EUI WORKING PAPERS

LAW 2016/21
Department of Law

Global Constitutionalism without Global Democracy (?)

Edited by Claudio Corradetti and Giovanni Sartor

European University Institute
Department of Law

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EUI Working Paper **LAW** 2016/21

ISSN 1725-6739

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

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Abstract

The contributions in this volume investigate interconnected aspects of the democratic deficit in global constitutionalism.

The commonly shared question is the following: to what extent, if any, a global (or cosmopolitan) shift of international law can proceed absent a transnational democratic check? Some scholars are convinced that this is a real problem since that a 'division of labour' is to be recognized between national and regional/international legal levels, only the first needing a democratic legitimacy. The contributors to this volume, on the contrary tend to share the view that detaching the production of international law from constituent will, as well as from a democratic framework, can indeed undermine constitutional legitimacy. Furthermore, this may open the way to forms of domination that affect also state's democratic institutions from within.

What is the way out from this deadlock? How is it possible to tame global constitutionalism in order to avoid a global Leviathan? The collection of essays here presented attempts to conceptualize some of the central challenges affecting contemporary patterns of legal dispersion and fragmentation. They follow a conceptual-historical thread which starts with a modern Kantian understanding of the problem, and unfolds into the discussion of issues of constitutional pluralism, institutional legitimacy and the risk of tyranny. The volume includes analyses of the role of China and the EU, two of the most important actors, even though perhaps at the opposite pole of the global constitutional project.

Keywords

Cosmopolitanism, global constitutionalism, legitimacy, sovereignty, democratic deficit

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Introduction: Global constitutionalism without global democracy (?)

Claudio Corradetti and Giovanni Sartor (eds.)

As a result of a collaboration between Giovanni Sartor at the Faculty of Law of the European University Institute and Claudio Corradetti at PluriCourts, University of Oslo, on 14-15 January 2016 a number of scholars gathered together to discuss the historical development and contemporary features of global constitutionalism, and how this can be reconciled with a certain notion of democratic legitimacy beyond the state level. This is certainly an enormous task to undertake, but one which deserves international consideration. Furthermore, there is no doubt that the picture is complicated even further by the fact that international law is undergoing several profound transformations. New legal sectors are rapidly developing, including the consolidation of the regime of Investment Arbitration, and the advancement of already existing areas such as the WTO. At the same time, claims about the "judicialization" of international law and processes of constitutionalization of multilateral agreements and regimes call for more precise theoretical definitions and categorizations.

The starting assumption of the workshop, and the leading research question shared among the contributions collected here, focused on whether global constitutionalism requires more democratic legitimacy. Furthermore, it was asked to what extent forms of democratic legitimacy can be conceived at the global level notwithstanding structural differences between domestic and global constitutionalism. Should global constitutionalism incorporate mechanisms and standards of democratic rule-making? If so, how?

The difficulty appears to be that some of the building blocks characterizing domestic constitutionalism seem unavailable in the transnational realm. How to transfer, for instance, the constituting democratic force of the "we the people" to the shaping of the global constitutional order?

What also appears unclear is what sorts of institutional implications a global democracy will have, such as whether a transnational process of democratization would imply the strengthening of centralized bodies. Is a reformed UN General Assembly part of the solution or part of the problem? Would this entail expanding the conformity of a global rule of law by yet further institutions of global governance such as the WTO, the IMF and the World Bank, to mention only a few? Alternatively, would the incorporation of international law into domestic democracy checks, "democratic iterations" as some have argued,[1] provide sufficient democratic control?

The contributions from the workshop collected here encompass both descriptive and normative themes. The collection begins with a mapping of the problems in modern, Kantian, and contemporary global constitutionalism. In particular, Corradetti, in his two contributions, reconstructs core aspects of the Kantian "cosmopolitan constitution" and its implications for contemporary notions of sovereignty, transnational citizenship and coercion. This picture is extended by Van den Meerssche to the analysis of three contemporary versions of constitutional pluralism and to the understanding of legitimate authority beyond states. Both modern and contemporary versions of global constitutionalism answer the more fundamental question of what reason justifies a move to global constitutionalism. The contribution by O'Donoghue considers whether this shift in public law is justified as a reaction to a system of tyrannical powers. But how does legitimacy and its inherent constitutional-institutional pluralism reconcile itself with global justice? This is the question answered by Eleftheriadis who proposes a legal constructivist method, one based on Kant and Rawls, to the understanding of the

[1] See S.Benhabib, *Another Cosmopolitanism*, Oxford University Press, Oxford, 2008.

moral legitimacy of international law and the institutional practices that accompany its instantiations. Does this view imply a commitment to the development of a global democratic institutional scheme? Some scholars are not convinced by the idea that there are any convincing arguments in support of the view that international courts should act as building blocks for a global democratic setting rather than as engines of an accumulative constitutional-like transformation of public international law. However, even if this picture promises to work for (western) liberal democracies, how does it fare with the 'exceptionality' of non-democratic superpowers? Carrai discusses to what extent global constitutionalism promotes a rather comprehensive picture of what the author calls "moral monism" and how the case of China favors a more pluralist view of the global constitutional order. This point is of capital relevance, particularly since one wants to reinvigorate the "cosmopolitan foreign policy mandate" of the European Union (EU) with non-European countries, as Petersmann argues in his paper. Whereas Free trade agreements (FTAs) have secured improved standards of living and political integration within the EU, transatlantic externalization of FTAs have backfired consolidated rights. A new vision is therefore requested for the EU to countervail legitimacy disruptions of regional rule of law by exercising leadership, as the author claims, in 'disconnected UN/WTO governance'.

There is no clear agreement on how and where to locate the problem of democratic deficit beyond the state. Yet, the drafts in this collection aim to suggest some possible lines of reflection on an ongoing and pressing issue that will occupy legal scholars, philosophers and political scientists, at the least, for the next years to come.

Rome-Florence

Claudio Corradetti and Giovanni Sartor

Constructivism in cosmopolitan law: Kant's right to visit

Claudio Corradetti

Introduction

If you agree that state legitimacy depends on both an internal and an external legal standard, then you are likely to be a global constitutionalist. But if you also think that these are juridical expressions of a principle of universal equal freedom, then you are a cosmopolitan constitutionalist. Constitutionalism in global law has gained significant new momentum in recent years, benefitting from a truly interdisciplinary debate among international law scholars, political theorists and legal-political philosophers. It is hard to believe, though, that this has been the outcome of fashionable academic thinking. It is rather the case that post-1989 international relations have profoundly changed the way states act in relation to new conceptions of legitimate sovereignty, authority and state powers, in particular the democratic rule of law and respect for human rights. As a result, academic interest in global constitutionalism has followed the course of development of new jurisdictional events: from the end of a bipolar world to the emergence of a plurality of regimes. These developments have also raised the question of whether national and international law should be conceived as integrated elements of one single constitutional framework and, furthermore, what degree of pluralism it should allow.[2] However, one could hardly claim that also as a *philosophical project* the cosmopolitan ideal is anything new. Limited to modern times, cosmopolitanism was a project of the Abbé de St. Pierre and Rousseau whose conception, as Kant reminds us, was "ridiculed" by contemporaries "because they believed its execution was too near".[3] Kant began his reflections bearing this legacy in mind, while aiming to relaunch cosmopolitanism as a serious philosophical project for framing the legitimacy of individual and state relations and ultimately for the achievement of a gradual approximation to peace. Kantian insights, as sketchy as they are, nevertheless frame several of the contemporary issues of constitutionalism now facing us. Kant was neither a blunt natural law philosopher nor a positive legal thinker. He was, as I claim, a legal constructivist. This makes his reflections a relevant starting point also for our contemporary understanding of the validity of the global rule of law.

In the following essay, I examine in particular the relation Kant establishes between "the right to visit"[4] and the generation of a global rule of law — what is called alternatively a "cosmopolitan constitution" (*Weltbürgerliche Verfassung*), a "cosmopolitan commonwealth" (*Weltbürgerliches gemeines Wesen*)[5]

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[2] Selecting from the burgeoning literature on the topic I suggest M. Kumm, "On the Past and Future of European Constitutional Scholarship*", International Journal of Constitutional Law*, 7(3) 2009, 401-415; Neil Walker, "Taking Constitutionalism Beyond the State", *Political Studies* 56, 2008, 519-543; P. Dobner and M. Loughlin (eds.), *The twilight of constitutional law: demise or transmutation?*, Oxford, Oxford University Press, 2010.

[3] I. Kant, 2009 [1784], "Idea for a Universal History with a Cosmopolitan Aim", in *Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide*. Ed. A. Oksenberg Rorty and J. Schmidt, 9-23. Cambridge: Cambridge University Press, 17.

[4] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.329.

[5] See, respectively, for "cosmopolitan constitution" I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 329; whereas for "cosmopolitan commonwealth", see I. Kant, "On the Common Saying: that May be Correct in Theory" in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 307. In the following sections I

or even, in the *Critique of the Power of Judgment*, "a cosmopolitan whole" (*Weltbürgerliches Ganze*) — (§1).[6] Here I pursue a Kantian argument, grounded on textual evidence but arguably extensible beyond Kant's writings. A connection between the above-mentioned concepts is evidently established in the following passage:

> "this right to hospitality [or to visit] — that is, the authorization of a foreign newcomer — does not extend beyond the conditions which make it possible to seek commerce with the old inhabitants. In this way distant parts of the world can enter peaceably into relations with one another, which can eventually become publicly lawful and so finally bring the human race ever closer to a cosmopolitan constitution" (I. Kant, "Toward Perpetual Peace", in Immanuel Kant. Practical Philosophy, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 329, emphasis mine).

I argue, furthermore, that the idea of a cosmopolitan constitution reflects a historical process of progressive constitutionalization of international law, starting from the adoption of a domestic "civil constitution" and then converging towards an incipient transnational constitutional arrangement (*phoedus pacificum*).[7] Moreover, I claim that such a progressive constitutional consolidation depends on a 'constructivist' conception, not just one that holds between morality and politics,[8] but one where the "innate right of humanity" of freedom as independence [9] constrains a system of private and public rights as respectively property, contract status and so on, while connecting morality to law. I consider, then, that Kant's legal constructivism answers the general question of how to justify cosmopolitan law starting from a procedural method for the justification of a public system of rights.[10]

Based on these premises the "right to visit"[11] establishes a relation with domestic constituencies — (§2). In other words it establishes a constitutional connection among previously autonomous judiciaries. I submit that the rational engagement of different peoples in peaceful relations follows from a constructivist role played by the cosmopolitan right to visit — something, as Kant considers, that is not simply equivalent to a moral sentiment of philanthropy or virtue.[12] I suggest, in turn, that the overall structure of Kant's cosmopolitan constructivism assumes that a system of rights is valid if it fulfils the standard of a normative theory, one based on the grounding concept of equal freedom as an "innate

quote different English editions of Kantian works. The choice will depend on the version I find most adequate to the point I intend to make.

[6] I. Kant, *Critique of the Power of Judgment*, P. Guyer (ed.), Cambridge University Press, Cambridge, 2000, p. 300.

[7] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.327. In the following I will use "cosmopolitan" and "global" constitution(alism) as synonymous terms.

[8] On the moral-political form of Kantian constructivism see in particular J. Rawls, Kantian Constructivism in Moral Theory, in The Journal of Philosophy, 77/9, 1980, pp.515-572; T.E. Hill, Jr., Kantian Constructivism in Ethics, Ethics, vol.99/4, 1989, 752-770; as well as O. O'Neill, Constructions of Reason. Explorations of Kant's Practical Philosophy, Cambridge University Press, Cambridge, 1989.

[9] See A. Ripstein, "Law and Justice", in *Kant's Ethics*, ed. T.E. Hill, Jr, Wiley-Blackwell, 2009, 162 ff.

[10] See the parallel for moral and political constructivism in L. Krasnoff, 'How Kantian is Constructivism?', in *Kant Studien*, 90 (30), 385-409. This seems also the strategy endorsed by Forst's "right to justification" as the most "fundamental moral demand that no culture or society may reject". R. Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice*, Columbia University Press, New York, p.209 ff.

[11] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.329.

[12] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.328.

right"[13] of humanity and thus realizing the presupposition of the Universal Principle of Right (*Allgemeines Prinzip des Rechts*).[14]

I conclude that each domestic jurisdiction has to strive not only internally but also externally towards the realization of peace as an approximation of the idea of reason "to which no object given in experience can be adequate – and a perfectly *rightful constitution* among human beings is of this sort – is the thing in itself "[15] and that this is also the task of the "moral politician"[16] in aligning the critical demands of cosmopolitan citizens with the requirements of public reason set by a Universal Principle of Right — (§3).

Taken together, these three components contribute to a general 'transitional' scheme for Kantian cosmopolitan constitutionalism, one which accounts for why a) Kant can claim that "each of them [states], for the sake of its security, can and ought to require to others to enter with it into a constitution similar to a civil constitution",[17] and one where b) the constitutional level established by the "*league of nations*" (*Phoedus Pacificum* or *Völkerbund*), is in continuous approximation with the ideal of a republican multistate confederation (*Völkerstaat*).[18]

As anticipated, the above steps are held together by an all-encompassing strategy of justification where the "innate right" of humanity — the idea of an equal freedom among persons — represents the grounding concept of a general constructivist theory of the law.[19] This suggests the view of a sort of Kantian "reflective equilibrium" that holds between the Categorical Imperative and the Universal Principle of Right through the mediation of "use [of] humanity…as an end".[20] As in the more recent case of Rawls,[21] the starting point of legal constructivism for Kant was a conception of rational agency marked by freedom and equality as the basis of a procedure of justification of law. The right to visit represents the point of view of the "citizens of the world",[22] that is, of a universally shareable practical perspective on rational deliberation. I discuss later what reasons human beings might be considered to have for the adoption of this clause. With regard to the procedure, though, it is only the protection of a formal condition of right, as one provided by the idea of humanity as an end, that autonomous beings can be enabled to bring their aims together into rational union. This allows for the exercise of external

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[13] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p. 393.

[14] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.387.

[15] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.505.

[16] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 338. On this point see Martti Koskenniemi, 'Constitutionalism as a Mindset. Reflections on Kantian themes about international law and globalization' (2006) 8 (1) *Theoretical Inquiries in Law*, ISSN (Online) 1565-3404, 9–36.

[17] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.326.

[18] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.326.

[19] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p. 393.

[20] I. Kant, "Groundwork of the Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 80.

[21] See in particular J. Rawls, "Kantian Constructivism in Moral Theory", in *The Journal of Philosophy*, 77(9), 1980, pp.515-572.

[22] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.322. The expression is use also in I. Kant "An Answer to the Question: What is Enlightenment?", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 18.

freedom in view of the requirements of the Universal Principle of Right, making possible a transition from a "provisional" to a "conclusive" ownership under a system of rights.[23]

Concerning the constructivist justification of Kant's cosmopolitanism, it is from the presumption of "possession of the land […] as possession of a part of a determinate whole […] to which each [...] has a right" that the right to visit is derived.[24] The basic idea here is to consider first-order principles of right as at least provisionally valid as they are agreed upon by all members of an initial condition of choice. It follows that the coerciveness of any system of law depends upon a 'procedure of justification' that specifies its own conditions of validity. What I argue is that the acceptability of such a procedure requires the adoption of a 'compensatory' principle of justice ("*iustitia brabeutica*")[25] to territorially excluded people, one rebalancing land-ownership through the allocation of a qualified right — the right to visit. I define the principle of compensation as an obligation arising from a rightful appropriation of land. A legitimate appropriation of land in circumstances of limited resources (Kant speaks of "determinate limits…as the spherical shape of the…*globus terraqueus*") requires that others are left with comparatively undiminished opportunities to access land and its goods.[26] This understanding reformulates the Lockean clause of appropriation, as famously defined with the "enough and as good left in common for others".[27] But, more generally, it responds to a fundamental problem discussed in the natural law debate: how to justify negative externalities of territorial appropriation by establishing obligations towards the exclusion of third parties. This was indeed also the problem of Grotius who allowed for interference with private property in cases of necessity by non-members.[28] Going back to Locke, if the "enough and as good" clause is interpreted as a sufficiency rather than as a restrictive principle, it then becomes clear on which basis a compensatory principle could be justified.[29] For Locke the "enough and as good" represents a 'factual circumstance' and not a restrictive standard of original appropriation. Accordingly, when money is introduced, as with civil society, he appeals to a natural duty "to preserve the rest of Mankind"[30] in response to the "spoilage proviso".[31] Kant replies to the issue of a re-equalization of opportunities by introducing the cosmopolitan right to visit. In contrast with the general Lockean natural law "duty of preservation", the cosmopolitan right to visit leaves unaltered the

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[23] See I. Kant "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, §15 , p.416. On a different interpretation of the role that "a community of rational beings" holds with regard to the mediation between Kant's ethics (Categorical Imperative) and Kant's philosophy of right (Universal Principle of Right), see H. Pauer-Studer "'A Community of Rational Beings'. Kant's Realm of Ends and the Distinction between Internal and External Freedom", in *Kant-Studien*, 107(1), 2016, 125-159. Unlike Pauer-Studer, I argue that this mediation is of a regulative and not of a constitutive type.

[24] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.489.

[25] See I. Kant "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.600. Kant does not make use of this notion and he limits to notice that it would be a "contradiction" if it were postulated between God and human beings. I argue nevertheless that such a relation should be inferred from the negative externalities on third persons coming from the establishment of a civil condition.

[26] I. Kant "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.489.

[27] J. Locke, Two Treaties on Government [1690], P. Laslett (ed.), Cambridge University Press, Cambridge, 1960, §27.

[28] See Alice Pinheiro Walla, "Common Possession of the Earth and Cosmopolitan Right", *Kant-Studien*, 107(1), 160–178, ISSN (Online) 1613-1134, ISSN (Print) 0022-8877, DOI: 10.1515/kant-2016-0008, March 2016.

[29] As Waldron acutely remarks "In §27 the rather ambiguous logical connective 'at least where'. the meaning of 'at least where' may differ, but surely reading of it is as a connective introducing a sufficient where Q' seems to me to be most naturally rendered as than as 'If P then Q'; the words 'at least' indicate that whenever Q obtains, there may also be other circumstances even though Q does *not* obtain." In J. Waldron, "Enough and as good left for others", *The Philosophical Quarterly*, 29(117), 1979, p.321.

