

EUROPE'S  
CONSTITUTIONAL  
MOSAIC

*Edited by*  
Neil Walker  
Jo Shaw  
Stephen Tierney

# Europe's Constitutional Mosaic

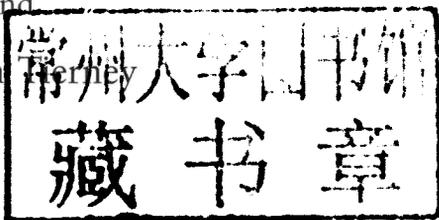
Edited by

Neil Walker

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and

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• HART •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2011

Published in the United Kingdom by Hart Publishing Ltd  
16C Worcester Place, Oxford, OX1 2JW  
Telephone: +44 (0)1865 517530  
Fax: +44 (0)1865 510710  
E-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)  
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by  
Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA  
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190  
Fax: +1 503 280 8832  
E-mail: [orders@isbs.com](mailto:orders@isbs.com)  
Website: <http://www.isbs.com>

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British Library Cataloguing in Publication Data

Data Available

ISBN: 978-1-84113-979-1

Typeset by Columns Design XML Ltd, Reading  
Printed and bound in Great Britain by  
TJ International Ltd, Padstow, Cornwall

## EUROPE'S CONSTITUTIONAL MOSAIC

This book emerged from an extended seminar series held in Edinburgh Law School which sought to explore the complex constitutional arrangements of the European legal space as an inter-connected mosaic. There has been much recent debate concerning the constitutional future of Europe, focusing almost exclusively upon the EU in the context of the (failed) Constitutional Treaty of 2003–5 and the subsequent Treaty of Lisbon. The premise of the book is that this focus, while indispensable, offers only a partial vision of the complex constitutional terrain of contemporary Europe. In addition it is essential to explore other threads of normative authority within and across states, embracing internal challenges to state-level constitutional regimes; the growing jurisprudential assertiveness of the Council of Europe regime through the ECHR and various democracy-building measures; as well as Europe's ever thicker relations, both with its border regions and with broader international institutions, especially those of the United Nations. Together these developments create increasingly dense networks of constitutional authority within the European space. This fluid and multi-dimensional dynamic is difficult to classify, and indeed may seem in many ways impenetrable, but that makes the explanatory challenge all the more important and pressing. Without this fuller picture it becomes impossible to understand the legal context of Europe today or the prospects of ongoing changes. The book brings together a range of experts in law, legal theory and political science from across Europe in order to address these complex issues and to supply illustrative case-studies in the topical areas of the constitutionalisation of European labour law and European criminal law.

# Acknowledgements

The present volume emerged from a series of five seminars held at Edinburgh Law School during the academic year 2008–9. The main funding for the seminar series came from a small grant from the British Academy, and we are extremely grateful for their support. We are also very grateful to Gavin Anderson, Daniel Augenstein, Christina Boswell, Ailsa Henderson, Chris Himsworth, Claudio Michelon, Drew Scott and Elaine Webster for moderating discussion or supplying comments to the main papers at the various seminars. The seminars were well-attended, provoked much debate and challenged our main speakers to revise or rethink their draft papers for publication. Sincere thanks are due to our contributors for taking this task so seriously, and also to Ruth Dukes, Cormac MacAmhlaigh and Kimmo Nuotio for providing excellent contributions to the final volume outside the context of the original seminar series. On the editorial side, we very much appreciate the work of Stephen Thomson and Conrado Hübner Mendes in helping prepare the manuscript for publication. Finally, we would like to thank Conrado (again) and all the administrative staff of the Law School's Research Office, especially its head Alison Stirling, for their sterling efforts in organising the seminar series.

