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An Analysis of Jim Tully's Theory of
Post-Colonial Empire

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Abstract

This paper provides a constructive critique of Jim Tully's innovative body of work on the juridical nature of 'empire' in its contemporary post-colonial phase. Tully's work emphasizes the high degree of continuity between the legal articulation of classical imperial power relations and the contemporary settlement, even though that settlement is mediated through a much more developed and notionally egalitarian framework of international and transnational law. The present author accepts much of Tully's critique, but urges that space must be retained within any explanatory scheme for the reconstitutive and transformative potential of law, even if that law cannot be hermetically sealed off from its imperial legacy

Keywords

governance – power analysis – globalization – sovereignty – protest – civil society

***The Reframing of Law's Imperial Frame:
An Analysis of Jim Tully's Theory of Post-Colonial Empire****

Neil Walker

1. Introduction

Taking as his point of departure the recent renewal of interest in 'empire' as a code through which to understand the contemporary global legal and political configuration, Jim Tully offers an arresting analysis of the limitations inherent in the majority of theoretical expressions of this new wave. For many in the mainstream of public law, international law or the burgeoning field of 'law and globalization' studies, talk of empire in the same breath as contemporary law may seem anachronistic, distorting, even gratuitously provocative. But Tully's critique comes from the opposite direction. His basic thesis is that, far from making exaggerated claims about law's imperial character, most understandings of the contemporary relevance of empire, and of empire's law, are euphemistic. They neglect one or more of empire's key dimensions, and in so doing understate its scope and depth and underestimate what a successful strategy and process of de-imperialization would require. His message, then, is offered not just as a critique of those positions that would celebrate the present global structure. It also poses a challenge to those many who would consider themselves to be keen critics of the *status quo*, but who, on our author's analysis, do not go far enough..

So ambitious and far-reaching is the offensive mounted by Jim Tully, indeed, that it would not be surprising if the first reaction of many across the broad spectrum of these challenged would be to look for holes in his argument rather than to question their own. Crudely, we can imagine two possible lines of objection. In the first place, there is the charge of *nominalism*. According to this argument, the price of a redefinition as radical as that offered by Tully is the loss of precisely that common sense of the zone

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of plausible contestation around the concept of empire which would make any such redefinition potentially persuasive and so worth making in the first place. On this view, the criticism is that Tully, armed with a stipulative definition that few share, may end up talking only to these converted few. In the second place, there is the charge of *structural fatalism*. According to this argument, the new definition of empire and of empire's law offered by Tully may be so encompassing that it becomes difficult if not impossible to imagine how law is to ever to escape the clutches of empire and operate in the service of an alternative geopolitical vision.

Of course, if the charges of nominalism is found proven, the second charge will be of little consequence, and indeed it might seem redundant even to pursue a verdict. If one has no sympathy with how the box is constructed, one will care little or not all if its builder subsequently finds himself 'boxed in'. Alternatively, if the charge of nominalism does not stick and the redefinition is found to be broadly engaging rather than narrowly idiosyncratic, then structural fatalism becomes a much more palpable concern. If we can be convinced that the expansive definition of imperialism offered by Tully is at least a reckonable one – one that *does* fall within the zone of plausible contestation, then we had better take seriously whatever threat of structural fatalism issues from such an expanded definition.

In what follows, I want to pursue two points. I want to argue, first, that the charge of nominalism is indeed ill-founded, and that those who are profoundly challenged by Tully's work should resist the temptation to dismiss that challenge as nothing more than conceptual overreach. I want to argue, secondly, that if the spectre of structural fatalism does hover over Tully's feast, then only a wishful form of thinking would equate this with a rebuttal of his argument. Even if we could demonstrate that his conclusions were deeply pessimistic about an alternative anti-imperial role for law, we would not be entitled to treat that demonstration as some kind of argumentative *coup de grâce*. Rather, it is our common task – ours as much as his – to try to find the most sharply constructive edge to the definition and critique of imperialism, and to show how what may be characterized as law's imperial dimension need not be treated as incorrigible.