[30] J. Locke, Two Treaties on Government [1690], P. Laslett (ed.), Cambridge University Press, Cambridge, 1960, II 6; also in J. Waldron, "Enough and as good left for others", *The Philosophical Quarterly*, 29(117), 1979, p.325.

[31] J. Waldron, "Enough and as good left for others", *The Philosophical Quarterly*, 29(117), 1979, p.319.

possibility of interaction by members of an original community. Accordingly, the institutionalization of a juridical condition, and more generally the legitimacy of the State comes to depend not only on an inner-boundary but also on an outer-boundary of lawful relations. Both elements, together, define state's territorial rights according to a cosmopolitan standard of the law.[32] Unlike a 'permissible' principle for territorial rights,[33] a compensatory theory of cosmopolitan law considers that states are peremptory and not conditional jurisdictional entities, where the reduction of opportunities they create for legally excluded members is acceptable only if it provides a qualified standard of right-constraint interaction also with non-members.

Starting points for the justification of the cosmopolitan right: on the inherent connection between (external) freedom and possession within the original community

In this section, I discuss the significance of Kant's idea of an original common ownership of the earth where individuals are in a condition of free interaction (*communio fundi originaria*).[34] As Kant observes, since "all nations are *originally* members of a community of the land" and since the community of the land is not a legal community of ownership but rather "a community of possible physical *interaction* (*commercium*),"everyone is in "a thoroughgoing relation of each to all the others *of offering to engage in commerce* with any other […] without the other being authorized to behave toward it as an enemy because it has made this attempt".[35] The juridical transformation of the never exhaustible possibility for every individual to interact with all others takes place only under the precepts of the Universal Principle of Right which, in turn, generates the legal-moral justification of the cosmopolitan right to visit. Furthermore, I reconstruct Kant's rationale for entering into a civil condition. I focus on the role of a "general united will"[36] to be laid down a priori. As a corollary, I argue that in so far as an omnilateral will legitimizes unilateral acquisitions, it also defines a compensatory standard for political obligation that applies to excluded people. In so doing, the a priori anticipation of a public authority sets a formal standard for the unity of a legal system articulated into a system of distributive justice within a territory and a regime of compensatory opportunities distributed extraterritorially.

To begin with, Kant's idea of an "original community" — the *communio fundi originaria* — reinterprets in ideal terms the traditional concept of Grotius and Pufendorf of the *communio primaeva* as well as later criticisms in Achenwall's *Elementa Iuris Naturae*.[37] For Kant, the 'factual' understanding of an

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[32] This view therefore integrates the purely domestic conception of state's territorial rights legitimacy advanced by A. Stilz, Nations, States and Territory, Ethics, 121(3), 2011, 572-601. The author explicitly recognizes that the rights to territorial jurisdiction are "limited by *external legitimacy conditions* that constrain how the state should exercise these rights when their exercise affects foreigners" p.573-4.

[33] As L. Ypi in her otherwise well conceived argument argues that "permissive principles justify states of affairs incompatible with the idea of 'right' only provisionally and conditionally", in L. Ypi, "A Permissive Theory of Territorial Rights", *European Journal of Philosophy*, 22(2), 2012, p.290 ff. The problem I see with this account, in so far as it relies on a Kantian argument, is that the 'permissible' justifies an act of the will in a condition deprived of law, as with the unilateral exercise of the will (*lex permissiva*).

[34] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.405.

[35] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 489.

[36] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.491.

[37] See, respectively, H. Grotius, *De Iure Belli ac Pacis* [1625], B.J.A. de Kanter-van Hettinga Tromp (ed.), Leiden: Brill (1939) and S. Pufendorf, *De Jure Naturae et Gentium* [1672], F. Böhling (ed.), Berlin: Akademie Verlag (1998). See also, G. Achenwall and J.S. Pütter, *Elementa Iuris Naturae* [1750], in G. Achenwall and J.S. Pütter, *Anfangsgründe des Naturrechts*, Jan Schröder (trans. and ed. 1995), Frankfurt: Insel. For Kant "community" is primarily, even if not uniquely, a "pure concept of the understanding". As Milstein notes, this illustrates a form of "relation" rather than a sociological or a political concept. This relation of interaction is characterized by "reciprocal causality", one where the affirmation of one member

original community of the earth is mistaken. This is because he considers that a community regulated by features of identity and property relations is a non-starter: "the community of the mine and thine (*communio*) can never be conceived as original".[38]

Not surprisingly, the original community is a regulative idea on which to justify political obligations as well as rights between citizens, between states and citizens, and among states. A distinct set of reasons applies, then, to the relation between an original community and the formulation of a cosmopolitan right to visit. Kant's argument for the justification of the cosmopolitan right assumes, on a preliminary basis, that we are all endowed with an original right to freedom as non-domination.[39] Freedom for Kant is either internal — related to virtue — or external, [40] that is, connected to an interpersonal obligation for agents to comply with the Universal Principle of Right according to which "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law".[41] In this way the formal constraints on justice are defined in terms of standards of "interpersonal consistency" and "demands for universality".[42] Freedom and particularly "external freedom" is equal to independence, that is, to be an equal subject of self-determination. External independence from the mastery of others, from control, follows from the postulate of "giving laws to oneself" of the Categorical Imperative.[43] As a result, a reciprocal coercive authority of legal obligations is derived from respect for everyone's freedom.

In addition to these formal constraints, material limitations apply. Unlike internal freedom, external freedom is subject to space boundaries, that is, to the shape of the earth as a condition for social formation and demands for justice in circumstances of moderate scarcity.[44] As noted, for Kant there is a necessary connection between external freedom and the possession of external objects,[45] so that if I

implies the denial of all others and vice versa. In B. Milstein, 'Kantian Cosmopolitanism beyond 'Perpetual Peace': Commercium, Critique and the Cosmopolitan Problematic', *European Journal of Philosophy*, (21)1, 2010, p.121. The disjunctive relation between a member and the original community can be understood only on the presumption of an original unified concept of possession which considers the totality of human beings. It is only on the premise of an original form of interconnection among all individuals that a disjunctive relation of interaction among all members is established.

[39] I. Kant, 'The Metaphysics of Morals', in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.392.

[40] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 329.

[41] I follow here M. Gregor's translation in Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.387.

[42]As T. Pogge puts it: "If persons were to embrace […] "what seems just and good" (Rechtslehre 312), then a social order ensuring interpersonal consistency would once again not be achieved. Different schemes for achieving mutual consistency will be mutually inconsistent […] Kant's later theory of justice sees its task then in pruning further the set of consistent systems of constraints – ideally down to a single one […] The first step in this reduction is taken through the other component of pure practical reason's formal aspect – the demand of universality. One person should have a particular external freedom only if that same freedom is enjoyed by everyone". T. Pogge, "Kant's Theory of Justice", in B. Sharon Byrd and J. Hruschka (eds) *Kant and Law*, Ashgate 2006, p.413.

[43] As Ripstein synthesizes this point: "Interference with another person's freedom creates a form of dependence; *independence* requires that one person not be subject to another person's choice", in A. Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, Harvard University Press, Boston, Mass., 2009, p.15.

[44] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.489. With regard to T. Pogge's "lexical hierarchy" of Kant's principles of justice, two formal and one material {FP-1}Consistency{FP-2}Universality{MP}Enlightenment, I would add a fourth element concerning the 'circumstances of justice' as the material constraints on justice. I would suggest calling this {MC-2} Geographical/Resources Scarcity. See T. Pogge, 2006, p.414.

[45] This is also called the "right of possession in common of the earth's surface", in I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.329.

were denied a place on earth, my original right to freedom would also be infringed. The original right to external freedom justifies therefore my right to a "place on earth" — what Kant defines as a "disjunctively universal right", that is, a right to be here or there.[46] In Kant, the legitimate acquisition of an external object depends on the possibility of "taking control of it [*occupatio*]"[47] and this, in turn, requires the recognition of having a place on earth. As one moves from acquisition to property and from a state of nature to a juridical state, the general recognition of a place on earth shifts into a cosmopolitan right to visit.[48] This rationale shows how for Kant there holds an inherent connection between an innate right to freedom and the idea of possession of the earth given in common.[49]

The interactions within an original community of *commercium* grant to its members the possibility to put forward reciprocal requests.[50] Relations of this type define a community that is radically different from that regulated by property relations (*communio*). However, a community of common possession lacks features of social stability. For Kant, the state of nature, and with that an original community of interaction, though not necessarily unjust, (*iniustus*) is certainly "*devoid of justice*" (*status iustitia vacuus*) due to the absence of a "judge competent to render a verdict having rightful force".[51] As a result, in order to defend the right to externally acquired objects, as well as for these rights to be granted a peremptory status, a form of coercion is required. It would be contradictory to claim rights to external objects without at the same time holding others to a duty of compliance. "Hence", Kant concludes "[…] there is connected with right by principle of contradiction an authorization to coerce someone who infringes upon it".[52] In this way, Kant justifies the duty to enter into a juridical condition and, ultimately, the creation of the state.

Since the unilateral exercise of the will (*lex permissiva*) and the ensuing property relations are legitimate only on the presupposition of an omnilateral a priori will by which they are legitimized, to argue for an individual right to a place on earth requires an original community characterized by an "*a priori* united will". [53] The subjective right to a particular possession on earth holds only in so far as this becomes a generalizable interest for all other members (Principle of External Acquisition). What follows is an obligation to divide the earth in accordance with an 'absolutely commanding will', a concept paving the way for the development of a civil condition.[54] In the community of *commercium* my right to possess a particular share of the land and the will that accompanies it — "the mine" — requires this to be derived analytically from an *a priori* united will that includes all other potential human beings.

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[46] I. Kant, *Vorlesungen Rechtslehre* [23:323:26-30;23:320:20-23] and [23:321:14-16]. Quoted by B. Sharon-Byrd "Intelligible possession of objects of choice", in L. Denis (ed.), *Kant's Metaphysics of Morals: a Critical Guide*, Cambridge University Press, Cambridge, 2010, 108

[47] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p. 412.

[48] I. Kant, "The Metaphysics of Morals", in Immanuel Kant. Practical Philosophy, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p. 456

[51] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.456.

[51] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.456.

[51] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.456.

[52] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.388.

[53] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.491.

[54]I. Kant, 'The Metaphysics of Morals', in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.415.

However, if my right to intelligible possession (*possessio noumenon*, "possession merely by right")[55] is implicit in an a priori united will,[56] I assume that my rights to property "do not depend on social approval".[57] Intellectual possession of external objects is based on a general united will that is given a priori and which legislates necessarily, not contingently.[58]

If this is the case, then, also my duty to be part of a civil order is linked to securing everybody's rights through the coercive force of the law. It is with a view to securing my *provisional* rights to external objects that the right to coerce others is upheld. The general united will, in so far as it justifies coercive laws through an omnilateral will, defines a general *standard of public authority*.

However, as argued, the instantiation of a public authority is not only required for the purpose of framing by legal means unilateral appropriations of the will through the creation of states, but also to *compensate* those who are affected by being excluded from such appropriations. Since the earth is limited, territorial exclusion can be omnilaterally acceptable only if state authority is held under an obligation to allocate a compensatory measure. This justifies the Kantian interpretation of the cosmopolitan right to visit in terms of a right-based measure for the rebalancing of opportunities due to territorial restrictions. Under a general scheme of law, the right to visit allows for the coexistence of individual maxims of freedom of choice under "a universal law",[59] thus establishing an overall lawful condition in accordance with the Universal Principle of Law. As a result, states have the right to rule and may thus reasonably expect others to accept exclusion, not only if (a) they establish a rule of law and a system of justice on their territory, but also if (b) they allow foreign visitors to enter their territory on the basis of publicly justifiable reasons aimed at compensating a unilateral appropriation of the land.

The right to visit as a constructivist principle of cosmopolitan law

As a result of the interpretation outlined above, in the following section I contend that the cosmopolitan right to visit is best considered on a par with the right 'to be heard' posed by a visitor travelling to a foreign state ("visit").[60] I divide this section into three sub-sections: first, I argue for the 'right to be heard' in terms of a general principle of law; second, I examine a plurality of right-claims that can be grouped into either negative or positive categories; third, I consider how the right to visit as a principle of cosmopolitan law overcomes the divide between natural and positive law and it lays out a constructivist agenda for the cosmopolitan constitution.

To be sure, the cosmopolitan right as a "subjective right" represents an acquired property. Whereas granting permission for a temporary visit as a 'right' takes on significance only based on a positive system of law justifying appropriation of the land, in terms of content the right to visit is not 'created' anew by any positive system of law. Rather it exists prior to any such system of positive law. It appears

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[55] M. Gregor's translation in Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.412.

[56] Kant distinguishes between three types of possession (empirical, as a concept of the understanding and as intelligible possession), M. Gregor's translation in Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.401. Where the first two categories pertain to the notion of having control over something, either directly or indirectly, intelligible possession pertains to the legal requirement that others should not interfere with my possession.

[57] B. Byrd, "Intelligible possession of objects of choice", in *Kant's Metaphysics of Morals. A Critical Guide*, L. Denis (ed.), Cambridge University Press, Cambridge, 2016, p.94.

[58] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.491.

[59] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 387.

[60] See P. Niesen when he claims that "The subjective *cosmopolitan* right thus appears to constitute a third category of subjective right to communication", in P. Niesen, "Colonialism and Hospitality", *Politics and Ethics Review*, 3(1) 2007, 92.

therefore that, more than as a right *tout court*, the right to visit is primarily a general principle of cosmopolitan law which becomes 'positive' once it is incorporated into domestic constitutions.

However, this point has gone largely unnoticed by Kantian scholars. Indeed, apart from general consideration as a "right to visit on a temporary basis" scholars have understood the right to visit (or the right to hospitality) as either an innate right to freedom,[61] or as a more property-oriented understanding of "the mine and the thine".[62] Whereas, for instance, Benhabib has equated the cosmopolitan right with the right to *non-refoulement*,[63] others have defined it as a right to commercial exchange.[64] By means of a textually-oriented analysis, Byrd and Hruschka have suggested that Kant changed his mind after the *Perpetual Peace*. In particular, they considered whether in the *Doctrine of Right*, the right to visit was incorporated as an element of international law (rather than of cosmopolitan law).[65] As a result of this apparent shift, the two scholars argue that the cosmopolitan right to visit is better understood in terms of a collective peoples' right to freedom of trade.[66] Others, like Bohman, have suggested instead an interpretation emphasizing the role of the cosmopolitan right to visit in terms of a critical exercise of public reason.[67] All in all these interpretations testify to a semantic openness of the cosmopolitan right to visit. I think that there is a reason for this that is not detrimental to Kant's interpretation.

I thus reject the hypothesis of Byrd and Hruschka's semantic reduction of the "*Verkehr*" (*commercium*, interaction) to a notion of 'trade'. Rather, I submit that the right to visit is reflective of the interactional element of the original community and that this can assume a variety of constitutionally defined rights once the process of a lawful territorial appropriation is activated. As human beings we are entitled to the cosmopolitan right to visit as foreign nationals whenever our innate right to external freedom provides a sufficient reason 'to be heard'. In all cases, the right to visit is justified on the basis of a general presupposition of individual inclusion into the society of human beings. It assumes, that is, that one can be a visitor only as a member of a foreign society. Recursively, moving beyond a lawless condition justifies the view of a general individual attribution of (world) citizenship. A system of rights can be established together with a rightful condition only if individuals enjoy the status of equal citizenship under general principles of reciprocity and universality of rights.

In §62 of the *Metaphysics of Morals*, Kant defines the cosmopolitan right as the capacity to "offer to have commerce with the rest":

> "each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt. - This right, since it has to do with the possible union of all nations with a view to certain universal laws for their possible commerce, can be called *cosmopolitan right (ius cosmopoliticum)*. (I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 489).

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[61] P. Kleingeld, "Kant's Cosmopolitan Law", *Kantian Review*, 2(1),1998, 73-90; S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge, Cambridge University Press, 2004.

[62] As Hruska and Byrd put this: "securing the mine and thine…can be done only in a juridical state, only in a state of distributive justice, only in a situation of a *lex iustitiae…*Provisional ownership is not secured, but instead preliminarily legal possession…earth's surface must be divided before any individual has a property claim to secure", in Hruska and Byrd, 2010, p.138-9. See also K. Flikschuh, 2000, p.469 ff.

[63] S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press, Cambridge, 2004.

[64] B.S. Byrd and J. Hruschka, *Kant's Doctrine of Right. A Commentary*, Cambridge, Cambridge University Press, 2010.

[65] B. Sharon Byrd and J. Hruschka, 2010, 208.

[66] B. Sharon Byrd and J. Hruschka, 2010, 208-9. On this restrictive interpretation see also Flikschuh "Cosmopolitan Right concerns just trade relations" in K. Flikschuh, *Kant and Modern Political Philosophy*, Cambridge, Cambridge University Press, 2000, p.476.

[67] "In the cosmopolitan case, the supreme coercive power of public right in the state is replaced by the initially very weak power of the public opinion of world citizens, that is, the power of a *critical* public." J. Bohman, *The Public Spheres of the World Citizen*, in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, MIT Press, Mass.: Boston, 1997, p.180.

What Kant says here is that interpersonal relations should be seen primarily in terms of a capacity and, only then, as a right. Kant distinguishes between the *privacy* of interpersonal relations as a capacity and the *publicity* of the cosmopolitan right as an element of cosmopolitan law. He also considers the cosmopolitan right as an individual right of foreign nationals not to be treated as enemies, thus resulting in universal laws that regulate the intercourse among nations. Note here the recursive use of the word "nation" [*Volk*].[68] This explains why Byrd and Hruska argue for the cosmopolitan right in terms of a collective right.[69] However, this reading leaves unanswered the question as to why Kant considers on an equal plane the individual-collective "human being" as in the case of when he refers to "a human being (or a nation)" [*Der Mensch*…(*oder das Volk*)].[70] This use is intelligible only based on the premise of an original community by virtue of which we are individual citizens of a "universal state of mankind" [*allgemeinen Menschenstaats*].[71] The cosmopolitan right, as a condition of "universal hospitality",[72] bridges the multidimensional gaps between individuals, peoples and states. The status of world citizenship, when projected onto the political plane, refutes any definitive assimilation within a specific jurisdiction even within a comprehensive world state since, as Kant says, whereas a world republic is an unrealizable ideal, a world monarchy would soon turn into "soulless despotism".[73] The more geopolitically connoted expression "nations on the earth" [*Völker auf Erden*][74] testifies to the relations that the cosmopolitan right establishes also between individuals and peoples.