*The editors*  
*Old College, Edinburgh*  
*March 2011.*

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*Introduction*  
*A Constitutional Mosaic? Exploring*  
*the New Frontiers of Europe's*  
*Constitutionalism*

NEIL WALKER AND STEPHEN TIERNEY

I. SETTING THE SCENE

A. Question of Europe

**T**HE CONSTITUTIONAL TRAJECTORY of Europe scarcely constitutes a novel field of enquiry. In recent years we have seen a wealth of scholarly analysis addressing the European constitutional present and speculating about its future. That there has been so much attention upon constitutionalism on a continental scale is unsurprising. We inhabit an age of 'post-national' constitution-building and constitution-branding. Over the past European decade the new post-national phase has reached an unprecedented pitch of intensity, triggered by the establishment of the Convention on the Future of Europe by the European Council at Laeken in December 2001. That initiative led to the publication of a Draft Treaty establishing a Constitution for Europe in 2003, its adoption in modified form by the subsequent Intergovernmental Conference, and its eventual and terminal defeat in referendums in Holland and France in 2005. In turn, the gap left by the failure of the 'big-C'<sup>1</sup> project was quickly filled by a more familiar 'small-c' instrument. A Reform Treaty, which retained the vast majority of the content of the aborted Constitutional Treaty but evacuated all the more obvious signs and conceits of constitutional ambition, was signed at Lisbon on 13 December 2007, finally entering into force on 1 December 2009.

<sup>1</sup> See eg N Walker, 'Big "C" or small "c"?' (2006) 12 *European Law Journal* 75–81.

## 2 Neil Walker and Stephen Tierney

Yet just as the Laeken Declaration did not signal the beginning of the new European constitutionalism, the conclusion of the new Lisbon project has surely not marked its end. In part, this is because the constitutional current of the European Union runs deeper than the events of the last decade. The social and political forces that made the contemplation of a Constitutional Treaty for the EU possible – and its deep disputation inevitable – have not simply disappeared. The increasing legal and political authority of the European Union and its developing forms of cultural identity mean that constitutionalism – traditionally such a close companion to similar developments at the state level – remains a key, if controversial, discourse and practice for those seeking to explain, justify and frame the progress of the new supranational polity and the challenges it poses to the state system.

But there is a broader reason why European constitutionalism extends beyond the events of the last decade. For it is the particular legal and institutional structure of the EU rather than Europe more generally that has been the dominant concern in recent work; so much so, indeed, that the former is often offered as a synonym for the latter. This elision is no mere linguistic shortcut, but carries a suggestion of some significance. It speaks to a tendency to address the EU's constitutional machinations as a free-standing and encompassing normative project for the continent, and so to treat the implications of the changes enacted or envisaged for the institutions of the Union and its Member States as if the EU occupies and controls all the available transnational legal space.

The premise of this book is that a focus on the EU as the key agent of non-state constitutional activity in Europe, while important, offers an incomplete picture of the complex constitutional configuration – or 'mosaic' – of contemporary Europe. Our purpose is to complement existing analysis with a work addressing this broader constitutional context. The volume, while paying due regard to the continuing importance of the EU's familiar constitutional relations with its Member States, explores other threads of legally-coded publicly sourced authority that (together with various new or strengthened threads of transnational *private* authority)<sup>2</sup> apply within and across states, and which both act upon and are acted upon by the states and the EU alike. These other normative

<sup>2</sup> There is also a burgeoning literature on the growth of forms of privately sourced 'constitutional' authority; that is to say, forms of authority which make no direct claim to represent the public but which are nevertheless involved in the pursuit of the kinds of collective goods, and/or are subject to the kinds of 'public interest' constraints, normally associated with publicly established constitutional bodies. The analysis of these trends lies beyond the scope of the present volume. For a notable example under the label of 'societal constitutionalism', see G Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010) 327–44.

threads of public authority have been by no means neglected in the legal literature to date. But they have tended to be addressed somewhat discretely, in a manner that pays little regard to their contribution to the wider *constitutional* landscape of Europe.

What are these other normative threads? They include, quite centrally, the developing institutional apparatus of Europe's other major post-war integrationist initiative, the Council of Europe. Confronted with a new frontier of opportunity after the end of the Cold War and the demise of Soviet Europe, the Council of Europe continues today to augment its constitutional personality through its ever more pervasive involvement in the life of Europe's new and existing states – both those within or seeking to join the EU and those situated at or beyond its margins – and through its increased role in the formation of binding legal obligations, including treaty-making with states outside Europe. A key specialism of the Council of Europe, and an area of constitutional inquiry in its own right, is, of course, human rights. Under the aegis of the Council, the European Court of Human Rights (ECtHR) responds to an ever broader and deeper set of challenges, the outcome of which is an expanding and increasingly dense body of case law that not only challenges the rights supremacy of its signatory states but also promises more overlap, and the possibility of future tension, in its relationship with the EU, and in particular its Court of Justice.