2. In the Name of Empire

The main part of Tully's essay is taken up with the systematic peeling away of the various layers of what he claims to be deficient analysis of the contemporary global configuration in order to reveal a better and fuller understanding of empire's law. The top layer of analysis is for Tully the most flaky, and so easily brushed off. This consists of the complacent view that empire is a matter of colonies, and that with the great 20th century waves of decolonization, empire has simply disappeared into history. But, Tully argues, even where, in reaction against this narrow formalism, it is acknowledged that whatever it is in the structure of relations between political forms that makes such relations imperial may well obtain even in the absence of colonies, and so that empire is as likely to be informally as formally configured, such acknowledgment is often of limited consequence. For, at a second level of analysis, what is conceded as the domain of informal empire tends for many to be treated as a marginal and occasional aberration from the post-imperial norm. On this view, when (or if?) the American people come to their sometimes neglected senses and vote against the imperial throwbacks they occasionally let amongst them - most recently the Bush presidential dynasty, equipped

with their strategies of overt militarism and unilateralism - they will also be voting Empire itself out of office. Yet, Tully contends, this is to take too narrow a view of informal imperialism, and to neglect the ways in which notionally multilateral institutions, including international law, can be and often are interpreted in the service of hegemonic economic and political interests under the silent but powerful shadow of accumulated military and cultural advantage.

However, even an expanded informalism does not satisfy Tully, if, at a third level of analysis, it holds that within the presently configured state system it is still possible, with the help of regional organisations such as the EU and other post-Bretton Woods institutions of global governance, to construct effective alternatives to imperialism. For Tully, this level of analysis, which he associates with the contemporary wave of neo-Kantian or cosmopolitan analysis and prescription, ignores just how deeply the form and content of the state system and its attendant complex of global regulation, aided and abetted by a universal meta-narrative of legal and cultural development, is implicated in the pattern of Western political and economic hegemony. A fourth level of analysis, one which looks for progress through the adoption by the subaltern states themselves of the discourse and strategies of self-determination and democratization, fares no better, and for similar reasons. The deep rules of the game have been set elsewhere, and so the price of playing the game tends to be either failure or Pyrrhic victory – success at the cost of conformity to imperial discipline and the suppression of those voices and forms of indigenous social relations which are out of kilter with imperial logic.

This brings us to a fifth and final level of analysis, one that concedes that the deep rules of the game are indeed skewed in favour of empire, but which argues that the disadvantages this visits upon the imperial subjects are by no means cast in tablets of stone. Rather, this post-colonial body of writing, as exemplified in the later work of Said and Foucault, would insist upon the capacity of the subalterns to challenge imperial relations from within in a manner which attacks their very imperial logic and form. Here, too, however, Tully remains sceptical. He wonders how any position that accepts the deep logic and form of imperialism can imagine forms of contestation within that logic and form which can be simultaneously transformative of that logic and form, and he suggests that the burden of proof rests squarely with those would make such a bold claim.

What makes Tully's thesis, for all its sweeping and uncompromising internal critique of the field, nevertheless a plausible reworking of imperialism? This rests, in my view, on two factors. First, Tully suggests a significant *causal* relationship between old and new – between colonial and post-colonial imperialism. Secondly, at the level of the structures identified and described there is also posited a close *analogy* between classical and contemporary imperialism, such that they might persuasively be seen as species of the same genus. What is more, the argument from causality and the argument from analogy are closely linked.

Take first the causal argument. For Tully, post-colonial imperialism is an outgrowth of colonial imperialism rather than simply its echo. The purpose of his emphasis upon the political writings of Immanuel Kant,¹ and upon the founding of the modern international

¹ Pursued at greater length in J. Tully, "The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives" in A. Pagden (ed) *The Idea of Europe: From Antiquity to the European Union* (Cambridge: CUP, 2000)

order with which Kant is so closely associated, is precisely to demonstrate the deep embedding and continuing significance of the building blocks put in place in the founding phase. According to Tully, the sheer familiarity and venerability of the state system, as well as its claims to universality and formal equality, are such that it tends to be taken for granted as a neutral frame for thinking about global law rather than treated as itself an object of critical inquiry. Yet if we appreciate that the system of states began as a system contrived by some imperial states *inter se* and imposed by them on other communities, and that all later developments, including formal decolonization and the ascent of the norm of self-determination, the slow development of a right to democracy, and even the last half-century's exponential sector-specific and region-specific diversification of the global regulatory structure, have all been grafted onto these same building-blocks, a rather different picture emerges; namely, one of an original bias that has loaded the form, and, it follows, progressively the content of international law in favour of an inherited power configuration. What is more, path-dependency is not just about structural inertia – about the objective difficulty of unsettling such an embedded framework, but is also a function of the very taken-for-grantedness, or reification, which, as we have noted, comes with such a lengthy pedigree, and which continues to provide a powerful ideological shield against claims of partiality.