In so far as the right to visit represents a general principle of cosmopolitan law as a 'right to be heard', it represents a 'response-triggering' principle rather than a specific 'claim-right'. It is thus a constructivist principle of cosmopolitan law giving rise to enlarged more wide-ranging pattern of reasoning; that is, a presumption of a general scheme of realization for a rightful condition by means of a critical use of public reasoning. I return to this point in the final section (§3).

The cosmopolitan right to visit presents both a 'negative' and a 'positive' aspect. With regard to the negative aspect, the cosmopolitan right takes hospitality as a minimum threshold for protecting life as a precondition for legitimate possession. However, preservation of life is not a right of necessity but a conditional duty, provided it can be achieved "without a crime".[75] Today this right is captured by the notion of *non-refoulement* as Benhabib has rightly pointed out. As the right of a foreign national not to be turned away in the case of mortal danger, the right to visit reflects the core of Kantian cosmopolitanism rooted in the universal entitlement to a place on earth. It might be objected that states do not have a duty to comply with the demands of non-citizens except in cases of *non-refoulement*. As a result, it might be argued, the right to visit has no constitutional-constructive output. However, Kant

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[68] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 322.

[69] Byrd and Hruska, 2010, p.208.

[70] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 322.

[71] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 322.

[72] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.328.

[73] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p 336.

[74] I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 489.

[75] As Kant makes this general point: "For to preserve my life is only a conditional duty (if it can be done without a crime); but not to take the life of another who is committing no offense against me *[der mich nicht beleidigt]* and does not even *lead* me into the danger of losing my life is an unconditional duty" in I. Kant, "The Metaphysics of Morals", in M. Gregor, *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996. p.299, note*. On a similar point see Alice Pinheiro Walla, "Common Possession of the Earth and Cosmopolitan Right", *Kant-Studien*, 107(1), 160–178, ISSN (Online) 1613-1134, ISSN (Print) 0022-8877, DOI: 10.1515/kant-2016-0008, March 2016.

explicitly rejects the idea that in a legitimate state there is no such duty. On the contrary, he urges the "moral politician" to bring the constitution of the state into line with the principles of right. Then, my argument goes, since the right to visit ensues from a compensatory principle of territorial delimitation, the moral politician is under a political obligation to provide a justification for the demands of the foreign visitor. In the case of justified acceptance, the domestic constitution incorporates a cosmopolitan request, so that a 'juridical interconnection' is established between disparate legal domains and individuals.

Although it might appear at first sight as a functionalist argument, i.e. motivated by protective measures, it suddenly turns into a constructivist justification for the consolidation of the cosmopolitan constitution (one realizing an original right to have a place on earth). The moral politician has a 'duty to justify', either accepting or rejecting, claims to visit, and any acceptable outcome has to be brought into line with an overall system of law.[76] One might speculate and argue that it is only if political judgment strikes an equilibrium between the external freedom of domestic and foreign nationals, that the Universal Principle of Right justification is achieved. If this is the case, it also becomes possible to understand why the right to universal hospitality, in allowing for a communicative interaction among disparate legal communities, gives rise to the conditions for a supraordinate global rule of law.[77]

Since citizens of a state are also "citizens of the world" ,[78] they have in common a reciprocal and universal right to societal inclusion, at least the right to visit on a temporary basis. Within the limits of a 'right to be heard', a qualified right to visit has to define a minimum threshold. However, with regard to the positive aspect, the right to visit instantiates the preconditions for laying out a more properly articulated cosmopolitan constitution, once that lower threshold has been set. Here, the idea of interaction as commerce is subordinated to compliance with the critical use of reason. That is, individual claims are presented to a foreign decision-making body that remains under an obligation to justify its territorial possession based on a public compensatory principle of cosmopolitan right. The recognition of a cosmopolitan demand for justification by state-constituencies widens the domestic standards of public reasoning to the extent that external wrongs are felt everywhere as one's own.[79]

These final considerations find textual support in the nexus that Kant establishes between cosmopolitan right and the standard of public reason as delineated in the *Perpetual Peace*. Kant claims that public reasoning has moved to the global level, so that legal integration among different regimes has become so pervasive that "a violation of right on *one* place of the earth is felt in *all*".[80] Following on from this observation, the 'negative' and 'positive' side of the right to visit can be grasped only by presupposing a critical-constitutionalist dimension of public use of reason where cosmopolitan citizens challenge 'from within and from without', so to say, public domestic constitutional standards, making them porous. What ensues from this process of dialogical interaction is that the critical bite of Kantian cosmopolitan right highlighted by authors such as Bohman represents only a stepping stone towards the juridification of public international relations and, finally, to the constitutionalization of public

[76] "A moral politician will make it his principle that, once defects that could not have been prevented are found within the constitution of a state or in the relations of states, it is a duty, especially for heads of state, to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model in the idea of reason, even at the cost of sacrifices of their self-seeking [inclinations]" I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.340.

[77] On the subjects of cosmopolitan rights including not only individuals, but also states and peoples, see P. Niesen, 2007, p.98.

[78] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.322.

[79] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 330.

[80] I. Kant "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 330.

international law.[81] The critical force of communicative interaction obliges individuals to engage with a consideration of reciprocal standards of public reasoning as if in a Gadamerian 'fusion of horizons'.[82] This process, as noted, represents only an intermediate step towards the realization of the cosmopolitan project as a whole and it would establish a relation between the right to visit and the cosmopolitan constitution under public standards of reason.[83]

In addition to the relation between a public critical standard and the adoption of a cosmopolitan constitution, Kantian cosmopolitanism establishes a connection between a critical-political dimension of the cosmopolitan right to visit and the form of rationality of the juridical system. This explains the proper constructivist character of Kantian cosmopolitan and his departure from a natural law scheme. I now seek to clarify this final point.

Kant attempts to reinterpret the natural law framework of the "common possession on earth" and "the right to visit" as elements of global system of law. By virtue of their earthly affiliation, as original members of a community on earth, individuals are entitled to submit requests for hospitality to contingently formed positive jurisdictions. [84] However, as a right grounded in an original natural law condition, the cosmopolitan right to visit is not exhausted by any positively given jurisdictions. With regard to the character of cosmopolitan right, Kant does not define this in terms of a cosmological order, nor as a theological or anthropological essence of the human being. Natural law is rather grounded on reason: it represents a purely practical aspect, one which can be known a priori through rational enquiry.[85]

However, there seems to be a bi-univocal relation here between natural and positive law. Whereas natural law establishes a distinct standard for the validity of positive law, its content as a right can be articulated only within a positive system. With regard to the first aspect, Kant notes that the lack of compliance of positive law with natural law is "Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain".[86] For Kant, there is an appearance of law also when normative validity is lacking; but in the absence of moral legitimacy, positive law is defective law. As for the second aspect, the "interaction" which characterizes the *communio fundi originaria* becomes a "right to visit" (or "to be hosted") only once as a positive system of law is established on the basis of the Universal Principle of Right.

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[81] J. Bohman, *The Public Spheres of the World Citizen*, in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, MIT Press, Mass.: Boston,1997.

[82] H.G. Gadamer, *Truth and Method*, Continuum, London, 1989.

[83] Bohman emphasizes this point in his reactualization of Kant's cosmopolitanism when he asserts that: "When community-wide biases restrict the scope of such self-scrutiny, usually by leaving relevant problems of the public agenda, a new public emerges to press for public self-scrutiny and sometimes for new rules and institutions…The civil rights movement, rather than the Supreme Court, is the exemplar of the public use of reason that can be extended to cosmopolitan conditions" J. Bohman, *The Public Spheres of the World Citizen*, in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, MIT Press, Mass.: Boston,1997, p.190.

[84] For a different position on this point see A. Pinheiro Walla, "Common Possession of the Earth and Cosmopolitan Right", *Kant-Studien*, 107(1), 2016, 160-178. The author quite rightly argues that Kant abandons Grotius' traditional view on needs as grounding elements for the common possession on earth. However, while she establishes important connections with the right not to be refused when in danger of life, not much is said with regard to the positive "interactional" aspect of Kant's right to visit, namely, the right to submit communicative demands that lead to the formulation of transnational legal principles. Since Kant explicitly defines the right to visit as a "natural right" (see note 70), it can be inferred that it relates constructively with positive domestic constitutional systems of law.

[85] See Höffe, 2006, p.95. As such, it concerns the justification of the law, its character of justice. One might argue, then, that Kant places his views on the relation between positive law and natural law on the side of what is currently defined as positivist inclusivism, a view according to which the validity of institutionally enacted laws are partially depending on their compliance to natural standards of validity. See C. Corradetti, *Relativism and Human Rights. A Theory of Pluralist Universalism*, Springer, Dordrecht, 2009, pp.111-152.

[86] I. Kant, 'The Metaphysics of Morals', in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.387.

Taken together, the positive-constitutive and the natural-law character of the cosmopolitan right to visit tend to subordinate the domain of international law to the legitimate demands of individuals as world citizens. Coordination among states by means of international law is justified only when individual requests remain mindful of standards of equality and non-discrimination, thus resulting in further integration between different legal domains. I turn next to the assessment of how this view of the law impacts on the construction of a cosmopolitan system of state-relations hopefully leading to peace.

Thinking cosmopolitan through the 'critical' public use of reason

In this final paragraph, I consider how the Kantian idea of "freedom as independence" is linked to a cosmopolitan use of public reason. In particular, I explain how a progressive trajectory of human emancipation is realized by the capacity to give oneself universal laws as citizen of a *cosmopolis*.[87]

As argued above, the right to universal hospitality, as the negative-limiting definition of the right to visit (the right "not to be treated with hostility"),[88] is explicitly connected by Kant to an original community on earth: "this right [the *right to visit*], to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth".[89] Cosmopolitan right, in so far as it is connected to the original community of earth, is not only dependent on the notion of a common will, but also on the content that is commanded by the obligating will as with the division of the earth held in common.[90] Since the unity of the will has an original character — it can never be exhausted by a factual arrangement — relations among the inhabitants should also be conceived as regulated by a permanent condition of continuous interaction.[91] This inherent tension within the original condition is evident also in Kant's characterization of the cosmopolitan order which remains a project in continuous search of a long-standing approximation towards peace. Consider the following passage:

> "If it is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then *the perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) is no empty idea but a task that, gradually solved, comes steadily closer to its goal (since the times during which equal progress takes place will, we hope, become always shorter)" I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 351.

The achievement of peace implies the persistence of an unsolved tension between a cosmopolitan juridical ideal and its positivist instantiation. This should come as no surprise since, as noted above, the original community represents a normative concept: "a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with

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[87] On the link between autonomy and public reason in Kant, see O. O'Neill, "Autonomy and Public Reason", in M.Timmons and R. N. Johnson (eds.), *Kant, in Reason, Value, and Respect: Kantian Themes* from the Philosophy of Thomas E. Hill, Jr.,Oxford University Press, 2015, 119-134.

[88] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 329

[89] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 329.

[90] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.415.

[91] This hypothesis diverges profoundly from Byrd and Hruska's thesis for whom once the disjunctively universal right to a place on earth is met, then the right to be located in a particular location disappears "and with it the right to visit that other place" Byrd and Hruschka, 2010, p.207. Contrary to this interpretation, I consider that the availability to the cosmopolitan citizen of the right to visit prevents closure as with final-state individual geographical assignment.

principles of right".[92] Its critical force, then, remains in place even after the original division of the earth has been accomplished. It follows that the exhaustion of the original mandates to establish a rule of law can never be concluded in factual terms, and that even with the historically given division of the earth, there remains a permanent demand for territorial legitimation. Cosmopolitan right cannot thus be equated with positive law: it is not exhausted by a command or by permission granted in any given code. In so far as it consists in an enabling condition for foreign nationals to visit and to present their claims to alien jurisdictions, the right to visit grants the right to be considered in the broad sense. The positive effects that the right to visit has on domestic systems may be considered as the 'public justificatory' strategy for the cosmopolitan constitution. Practical assessment requires the political autonomy of state citizens to be considered in light of external demands requiring a public use of reason beyond state borders where each is not only a "member of a commonwealth" but "even of the society of citizens of the world".[93] For this reason, continues Kant, positive laws, even if they must be obeyed, can nevertheless be criticized so that a "citizen cannot refuse to pay the taxes imposed upon him…But the same citizen does not act against the duty of a citizen when, as a scholar, he publicly expresses his thought about the inappropriateness or even injustice of such decrees".[94]

A corollary of this line of argumentation expands the constructivist purchase of the right to visit upon Kant's anthropological views on the "unsociable sociability" of the human nature. This approach captures the problem from an *a posteriori* perspective.[95] As the argument goes, it appears that in an empirical perspective, unsociable sociability motivates the perpetuation of claims of interaction in a context of moderate scarcity of land resources.

The argument of the "unsociable sociability" also requires the "public justificatory" argument to be valid. The fact that further demands for legitimation are presented following justified schemes of redistributive justice presupposes that the cosmopolitan right to visit reflects the idea that a rightful relation between individuals and states should be independent from historically given determinations of citizenship. Rather, these relations are valid on the premise of *a priori* principles. As Kant claims in the *Conclusion* of the *Doctrine of Right*: "the rule for this constitution, as a norm for others, cannot be derived from the experience of those who have hitherto found it most to their advantage; it must, rather, be derived a priori by reason from the ideal of a rightful association of human beings under public laws as such".[96]

Both the public justificatory and the "unsocial sociability" argument account for establishing a constructivist relation between the "critical-constitutional" function of "right to visit" and the making of the cosmopolitan constitution. This point remains implicit in Kant's writings and it can be reconstructed only conjecturally. In the following paragraph I will therefore abandon the pretence of a philological reading of the texts in order to pursue a purely Kantian argument.

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[92] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.415.

[93] I. Kant "An Answer to the Question: What is Enlightenment ?", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.18.

[94] I. Kant "An Answer to the Question: What is Enlightenment?", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, p.19. According to Waldron this point seems to prevent any interpretation of Kant as a positivist. See J. Waldron, Kant's Legal Positivism, Harvard Law Review, vol.109/7, 1996, 1535-1566.

[95] See I. Kant, "*The means nature employs in order to bring about the development of all their predispositions is their antagonism in society, insofar as the latter is in the end the cause of their lawful order.* Here I understand by 'antagonism' the *unsociable sociability* of human beings, i.e. their propensity to enter into society, which, however, is combined with a thoroughgoing resistance that constantly threatens to break up this society". *I. Kant, 2009 [1784], "Idea for a Universal History with a Cosmopolitan Aim", in Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide. Ed. A.Oksenberg Rorty and J.Schmidt, 9-23. Cambridge: Cambridge University Press,* 13.

[96] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 491.

As Kant observes, since peoples are subjected to a geographically constrained place on earth, each must receive a share the earth's resources in accordance with an original right to earthly affiliation. Since this condition is that of a community of reciprocal action, or commerce, cosmopolitan right allows individuals to engage in communicative interaction under the conditions of limited availability of the earth's space and resources. The cosmopolitan right regulates the relation between law and space by legitimately restricting individual external freedoms on the basis of a Universal Principle of Right. From the "attempt" to enter into differential relations, the right to visit allows the submission of claims as a foreign national to a different public sphere and, ultimately, to a different jurisdiction.

The distinction between the 'negative' and the 'positive' aspect of the right to visit finds a further grounding here. Whereas the endangering of one's life advances only an unchallengeable claim to the "moral politician",[97] that is, a claim-duty to host temporally anyone who is endangered upon return to her native land, the same does not hold for the 'positive' critical aspect of cosmopolitan constitutionalism. Whereas in the 'negative' aspect of the right to visit the endangering of an original right to equal access to a portion of land compels the moral politician to comply, the 'positive' aspect of the right to visit leaves the claims of the foreign visitor open to rejection. A striking case is that of a claim to trade advanced by foreign nationals. In this case nobody could claim that even a "moral politician" has a duty to comply. Here, *the form* of the claim that is advanced with the capability to be heard within a different jurisdiction is not necessarily linked with the violation of the *content* of the cosmopolitan right, namely the respect of an equal right to have a place on earth. As a result, one might arguably infer that the cosmopolitan-constitutional outcome of the right to visit is necessarily activated only on conditional acceptance of the trade-claim by a foreign jurisdiction. That is, whatever the specific trade-agreement offered, it has to comply with certain universal standards of public reason arising from the right to visit. Several examples are on offer here to account for this general constraint. One example for all is the exclusion of colonial relations of domination that violate the equal standing before the law of the participants in the agreement.

Kant is undoubtedly supportive of anti-colonialist views, since any imposition by force even of a rule of law would create a legal void in the target population.[98] This means that he places a global constitutionalist burden primarily on the shoulders of the visitor, so to speak. It is for this reason that Kant approved the restrictions on European visitors adopted by China and Japan.[99]

But what if the trade proposal — in terms of its provisions — is fair to the peoples addressed and does not violate their respective external freedoms? I believe that Kant would agree that a cosmopolitan-like public standard of trade-fairness applies also in this case. The agreement would turn into one not violating the cosmopolitan constraint of access to the earth for humanity, for instance, one causing massive environmental devastation or resulting in severe economic impoverishment for third-parties. Where these catastrophes do occur, access to earth's resources would be prevented and an interaction-based standard of cosmopolitan justice violated.[100]

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[97] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 338. On this point see Martti Koskenniemi, 'Constitutionalism as a Mindset. Reflections on Kantian themes about international law and globalization' (2006) 8 (1) *Theoretical Inquiries in Law*, ISSN (Online) 1565-3404, 9–36.

[98] On this point see the recent collection of essays edited by K. Flikshuh and L.Ypi (eds.), *Kant and Colonialism*, Oxford University Press, 2014.

[99] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 330. As M. Risse observes in this regard "China and Japan may impose restrictions only if *that* is what is required to protect their citizens from assault, that is, only if *that* is what the maintenance of charitable treatment of individuals by foreign government requires. European powers had undermined that requirement. Protection against their intrusion was needed". In M. Risse, Taking up space on earth: Theorizing territorial rights, the justification of states and immigration from a global standpoint, in Global Constitutionalism, vol.4(1), 2015, 98.

[100] On the contextualization of some of these problems in the contemporary world see, T. Pogge, *World Poverty and Human Rights*, Polity Press, Cambridge, 2008.