Constitutionally ambitious normative claims at the internal, sub-state territorial level in Europe's many and architecturally various federal and multinational polities are also deserving of our attention in posing an increasing challenge to the unitary self-assurance of states and the supra-state polity-building assumptions of the EU. Finally, and at the opposite extreme, the new transnational normative threads tend more and more to overlap the outer boundaries of Europe. Europe in its various institutional guises has increasingly 'thick' legal relations with other international institutions, perhaps most prominently today with the United Nations Security Council but also with key global sectoral regimes such as the World Trade Organization (WTO), as well as with the 'constitutional' features of 'international law' generically conceived.

Together, these various relations create increasingly dense networks of legal authority within and beyond the continent. 'Europe' is revealed as a more complex, fluid, multi-dimensional category – and also a more recondite one – than in most received understandings of the contours of public authority, and one that merits close investigation. But if this tells us something about 'where' our volume is located, what of the two other key concepts in our title, namely 'constitutional' and 'mosaic' itself?

## B. The Constitutional Dimension

The unsettling of old taken-for-granted certainties about the role of a previously dominant state-centred constitutionalism within the European and, indeed, global scheme in recent years has been both energising and destabilising for constitutional analysis. On the one hand, never before has discussion of law and politics so frequently, so explicitly and so self-consciously occurred within a constitutional register. On the other hand, never before has there been a less settled view as to the proper locus and centre of gravity of the constitutional idea, or indeed as to whether the constitutional idea retains *any* significant locus and role in the new transnational circumstances.<sup>3</sup> Constitutional ideas, in other words, are today more widespread than they have previously been, and more ambitious in their jurisdictional claims, but, equally, the nature and extent of their jurisdiction is more keenly contested than before.

How, then, should we handle the deeply disputed quality of the very concept with which we seek to depict the new complexity of legal relations in Europe? And this is joined by a second and more fundamental question: how can we justify the choice of such a disputed concept at the core of our analytical framework in the first place? The short answer to the first question is that we adopt a permissive approach. As we shall see, our various contributors do bring somewhat different understandings and expectations of constitutionalism to the table, or at least vary in their emphases. Given the contested character of what they are dealing with, this is no more than was to be expected, and could only have been avoided by the kind of question-begging conceptual dictat that would have defined certain possibilities out of their consideration in advance. Nevertheless, our embrace of diversity might seem to purchase inclusiveness at the price of coherence. For how can we talk meaningfully about – still less systematically investigate – a social and political phenomenon for which we lack agreed terms of reference?

On deeper reflection, however, the unresolved and underspecified quality of constitutionalism appears both manageable and, indeed, healthily inevitable. On the one hand, there is in fact sufficient overlapping consensus about what is going on in European ‘constitutional’ terms for the danger of incoherence, and of an attendant analytical confusion or vacuity, to be averted. On the other hand, what remains at issue is implicit in the very idea of constitutionalism, and speaks to a sense of uncertainty,

<sup>3</sup> Recent volumes exploring both sides of this coin include Dobner and Loughlin (eds), n 2 above; JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press, 2009); J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009).

divergence and open possibility that tells us something important about the very character of the modern political age. An exploration of these points allows us to address the second question of the basic justification of a constitution-centred approach.

We should begin that exploration by acknowledging that constitutionalism and the idea of constitutional government typically refer to factors located at different levels of analysis, and that the nature and degree of controversy differ depending on the kinds of factors and the level of analysis with which we are concerned. In the first place, there is little controversy over constitutionalism conceived of as an arsenal of *normative resources*. Whether we are talking about normative forms (eg a legal order with its own system of internal hierarchy and independence of external authority, or the different formal methods of achieving a constitutional settlement), or normative structures (eg Parliaments, executives, Ombudsmen, Supreme Courts), or normative doctrines (fundamental rights, separation of powers, proportionality, subsidiarity), there is scant disagreement about what counts in historical and conventional terms as constitutional or not, or about how, where and when these normative materials now manifest themselves on the European transnational scene. Granted, the ways in which constitutional norms – form, structure and substance – are put together differs radically between different state settings, between the state and the post-state setting, and indeed between different post-state settings. But if we are interested not in the shape of the whole but in the disaggregated normative parts, then there is little doubt or controversy that contemporary Europe has witnessed the dissemination – some would say fragmentation – of constitutional ideas well beyond their state domicile, and even beyond their EU ‘second home’.