Yet the causal argument does not persuade simply by pointing to the continuity of certain discrete structures of governance across the colonial and post-colonial periods. We must also be able to point to an overall similarity – a comparable asymmetry - of geopolitical relations as between the age of high imperialism and the contemporary period. Here Tully's method, at least implicitly, is one of abstraction. In the course of his argument he points to a number of general features which all phases of global legal and political history since the onset of imperialism have had in common. Four in particular appear to stand out.

In the first place, with regard to the basic relations between imperial and subaltern powers, both colonial and post-colonial phases are characterized by what may be characterized as cumulative inequality. That is to say, inequality operates in a mutually reinforcing fashion over various sectors or fields. In particular, it is about the constitution of global markets with terms of trade heavily favourable to the great powers, which economic ascendancy is supported, on the one hand, by military threat or intervention, and on the other, by the 'softer' mechanism of political, educational, cultural and legal control and persuasion.

In the second place, the motivational underpinnings remain similar. While Tully readily concedes that informal imperialism, at least in its non-military variant, is less overtly exploitative in its design, he wants to argue not only that there remains a structural disposition towards inequality, but also that when the system that supports the great powers is deemed to be under threat, whether the key forum be the UN Security Council or the WTO or the Rio Convention on Biological Diversity, these great powers and their allies are not squeamish about willing the means to re-assert their preferred ends. That is to say, for all its internal complexity and structural depth, informal imperialism is not a machine that reliably runs by itself. At critical junctures it will require, and invariably receive, knowing intervention in one or more of various aggressive forms - political, legal, economic and, in the last resort, military.

In the third place, there is something deeply pervasive about the logic of imperialism. This is emphatically not to claim that no alternative forms of social relations can subsist alongside imperial relations, a point to which we return below. Rather, it is to argue that the imperial framework purports to embrace everything within its own horizon. The imperial system understands itself 'imperially' so to speak – as a system whose operation is optimized to the extent that all social relations are subsumed within its logic and is threatened to the extent that certain social relations may escape its logic. This does not mean that the imperial system is narrowly dogmatic. Quite the opposite in fact. The imperial mind-set is prepared to adapt and to be flexible in its own terms to the extent necessary to maintain its hegemony rather than founder on its own rigidity. International law, transnational institutions, the collective security system, the free movement of the factors of production; all of these are amenable to modification as required to retain the authority-in-the-last-instance of the imperial system.

Fourth and finally, imperialism exhibits a high degree of resilience. This is not just a restatement of its deeply-layered historical continuity, but also a predictive inference from its other abstract properties. Its cumulative and mutually reinforcing prosecution of inequality, its motivated character and its adaptability all speak to a form of ordering that raises and meets expectations of high durability, of indefinite extension.

In summary, the combination of causal and analogous registers of argument in Tully's thesis is a potent one. An argument driven purely by causal dynamics would tend to undue concentration on the historical legacy of formal empire. Alternatively, an argument driven purely by analogy would tend to neglect the complex geology of imperialism, and to miss the profound sense in which many of our contemporary transnational relations of inequality do indeed possess a cumulative and continuous dimension, however intricate and uneven the historical trail might be. An argument such as Tully's that combines both, however, understand that, while they are closely related, neither pole of empire – neither its deep legacy nor its persistent and recurrent character – is reducible to the other.²

Of course, some will be sceptical about the robustness of Tully's causal chain and the generous inclusiveness of his method of abstraction, and will remain unconvinced that he is not pitching his conceptual tent too far from the main camp. After all, that global constellations in various phases of the modern age have in common cumulative inequality, the self-interested motivation and intervention of the powerful, pervasiveness of reach and high resilience, still leaves a lot of room for them to differ. Yet the point of this first stage of debate is not whether Tully's definition of imperialism commands or deserves widespread agreement. Rather, it is whether he has done enough to answer the charge of nominalism – of whether his definition provides a basis for critical engagement with the existing terms of debate rather than simply opening up an idiosyncratic furrow. And, in my view, this is precisely where his method of abstraction succeeds. For, even if it does not provide definitive answers, by providing an abstract frame of continuity and commonality, his thesis does at least succeed in posing in a challenging fashion the vital question of the key areas of convergence and divergence

² For example, Tully wants to stress the imperial characteristics of the 20th century Soviet Empire, which rest much more easily on the argument from analogy than on the argument from causality. See *On Law, Democracy and Imperialism* (present volume) 5.

and overall balance of similarity and difference between early imperialism and contemporary global relations.