However, it remains the case that any cosmopolitan request, whenever successful, would give rise to a 'constitutional crisis' since it would raise self-reflectivity by questioning how to relate externally with other constituencies. This would eventually lead to a transformation of the domestic constitutional system. In light of such considerations Kant's cosmopolitan right to visit can be taken as the prompting element of a process of public reasoning. Individual requests nudge domestic constitutions to comply with the generalizable public principles of law. Whereas domestic constitutions, *stricto sensu*, derive their legitimacy from a self-determining collective body that by definition excludes those subjects who are not recognized as members of the constituency — the people — cosmopolitan right gives rise to such a self-referential understanding by introducing the possibility of interaction between non-citizens, communities and foreign states.

New constraints of public reasoning lay down limits to strategic state-behaviours with regard to external relations and hence to their use of secrecy and political expediency.[101] Publicity empowers the individual as a generalized other, that is, as a representative of an unrestricted audience in the "communication *between* audience and speaker".[102] In this way cosmopolitan law realizes an "interconnection" among jurisdictions. Thus, the gap is closed between a) the assumptions of a rightful cosmopolitan condition from which the cosmopolitan right to visit is legitimately enforced b) a specific content-related claim submitted by a visitor, and c) a domestically defined context of public reason (following a "constitutional mindset" as Koskenniemi defines the thinking of Kant's "moral politician").[103] Integration between these three levels allows for the transnationalization of domestic public legal standards. This process completes what I have referred in the opening sections as the second part of Kantian political-juridical aspect of cosmopolitan constructivism.

As observed, the outcome of the construction of a cosmopolitan public sphere by the public use of reason, while necessary and valuable, should not be regarded as the end-point of Kantian cosmopolitan concerns. It is rather the juridification of the global public sphere that ultimately brings about a lawful condition between citizens and foreign states among themselves, as well as between domestic citizens. As Kant says: "The problem of establishing a perfect civil constitution is dependent on the problem of a lawful external relation between states and cannot be solved without the latter".[104] Here is the link with the law: in so far as standards of public reasoning are reflected in domestic constitutionalism, the incorporation of new interactional claims gives rise to further codifications in compliance with the general principles of public law. This time, though, such norms reflect an external —cosmopolitan— perspective, filling the gap between domestic and international law. Whereas national constitutional law may be seen as the product of a domestic constituent power —a sovereign people— the cosmopolitan constitution results from a more fundamental source of legitimacy: the common possession of the earth.

Kant seems to suggest that the construction of a cosmopolitan constitution is to be conceived along the lines of global citizenship and civil society as when he states that "the condition of peace is alone that condition in which what is mine and what is yours for a multitude of human beings is secured under

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[101] "Publicity has a limiting effect upon all strategic actions, both within states and between states. In the First Appendix to *Perpetual Peace*, Kant subjects political strategies to tests of publicity alone: if many maxims of political expediency are publicly acknowledged, they cannot attain their own purpose". J. Bohman, *The Public Spheres of the World Citizen*, in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, MIT Press, Mass.: Boston,1997, 182.

[102] J. Bohman, *The Public Spheres of the World Citizen*, in J. Bohman and M. Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, MIT Press, Mass.: Boston,1997, p.184.

[103] The relevant passage is I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, 338. On this point see Martti Koskenniemi, 'Constitutionalism as a Mindset. Reflections on Kantian themes about international law and globalization' (2006) 8 (1) *Theoretical Inquiries in Law*, ISSN (Online) 1565-3404, 9–36.

[104] I. Kant, 2009 [1784], *"Idea for a Universal History with a Cosmopolitan Aim", in Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide. Ed. A. Oksenberg Rorty and J. Schmidt, 9-23. Cambridge: Cambridge University Press*, 16.

laws living in proximity to one another, hence those who are *united under a constitution*".[105] More precisely, the cosmopolitan legitimacy of the state as a subject within the international order is the result of two intersecting parameters: national constituent sovereignties for self-legislating peoples and global citizenship. For Kant this condition is far from being unrealizable. However, if peace has to be preserved as a realizable aspiration, then, it has to be achieved through counterfactual-regulative conditions. As Kant argues in the *Metaphysics of Morals* "we must act *as if* it [perpetual peace] is something real, though perhaps it is not; we must work toward establishing perpetual peace and *the kind of constitution* that seems to us most conducive to it (say, a republicanism of all states, together and separately)".[106] For Kant, the time seemed ripe to conceive a "realistic utopia"[107] to gain momentum.

A crucial question arises at this point: what sort of institutional progression is generated by the Kantian "general united will" and how does it connect to state sovereignty and more in general to a cosmopolitan order? These remarks also help to frame under a constructivist presupposition the institutional aspects of cosmopolitan approximation. I consider that Kant conceived of the role of a republican confederation of states *also* in terms of counterfactual guidance and not as an empirical condition to be realized.[108]

The idea of a positive instantiation of a cosmopolitan republic would be plausible only if it were the case that Kant's concept of a general united will justified moving beyond a lawless scenario on the basis of contractarian terms for political obligation. Only in so far as a global cosmopolitan covenant could be derived from the general will to abandon the original condition would it be possible to conceive the idea of world sovereignty and a global state. However, this hardly seems to be the case from the interpretation outlined above. The notion of a contract conflates the unconditional and transcendental force of political obligation of the general united will with a conditional and contractual will of a constituent people. However, it contravenes Kant's overall rationale and his explicit denial of the fact that the *communio fundi originaria* is like the *communio primaeva*, "[…] one that was *instituted* and arose from a contract by which everyone gave up private possessions […]".[109]

The question that one can legitimately ask then is: Why does Kant make use of a key Rousseauian concept by referring to the idea of a general united will? This is a complex question that can only be addressed here with regard to its relevance for the establishment of a civil condition. Kant reinterprets in conceptual terms the Rousseauian "*volonté générale*" in the co-legislating activity among equal members.[110] For Kant Rousseau's conception of the general will does not suffice to account for the transformation of a multitude into a unity of self-legislating constituent people. Sovereignty in this regard, as for Hobbes, pertains not to the people alone but to the ruler and to the state as a community.[111] Unlike Hobbes, though, Kant does not accept the idea that coercive authority is justified simply because a multitude has transferred authority on it. On the contrary, he holds that coercive authority is subjected to a concept of legitimacy. As a result, the notion of a general united will lays down a standard of legitimacy of coercive authority. A multitude of interactive individuals can be thought of as a community of right only in so far as a general united will is presupposed as a unifying concept, so that the sum total

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[105] I. Kant, I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, 491.

[106] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 491, emphasis added.

[107] The expression is taken from J. Rawls, *The Law of Peoples*, Harvard University Press, Cambridge MA, 1999.

[108] In contrast with W. Scheuerman, I do not consider that for Kant the realization of a republican confederation was just a matter of time. See W. Scheuerman, "Cosmopolitanism and the World State", *Review of International Studies*, 4, 2014, 419-441, in particular p.440.

[109] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, p.405.

[110] See K. Flikschuh, "Elusive Unity: the General Will in Hobbes and Kant", *Hobbes Studies* 25, 2012, 21-42.

[111] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, 85.

of individual actions is accountable to a standard of public authority. This means that the absence of an antecedently constituted people, which in Hobbes justifies the rejection of a democratic standard, is reconstituted in Kant based on the notion of a general united will, one of equal deliberating members as for Rousseau, where real citizens take part in town assemblies. Unlike Rousseau, though, Kant believes that an association of equals is not a society, because there is no "*commander* (*imperans*) and the *subject* (*subditus*) […] it rather *makes* one".[112] This is where Kant envisages conferring a distinctively legitimating form of the general united will on sovereignty. The general united will represents a more fundamental concept from which individual sovereign authority derives legitimacy while ceasing to be an arbitrary coercive force.

The absence of a rightful condition reappears at an international level in the relations between states. Also with regard to states' *external relations* there is a duty to move beyond the state of nature and to comply with the principles of public right. However, since for Kant only republics are eligible for cosmopolitan peace, it may be asked: On the basis of what reasons should states be obliged to move to an external condition in compliance with a global rule of law?

Consider an *a contrario* argument. In the absence of a scheme of (distributive) justice among states, one that for Kant would result in a civil condition and therefore require an impartial adjudicator, solutions could be sought only on an individual basis and with the use of force. This would eventually undermine the internal juridical condition of Republics. For instance, it is imaginable that as a result of unregulated controversies between states, at least some citizens would lose their possessions and ultimately their freedom.[113] It could be argued, then, that it is only in so far as inter-state external relations are regulated by principles of public law that it would follow that internal conditions of states could be lawfully maintained.

At this point one arrives at a non-contractualist account, one where the notion of a common possession on earth allows for either determinative or regulative guidance by cosmopolitan law. As noted above, the distinctive element that Kant introduces into the debate is that the *communio fundi originaria* does not represent an historical event, as in the case of the *communio primaeva* (Grotius), but it is rather an idea of reason. It is therefore a regulative idea. In fact, if it were a determinative idea one would objectify the command of the general united will and the realization of freedom. For Kant "[…] the concept of freedom cannot hold as a constitutive but solely as a regulative" and therefore unilateral choices can be assessed only "as if" they were in line with the regulative standards of a general (a priori) united will.[114]

Conclusion

In this article I defended the idea of a juridical constructivist notion of Kant's theory of cosmopolitanism. I claimed that the right to visit represents a formalization of the right-interactions among members of an original community of *commercium*. In so far as cosmopolitan right requires the justification of political decision-making and territorial boundaries, it gives rise to the need for mechanisms of constitutional coordination among individuals, peoples and states. A hierarchy of legal principles, equal protection and constraints on hegemonic states are just a few of the features of such a project.

Kantian cosmopolitan constitutionalism includes innovative elements with respect to his natural law tradition as well as constitutional theory as such. It not only envisages a form of cosmopolitan

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[112] K. Flickschuh, 2012, p.32.

[113] This is mentioned by Kant in various ways in his writings, as in the Seventh Proposition of I. Kant, 2009 [1784], *"Idea for a Universal History with a Cosmopolitan Aim", in Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide. Ed. A. Oksenberg Rorty and J. Schmidt, 9-23. Cambridge: Cambridge University Press,* 16, where war is said to prevent human enhancement; or in the "Conjectures on the Beginning of Human History" in I. Kant, *Political Writings*, H.S. Reiss (ed.), 1991, 231-232, where even "preparation for the war" is said to exhaust the internal resources of the state.

[114] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.376.

constitution without a state, wherein the idea of a progression under the guidance of a multistate confederation (*Völkerstaat*) becomes apparent, but it also argues for a form of world citizenship without world sovereignty, one where the cosmopolitan point of view gives rise to a critical stance against an ultimate assimilation to a *de facto* constituency. It is not only the case that constitutional progression is part of the Kantian vision of a regulative function based on the cosmopolitan ideal of an original shared possession of the earth but also, and more importantly, that the obstinate commitment to the idea of freedom as independence is not only an internal domestic resource but also a cosmopolitan liberty limited to the right to be heard in another jurisdiction.

There is a way in which great thinkers remain contemporary. This, I believe, is by virtue of the possibility of a continuous reinterpretation of their ideas in light of presently unsolved challenges. It is in this sense that I have considered Kant's cosmopolitan theory to be relevant for guiding our contemporary reflections on the standards of legitimacy of international law. For Kant, as I attempted to show, valid law should reflect an ideal of moral freedom. Following on from this premise, public right generates a rightful condition — a constitution (*constitutio*) — at both state and international level. This notion is constructed on the model of the Categorical Imperative and, particularly, on the idea of a submission of maxims as if one were to regard oneself as "a lawgiving" member "in a kingdom of ends".[115] For Kant, public right enhances freedom not only within the state, that is, internally and in the form of domestic right (civil constitutional law), but also externally through international right — *jus gentium*. The innovative nature of Kant's thinking, as I argued, is that he claims that international law should be supplemented by one further component, one regulating primarily relations between non-citizens and states. This is what Kant has called the "right to hospitality".[116] Arguably, the constitutional effects of such a right should by now be clear.

[115] I. Kant, "Groundwork for the Metaphysics of Morals [1785]", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.83.

[116] I. Kant, "Toward Perpetual Peace [1795]", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.328.

Thinking with Kant "beyond" Kant: Actualizing sovereignty and citizenship in the transnational sphere

Claudio Corradetti

Kant's sovereignty dilemma

The Kantian view on the legitimacy of the state cannot be disembodied from the international and cosmopolitan dimension of public law. Yet, prima facie, these sources of obligation generate a dialectical tension between the domestic right of state-citizens (*citoyens*)[117] and the international and even cosmopolitan level of the rights of people as a "*right of citizens of the world*" (*Weltbürgerrecht*) [118] or as "citizens of the earth" (*das Recht des Erdbürgers*).[119] If the state is sovereign, then its will must be autonomous. This means that at the risk of losing their sovereignty, states cannot be coerced by a heteronomous will ─ neither internally by an independent force, as a revolutionary power, nor externally by an internationally independent body, as in the case of an international court. For Kant, however, law requires coercion, and since international and cosmopolitan right are two of the three pillars of public law, they are enforceable rights. This conundrum is known as Kant's sovereignty dilemma.[120]

Kant uses the terms "Herrschergewalt" and "Souveränität" to define sovereignty as something primarily linked to legislative authority.[121] For Kant, sovereignty requires holding exclusive legislative functions: states cannot be externally coerced. This would violate the Kantian republican principle of legitimate coercion, namely the tracking of state sovereignty to an ultimate constituent will.[122] External coercion is thus incompatible with state authority as expressed by its constituent source: "the people". Kant's sovereignty dilemma thus poses the problem of reconciling states' autonomous will with the duty to

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[117] As Kant defines this: "He who has the right to vote in this legislation is called a *citizen* (*citoyen*, i.e., *citizen of a state*, not of a town, *bourgeois*)*",* in I.Kant, *"*On the Common Saying: That may be correct in theory but is of no use in practice*"*, in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [1793], [8:295], p.295. Alternatively, he uses "citizens of the state (*cives*)", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [6:314], p.457.

[118] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:349], Note *, p.322.

[119] I. Kant, "Metaphysische Anfangsgründe der Rechtslehre", in *Immanuel Kant Zum ewigen Frieden*, Kommentar von O.Eberl und P.Niesen, Suhkamp, Berlin, 2011, [6:353], p.84. Kant uses also the expression "*das Recht der Oberfläche*" ("the right to the *earth's surface*"), as in I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:358], p. 329. The expression "*der Weltbürgergesellschaft*" ("the society of the citizens of the world") is used in I.Kant, "An Answer to the Question: What is Enlightenment?" In *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [8:37], p.18. Finally, yet another formula is used by Kant with "a *man of the world* (or citizen of the world generally)", in I.Kant, *"*On the Common Saying: That may be correct in theory but it is of no use in practice", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [8:277], p. 281.

[120] See K. Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis", in *The Journal of Political Philosophy*, vol. 18, n.4, 2010, p.471.

[121] See I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [6:312], p.457, note "h". See also Kant's distinction between the "form *(forma imperii)*" namely 'who' has the power, if one, few or many and the "form of government (*forma regiminis*)", that is, whether "*republican* or *despotic*" according to whether it follows a division of powers or not.

[122] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [6:221], p. 376.

comply with international obligations.[123] Given his views on sovereignty and enforceability of the law, Kant is not explicit on how and through which institutions states are to comply with international and cosmopolitan standards of the law. Nevertheless, he mentions the "proposal for a universal state of nations [*Völkerstaat*] to whose power all individual states should *voluntarily* accommodate themselves [emphasis added]".[124] Kant wants to give momentum to this apparently utopian project, initially introduced by the Abbé St.Pierre and Rousseau.. In particular, Kant aims to provide a reason for compliance to those states determined to "never submit to coercive laws of this kind" as well as to their unified stand on one single "rational ground", so that what "holds for theory [holds also] for practice".[125]

It is here, however, that the problem lies. Thus, how to reconcile this sort of "ought-can" divide? Kant suggests "to assume" a certain practical attitude, one considering that "such a universal state of nations […] is possible (*in praxi*) and that it *can be*".[126] It appears here as if the theory-practice divide is solved by assuming, cognitively, the *possibility* of such unity from the state perspective. What this means is that if states *must* comply with the coercive demands of international and cosmopolitan law, then they *can* do so only by assuming a regulative role for the coercive power that an international institution, (i.e. the universal state of nations), would exercise on its members. States would adopt laws, judicial decisions etc. issued by a supraordinate political entity only "as if" they were externally coerced to do so. In fact, however, they would maintain an always actionable opting-out reservation to the demands of an international body. Suppose that international obligations are regulated and enforceable. This means that states' compliance with the commands of an external agency would occur analogously to their external enforcement without in fact being so. Actual enforceability is left to states' exercises of sovereign will and to their understanding of the compulsory character of non-domestic law in regulative terms.

In this fashion, I consider that Kant has maneuvering space to conceive of the possibility for states to conform to the constitutional cosmopolitan demands adjudicated by a transnational institution such as a court of arbitration. Nevertheless, in all these cases it would remain true that none of the organs of a transnational institution would legitimately enforce the law by threat of legitimate punishment, and therefore, compliance would remain in the hands of the states themselves.

If this interpretive hypothesis is sound, then it also becomes possible to explain why Kant is in the position to maintain the idea that states will never give up their sovereignty, as well as to account for the likelihood that their practices be understood as advancing a global rule of law, as with the case of approximation to a universal state of nations. The 'drama' of an insoluble conflict of duties would be in such a way diffused. To be sure, there is here no logical contradiction between duties to comply with the commands of a state's sovereign will, and obedience to the commands of an international or cosmopolitan norm externally issued. As far as such order obligates in a regulative manner, enforceability requires a state's incorporation of an international or cosmopolitan standpoint "as if" the supranational juridical order to which it belongs were directly enforceable.

Accordingly, the thesis I defend consists in identifying a regulative role for the ideal of peace towards which public international and cosmopolitan law would approximate. Whereas nature for Kant provides us with the idea of a general compatibility of such mechanisms with the possibility of peace, it is only by striving morally towards peace that we might hope to achieve moral progress. Similarly, Guyer considers that the "morally motivated acts of human will" complete the Kantian picture of a

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[123] K.Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis", in *The Journal of Political Philosophy*, vol. 18, n.4, 2010, p.471.

[124] I. Kant, "On the Common Saying: That May Be Correct in Theory, but it is of No Use in Practice", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [8:313], p.309.

