual claims only by wrongly identifying the character of modern law; and finally because, although there is an important issue to be raised by contemporary developments, this—a politico-legal issue—is one that they avoid.

The legal-conceptual questions raised are not new. Avant-garde jurists may have latched on to a phenomenon called 'globalisation' in order to display their cutting-edge credentials, but the jurisprudential question underpinning these globalising trends is as old as the modern phenomenon of law. Consider, by way of example, Henri de Saint-

[10] *Ibid* 44.

Simon's argument in the early-nineteenth century that the French Revolution had veered out of control because, rather than operating according to scientific principles, it had been dominated by lawyers imbued with metaphysical ideas. Authority in the modern world, he suggested, could be acquired only by demonstrating the material benefits that government confers: authority is generated by supplying collective goods that enhance the security, wellbeing and happiness of subjects.[11] Reformulated in jurisprudential language, Saint-Simon was saying that the idea of law as the expression of will, and especially the will of political majorities, must be jettisoned and replaced with a modern conception of law as a co-ordinating mechanism. Law is not (political) will: it is a regulatory technique.

Saint-Simon's faithful secretary then presented his argument in a more pithy form. Metaphysics, Auguste Comte declared, must be replaced by social physics, and the government of men replaced by the administration of things.[12] This adage was soon borrowed by Friedrich Engels and adopted as a pillar of scientific communism. Stripped of its emancipatory *telos*, this is the conceptual foundation of the claims made for global law. Latching on to a crude version of legal positivism that suggests that law in modernity is a set of rules made by the will of the state's legislator, the avant-garde jurists assert, first, that many things with law-like characteristics no longer have their originating source in legislative will and, secondly, that rather than being commands they are best conceived as sophisticated regulatory devices. Proportionality, subsidiarity, burden-sharing, emissions-trading, experimental governance, smart-sanctioning, nudging, outcasting: if these are exemplary techniques of global law (Ch.5) then its emergence seems only to signal the realisation of Saint-Simon's claim. Global law presents itself as the science of the administration of things.

Reflecting on its character with reference to the competing conceptions of modern law as *ratio* and *voluntas*, Walker submits that global law 'sounds in both basic templates … but more as *ratio*' (pp.196-7). He might have been bolder. Global law is *ratio*; it is the expression of a type of instrumental reason that informs the guidance, control and evaluation mechanisms of the many regulatory regimes that now permeate contemporary life. But does the emergence of so-called 'global law' displace 'our received

[11] See J Jennings, *Revolution and Republic: A History of Political Thought in France since the Eighteenth Century* (Oxford University Press, 2011), 347-59.
[12] *Ibid.*

understanding of law'? And is that 'a good or a bad thing'? I want first to suggest that it is not a good thing to assume that these empirical developments in regulatory practice resound at the level of the concept. The question is not whether the extension of transnational regulatory regimes is a good or bad thing: that can only be answered through sociological analysis or, perhaps, by adopting an intuitive judgement. The key question is whether we should assume that the concepts of law and regulation can now be fused.

There are, I suggest, significant differences between the concepts of law and regulation, a point often blurred by those who conceive law simply as normative order. This is a mistake: a legal order is, in essence, a concrete and effective unity and the norms generated by that legal order are derivative phenomena. Law is not normative order: it is an institution which has a firm and lasting identity that persists even as its membership and normative structures change through time.[13] This claim does not resolve the issues raised by globalising developments, not least because it suggests that there are as many legal orders as there are institutions. But by placing the focus of inquiry onto the institution as an effective operating entity rather than on norms or regulatory mechanisms it brings about a more sensible re-alignment.

Once this adjustment is made, the questions raised about the emergence of transnational regulatory regimes seem not to be of a conceptual nature. The first question is: are the various emerging regimes 'institutions'? If the answer is affirmative, then, rather than examining these institutions as some new species whose existence might give rise to a new genus of law, the questions become more prosaic; they are not legal-conceptual but sociological. Are these new regimes derivative institutions or have they been able to acquire an autonomous status? Do they perform limited and particular functions or are their aims of a general nature? And perhaps most importantly: having mapped the network of institutions, can a credible account be given of the power relations that operate across this network?