3. Empire and Transformation: overcoming three oppositions

If we turn, then, to the charge of structural fatalism, this might come in two variants. In the first place, there is the full frontal assault which, while endorsing Tully's definition of the present conjuncture as imperial, argues that actually existing imperialism, if not procuring an ideal world, nevertheless represents the best of all *possible* worlds. The apologists for empire's latest brand, as Tully notes in his Introduction, cover a remarkably wide range - 'realist, neo-conservative and neo-liberal and traditional liberal.'³ For them, moreover, the resilience of the current American-led imperial configuration, such as it may be, is not viewed as a matter of regret still less of despair, but as something to be vigilantly maintained. The difference here is clearly not a conceptual one, nor even fundamentally one of empirical assessment or strategic judgement. Rather, it is one of basic moral evaluation. For Tully, the cumulative harm of a configuration that produces not only deeply skewed distributive outcomes, but which in its reliance on the more or less enlightened self-interest of a single hegemon, or coalition of the willing, also countenances and encourages widespread forms of misrecognition and misrepresentation within the political process itself, can never be accepted as the best, or even as the least bad, solution.⁴ To put it in other terms, insofar as we are able to agree a common, if abstract, understanding of key features of the present global configuration as imperial, this for Tully can never be a matter of acquiescence still less celebration. And if the defining frame or structure of that configuration is as resistant to change as some hope and other fear, then, if one is in the latter camp, that is bound to raise the spectre of fatalism.

Many, myself included, would readily side with Tully that the current global configuration would be intolerable if and to the extent that its imperial characteristics reveal themselves as stubbornly resistant to change. The more difficult question, however, and the basis for the second variant of the charge of structural fatalism, concerns just how resistant to change the current global configuration is. For what Tully's redefinitional efforts succeed in placing in sharp relief is the relatively sanguine view of the transformability of the present structure held by both the neo-Kantians and the post-colonial school. From the perspective of the neo-Kantians, indeed, the scope for internal transformation of the new and increasingly differentiated form of global rule is such that they would hesitate before using the label imperial at all in the present tense. And while the post-colonial writers believe, in contrast, that the imperial legacy currently remains strong, they are nevertheless relatively confident as to its amenability to ongoing strategies of resistance and transformation. Accordingly, in conceptualizing the resilience of the present structure as he does, Tully, as already intimated, seeks to shift the burden of proof back onto all those - neo-Kantians and post-colonials alike - who would acknowledge the durability of structures long associated with imperialism, but would maintain that they can nevertheless be transformed from within.

³ *Ibid* at 2.

⁴ See e.g. J. Tully, "Struggles Over Recognition and Redistribution." (2001) 7 *Constellations* 469-482.

In an argument, such as this, about the conditions of social and political *praxis*, it is not difficult to see why the burden of proof becomes so important. Not only is any discussion about the prospects and consequences of future change inherently speculative, but in that speculation there is always an unstable dialectic of optimism/pessimism at work. Some will accuse others of being too slow to recognize the ways and means of transformation, of setting the bar of plausible transformability so high that all viable options are foreclosed, and the shadows of fatalism descend. The others, in turn, will accuse the first group of being too quick to imagine transformative possibilities, of seeing open highways where there are in fact only hidden traps or dead ends, and thus of avoiding the hard but necessary work of exploring as critically and remorselessly as possible what stands in the way of genuine transformative possibilities. In both cases the accusation is, or at its most acute can be, a strong one – either defeatism or wishful thinking.

How well, if at all, then, does Tully succeed in avoiding the charge of fatalism and instead succeed in exposing as naïve and undertheorized those positions who would not share his scepticism about existing possibilities of changes and join his search for new possibilities? To answer this question, it is helpful to examine Tully's position in relation to three inter-related oppositions that are pertinent to much critical social and political theory but which seem particularly relevant to his own work. The first is the classic opposition between revolution and reform. The second is the opposition between inside and outside – between working within the system and operating outside it. The third is the opposition between what we may call 'top-down' and 'bottom-up' mechanisms of transformation.