[125] Ivi.

[126] Ivi.

cosmopolitan progression which nature alone makes simply possible but not necessary.[127] The regulative force of peace is therefore of relevance to establish the duty of the moral politician to comply with the demands of practical reason. However, my argument goes, the moral striving towards human progression turns into the constitutionalization of interstate relations. It is the legal point, which in the end, interests Kant. The difference is subtle but crucial: states' motivating reasons for compliance are based on moral reason, but the reason for other states' parties to form/create (?) a federation to coerce is law. That is, it is because a member state violates interstate agreements (and not just the morality of such agreements), that other parties have a legal right to intervene.[128] Furthermore, in the second appendix, Kant argues that politics and morality can be reconciled among themselves only through *publicity*, and that conversely, any maxims that "*need* publicity (in order not to fail in the end) harmonize with right and politics combined".[129] (?) This also helps to clarify some institutional aspects of Kant's cosmopolitan project, such as the apparently enigmatic sentences of the *Perpetual Peace* in which Kant asserts that the realization of a *civitas gentium* (*Völkerstaat*) does not match what nations want: "they do not at all want this".[130] To argue for this view, Kant draws a distinction between what is ideally right ("*in thesi*"), and what states would actually reject ("*in hypothesi*").[131]

Several readings of this passage have been suggested. All in all, one can distinguish between two groups: those considering that states would never allow for external interference — so that only a non-coercive "league of states" would be admissible — and those considering that states would eventually embrace a global confederation, such as the universal state of peoples or the multistate confederation (*Völkerstaat*). Whereas the first group expresses a liberal internationalist view *à la* Rawls,[132] the second is typical of cosmopolitan theories *à la* Held or, in line with present interpretive purposes, of Kleingeld's interpretation of Kant.[133]

Liberal internationalists consider from their perspective that, insofar as democracies do not wage war with one another, this suffices to bring about international peace. Kleingeld, instead, holds that the Kantian starting assumption of a "no analogy" thesis between the domestic and the international realm does not prevent cosmopolitan approximation and, with that, the realization of a multistate confederation (*Völkerstaat*). Differently from individuals who can be coerced to exit the state of nature, sovereign states cannot be obliged to do so.[134] Coercion to enter a multistate confederation would infringe upon "people's autonomy".[135] Accordingly, it would create a relation of subordination of an "inferior (the people obeying the laws)" to a "superior (the legislator)" that would ultimately lead to a "contradiction" between the "presupposition" of international law and that of a universal state of peoples.[136] At face

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[127] See P.Guyer, *Kant on Freedom, Law, and Happiness*, Cambridge, Cambridge University Press, 2000, p.413.

[128] For a different view on this see P.Guyer, *Kant on Freedom, Law, and Happiness*, Cambridge, Cambridge University Press, 2000, p.422.

[129] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:386], p.351.

[130] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:357], p.328.

[131] Ivi.

[132] J.Rawls, *The Law of Peoples*, Cambridge: Mass, Harvard University Press, 2001.

[133] P.Kleingeld, "Approaching Perpetual Peace: Kant's Defense of a League of States and his Ideal of a World Federation", *European Journal of Philosophy*, 12:3, 2004. I prefer to translate "*Völkerstaat*" as "the multistate federation".

[134] "[…] each may impel the other by force to leave this state and enter into a rightful condition", in I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [6:312], p.456.

[135] P.Kleingeld, "Approaching Perpetual Peace: Kant's Defense of a League of States and his Ideal of a World Federation", *European Journal of Philosophy*, [12:3], 2004, p.310.

[136] P.Kleingeld, 2004, p.312.

value, this would also prevent the possibility to conceive of a *plurality* of self-legislating states, such as that arising from the departure of a lawless condition characterizing the original state of nature.[137]

Kleingeld considers that the multistate confederation is a realizable ideal, even if one difficult to achieve. It is an ideal that can be reached starting from a league of states.[138] Coherently with such a rationale, Kleingeld aims to solve the sovereignty dilemma by claiming that for Kant a "global federation of states" requires at some point a "transfer of external sovereignty".[139] The problem, however, is that for Kant, sovereignty as the capacity to enforce the law is indivisible. The solution envisaged by Kleingeld would be feasible only if it were the case for Kant that a new notion of sovereignty would eventually replace the old one in the future. Unfortunately, Kant at no point suggests this possibility. We are thus left with the sovereignty dilemma unsolved.

The alternative reading, the one I have offered here, is that control of law-enforcement by states' parties does not prevent conditional delegation of authority to a transnational body. The conditionality of authority transfer here means that states always remain the ultimate subjects to exercise authority upon their territory; that is, to decide whether to enforce or not the commands issued by international bodies.

Let us take the case of international adjudication. What is conditionally delegated by states, in this instance, is an adjudicative *competence* that is useful to solve rather complex international issues involving two or more states. However, this requires no actual delegation of sovereign power as with, for instance, the cession cessation (?) of functions, not to mention the delegation of sovereignty, or the "*monopoly of legitimate physical violence* within a certain territory" — to use a Weberian definition.[140] Enforcement of decisions remains to be ultimately interpreted and implemented by an act of will of the state. It follows that the conditional transferring of authority leaves the ultimacy of state sovereignty as well as of its power unity unchanged. Let us explain this point with reference to the Kelsian distinction between "direct" and "indirect motivation" of states for compliance to the law. Even though this explanation is far from being Kantian in a strict sense, one might assume that Kant would have possibly endorsed this view. Kelsen argues that the coerciveness of the law is not guaranteed only by the threat of punishment (indirect motivation). In addition "voluntary obedience is itself a form of motivation, that is, of coercion, and hence is not freedom". [141] For Kelsen, one can conceive of coercion simply "in the psychological sense".[142] Differences arise with regard to the *efficiency* wherever an institutional apparatus lacks a sanctioning system. If one now substitutes the Kelsian "psychological" character for self-coercion with a properly Kantian "morally" motivating character of the law, then it becomes possible to understand why for Kant compliance to international law requirements is in need of a "constitutional mindset". This is yet another step in the construction of an argument for states compliance to international law.

"Constitutional mindset" and the progression towards cosmopolitan peace

These reflections provide a supply of arguments for interpreting one of the most crucial, as well as puzzling, passages of Kant's cosmopolitan theory: what I have mentioned before with the distinction in the *Perpetual Peace* of what is right in theory (*in thesi*) ― as in the case of the institutionalization of

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[137] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:354], p.325.

[138] P.Kleingeld, "Approaching Perpetual Peace: Kant's Defense of a League of States and his Ideal of a World Federation", *European Journal of Philosophy*, [12:3], 2004, p.314.

[139] P.Kleingeld, "Approaching Perpetual Peace: Kant's Defense of a League of States and his Ideal of a World Federation", *European Journal of Philosophy*, [12:3], 2004, p.313.

[140] M.Weber, "The Profession and Vocation of Politics", in *Weber. Political Writings*, ed. by P.Lassman and R.Speirs, 2002, p.311.

[141] H.Kelsen, *General Theory of Law and State*, Cambridge Mass.: Harvard University Press, [1945], 2007, p.19

[142] Ivi.

the universal state of peoples — and what is right in practice (*in hypothesi*) --- as exemplified with the federation of states as a "*negative* surrogate of a *league*".[143]

What my interpretation suggests is that the move from the league of states does not allow for a *positive* instantiation of a universal state of peoples. The *Völkerstaat* understood as either a universal state of peoples, or as I prefer, in terms of a multistate confederation, can never be for Kant something empirically realizable from the perspective of a state's sovereignty, but only a *regulative function* to be adopted as a model for global coordination of spheres of law among states in their transitional progression towards peace. In the eyes of the states, therefore, the multistate confederation would represent only an "*as if*' rule for the coordination of states among themselves on the basis of the presumption of a universally shared jurisdiction.

In Appendix I of the *Perpetual Peace*, Kant explains why there is a connection between morality and politics and why morality as such constrains meaningful projects for political action.[144] Kant claims that if there were an irreconcilable conflict between theory and practice, between what we are required to do by the moral imperative and what we are in fact capable of doing in practice, this would amount 'to deny[ing] that there is a [doctrine of] morals at all'.[145] If we could not act in accordance with moral demands, any use of politics would become a legitimate means for advancing expediency and self-interest. This point is captured by the distinction Kant draws between the "moral politician", i.e. "one who takes the principles of political prudence in such a way that they can coexist with morals," and "the political moralist", i.e. one "who frames a moral to suit the statesman's advantage".[146]

On the one hand, the moral politician sees the subordination of political action and legal reforms to the duties of morality. On the other hand, the political moralist disguises his personal advantage in moral terms and "on the pretext that human nature is not capable of what is good in accord with that idea".[147] Unlike the moral politician, the political moralist sees the cosmopolitan project in terms of a "technical problem,"[148] and perpetual peace as simply the result of the adaptation of morality to political advantage. According to the latter perspective, it is based on states' interests and in view of a cost/benefit analysis that solutions to international problems are to be sought. Kant rejects this possibility, and in the concluding paragraphs of Appendix I of Perpetual Peace, he declares that "The right of human beings must be held sacred, however great a sacrifice this may cost the ruling power",[149] alluding to a non-managerial interpretation of the significance of the law in view of its non-instrumental value. It follows that when confronted with the question of how to construct the cosmopolitan project, the moral politician interprets this as a moral task. Nevertheless, such a task does not end, in my view, in a merely moral endeavor as Guyer has argued.[150] It leads instead to the establishment of a global rule of law, and thus to "the cosmopolitan constitution" which provides for the ordering of the sources of international law in

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[143] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795] [8:357], p.328.

[144] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], pp.338–347.

[145] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], p.338.

[146] Ivi.

[147] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], p.341.

[148] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], p. 344.

[149] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:381], p. 347.

[150] See P.Guyer, *Kant on Freedom, Law, and Happiness*, Cambridge, Cambridge University Press, 2000, p.408 ff.

relation to itself.[151] This moral striving of the suitable political that Kant presents us lays down the preconditions for the construction of a cosmopolitan rule of law. For Kant, this also means that constitutional thinking represents an instance of practical reasoning. It concerns the process of unification of public international law by means of compliance with a cosmopolitan ideal. As Kant states in the fourth thesis of Idea: "nature employs in order to bring about the development of all their predispositions . . . their antagonism in society, insofar as the latter is in the end the cause of their lawful order".[152] The lack of sociability depicted here with the word "antagonism" gives rise to the need for domestication through the enforcement of valid laws. This process should take place not only among individuals per se and within domestic borders, but also among states engaged in warfare or aggressive behaviour (i.e. through colonisation). A "cosmopolitan condition" (*weltbürgerlicher Zustand*)[153] must be instantiated, in which a global rule of law is realised through a cosmopolitan "right to visit".[154]

With regard to Kleingeld's interpretation of the unwillingness of states to comply with transnational demands of reason, the hypothesis of a Kantian transferring of "slices of sovereignty" to a hierarchically supraordinate institution, even if a federated one, appears counterintuitive. This differs from the case of the transferring of competences for interstate coordination, where implementation remains ultimately in the hands of states themselves. Transferring of adjudicative competences, for instance, can always be claimed back by states even when this might result in a breach of law. Furthermore, the potential contradiction between the dissolution of state sovereignty and the persistence of international law is diffused by a division of labor throughout dispersed juridical sources. The division between domestic and transnational adjudicative sources thus bears no substantive effect on the unity of state sovereignty as such.[155] This reading requires a corollary, namely, the idea that for Kant cosmopolitan peace represents a regulative ideal rather than being a constitutive notion.[156] It orients stages of approximations without proposing an "either/or" standard for legal validity. Kant's regulative function for the multistate confederation offers, therefore, a precise understanding of the validity of institutional decision-making and adjudication. Overall, it provides a criterion for defining the formal unity of the law.

A further speculation on what Kant might have had in mind when sketching the institutional progressions towards perpetual peace would also consider the significance of the distinction between compulsory and non-compulsory jurisdiction. As referred initially, for Kant right is defined by its coerciveness and coercion, in turn, requires an enforcing agent. Thus, the dilemma of sovereignty is not solved by simply avoiding a state's delegation of legislative functions. In addition, it must tackle the problem of law coerciveness. In this case, it also seems that Kant holds a view based on *progressive stages* of legal coercion. At the end of the *Perpetual Peace*, indeed, he observes that "public right […]

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[151] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:358], p.329. See also I. Kant, "On the Common Saying: That May Be Correct in Theory, but it is of No Use in Practice", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [8:310], p.307.

[152] I. Kant, "Idea for a Universal History with a Cosmopolitan Aim" in Amélie Oksenberg Rorty and James Schmidt (eds), Kant's Idea for a Universal History with a Cosmopolitan Aim: A Critical Guide (Cambridge University Press, 2009) p.13.

[153] Ivi, p.20.

[154] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:358], p. 329.

[155] This is my reading of the expression "Da sie dieses aber nach ihrer Idee vom Völkerrecht durchaus nicht wollen […]". I. Kant, *Zum ewigen Frieden,* in O. Eberl and P. Niesen (eds.), *Immanuel Kant Zum ewigen Frieden und Auszüge aus der Rechtslehre,* Suhrkamp, Berlin, 2011, [8:357], p.29.

[156] See H.Arendt, *Lectures on Kant's Political Philosophy*, ed. R. Beiner, Chicago, IL: The University of Chicago Press, [1982] 1992. See also the most recent reinterpretation of this point in A.Ferrara (ed.), 'The Uses of Judgment', special issue of *Philosophy and Social Criticism*, vol. 34, no. 1–2, 2008.

[156] My translation of the expression "Da sie dieses aber nach ihrer Idee vom Völkerrecht durchaus nicht wollen […]". I. Kant, *Zum ewigen Frieden,* in O. Eberl and P. Niesen (eds.), *Immanuel Kant Zum ewigen Frieden und Auszüge aus der Rechtslehre,* Suhrkamp, Berlin, 2011, [8:357], p.29.

must proceed from some kind of pact, which need not (like that from which a state arises) be based on coercive laws but may, if necessary, be a condition of *continuing free* association, like that of the federalism […]".[157]

In the case of transnational adjudication, the problem turns into how to ground obedience to a judicial decision issued by an international body. If sovereignty is to retain any significance at all, it has to require state-consent. As we know, there are two purposes for demanding consent, either in view of compulsory or in view of non-compulsory forms of jurisdiction.[158]

Whereas compulsory forms demand that states enforce the law without a renewal of their consent once this has been initially granted, non-compulsory mechanisms conceive interstate arbitration as requiring a renewal of state consent each time. In either case, a state's refusal to comply with the law raises complex issues of international legal enforcement, but it does not set aside the duty to comply.

How does the distinction between compulsory and non-compulsory jurisdiction help in understanding Kant's sovereignty dilemma? One might argue that for Kant a non-compulsory form of adjudication would be compatible with the unwillingness of states to subordinate to supranational law-enforcing bodies. In this way, both coerciveness of the law as well as state sovereignty would be saved by admitting self-enforcement.

Under the regulative rationale for a progressive instantiation of perpetual peace, one would also consider where Kant would place a shift between non-compulsory and compulsory forms of transnational adjudication. Let us recall Kant's three-step leeway, namely, starting from an unbound Hobbesian conception of international relations and progressing towards forms of interstate relations under an inclusive rule of law. First, Kant mentions the case of the Hague arbitration tribunal at the beginning of the 18th century: the "*permanent congress of states*" (*Kongreß*), where "each neighboring state is at liberty to join".[159] This represents a weak form of association since it lacks a constitution, and therefore, it "can be *dissolved* at any time".[160] Nevertheless, Kant recognizes that it plays a significant role in allowing the possibility for states to introduce "the idea of a public right of nations" so as to allow states to solve their disputes "by a lawsuit, rather than in a barbaric way".[161] As starting points of departure, both the congress and the league of states contribute to the construction of a domestic cosmopolitan mindset. This constitutes the premise for a higher degree of state interdependence, something that would eventually lead to compulsory mechanisms of transnational adjudication. Whereas the first two phases, the congress and the league of states, are characterized by non-compulsory jurisdiction, it is only starting from the progression towards the third phase that states conceive the idea of compulsory judicial deferral to international courts. We know nowadays what such mechanisms are, an example being the European Convention of Human Rights and its judicial organ, the Strasbourg Court.

Indeed, even if coercion cannot be demanded by states, certainly a form of "moral suasion" appears to be possible, as when Kant claims that states "can and ought to require the others to enter […] into a constitution similar to a civil constitution, in which each can be assured of its right. This would be a

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[157] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:383], p. 349.

[158] See in this regard the groundbreaking work by K. Alter on the compulsory jurisdiction of international courts and their transformation of international law, in K. Alter, *The New Terrain of International Law. Courts, Politics and Rights*, Princeton University Press, Princeton and Oxford, 2014.

[159] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [6:350], p.487.

[160] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [6:351], p.488.

[161] I.Kant, ivi [6:351], p.488.

league of nations, which, however, need not be a state of nations".[162] Since states already do grant themselves an internal rule of law, if it holds true that internal enjoyment depends partially on the enforcement of external legal condition, then this should also be established *among* states themselves.[163] Ergo, it appears that citizens should want, at least because of prudential reasons, to exit an interstate lawless condition by complying with a cosmopolitan rule of law.

This element also explains why Kant conceives the formation of a league of states (*Völkerbund*) as feasible, even if suboptimal, without the additional consideration that the lack of an international confederation of states (*Völkerstaat*) would compromise the project of cosmopolitan peace. Furthermore, one might think that a non-compulsory form of dispute settlement would serve the purpose of overcoming a lawless scenario by "enlightening" and "educating" states, as it were, to solve interstate disagreements through law (by means of a legal process). This would cohere with the general Kantian view on the regulative role that the ideal peace would have with regard to history as a learning process.[164]

I propose, accordingly, to understand this point through an argument based on regulative analogy. Kant considers that as individuals enter into a "*civil constitution*" due to the insecurity of an "omnilateral violence", similarly states "even against their will" will eventually "enter into a *cosmopolitan constitution*; or else […] a *federation*".[165]A partial dissimilarity with the domestic level remains, however , with regard to the normative reasons that the members of an original community of interaction — a *communio fundi originaria* —[166] would have, but state citizens would not share, with regard to the duty of conforming to a general principle of right conceived in a transnational fashion. What remains permanently available here is compliance to an a priori, adjudicative, and united will aiming to solve disputes through the medium of the law.