In the second place, constitutionalism tends to be associated not only with its normative resource pool but also with *an underlying complex of public power*. Here there is already more scope for controversy. For some, constitutionalism in its fullest sense is parasitic upon an underlying complex of public power modelled upon or in some way analogous to that of the state, while for others the state-centredness of constitutionalism is merely a contingency of modern history. Yet the kind of disagreement to which this gives rise, though sometimes styled as all or nothing – as categorical<sup>4</sup> – can be (and often is) more productively understood as a matter of degree. While there may be significant disagreement about just how much public power non-state polities possess, and just how much underlying legitimacy, we are bound to acknowledge that the spread of

<sup>4</sup> See eg D Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’ in Dobner and Loughlin (eds), above n 2, 3–22.

constitutional norms beyond the state has *in some measure* been accompanied – underpinned, indeed – by a corresponding shift in the architecture of public power. No one can deny that, whether we are talking about the expanding social, economic and security mandate of the EU, or the ECtHR’s maturing concern with continental standards of human rights protection and public order, or the UN Security Council’s enhanced powers of intervention in the collective affairs of state and non-state polities and in the individual affairs of their citizens, or the increasing political and cultural autonomy of the federal or quasi-federal parts of Europe’s multinational states, what we are observing is a significant dispersal of the very idea of public power and its corresponding authority structures away from its state stronghold.

We would contend that these areas of overlapping consensus over the spread of constitutionally familiar normative resources and the shift in the underlying political architecture provide enough by way of shared terms of reference for the significance of what remains unavoidably at issue in the transnational constitutional debate to become a matter of common acknowledgement and engagement rather than one of mutual incomprehension. In that common acknowledgement of and engagement with divergent possibilities, moreover, we are alerted to one of the defining features of the modern age.

Constitutionalism, understood in a third and broadest sense as the very *organising frame of the political realm*, is by its very nature Janus-faced. It is simultaneously concerned with achieved structures of power and the normative resources these draw upon, and with ways of ideally conceiving of and projecting the organisation of authority. It is, therefore, both profane institutional reality and *symbolic aspiration*. And in its double perspective, constitutionalism puts on vivid display its modernist credentials as a constructivist idea. The constitutional framing of the political speaks to our sense of collective capacity to make over the world in our own terms, rather than (as in the pre-modern imaginary) to seek and manage the world’s conformity with a pre-given order of things.<sup>5</sup> And such a constructivist ambition involves a striving that is invariably marked both by a record of existing accomplishment and by a supplement of unrealised and unresolved potential.

Accordingly, the contestation that lies at the heart of European constitutionalism is not just about the taking of a state-fertilised idea away from its roots, and over whether and to what extent this is feasible and desirable. For, in a more basic methodological sense, contestation and the plasticity of social and political possibilities are built into the very DNA of modern

<sup>5</sup> See eg N Walker, ‘Constitutionalism and the Incompleteness of Democracy’ (2010) 39 *Rechtsphilosophie en Rechtstheorie* 206–33.

constitutionalism. When we argue, as our contributors do, over the proper and projected balance of constitutional authority between the states and the EU, or between the EU and the Council of Europe, or between the local and the regional, or between the regional and the global, we are not arguing *against* the grain of constitutionalism. Rather, we are operating *within* the modern tradition of the contentious construction of our collective futures, albeit no longer in a universe dominated by nation states, as in the high modern age, but in the politically multiform context of today. To retain a constitutional mode of analysis, therefore, is not some blindly anachronistic imposition of the old upon the new. Rather, it is a way of trying to understand the nature and limits of the adaptive relevance of our most prominent and resilient inherited categories of modern legal and political thought to the significantly altered circumstances of twenty-first century transnational Europe.

### C. The Matrix Metaphor

What, finally, of the matrix metaphor itself? How useful is it as a means of depicting and exploring Europe's contemporary constitutional circumstances? We offer some preliminary points by way of general justification of the mosaic metaphor before addressing its particular utility to the case in hand.