Tully has always been consistent in his rejection of revolution and reform alike. Indeed, his reputation, certainly in the decade since the publication of *Strange Multiplicity*,⁵ has been largely and justifiably built on the basis of his powerful cumulative efforts to think through a 'third way,' (lower case!) and, indeed, to do so in an essentially affirmative vein. On the one hand, he is no friend of revolution – of the overthrow of a government by those who are governed - not only for the obvious pragmatic reason that they tend not to succeed, but also on two other grounds. In the first place, as his citation of Franz Fanon's discussion of the "curse of independence"⁶ makes clear, merely cutting off the head of the King may change little if the new rulers inhabit the same structures and experience the same constraints. Revolution as usurpation, in other words, can be and often is highly conservative. In the second place, revolution can be *over*inclusive as well as *under*inclusive – it can cause indiscriminate and unjustified harm and can destroy the healthy tissue of social and political relations as much as it may dismantle the structures of oppression. In elaborating his three conventions of 'constitutionalism' *qua* intercultural dialogue in *Strange Multiplicity*, namely "mutual recognition, consent and cultural continuity"⁷ Tully sets his stall firmly against this kind of forced evacuation of the past. The idea that there is and remains much to be valued beyond the imperial horizon, and that transformation is as much about recovery as innovation, are repeated themes of his work, and indeed are much emphasized in the present essay. Revolution, clearly, is too crude an instrument for these purposes.

⁵ *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP, 1995).

⁶ Above n2, at 16.

⁷ Above n5, at 30

On the other hand, Tully is equally alert to the dangers of reformism. For Tully, democratic freedom does not imply a particular institutional design, but is a principle of necessarily open-ended significance. In an important earlier formulation of his position, he put it this way :

“if citizens are to be free, then the procedures by which they deliberate, the reasons they accept as public reasons, and the practices they are permitted to test by those democratic means must... themselves be open to deliberation and amendment *en passant* (not all at once) – in the course of the exchange of reasons – as the principle of democracy requires. The entire exercise of democratic freedom in relation to the existing rule of law must be intersubjective and open-ended practical reasoning”⁸

Democratic constitutionalism, therefore, requires “acceptance of reasonable disagreement all the way down... not only over different conceptions of the good within a framework of fundamental principles of justice, procedures of deliberation or constitutional essentials, but over any such framework as well.”⁹ In other words, if, as appears undeniable on all available evidence, disagreement and dissent are as inevitable and irreducible as regards the very rules of the political game as they are as regards its playing, and if the rules as always/already constituted are never neutral between different interests, identities, values and aspirations but always/already express a structural bias, then the relentlessly agonistic¹⁰ conditions of democratic possibility demand that we are always as attentive to the frame within which we negotiate as we are to the quotidian substance of that negotiation. And insofar as the agenda of reform becomes one of bracketing off these framing question and concentrating only on what is possible within the rules of the games, then it is by definition a truncated and democratically compromised agenda.

But, of course, if the twin dangers of revolution and reform are portrayed so fully and candidly, there will be no easy route for the third way to follow. The scale and depth of Tully’s struggle here becomes apparent when he turns to discuss the second opposition - between inside and outside. Apparently more emphatically than ever before, in the present essay Tully wants to insist that the quality of social and political relations possible within the dominant imperial frame are quite distinct from and discontinuous with what is possible outside these relations. Opposition from within, he claims, is essentially ‘tactical’ and defensive rather than ‘strategic’ and offensive. Its capacity to exploit “the ‘play’ or ‘indeterminacy’ of relations of meaning and power in order to extend and modify them *en passant*”¹¹ - previously seen as the basic modality through which democratic freedom is simultaneously claimed and expressed¹² - is now seen, in a move that is crucial in distinguishing him from other post-colonial writers, as presumptively incapable of occasioning a change of sufficient profundity to do other than leave the basic imperial features intact. It is not that in principle Tully has given up on the idea of a form of democratic freedom that moves between different operational levels and is not constrained by the distinction between form and substance, but rather that on empirical grounds he finds it very difficult to imagine how such root-and-branch

⁸ “The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy” (2002) 65 *Modern Law Review*, 204-228, at 217

⁹ *Ibid.* 218

¹⁰ On Tully’s engagement with agonistic theory, see, for example, *The Agonistic Freedom of Citizens*, (1999) 28 *Economy and Society*, 161-182.