According to the regulative analogy I propose, the political will of cosmopolitan citizens is grounded not only on the compulsory entrance of individuals into the civil state, but also on the political request to their states for a *voluntary* inclusion into a cosmopolitan rule of law. It is indeed from the presumption of a general *political will* compelling a move towards a juridical condition that each "citizen of the world" would *also* want the enactment of a cosmopolitan rule of law. As in the domestic constitutions "…the well-being of a state is understood [as] that condition in which its constitution conforms most fully to principles of right." Similarly, one could argue that compliance of constitutions to standards of reason represents "that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after".[167]

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[162] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [1795], [8:354], p.326.

[163] On the partial analogy between individuals and states see A. Ripstein "The absence of arguments from coercion and assurance, and the corresponding absence of public law and coercive enforcement, reflect two differences between states and private persons. The first difference is that as Kant understands states. The second difference is that a state is a public rightful condition. The public nature of the state limits the purposes for which it can act to those that are properly public, that is, sustaining its own character as a rightful condition" (p.228) and also "If the only source of conflict in a state of nature between states is generated by the indeterminacy of the right to self-defense, then the solution is a partial analogue if a civil condition, but not a civil condition as such" (p.229). In A. Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, Harvard University Press, Cambridge, Mass, 2009.

[164] I.Kant, "Idea for a Universal History with a Cosmopolitan Aim. In *Kant's Idea for a Universal History with a Cosmopolitan Aim. A Critical Guide*. Ed. A.Oksenberg Rorty and J.Schmidt, Cambridge: Cambridge University Press, 2009 [1784], pp. 9-23. See on this P.Guyer, *Kant on Freedom, Law, and Happiness*, Cambridge, Cambridge University Press, 2000, p.425 ff.

[165] I. Kant, "On the Common Saying: That May Be Correct in Theory, but it is of No Use in Practice", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [8:310], p.307.

[166] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [6:250], p.405.

[167] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 1996, [6:318], p.461.

Based on these assumptions, it is not difficult to imagine, therefore, that the demand of (for?) enjoyment of the cosmopolitan "right to visit" would pave the way to the enhancement of domestic public *fora*.[168] Here the *citoyens*, once having shifted their thinking to earth citizenship, would likely raise demands for the formation of a league of states (*Völkerbund*), and then request entrance to compulsory forms of jurisdictions "as if" they were members of a multistate confederation (*Völkerstaat*). The projection of a state's self-contained civil condition into a transnational plane does not exhaust the domestic sovereign capacity of states to remain ultimate "self-enforce[rs] of […] international obligations".[169] Nevertheless, the implementation of an international decision should not be conflated with the autonomy and the compulsory force of an international adjudicative institution.

What ensues from this process is the undertaking of a further step, one in which Kant's state-subjective anticipation of a community of earth citizens is followed by a *conditional* delegation of authority to a transnational body with compulsory adjudicative functions. This is the most significant shift in contemporary international adjudication, and while it was still far from realization in Kant's time, it was certainly not inconceivable.

For Kant, there is no shortcut to the achievement of a legitimate order, one derogating from compliance with both an internal and external standard of legitimacy. This means that no solution is available in the direction of a centralized institutional system, neither republic nor monarchy. Both options are to be excluded because they are empirically unrealizable or normatively undesirable.[170] Transition, instead, should be sought starting from a weak congress of states (*Kongreß*) and progressing towards a league of states (*Phoedus Pacificum*). Finally, the advancement into jurisdictional strictures would occur under the counterfactual guidance of a multistate confederation (*Völkerstaat*).

In the absence of further institutional details, it remains problematic to identify in Kant the alternatives to the realization of the co-dependence of all states and peoples under a common legislation.[171] However, what Kant indicates here is that the cosmopolitan constitution backed up by a multistate confederation, is an arrangement of a particular kind: one that needs to be appropriate to the goal that it serves; namely, the achievement of perpetual peace. Yet the movement on the progressive advancement of compulsory adjudication does not elicit the idea of a form of adjudicative pluralism; that is, the possible coexistence of compulsory and non-compulsory forms of adjudication within a single cosmopolitan framework.

In this way, state sovereignty is saved, and with that the formal unity of the legal system. Indeed, such unity does not require a global institutional hierarchy. On the contrary, it is compatible with institutional heterarchy, or the recognition of a relative autonomy of adjudicative bodies understood in terms of functional specialization. Since the unity of the global system of law is conceived in counterfactual terms, there is no logical contradiction between global constitutional pluralism as the idea of a plurality of constitutional sources and the view of a formal unity of law. It follows that in the case of constitutional disagreement, there would always remain open the possibility to resort to interstate arbitration as a way

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[168] I. Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:358], p.329.

[169] See K. Flikschuh, *Kant and Modern Political Philosophy*, Cambridge, Cambridge University Press, 2000, p. 488.

[170] I. Kant, *ivi*.

[171] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:349-50], p.322.

to identify who is the legitimate subject of authority.[172] Given such institutional trajectory, the question arises as to how is it possible to instantiate a cosmopolitan rule of law in the absence of a world state?[173]

As Hruschka and Byrd observe, Kant's move from a state of nature to a juridical condition first requires the postulation of a form of *iustitia commutativa* — the type of justice connected to the public market as a realm of free interactions —[174] something also realizable outside of a statehood framework.[175] However, this requires the establishment of an interstate rule of law which would regulate property outside states' jurisdictional domain and in the absence of a world state. The regulation of the market in accordance to a general principle of right would thus have to take place counterfactually, "as if" occurring within the jurisdiction of an international state confederation. Second, in the progression of states towards a cosmopolitan condition, incremental demands of "possible commerce"[176] are achievable only as elements of public law-giving. This could take place only in the absence of a transnationally centralized legislative power. Such a second requirement is indeed, what Kant defines as *iustitia tutatrix*: a public law-giving process protecting rights. This is subjected to public enforceability — what Kant calls *iustitia distributiva* — and only when framed in terms of transnational public justice can it also be administered by an impartial arbiter, something along the lines of (resembling) an international court of arbitration.

Once the above framework is assumed as a plausible interpretation of what Kant might have agreed with for the definition of the legitimacy conditions of the transnational realm, how would coordination problems among members of a federation be solved? How to conceive forms of coercive powers exercised within a transnational entity in accordance with Kant's principles, and particularly with a 'thick' conception of state sovereignty? Perhaps a few features can be sketched. An international court operating under the regulation of Kant's cosmopolitan constitution could authorize the use of force against a member or a non-member to the federation. Yet, no state member of the transnational entity could be obliged to comply with such a command since this would violate the autonomy of its sovereignty. Therefore, as each of the member states could only enter the transnational confederation of states voluntarily, similarly it could only voluntarily fulfill the commands of an international adjudicator. Whatever a state decided upon to comply with such a decision, it would act in accordance with a rightful coercion, one conceived in accordance with the laws and treaties of a transnational federation. This means that within this Kantian picture, there remains an unsolved tension: one between the non-enforceability on member states of a lawful transnational decision, on the one hand, and the mandatory compliance to transnational adjudications, on the other hand. This implies that, as sovereignty would be infringed upon if states were compelled to punish another state for non-compliance to a transnational command, similarly, a state's non-compliance to judicial decisions would represent a violation of the transnational law of the federation. In other words, it would manifest the will of the state to withdraw from the obligations set out by the transnational entity, thus legitimizing a war against it. In conclusion,

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[172] The type of model for global sovereignty and constitutionalism that my suggested reading of Kant implies, therefore, is closer to M.Kumm's cosmopolitan pluralism than to J.Cohen's "constitutionalist pluralist conception" constructed on a dualist notion of sovereignty. In J.Cohen p.66. With regard to Kumm's pluralist theory of global constitutionalism, see M.Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" *Common Market Law Review*, 36 (1999), pp.509-514.

[173] See on this point J.Habermas, The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society, in Constellations, vol.15 issue 4, 2008, pp. 444-455. As well as the debate between Scheuerman and Brunkhorst, respectively: W.E.Scheuerman, "All Power to the (State-less?) General Assembly!", Constellations, 4, 2008 and H.Brunkhorst, "State and Constitutions — A Reply to Scheuerman", *Constellations*, 4, 2008, pp.493-501.

[174] I. Kant, 'The Metaphysics of Morals', in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [6:306], p.450.

[175] On this see Hruschka and Byrd, 2010, p.211.

[176] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [6:352], §62, p.489.

given the mandatory character of law as such, whereas international entities cannot by themselves constrain other states' members to compliance, for Kant this role can be performed horizontally, so to speak, by reciprocal compulsion of the member states to a federation.

The "general united will" as a transcendental constituent power for the cosmopolitan rule of law

Progressive legal stages of enforceable transnational justice (*iustitia*) require the interplay of a multilayered conceptual apparatus. Given the notions displayed by Kant, it appears that a number of mediations are realized between: a) the perspective of individuals both as state-citizens (*citoyens*) as well as citizens of the earth (*Erdbürger*) and; b) the anticipation of a necessary transcendental constituent will, as with the idea of a "common united will". Finally, c) the cosmopolitan "right to visit," resulting from the liberties set forth by both a) and b), realizes the jurisdictional unity of the Kantian cosmopolitan constitution, providing a view that accommodates the individual "at home" in this world. The right to visit brings together constitutional progressions by transforming distant jurisdictions into legally porous wholes.

In the following paragraphs, I discuss the relation between a) and b) with regard to the significance of what it means, from the standpoint of state and earth citizenship, to comply with the demands of a transcendental united will.

As anticipated, the legitimacy for states to move towards transnational realms of adjudication and power-sharing relations depends on the presumption of a transcendental role played by the general united will. Once individuals progress towards a condition regulated by principles of law, as with the creation of states, a claim to a general united will reappears with regard to the peaceful establishment of interstate relations. State demands for a cosmopolitan rule of law are justified not only by virtue of security threats, but also because international trade undertakings and interstate cooperation demand altogether the construction of a cosmopolitan legal framework.

As previously observed, Kant claims that the citizens of the earth are the subjects of cosmopolitan rights among which is recognized the right to visit.[177] Furthermore, in identifying the conditions of a "rightful constitution",[178] he considers not only "the right of the citizens of the state"[179] as well as "the right of the nations",[180] but he also speaks of "the *right of citizens of the world*, insofar as individuals and states, standing in the relation of externally affecting one another, are to be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*)".[181] This bi-directional relation points to a critical tension between natural and positive law in as far as earth's citizens are defined by the former and states by the latter. For Kant, it appears, therefore, to be justified to conceive both strands of law as mutually defining planes. It is by such reciprocal determination that external relations among states become regulated by an overarching legal system.

In this light, Kant's explanation of "earth citizenship" as a form of "citizens[hip] of a universal state of humankind" (*allgemeiner Menschenstaat*)[182] can also be interpreted. This is a condition where individual relations are coherent with a transcendental constituent will — a general united will — presupposed necessarily a priori. By advancing a claim to visit, the citizens of earth aim at transforming

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[177] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [6:352], p.489 ff.

[178] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:349], p.322.

[179] Ivi.

[180] Ivi.

[181] Ivi.

[182] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:349], p.322.

the positivist strictures of national jurisdictions, ultimately creating the legal conditions for earth citizenship. In this respect, state citizenship as well as earth citizenship qualify as mutually interdependent forms of community affiliation. To be a citizen of the state is also to be a world citizen in as far as both affiliations realize an original right to freedom within a whole of rationalized institutions.

Let me illustrate this point by confronting Kant's position with an opposite view such as Schmitt's constitutional theory.[183] Whereas for Schmitt, modern constitutionalism is characterized by the never pacified antagonism between the primacy of a constituent will (the democratic system) and a constituted power (a rule of law), the Kantian notion of a transcendental united will stands quite at the opposite spectrum, subordinating democracy to a cosmopolitan rule of law.[184] For Schmitt, the democratic will can never be represented, which he often claims by referring to Rousseau's *Social Contract*.[185] In Schmitt the relation between what comes first, whether the constituent or the constituted will, is inverted with respect to Kant's transcendental account. Furthermore, for Schmitt, the constituent will is subordinated to an empirically identifiable constituent power, which is prior. In Kant, in contrast, the (cosmopolitan) general united will is transcendentally anticipated, and this is why it regulates the legitimacy conditions for the formation of empirically constituted powers. These latter are subordinated to the legitimacy conferred by a transcendental constituent will; therefore, by the general united will ending the state of nature. Through the anticipation of a transcendental will, it follows that empirically constituted powers fall into a general concept of unity of a cosmopolitan rule of law. Unlike the Schmittian identitarian seizure of membership,[186] such unity in Kant remains open to critical demands of inclusivity. The cosmopolitan "right to visit" testifies to the ineradicable openness of any constituted jurisdiction to the legitimate demands of cosmopolitan interaction. It follows that the concept of a general united will provides reflexive conditions that realize the constitutive unity of the polity by "means of" and "of" a collective body.[187]

If this interpretation is sound, then Kant's views are incompatible with any attempt to subordinate law to politics. On the contrary, for Kant the demands of the transcendental united will demand to conceive of the legal and the political as united and co-dependent concepts.

The Kantian understanding of the transcendental conditions legitimizing a historically given constituent power also provides for an indication of the debate concerning the self-reflexive character of a constituent collective selfhood.[188] Based on these normative assumptions, the construction of a cosmopolitan constitution is not simply the precipitate of a historically given constituent power as it is in the liberal constitutional processes of national jurisdictions. Unlike domestic social movements of sorts, the ultimately transcendental character of constituent power places Kant's natural right to visit into a constructivist tension with the positive laws of states. Such tension confronts opposed

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[183] C.Schmitt, *Constitutional Theory*, Duke University Press, 2008.

[184] As Eberl and Niesen observe: "In Abwesenheit eines globalen Staatsvolks kann Kant sich für den übergreifenden Verfassungsbegriff nicht auf das in den demokratischen Revolutionen etablierte Prinzip verfassunggebender Volkssouveränität stützen. *Sein Verfassungbegriff für die globale Ordnung ist rechtlich-normative, aber nicht demokratisch"* (emphasis added), in O. Eberl and P. Niesen (eds.), *Immanuel Kant: Zum ewigen Frieden und Auszüge aus der Rechtslehre*, Suhrkamp, Berlin, 2011, p.209

[185] C.Schmitt, *Constitutional Theory*, Duke University Press, 2008, p.272 and 289 ff. and particularly p.300.

[186] Alternatively, in terms of "identity as sameness", H.Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood", in M.Loughlin and N.Walker (eds.), *The Paradox of Constitutionalism*, Oxford University Press, 2007, p.9.

[187] Ivi.

[188] On a particularly illuminating reconstruction of the debate as well as distinct position see H.Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood", in M.Loughlin and N.Walker (eds.), *The Paradox of Constitutionalism*, Oxford University Press, 2007, pp.9-24.

constituencies, such as an empirically domestic and a cosmopolitan transcendental one, out of which springs the notion of earth citizenship.

If this is compatible with Kant's views, a problem arises here that goes far beyond a textual exegesis. Indeed, were it the case in Kant of a circular movement between the constituting will of historically determined peoples and the notion of a transcendental rule of law, then the demands for the transnational legitimacy of an agent ("I") could be assimilated into her acting as a subject representing an *already constituted* will. On the contrary, she could act only based on a *transcendental presumption* of a yet to be constituted collectivity.[189] Such a community can never be constituted exhaustively and therefore it cannot be represented as a whole. Renewals of claims of cosmopolitan representation unfold over time with none being conclusive.

Representation of a collective will identified by an act of transnational agency takes the form of a plural "We". The collective "We", conceived here in terms of a "double plural", through the mediation with the transcendental general will generates the notion of "the right of the citizens of the earth" (*das Recht des Erdbürgers*).[190]

Overall, the formulation of a Kantian argument for the cosmopolitan constitution helps in understanding the problematic relation of representation of a transnational constituent whole. First, it avoids a simplistic dichotomy between presence and representation, as well as between constituent and constituted power. It frames, instead, a number of multi-level relations where a mediation occurs between domestic and transcendental selfhoods.

Regarding the problem of the self-constitution of the political community, one might then wonder how this process helps to realize (bring about) democratic-like features within the transnational realm. It could be said that, paradoxically, a space for representation remains open when no claim aims at representing the whole — even though it is the case that such a new order is constituted only once a claim of such sort is made.[191] In the Kantian-like argument I propose here, the attempt to replace the whole never exhausts the transcendental standard set by the general united will. The transcendental collective will represents, therefore, an exhortation to societal emancipation by means of creating a progressive cosmopolitan rule of law, which can never pretend to be valid in "the name of humanity", as it were. In this regard, individual cosmopolitan agents ("I's") neither only represent nor do they solely constitute the whole of collectivity. The author of cosmopolitan *acts* of constitution remains therefore external to the same order that was thereby constituted. Only when cosmopolitan agency avoids objectification in an already solidified and constituted rule of law, will earth citizenship as a whole remain open to the demands of a transcendental will , which stands as a critical counterpoint against power-domination.

Double sovereignties and plural citizenries: a rejoinder to a (virtual) 'family quarrel' between Kant and Habermas?

Perhaps not surprisingly, the dilemma between transnational sovereignty, constituent power and transnational democratic legitimacy has been tackled recently by Habermas in his collection of essays published with the title: *The Lure of Technocracy*.[192] Under examination, here, is the relation between

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[189] See on this the passage by H.Kelsen quoted in H.Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood", in M.Loughlin and N.Walker (eds.), *The Paradox of Constitutionalism*, Oxford University Press, 2007, p.10.

[190] I. Kant, "Metaphysische Anfangsgründe der Rechtslehre", in *Immanuel Kant Zum ewigen Frieden*, Kommentar von O.Eberl und P.Niesen, Suhkamp, Berlin, 2011, [6:353], p.84.

[191] On this point see H.Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood", in M.Loughlin and N.Walker (eds.), *The Paradox of Constitutionalism*, Oxford University Press, 2007, 18.

[192] J. Habermas, *The Lure of Technocracy*, Polity Press, Cambridge, 2015.

a European political identity and its division into national and regional constituencies. Habermas introduces a conceptual pillar of his cosmopolitan theory, described as the notion of "double sovereignty".[193] This is the idea of a "form of sovereignty divided *at the root*"[194] which accounts for the legitimate transferring of authority from the national to the transnational level.[195] From this notion, it follows that a dialectical movement is unleashed between "*constituted components*" and a "*constituting power*", wherein "*citizens and states* (*that are already constituted by citizens*) can participate *on an equal footing* in constituting a supranational democracy".[196]

In this section, I will claim that the Habermasian notion of an inherent duplicity of constituent citizenship can be fatherly expanded by reference to Kant. Notwithstanding differences in perspective, the two views integrate reciprocally. In particular, the Kantian distinction between state citizenship and citizenship of the earth helps in defining the Habermasian thesis on the internal division of sovereignty as well as illustrating the plurality of a scheme of transnational memberships.