We should begin with a declaration of modesty. New labels will only ever take us so far in making sense of the shifting European and global constitutional order. They can be no more than orienting devices, encouraging new directions and fresh insight. There are already in circulation countless terms that have sought to convey the novelty of Europe's changing constitutional order. Reflecting the weight of prior analysis, most of these have been concerned primarily with the EU and with its newly staked place in the previously state-centric order of constitutional relations. Some such terms have stressed the idea of novelty itself, referring to supranational Europe's *sui generis* character,<sup>6</sup> or its status as an 'unidentified political object'.<sup>7</sup> In more assertive formulations, this unidentified object may approximate to a compound democracy,<sup>8</sup> a transnational

<sup>6</sup> See eg DN MacCormick, *Who's Afraid of the European Constitution?* (London, Societas, 2005).

<sup>7</sup> As described by Jacques Delors in 1985. For discussion, see H Drake, *Jacques Delors: Perspectives on a European Leader* (London, Routledge, 2000) 5.

<sup>8</sup> See S Fabbrini, *Compound Democracies: Why the United States and Europe are Becoming Similar* (Oxford, Oxford University Press, 2009).

consociation,<sup>9</sup> a commonwealth,<sup>10</sup> a post-Hobbesian non-state,<sup>11</sup> a *Bund*,<sup>12</sup> a *federation d'états-nations*,<sup>13</sup> or a form of 'multi-level constitutionalism'<sup>14</sup> – to name but a few of the candidate neologisms. None of these terms should be taken too seriously. Their status is not analytical but expressive. They do not speak to mutually exclusive scientific paradigms of explanation (even if they are sometimes treated as if they do), but are merely so many loose evocations of an imprecisely understood and unfinished transformation. The 'mosaic' idea joins these terms – albeit now with a somewhat broader and less EU-centred frame of reference – less as a conceptual rival than as an additional stimulant in a cumulative exercise of thick description.<sup>15</sup>

It is clear that, understood in these unassuming terms, the mosaic idea does have something to offer us. The primary meaning of mosaic is of a picture or decoration made of differently coloured pieces of inlaid stone, glass or similar substance. Often, however, as it is in our own case, the mosaic terminology is used in an active metaphorical sense to depict anything resembling such a picture or decoration in the diversity of its composition.

There are two additional and related features of the mosaic idea, at least as understood in its more developed forms, which enhance its suggestiveness in the present context. First, as in the notion of an aerial mosaic or a photo-mosaic, the mosaic idea has gradually been extended in a *representational* direction. Here its primary value is no longer aesthetic, and no longer confined to the familiar and somewhat limiting image of a multi-chrome structure made out of monochrome pieces.<sup>16</sup> Rather, it is descriptive, providing a picture or a map of some underlying 'real world' (whether

<sup>9</sup> See eg R Dehousse, 'European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?' (1998) 35 *Common Market Law Review* 595.

<sup>10</sup> See eg DN MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999).

<sup>11</sup> See P Schmitter, 'If the Nation-State Were to Wither away in Europe, What Might Replace It?' in S Gustavsson and L Lewin (eds), *The Future of the Nation State* (London, Taylor and Francis, 1996).

<sup>12</sup> See M Avbelj, *Theory of the European Bund* (PhD thesis, European University Institute, 2009).

<sup>13</sup> See O Beaud, *Théorie de la Fédération* (Paris, Presses Universitaires de France, 2007).

<sup>14</sup> See I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703–50; 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 511–29.

<sup>15</sup> 'Mosaic' terminology has been used previously in the European context, but to describe the composition of the diverse field of EU *theory* rather than the pattern of European institutions or constitutional forms; see T Diez and A Wiener, 'Introducing the Mosaic of Integration Theory' in A Wiener and T Diez (eds), *European Integration Theory* (Oxford, Oxford University Press, 2004).

<sup>16</sup> The limitations of the most familiar version of the mosaic image have been characterised by Rogers Brubaker in this way in the somewhat different (but not entirely unrelated) context of a critique of Will Kymlicka's 'groupist' approach to the structure of national or

'natural world' or, as in the present case 'socio-political world') structure in all its multiform and fluid complexity. Secondly, as our cover image indicates and as Sionaidh Douglas-Scott demonstrates to striking effect in her chapter (chapter five), sometimes the mosaic is deployed purely as a *visual* or pictorial metaphor with no textual intermediation. That is to say, the metaphor consists of the image itself, in its independent signifying power, and in the implication that what it depicts cannot be adequately conveyed in words. Or, translated into the immediate context, the visual quality of the matrix metaphor speaks quite literally to its representational ambition, and in so doing dramatises the fact that we struggle to find in our existing vocabulary the terms necessary to capture something possessing such an emergent and unprecedented character.