¹¹ Above n2 at 43

¹² See above n8.

democratic interrogation is possible in the context of the “vastly unequal field of institutions of informal imperialism.”¹³ That is to say, his fear is that the deep structure of informal imperialism, with its promotion of low-intensity elite-led democracy in former colonial territories and its network of international institutions shaped through the unequal influence of a few old sovereigns, is just *too* deep to be amenable to this kind of challenge from within.

If, by contrast, we turn to relations situated beyond the imperial horizon – to “the legal, political and economic pluralism that has not been reconstituted by western imperialism, but continues to exist in the day-to-day lives of millions of people,”¹⁴ then Tully remains much more optimistic. Recovery from the margins and cultural continuity, as we have seen, have always been central themes of his work, and this remains the case. The problem, however, lies in the mutual articulation of inside and outside. If the inside is compromised, what is the outside to act upon other than itself, and if it can only act upon itself, how are imperial relations ever to be disturbed? That is to say, when Tully charges post-colonial writers with ultimately not yet being “able to distinguish between a form of contestation that ‘modifies’ an imperial relationship, which leaves the underlying imperial features in place... and a form of contestation that ‘transforms’ an imperial relationship... whereby it comes under the shared democratic authority of those subject to it,”¹⁵ he must also ask himself the same question. Just as the internal ‘contestation’ of his protagonists may be co-opted by their internality, so his own external ‘contestation’ may be marginalised by their externality.

Tully is clearly aware of this problem – hence his concluding admission that the complexity of our entanglement in imperial relations is such that *no-one* can be “so sure of our way out as the [post-colonial] critics of imperialism lead us to believe”¹⁶ Hence, too, my final conviction that it would be unfair to level the charge of structural fatalism against him. His only crime seems to be to have succeeded in formulating new theoretical and practical challenges for those committed to an idea of global justice, or at least to insist upon the continuing relevance of questions that no-one has satisfactorily answered. Moreover, he properly sees the posing of these questions as a common challenge in our understanding and development of the theory and practice of social, political and legal *praxis* rather than a theoretical trump-card to flourish before his interlocutors.

But, in conclusion, and in the spirit of that common challenge, I would like to offer a way of developing the argument further - one that turns on the third opposition between ‘top-down’ and ‘bottom-up’ mechanism of change. Tully does not address this opposition directly, and three reasons might be offered, in ascending order of seriousness, why he might be resistant to such a move. First, it may be tempting to conflate the ‘top-down’/‘bottom-up’ division with the inside/outside distinction. That is to say, on one view, only external and imperially untainted democratic practices are properly ‘bottom-up’ – grounded in the grassroots of civil society – and, equally, all practices internal to the imperial structure are by the nature of their privileged domicile ‘top-down’ But to insist upon this as the only relevant axis of variation within the anti-imperial field would be to gloss over potentially important differences. For alongside

¹³ Above n2 at 44

¹⁴ *Ibid.* at 46

¹⁵ *Ibid.* at 45

¹⁶ *Ibid.* at 46

the basic inside/outside distinction, can we not think of a further set of sub-divisions within each domain between different operative levels?

Perhaps, however – and this would be a second and more serious objection - precisely because of his longstanding insistence on democratic interrogation ‘all the way down’, Tully would not want to allow too rigid a distinction of levels between ‘bottom-up’ everyday contestation over the meaning of a norm and more rarefied ‘top-down’ discussion of the procedures for its authorization, or even of the meta-procedures for legitimating these procedures. But, of course, however wide the interpretive space for the ongoing adaptation of the substantive ‘bottom-up’ normative rules and guidelines, however amenable to democratic voice and participation the system of institutional design, and however flexibly the higher order rules of normative change might be constructed, a basic logical distinction remains between the first-order rules at the operational base of the legal-constitutional order, and the jurisgenerative framework rules at the apex of the pyramid.

The ‘top-down’ / ‘bottom-up’ distinction, therefore, begins to suggest ways to rehabilitate insider strategies, and also to reconnect them to external strategies.¹⁷ For whereas it may not be possible to view external agitation and insider tactics at the level of ‘bottom-up’ normative rules as a domain of practice which in isolation can do anything other than modify and mitigate the hegemonic system, the position may look rather different if we bring into the same strategic picture the ‘top-down’ framing legal and political structures of the global order. At least in theory, it is at the level of redesign of the deep regulatory structure – the basic “Keynesian-Westphalian frame”¹⁸ - of informal imperialism, and through the invocation of the principle of “participatory parity”¹⁹ in its more abstract contexts of “meta-political democratization”²⁰, that we imagine transformations of the informal imperial system as opposed to modifications that are in the final analysis system-endorsing.