Whereas Habermas' conception of a "double sovereignty" goes beyond the traditional view of a purely domestic source of power for state legitimacy, Kant's idea of earth citizenship provides the conceptual template for framing the tension between a state-constrained conception of sovereignty and, ultimately, a critical conception of cosmopolitan affiliation claimed in compliance to global principles of public law: "a principle *having to do with rights*".[197]

Why so? The reason, to employ the Habermas expression, is that "[…] the trust among citizens that currently exists in the form of a nationally limited civic solidarity can very well develop into an even more abstract form of trust that reaches across national borders. The 'no demos' thesis obscures a factor that we must take seriously – the conviction that the *normative* achievements of the democratic state are worth preserving".[198] Habermas asks us to formulate a thought experiment: "Let us imagine a democratically developed European Union *as if* its constitution had been brought into existence by a double sovereign".[199] These two sovereignties would be the citizens of the European states (the European peoples) and the citizens of Europe. Such cofounding powers would then "be reflected at the level of the *constituted* polity".[200] However, as notices Habermas, this determines a situation of deadlock where "no longer [anyone would be able to] decide in a real sovereign manner".[201] An assumption arises spontaneously, one where the European constituent power has "already committed itself […] to recognizing the historical achievements […] by the nation-states".[202]

From a Kantian perspective, an initial argument would take into consideration that no empirically given "constituent power" can be postulated from outside a transcendental process of justification of a constituent will. This means that the Habermasian conception of a "double sovereignty" can be conceived only in the light of a deeper transcendental notion, one resorting to the idea of earth citizenship. Habermas also seems to concede this point, as when he claims that "the citizens satisfy their

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[193] J. Habermas, *Democracy in Europe*, discourse for the Holberg prize at Universitetet i Stavanger, Sept.11 2014, available at https://www.youtube.com/watch?v=0sLtM0hNnVc.

[194] J. Habermas, *The Lure of Technocracy*, Polity Press, Cambridge, 2015, p.59. The concept had already been introduced as "*pouvoir constituant mixte*" in J.Habermas, *The Crisis of the European Union. A Response*, Polity Press, Cambridge, 2012, p.36.

[195] J. Habermas, *The Lure of Technocracy*, Polity, Cambridge, 2015, p.58.

[196] Ivi.

[197] I. Kant, "The Metaphysics of Morals", in *Immanuel Kant. Practical Philosophy*, M. Gregor (ed.), Cambridge University Press, Cambridge, 2006, [6:353], p.489.

[198] J. Habermas, 2015, p.39.

[199] J. Habermas, 2015, p.40.

[200] Ivi.

[201] Ivi.

[202] J. Habermas, 2015, p.41.

two allegiances [state and EU affiliations][…] from the perspective *as if they had* participated in the constitution-building from the outset *as equal subjects* in their dual role […]".[203]

Yet, the transcendental assumption of the Kantian general united will also suggests also more for the Habermasian conception of a dual sovereignty. The former opens to inclusion different types of constituent affiliations established transnationally. Furthermore, it defines standards of legitimacy for those kinds of jurisdictional affiliations that do not require conceiving exercises of sovereignty. These include, for instance, all those transnational regimes as in the case of commercial trade agreements such as the WTO, or the case of networks as with the G8 and G20.

What a Kantian-like argument has to say here is that it is through the fundamental presumption of a general united will that it follows a peremptory command to join a rightful condition of a global polity. Once the Habermasian conception of "double sovereignty" is reinterpreted in this Kantian way, it also becomes possible to account for both a *plurality* of transnational forms of sovereignty as well as inclusion of transnational but non-sovereign forms of regime. .

By thinking in Kantian terms with "the benefit of two hundred years' insight",[204] it can be shown how the critical perspective associated with the idea of earth citizenship needs to shift away from the national realm of republican states to the burgeoning of transnational regimes. For these cases, the notion of "earth citizenship" expresses a pragmatic instantiation of a transcendental collective will.

That contemporary legal and political regimes continue to express incomplete forms of earth citizenship reflects a contingent deficit but not a normative drawback. Nevertheless, in such a plurality of regimes, even the non-ideal democratic progressions achieved under the guidance of a transcendental will show deficient arrangements in the treatment of their members. Notwithstanding significant progress, moving beyond the treatment of individuals as mere objects of concern, a comparably diffused notion of earth citizenship framed by human rights is not yet delivering a form of subjectivity fully endowed with enforceable constituent powers.

Legal and institutional integration certainly requires *some form* of transnational democratic accountability, but this does not imply an all-pervasive (insert hyphen) form of global sovereignty. Instead, there might be different means by which legitimate forms of transnational powers are realized: from the opportunity for citizens to express a critical appraisal of decisions taken by transnational bodies, to their participation as members in transnational decision-making processes. Whereas state-sovereignty provides, to a large extent, an indirect way for people to influence political outcomes world-wide, it is undeniable that decisions beyond the state-level are often made by technocrats rather than by state-elected representatives pursuing a public agenda — something known in the EU context as the power of "comitologies".

Unfortunately, the lesson handed down by Kant does not provide guidance with regard to the institutional mechanisms for realizing a positive transnational integration among peoples. The time was not yet ripe to propose viable institutional steps for the constitutionalization of international law. However, what Kant clearly states that continues to remain valid today, is that in a cosmopolitan perspective any justifiable arrangement beyond the state has to be consistent with Republican ideals. With regard to such enterprise, the cosmopolitan constitution must promote an ideal of freedom as non-domination, meaning an overall protection of individual rights from domestic and transnational domination.[205]

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[203] J. Habermas, 2015, p.44.

[204] This is the title of Habermas's first essay on Kant's cosmopolitanism. See J. Bohman and M. Luz-Bachtmann (eds.), *Perpetual Peace. Essay on Kant's Cosmopolitan Ideal*, Mass: MIT Press, 1997, pp.113-154.

[205] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:356–7], pp.327-8.

Conclusion

Let me conclude with a remark concerning the reactualization of Kant's cosmopolitan insights. It is understood that the world of internal law and international relations has changed profoundly. Nowadays, we need certainly new categories for reflecting and understanding such transformations. The relevance and actuality of Kant, nonetheless, is that of having inaugurated a "modern view" of international law, one that later developed through the Charter of the United Nations in 1945, followed by the growth and consolidation of the human rights regime. To understand the contribution of Kant, one should first underscore his challenge to a persistent dogma of his time: the impossibility to conceive domestic and international law as one single legal system. Conversely, Kant argues for the unity of the public law, notwithstanding an internal tripartitition into "the *right of a state*, the *right of nations* and *cosmopolitan right*".[206] We know how the idea of a unity of the law affected later reflections in philosophy of law and, in particular, how such an idea gained momentum with the Kelsenian notion of a "basic norm". [207]

For Kant, however, such unity is not a matter of defining a law-internal "juristic hypothesis" as it is for Kelsen.[208] Whereas for Kelsen an internal law-like grounding satisfies the demand on "what the law actually is", avoiding an allegedly widespread confusion with "what it should be", for Kant such a separation does not seem to hold due to the validating force that the categorical imperative provides to the principle of right.[209]

Thus, it seems that the Kantian conviction for the unity of the law rests on resorting ultimately to a meta-juristic, transcendental hypothesis validating the legal system as a *whole*. The suggestion I have made throughout this essay detects the juncture between positive law and its meta-legal foundation in the Kantian justification of the reasons for abandoning a lawless condition of the state of nature. Such a step becomes possible due to an individual convergence into a "general united will" based on intersubjective relations regulated by rights. The concept of public right, before being characterized by specific content, is an a priori notion. It is the condition through which the structuring of the spheres of a general civil condition occurs that can only provide an approximation towards perpetual peace.

As Kant affirms: "If it is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then the *perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking truces) is no empty idea but a task that, gradually solved, comes steadily closer to its goal […]".[210] It is to the understanding of the actual stage of international law that one needs to turn in order to see how it might be reasonably achieved progress towards perpetual peace.

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[206] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:365], p. 334.

[207] H.Kelsen, *General Theory of Law and State*, Cambridge Mass.: Harvard University Press, [1945], 2007, p.xv.

[208] Ivi.

[209] On the textual difficulties to defend such reading, see A.Wood, "General Introduction, Immanuel Kant. Practical Philosophy", M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, p.xxxi.

[210] I.Kant, "Toward Perpetual Peace", in *Immanuel Kant. Practical Philosophy*, M. Gregor (trans. and ed.), Cambridge University Press, Cambridge, 2006, [8:386], p.351.

Exploring constitutional pluralism(s): an ontological roadmap

Dimitri Van den Meerssche[*]

Introduction

The proliferation in recent decades of new actors and modes of law-making beyond the state has splintered the transnational regulatory space into substantively overlapping normative complexes with varying levels of institutional embeddedness and claims for authority. This shift in global governance – underlined by heuristics such as transnational law[212], global regulatory governance[213], or international public authority[214] – questions the orthodox concepts of legal sovereignty (*i.e.* ultimate legal authority) and hierarchy, and signals the obsoleteness of the traditional jurisprudential monism-dualism divide[215]. Apart from jurisprudential puzzlement, the rise of transnational law also raises questions of legitimacy: what normative parameters can be used to evaluate the legitimacy of transnational legal sources in areas of substantive overlap with pre-existing national law? And where does the constituent power fit in the model? In response to these questions of ultimate authority and legitimacy, many influential international legal scholars have turned to constitutional language and have developed the paradigm of 'constitutional pluralism' (CP) as a heuristic to approach the questions of legal validity and legitimacy in the transnational era. Since its inception, CP has been recognized as one of the brightest beacons in the contemporary debates on international legal theory[216].

While the different strands of CP are presented in the literature as different assemblages of complementary and cumulative descriptive, prescriptive and epistemic claims[217], the first aim of this paper is expose and explore the analytical and normative paradoxes and multiplicities within the

[*] I am very grateful to Professor D. Patterson for motivating me to develop this argument – which originated during discussions in his 'jurisprudence' seminar – and for his insightful comments and patience; to Professor L. Azoulai for introducing me to the topic and for commenting an early version of this argument; and to Marie-Catherine Petersmann for relentless support and feedback.

[212] See K. Tuori, "Transnational Law: on legal hybrids and legal perspectivism" in K. Tuori, M. Maduro and S Sankari (eds.), *Transnational law: rethinking European law and legal thinking,* Cambridge, Cambridge University Press, 2014; T.C. Halliday and G. Shaffer, "Transnational Legal Orders" in T.C. Halliday and G. Shaffer (eds.), *Transnational Legal Orders*, Cambridge, Cambridge University Press, 2015.

[213] B. Kingsbury, "Introduction – Global Administrative Law in the Institutional Practice of Global Regulatory Governance", In Bradlow, D.D., Cisse, H., Kingsbury, B., (eds.), *International Financial Institutions and Global Legal Governance*, Washington DC, The World Bank Legal Review Volume 3, 2012.

[214] Von Bogdandy *et al., The exercise of public authority by international institutions: advancing international institutional law*, New York, Springer, 2010.

[215] This is contested by Somek. See A. Somek, "Monism: a tale of the undead", *Constitutional Pluralism in the European Union and Beyond*, M. Avbelj and J. Komárek (eds.), Portland, Hart Publishing, 2012.

[216] J.H.H. Weiler, for example, noted that 'Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high tables of public law professorate', in G. De Burca and J.H.H. Weiler (eds.), *The World of European Constitutionalism*, Cambridge, Cambridge University Press, 2008, 8.

[217] See, for example, the cumulative and complementary explanatory, normative and epistemic versions of CP sketched out in N. Walker, "The idea of constitutional pluralism", *The Modern Law Review* Vol 65:3, 2002, 337-339. Others also consider the different strands of CP to share the same jurisprudential presumptions and to differ only in their relative positions on a linear scale of reasoning; see, for example, M. Loughlin, "Constitutional pluralism: an oxymoron?", *Global Constitutionalism*, Vol 3 (1), 9-30, 2014.

paradigm. The innovative contribution is to root this multiplicity in the diverging ontological[218] underpinnings of the constitutional heuristic. This analytical exercise, I argue, does not only allow us to see the classic jurisprudential schism between legal positivism and normative general jurisprudence through a transnational lens[219], but – more importantly – it sheds light on CPs reconfiguration of the concept of law in a transnational era. My recourse to metaphysics results from the argument – central to this paper and generally overlooked – that the different strands of CP holistically (re)define law's ontological foundations in the pluralistic and interwoven normative scheme of global governance. The paper reveals and elaborates three distinct (and often unarticulated[220]) ontological perspectives on transnational law in the constitutional discourse: law as (i) an endogenously validated *institutional* product (MacCormick); (ii) a *relational*, discursive phenomenon (Maduro); and (iii) the outcome of a meta-normative, *interpretative* praxis (Kumm). Departing from these different ontological positions, the paper demonstrates, 'constitutional pluralists' have developed radically divergent approaches to questions of legality and legitimacy in transnational law. The paper offers an analytical roadmap through this ontological landscape, thereby providing a typology of the different strands of CP and demonstrating how the heuristic has transmuted from an empirically embedded narrative on the end of legal sovereignty and the multipolarity of contemporary global governance, *i.e.* the *'pluralization of constitutionalism'*, to a normatively thick model of constitutional unification, *i.e.* the *'constitutionalization of pluralism'*[221]. The typology will render explicit how the arguments of CP's proponents[222] – ranging from descriptive sociology to normative political theory – are plagued by the ontological obscurity of 'law' in the transnational era.

The argument proceeds in three stages. First of all, the paper explores the *genesis* of CP in the seminal work of Neil MacCormick. Beyond reformulating his basic claims[223], I will highlight MacCormick's reliance on Hart's *Concept of Law* and set out the implications of that ontological starting point[224]. The institutional positivist perspective that is employed, the paper argues, is transposed by MacCormick beyond general jurisprudence, as a tool of descriptive sociology and normative political theory. Consequently, MacCormick's claim of radical CP – *i.e.* a multiplicity of non-hierarchical constitutional orders within and beyond the European context and across the formal-informal, public-private dichotomies – entails a normative paradigm for global governance that favors heterarchy, interaction and political conflict-mediation over the traditional notions of legal hierarchy, which define both the monist and dualist approaches to international law[225]. In sum, MacCormick's dynamic approach of Hart's legal ontology inspired a horizontal, interactive and anti-formalist theory on legality and legitimacy in the transnational era: a *'pluralization of constitutionalism'*.

The second part of the paper offers an innovative typology that systematizes the different descriptive, analytical and normative engagements of 'constitutional pluralists' with the 'original' theory. Focusing on the work of Maduro and Kumm, the paper argues that the doctrine of CP has taken a radical turn: away from radical pluralism to a constitutional paradigm that overarches the national-transnational

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[218] In this paper I assign the 'ontological' label to the theories that inquire into law's fundamental mode of existence; its essential 'fabric of being'. An ontological claim about law answers the questions: 'what are the constitutive components of 'law''? 'What characterizes law as a distinct social phenomenon?'

[219] More specifically, I will argue, the jurisprudential tension within CP echoes the Hart vs. Dworkin debate.

[220] Neil MacCormick's explicit reliance on Hart's *Concept of Law* can be seen as an exception here.

[221] This shift of focus from constitutional *pluralism* to *constitutional* pluralism, the paper argues, echoes a deeper jurisprudential shift from a Hartian to a Dworkinian approach to transnational law.

[222] The paper focuses systematically on the writings of Neil MacCormick, Miguel Maduro and Mattias Kumm. Neil Walker will be discussed in a haphazard way, adding insight to the three aforementioned theorists.

[223] This task has been undertaken on several occasion. See, for example, Loughlin 2014, *cit. supra* n. 6.

[224] MacCormick's explicit reliance on Hart in developing the concept of CP is underexplored in literature.

[225] While these approaches locate the source of ultimate legal authority on different levels, they both assume the convergence of different chains of validity in one central point.

divide. This turn, which I call the *'constitutionalization of pluralism',* is grounded in two different ontological theories: while Maduro roots his paradigm in the understanding of law as the product of an 'inter-institutional dialogue', *i.e.* a discursive practice, Kumm builds his constitutional model upon a normative non-positivist concept of law, along Dworkinian lines. Grounded in these ontological premises, 'constitutional pluralists' either induce (from common institutional semantics) or deduce (from moral theory) constitutional principles to reunite and constrain the postnational legal order.

Although profoundly different in many regards, what these three branches of CP have in common is that they combine elements of general jurisprudence (law's internal validity), descriptive sociology (law's social functionality) and normative political theory (law's external legitimacy) in one holistic paradigm on transnational law. Reconstructing these paradigms root and branch allows us to sharpen the focus on the different approaches *within* CP to the phenomenon of transnational law and the complementary debates on (i) the postnational concept of law; (ii) the issue of ultimate legal authority (echoing the dualism *versus* monism debate[226]); the questions of (iii) sovereignty and (iv) legality; and (v) the substantive boundaries of the transnational regulatory space. Informed by these insights, the paper describes a general trend in CP from an interactive theory on pluralism and heterogeneity to a rationalist revision of legal monism under constitutional principles[227].

In the final section, the paper employs these insights to account for the absence of the *demos* in CP's different strands. I argue that the democratic deficit of CP has to be understood in the light of its ontological roots. In short, the paper explores CP's diverging approaches to the metaphysical contours of transnational law in order to draw two conclusions: first of all, the paper describes a general trend in CP from a focus on pluralism and heterarchical interaction to a rationalist renaissance of legal monism under constitutional principles. This provides for two distinct models of CP, the former being characterized by radical heterarchy, the end of sovereignty, moral relativism and political conflict-mediation, while the latter reinstalls legal hierarchy under a normatively thick set of principles, substantively shaped on the level of (international) constitutional adjudication. Secondly, the paper exposes how deeper insight into the ontological premises of CP implicates the democratic deficit that is present in its normative political theory. The paper argues that the absence of 'constituent power' results from the conflation of the jurisprudential, normative and sociopolitical features of CP.