Let us now look in more depth at the impression the mosaic metaphor conveys about the changing European constitutional scene. Here we proceed in two stages. First, the mosaic metaphor assists us in developing a series of general contrasts between the state-centred and so-called 'Westphalian' European constitutional configuration of the high modern period and the emerging post-national configuration. In turn, this allows us to indicate a set of constitutional challenges that are distinctive to the new 'mosaic' phase.

Regarding the contrast with a state-centred configuration, the idea of a constitutional mosaic suggests an emergent pattern exhibiting four distinguishing features. It is a pattern based on the *plurality* rather than the *singularity* of the constitutional field; the *diversity* rather than the *uniformity* of its parts; the *heterarchical* rather than the *hierarchical* quality of the relations between these parts; and the *fluidity* rather than the *fixity* of the internal and external boundaries.

The most basic property of the constitutional mosaic is its plural or composite quality. Whereas the state-based constitutional order is a discrete and self-contained whole, and knows only 'international' as opposed to constitutional relations with other discrete and self-contained state-based constitutional orders, the European constitutional mosaic is a thing of many interdependent parts. The states, the EU, the Council of Europe and the various other transnational or international constitutional instruments and orders that thread across and beyond the European continent, each has only partial constitutional jurisdiction. In addition, all

ethnic communities and the relationship between them; see R Brubaker, 'Myths and Misconceptions in the Study of Nationalism' in J Hall (ed), *The State of the Nation: Ernest Gellner and the Theory of Nationalism* (Cambridge, Cambridge University Press, 2008) 272–306; see also H De Schutter, 'Towards a Hybrid Theory of Multinational Justice' in S Tierney (ed), *Accommodating Cultural Diversity* (Aldershot, Ashgate, 2007) 35–58.

are closely mutually engaged, with adjacent and interlocking competence over matters as diverse as trade, migration, the environment, criminal law, social law and human rights.

Diversity rather than the uniformity of the parts is the second outstanding feature of the constitutional mosaic. The polity 'pieces' are no longer based upon the same basic state template. Rather, they are highly variable in form. On the state-like end of the spectrum, we have the still capacious if no longer monopolistic state authorities, the sub-state nations with sovereign aspirations, and the ever more prominent supranational remit of the EU, which has seen five Treaty-based extensions of jurisdiction and a trebling of its membership in 20 years. At the other end of the spectrum we have the Council of Europe, whose remit has remained much narrower, but which has considerably deepened in impact and widened in territorial scope, as well as various global institutions of even more restricted remit and still broader territorial scope.

The new mosaic, at least if viewed from the disinterested 'outside' – as in the idea of the aerial or photo-mosaic – also exhibits a very flat structure. Whereas constitutional authority within the state is hierarchically structured and closely concentrated at the top, the distribution of authority between the states and the various other new post-state polities forms a heterarchical pattern across these widely dispersed sites. There is no agreed meta-authority standing above these various polities, but merely so many site-specific claims to authority whose recognition and endorsement at other constitutional sites is not automatic, but may be refused, recast, qualified or otherwise disputed.

Finally, the mosaic metaphor, certainly if understood in its more advanced representational and visual modalities, emphasises the crowded and unsettled nature of the internal and external frontiers of the emerging European constitutional map. Whereas boundary shifts and disputes at the margins of constitutional orders are the exception under the more clearly and stably demarcated state-based system, once constitutional sites boast complexly overlapping jurisdictions but lack an authoritative place of common monitoring and authoritative point of common resolution between these jurisdictions, such movements and disputes multiply in number and amplify in significance.

Considered together, these mosaic features of plurality, diversity, heterarchy and fluidity raise a number of new issues and pose a number of new challenges to constitutional forms of governance in the European domain. These issues and challenges may be grouped under the heads of *authority*, *legitimacy*, *identity* and *contestability*. In substance, if not necessarily under these labels, these are the topics with which our various authors engage in their individual chapters, and so they should not detain us long at this preliminary stage. Let us, however, say a few introductory words about each.