Yet this is surely the cue for a third and key objection. For whatever the merits of such an approach *in theory*, is it not the case that in practice it is precisely the ‘top-down’ framing rules that are the most difficult to change? If informal empire remains a motivated achievement and one that is pervasive in its reach and resilient in its dominance, then is it not in these very framing contexts – the constitutional high-ground of the post-national constellation – that the agents of empire will be its most jealous guardians and be most highly motivated to retain the pervasiveness and guarantee the resilience of the prevailing order?

While no-one who has spent any time examining the contexts of original and ongoing negotiation of the basic postnational regulatory frame – whether in the context of the UN and its Security Council or the WTO or the EU or NAFTA – can have any illusions over the strong representation and sustained prevalence of the interests of dominant economic and political groupings, their continuing success is by no means inevitable. For, crucially, the very informalism or ‘loose coupling’ of the current structure of dominance that allows it to be so pervasive and so resilient, may also provide the key to

¹⁷ For an earlier formulation of this argument, see G de Burca and N. Walker, “Law and Transnational Civil Society: Upsetting the Agenda?” (2003) 9 *European Law Journal* 387-400.

¹⁸ See N. Fraser, “Reframing Justice in a Globalizing World” (2005) 36 *New Left Review*, 69-88.

¹⁹ *Ibid.* at 87

²⁰ *Ibid.* at 86.

its transformation. Informal empire is poly-centred and hydra-headed empire. It is not a centralized or even a federalized or consociationalized and in any rate 'singular' world system, but a more 'plural' constellation of overlapping functional and territorial national and postnational institutional forms.²¹ Indeed, as we have seen, it is a key part of Tully's thesis that such plurality is one of empire's key strengths. It permits it more easily to assume an ideologically non-imperial guise, and it also allows it to present itself as a more diverse target – a series of strongholds rather than a single citadel to be toppled.

Yet plurality also offers transformative possibilities. The absence of a single citadel also means the lack of a monolithic power with the capacity and co-ordination to design and defend 'formally' what alternatively may evolve 'informally' It means the relative autonomy, and sometimes mutual contestation, of the plural parts.²² It means that although the democratic transformation of no one particular site of power will lead to the demise of all asymmetrical orders, there will nevertheless be a cumulative effect if there are simultaneous changes across sites. And it means that the odds are not so formidably stacked against any such particular transformations as they would be against the removal of a single monolithic structure – something of which we have current cause to remind ourselves as we see in the early years of the new century increasingly intense democratic challenges to the constitutional legitimacy of the Security Council, the WTO and, most acutely of all at present, the EU.²³ It is only if we are prepared to follow this flow and re-focus on the various commanding legal and political heights of our still significantly unbalanced global order, as well as on the detailed regulatory and practical depths and the "alterity beyond"²⁴ that Jim Tully has done so much to address and highlight, that we can begin to imagine the global order along a non-imperial trajectory

²¹ See e.g. N. Walker, "The Idea of Constitutional Pluralism, (2002) 65 *Modern Law Review* 317-359. And in the context of 'global administrative law', see N. Krisch, "The Pluralism of Global Administrative Law" (2006) 17 *European Journal of International Law*, 247-278.

²² Krisch, above n21.

²³ In very recent work Tully has also re-focused more specifically both on what he sees as the limitations of the conventional constitutional mind-set and the structures to which this refers (see J. Tully, "The Imperialism of Modern Constitutional Democracy" in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism*(Oxford: OUP, 2007)) and on the priority of reforming the EU from below rather than from above (see J. Tully "A New Kind of Europe? Democratic Integration in the European Union" (2007) 10 *Critical Review of International Social and Political Philosophy*). For a less sceptical view of 'top-down' constitutionalism in the transnational context generally see e.g. J. Habermas , *The Divided West* (Cambridge: Polity, 2006) ch.8); and in the EU context see N. Walker "A Constitutional Reckoning" (2006) 13 *Constellations* 140-150.

²⁴ Above n2, at 46.