In the modern world, the state (understood as a centralised agency of rule) is commonly recognised to have acquired a predominant status as 'the institution of

[13] S Romano, *The Legal Order* [1918] M Croce trans (Routledge, 2017); M Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' in A Broderick (ed.) *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos* (Harvard University Press, 1970), 93-124.

institutions'. Most—but not all—institutions have derived their existence or mode of operation either from the state's actions or its acquiescence. Some scholars now argue that globalisation displaces this political reality. This is important, but it is an empirical rather than a conceptual question, on which the evidence presently is inconclusive.[14] For this reason, the emergence of the avant-garde jurists seems mainly to signal the growing influence of a new strain of legal conceptualism, one that seeks conceptual solutions to sociological questions. Neil Walker's may be the most subtle, nuanced and open-minded of these exercises, but this does not mean he has been able to avoid that trap.

I have tried to show that the avant-garde jurists are not making a novel claim about law, are able to claim that a fundamental shift is occurring only by mischaracterising modern law, and have inappropriately converted empirical issues into conceptual claims. I come now to the final criticism, the reason why—on explicitly normative grounds—jurists should be reluctant to embrace the suggestion that law might now be conceived as regulation rather than institution.

Recent developments have certainly challenged the standing of the state as the institution of institutions, but this registers primarily as a crisis of the political rather than the legal. This is because the institutions formed as a consequence of globalisation are mainly regulatory agencies that possess an economic-technical rationale. A complex network of governmental institutions has emerged, many of which operate at arms-length from the state and may not have been established through an exercise of the state's will. This may or may not displace the pivotal role of states in this network—that is an empirical question—but more significantly it undermines the notion of the political as the domain in which collective unity is maintained. Rather than leading to a general jurisprudential crisis, it generates a political crisis born of the difficulty of sustaining the idea of 'the people' as a symbolic representation of collective will formation.

If, as I suggest, this is primarily a crisis of representation of political authority, then it resonates in the metaphysics of sovereignty rather than the empirics of government. The political challenge is to find an adequate expression of collective political agency. Although it generates legal problems, these concern public law—public law as political jurisprudence—rather than positive law in general. The crisis is acute

[14] See: B Jessop, *The State: Past, Present, Future* (Polity, 2016) ch.8.

mainly because, unlike the social that operates on status categories and the economic operating on ability to pay, the political is the domain of equality. And it is through political imagination that the social bonds of those collective groups we call nation-states have been maintained.

The nation-state should certainly not be fetishised but, notwithstanding its constitutive tensions, the way that the institution has been able to manage difference and generate strong bonds of solidarity should also not be underemphasised. Globalisation has opened borders, expanded minds, and created new solidarities. But equivalence between the solidarities of humanity and citizenship cannot be assumed. The solidarity of humanity, Pierre Rosanvallon notes, is a minimal duty that we owe to 'keep people from suffering death by hunger or genocide'; this, according to UN estimates, requires the allocation of around 1 percent of the world's wealth. The solidarity of citizenship calls for the preservation of a common physical and social infrastructure, the promotion of equality of opportunity and the maintenance of a relative equality of living standards, and that requires somewhere between 35 and 50 percent of the nation's wealth.[15]

The crisis we face today has arisen because cosmopolitan sensibilities have been extended while civil sensibilities have declined. This is the fundamental problem, and is one for which global law offers no solution. This is a problem of a political imagination which historically has been sustained by a civil religion that conceives the people as a unity. It generates problems in public law because this is the medium through which this institutional edifice is maintained. If the crisis is not overcome, we will be left with markets, regulatory agencies, basic rights, 'public opinion', and an emaciated sense of solidarity. We might get global regulation—the realisation of global law—but I cannot see how that will be able to sustain a common world.

[15] P Rosanvallon, 'From the Past to the Future of Democracy' in his *Democracy: Past and Future* S Moyn ed. (Columbia University Press, 2006), 216-7.