MacCormick and the pluralization of constitutionalism

The inception of constitutional pluralism is commonly ascribed to Neil MacCormick, who coined the term in *Questioning Sovereignty* in 1999. The concept is defined as follows: '[w]here there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-norms establishing and conditioning relevant governmental powers), […] while none asserts or acknowledges superiority over another […], 'constitutional pluralism' prevails"[228]. Remarkably, this definition implicitly contains two other definitions: (i) instead of 'legal' order, MacCormick refers to the 'institutional normative' order; and (ii) when referring to the 'constitution', MacCormick defines this as any 'body of higher-norms establishing and conditioning relevant governmental powers'. The traditional statist constitutional paradigm, which presumes an analytical link between the legal constitution, democracy as a foundational value and the authority of the state[229] is thereby disregarded.

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[226] I agree with Alexander Somek, who argues that pluralism is a reformulation of either monism or dualism. See Somek 2012, *cit. supra* n. 4.

[227] This, the paper argues, reflects the shift from a Hartian to a Dworkinian (or even Kantian) approach to transnational law. This is further elaborated in section 2.2.

[228] N. MacCormick, *Questioning sovereignty: Law, State and nation in the European Commonwealth*, Oxford, Oxford University Press, 1999, 104.

[229] This is borrowed from M. Kumm, "The Cosmopolitan turn in Constitutionalism", in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World*, Cambridge, Cambridge University Press, 2009, 265.

Below I will demonstrate that MacCormick arrives at his conceptualization of CP by applying tools of descriptive sociology to a specific ontological claim. The latter – which is inspired by Hart[230] and conceives of law as a normative structure constituted and systematized by institutional practice – is at the core of his concept of CP[231] and should therefore be explored in depth.

The Hartian origins of constitutional pluralism

Hartian positivism conceives of law as a system that is constituted by the union of primary rules of conduct and secondary rules, among which the 'rule of recognition' figures prominently[232]. This rule of recognition – which sets out the criteria for norms to be recognized as valid law and is therefore ontologically constitutive – is considered to be rooted in customary social praxis[233].The importance of this claim for MacCormick's theory of constitutional pluralism can hardly be overstated, as I will elaborate below. The *being* of law, in Hartian logic, is both induced from and constitutive of the discourse and 'official behavior' by 'officials'[234] or, more specifically, by 'courts'[235]. In other words, for Hart, official institutional practice systematizes the normative space, thereby existentially constituting law[236]. As I will discuss below, this broad inclusiveness is also at the core of MacCormick's concept of CP.

MacCormick explicitly roots his paradigm of CP in this Hartian approach[237]. In line with Hart, for MacCormick, institutional praxis is the locus where law emerges from: the rule of recognition, which constitutes law and determines its validity, 'depends on deliberative practice and emergent custom' and is revealed through official 'practice and argumentation'[238]. Until this point, MacCormick formulates Hart's claims in a standard and neutral way. To arrive at CP, however, MacCormick takes an important and controversial leap[239]. Since the rule of recognition is induced from an institutional practice that is inherently volatile and dynamic, MacCormick argues, the rule can and must 'evolve and develop over time'[240]. In other words, since law's validity follows institutional praxis, any changes in the spatial and structural features of this praxis – *i.e.* the transnationalization of institutional regulatory processes – impact legal validity. This self-proclaimed 'evolutionary interpretation' of the *Concept of Law* is not articulated by Hart, who embeds his jurisprudential theory firmly within the confines of the nation state. MacCormick acknowledges this, stating that 'the pluralistic or polycentric potentialities' of Hart's ontology remain 'more a potential than an actual virtue of [Hart's] work'[241]. For MacCormick, however, this national focus of Hart's institutional jurisprudence is merely a matter of historical contingency; the

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[230] The impact of Hart's positivism on MacCormick is also clear in earlier work, see N. MacCormick, *H.L.A. Hart*, Stanford, Stanford University Press, 1981.

[231] See MacCormick 1999, *cit. supra* n. 17, 102.

[232] H.L.A. Hart, *The Concept of law*, Oxford, Oxford University Press, 1961, 108-116.

[233] *A contrario* with Kelsen's transcendental, Kantian, notion of the *grundnorm* as a 'presupposed' ultimate source of validity. See J. Coleman, *The Practice of Principle*, Oxford, Clarendon Press, 2001; A. Marmor, "Legal Conventionalism," *Legal Theory*, Vol. 4, 1998, 509.

[234] H.L.A. Hart, *The Concept of law*, Oxford, Oxford University Press, 1961, 115-116.

[235] *Ibid.*, 108.

[236] *Ibid.*

[237] N. MacCormick, "Beyond the sovereign state", *The Modern Law Review* Vol. 56:1, 1-18, 1993. Interestingly, Maduro considers this work to be at the roots of his constitutional pluralism: quoted in M. Avbelj and J. Komárek (eds.), "Four Visions of Constitutional Pluralism", EUI Working Paper Law No. 2008/21, 12.

[238] MacCormick 1993, *cit. supra* n. 26, 5-6.

[239] Deliberately going against the interpretation of Hart's relevance for EU law, in F.E. Dowrick, "A model of the European communities' legal system", *Yearbook of European Law* Vol. 3, 169-239, 1983.

[240] MacCormick 1993, *cit. supra* n. 26, 5-6.

[241] *Ibid.* 9.

'once-for-all cut-and-dried quality' of the rule of recognition should be denied. The latter should therefore be considered as a living concept, a product of decentralized institutional change.

The conclusion from MacCormick's 'dynamic' approach to Hart is that any change in, or a fragmentation of, 'official' institutional praxis has the potential to generate a new rule of recognition, which determines distinct criteria of validity that shape an autonomous legal system[242]. This nascent legal system can coexist and substantively overlap with pre-existing legal systems without losing its systematic character and without being invalidated. The validity of norms *within* each legal system is determined by their own dynamic processes of institutional (legislative, judicial and executive) practice and doctrinal development. Consequently, since institutional practice autonomously shapes and systematizes the legal system, institutional fragmentation leads to legal pluralism. Applied to the changing landscape of global governance and the emergence of transnational law, this jurisprudential step clearly allows for an endless multiplication of rules of recognition. (Global) institutional fragmentation and (global) legal pluralism are jurisprudentially equated.

From legal to constitutional pluralism

MacCormick's claim is, therefore, first and foremost, a claim with respect to the ontology of law that results in a theory of *legal* pluralism. While pluralism was traditionally linked to an anthropological or sociological exploration of normative pluralism in non-Western societies[243], lately it has also become pivotal to the study of global governance, which is pointed out by the proliferation of literature on 'transnational law', 'global legal pluralism' or 'global administrative law'[244]. MacCormick underwrites this notion of global legal pluralism on different occasions, claiming that 'state law is not the only kind of law that there is, [there is also] international law, the law of organized associations of states […], the law of churches, […] laws of games and laws of […] sporting associations'[245] and that we should abandon the foundational fixation on state-law, which unrightfully marginalizes 'international law', 'canon law and church law' and the 'living law of social institutions like universities, firms or families'[246]. It is remarkable that MacCormick roots this pluralist claim in the system-theory of Hart, which is traditionally conceived as a hierarchical, statist account of holistic legal validity[247]. To understand how MacCormick abandons the hierarchical feature of Hart's positivism and employs the model in favor of CP, we need to turn to his constitutional paradigm.

MacCormick's *constitutional* pluralism goes beyond the claim that a plurality of valid normative orders can coexist in one social space (a commonly accepted and quite pedestrian observation): it relates to *ultimate authority* (legal sovereignty) and the *relationship* between institutionally constituted legal systems[248]. The bridge between pluralism and constitutionalism[249] expresses these aims and requires MacCormick to develop a constitutional paradigm. This is his definition: 'the 'constitution' of any such

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[242] See H.L.A. Hart, *The Concept of law*, Oxford, Oxford University Press, 1961, 44; MacCormick, *Legal Reasoning and Legal Theory,* Oxford, Oxford University Press, 1978.

[243] See S.F. Moore, "Law and social change: the semi-autonomous social field as an appropriate subject of study", *Law and Society Review*, Vol 7 (4), 1973; S.E. Merry, "Legal Pluralism", *Law and society review*, Vol. 22 (5), 1988.

[244] See, for example, W. Twining, *General jurisprudence: understanding law from a global perspective,* Cambridge, Cambridge University Press, 2009; Tuori 2014, *cit, supra* n. 1; Halliday and Shaffer 2015, *cit. supra* n. 1; Kingsbury 2012, *cit. supra* n. 2.

[245] MacCormick 1999, *cit. supra* n. 17, 114.

[246] MacCormick 1993, *cit. supra* n. 26, 14.

[247] Tuori, for example, claims that pluralism of legal orders 'challenge[s] […] the Kelsenian-Hartian hierarchical view of law'. See Tuori 2014, *cit, supra* n. 1, 25.

[248] MacCormick 1999, *cit. supra* n. 17, 109. The relational aspect of CP is also highlighted in Walker 2002, *cit. supra* n. 6.

[249] With this step, the jurisprudential argument implicitly transmutes into an argument of political theory.

[institutional normative] order[250] can best be defined in terms of the *establishment and empowerment of the agencies* ('institutions' in one sense) that perform the roles of enunciating, executing, administering or judging about the norms whose institutional character is established by the very exercise of those powers'. This establishment, MacCormick claims, 'is itself achieved by institutional acts'. So far, the constitutional argument seems to be circular: institutional acts determine the constitutional validity of institutional acts. 'To avoid infinite regress', the argument acknowledges, 'it is necessarily the case that some ultimate empowering norms be informal and customary or conventional in character'. These empowering elements, MacCormick concludes, '*can be self-referential*'[251]. In other words, not only does institutional praxis determine legal validity (leading to *legal* pluralism) in MacCormick's model, it also constitutes ultimate constitutional authority in a self-referential fashion (*constitutional* pluralism). This is quite a revolutionary line of reasoning: with a stroke of the pen, MacCormick transformed Hart's jurisprudential positivist theory on the concept of law into a constitutional paradigm on the question of *ultimate authority* in the sphere of global governance and the *interface* between domestic and transnational law. While Hart's positivist theory was embedded in a static sovereign model of national constitutionalism, which it did not aim to contest, constitutionalization in MacCormick's ontological frame can be multiplied by mere self-referential institutional practice. Whenever this self-referential institutional exercise does not voluntarily imbed the nascent legal system in a pre-existing constitutional frame, it stands free from it. Concretely, MacCormick's paradigm necessarily considers organisations such as FIFA, ICAO or ICAN to be not only valid venues of transnational law-making, but independent constitutional orders. The gap between institutional pluralism and CP is therefore not of categorical nature, it can be bridged in a strict self-referential fashion.

The end of sovereignty

A logical consequence of this denial of all constitutional interdependency, is that MacCormick has to abandon legal hierarchy in favor of 'interaction'[252]. The question of hierarchy or heterarchy[253] in this understanding is determined by institutional subjectivity, *i.e.* self-reflexive praxis determines ultimate authority. This creates a constitutional paradox: the 'officials' assigned with the task of determining final legal authority derive their capacity to do so on the basis of that very determination[254]. MacCormick underwrites this problem, but does not seek a way out. His claim is that '[s]uch paradox, such question-begging, such circularity of reasoning, is perhaps built into our very understanding of [legal] system'[255]. Indeed, the ontological assimilation of 'law' and 'authority' with self-referential institutional practice renders this circularity inevitable. Consequently, according to MacCormick's constitutional paradigm, there can be no categorical gap between Tuori's understanding of system pluralism, *i.e.* pluralism of institutional normative orders[256], and 'constitutional pluralism'. In conclusion, it is clear that MacCormick's adaptation of Hartian legal positivism grants legal validity and supreme constitutional authority to all normative edicts that emerge from systematized, autonomous and self-legitimizing institutional practice. Bluntly put, it seems that MacCormick's ontology would have to consider ISIS as an autonomous constitutional order.

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[250] It follows from the previous paragraph that this 'institutional normative order' necessarily constitutes a 'legal order'. This is also underlined by MacCormick 1999, *cit. supra* n. 17, 102.

[251] *Ibid.*, 102 (emphasis added).

[252] *Ibid.*, 117-118.

[253] See D. Halberstam, "Constitutional heterarchy: the centrality of conflict in the European Union and the United States", in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World*, Cambridge, Cambridge University Press, 2009, 326-355.

[254] One could argue, however, that this paradox very accurately describes the determinations by the ECJ in the *Costa v Enel* and *Van Gend en Loos* cases and in the *Kadi* case.

[255] MacCormick 1999, *cit. supra* n. 17, 109.

[256] Tuori 2014, *cit, supra* n. 1, 26.

MacCormick's claim, however, is not only of a conceptual nature. Applying his ontological claim – defining the legal system as an institutional normative order and constitutional authority as derivative of self-referential practice – to the European political reality, he develops the descriptive claim that the European Union and its member states are in a state of constitutional heterarchy[257]. On both sides, claims of ultimate legal authority are being voiced and separate set of criteria of validity have been developed[258]. Holding the relevant case-law against MacCormick's ontological blueprint, the conclusion of non-hierarchical CP in the European political space seems inevitable. But why should it stop there? While the descriptive elements of MacCormick's theory are solely focused on the relationship between the EU and its member states[259], the repercussions of his ontological claim stretch far beyond. He acknowledges that the edicts of an 'international church' might relate to states in the fashion of CP[260]. Consequently, should the same not be argued also about the WTO[261], the European human rights regime or even the mafia[262]?

MacCormick's concepts of legal validity and constitutionalism have no way to withhold constitutional authority from the contingent multitude of institutional normative structures that shape the transnational regulatory space. In terms of the theory on transnational law, the 'polycentrism' of legal systems inevitably results in CP[263]. Descriptive sociology now becomes a tool for endless constitutional multiplication, and thereby, the identification of different layers of potential constitutional conflict. As MacCormick rightfully underlines, this can only lead to the end of sovereignty, understood as 'near absolute legislative power'[264]. The end of sovereignty is for MacCormick not only factually undeniable[265], it is also desirable since it may 'release us from the conceptual fetters of juridical foundationalism'[266]. The sociopolitical – *i.e.* 'We the People' – and normative convergence points of this juridical foundationalism, which characterize traditional statist accounts of legal sovereignty and constitutional authority[267], are disregarded in MacCormick's constitutional model: institutional praxis determines legal validity and ultimate authority, and splinters the legal landscape in endless heterarchical venues of normativity. The polycentric interpretation of Hart clearly generates analytical consequences beyond general jurisprudence.

MacCormick's constitutional paradigm in the light of constitutional theory

A third part of the analysis of the original account of CP – after addressing ontology and sovereignty – relates to the normative repercussions of MacCormick's theory. Contrary to a broad legacy of

[257] See MacCormick 1999, *cit. supra* n. 17, 117-120 and MacCormick 1993, *cit. supra* n. 26, 8.

[258] On the level of the European Union, the classic case-law is: Case 26/62 *Van Gend en Loos v Nederlandse administratie der belastingen* [1963], ECR 1 and Case 6/64, *Costa v ENEL* [1964], ECR 585.

[259] On the basis of how the argument is constructed one could even argue that the conceptual work is developed solely to shed light on this relationship in favor of the Union's constitutional independence.

[260] MacCormick 1999, *cit. supra* n. 17, 104.

[261] On the constitutional nature of WTO law, see C. Joerges and E.U. Petersmann (eds.), *Constitutionalism, multilevel trade governance and social regulation,* Oxford, Hart Publishing, 2006.

[262] This is hinted at by Loughlin 2014, *cit. supra* n. 6, 16. MacCormick seems to point this out himself, in MacCormick 1993, *cit. supra* n. 26, 15.

[263] Tuori 2014, *cit, supra* n. 1, 16.

[264] MacCormick 1993, *cit. supra* n. 26, 14.

[265] 'It seems obvious that no state in Western Europe any longer is a sovereign state', see MacCormick 1993, *cit. supra* n. 26, 14.

[266] *Ibid.*, 16.

[267] This is argued brilliantly in M. Loughlin, "The concept of constituent power", *European Journal of Political Theory* Vol. 13, 2014.

constitutional theory[268], his institutional constitutional paradigm does not link constitutionalism to any substantive normative standard[269], nor to any constituent power (as will be further elaborated in section 3 below). Therefore, MacCormick cannot normatively contain the proliferation of constitutional orders. On this basis, Loughlin argues that MacCormick's theory suffers from the 'fallacy of equivalence'[270]: every legal system or every constitutional order is supposedly of equal normative significance. This is a necessary consequence of the fact that legal positivism is the ontological backbone of his reasoning[271]. The difference with traditional jurisprudential accounts, however, is that the latter differentiate between the law's internal validity and its normative legitimacy[272]. Due to MacCormick's instrumentalization of the positivist concept of law in favor of a specific normative project, *i.e.* the replacement of sovereignty with CP, this distinction between validity and normativity is blurred: MacCormick argues for the normative *legitimacy* of transnational law-making by making reference to the jurisprudential criteria of *validity*, as formulated by Hart. This conceptual obfuscation is also central to the democratic deficit of CP, as exposes in section 3.

Apart from embracing moral relativism, the non-hierarchical co-existence of constitutional orders also seems difficult to rhyme with the rule of law principle, since, as MacCormick acknowledges, 'the maintenance between overlapping systems in [the case of CP] is a matter of political decision, not a built-in feature of law as such'[273]. This claim is reiterated in his later work: 'acceptance of a radically pluralistic conception of legal systems entails acknowledging that not every legal problem can be solved legally'[274]. The conclusion is that 'there will necessarily have to be some political action to produce a solution'[275]. Political deliberation seems necessary to resolve the tension of ultimate authority, MacCormick argues, but he provides no indication on the formal processes of the deliberation, nor does his theory provide any substantive limits on its outcomes. An unavoidable repercussion of MacCormick's theory is therefore that a stable continuation of conflict-resolution is ultimately dependent on contingent 'equilibria of power'[276].

It is remarkable how far MacCormick's concept of CP stands from the traditional virtues of constitutional theory. While MacCormick frames his conceptual approach to transnational law in a constitutional language, he dismisses (i) the subordination of politics to law (the principle of *legality*); (ii) the recognition of hierarchical superiority of fundamental rights (the principle of *substantive justice*); and (iii) the origin of constitutional authority (the principle of *democracy*).

Six years after developing the concept of CP, MacCormick tried to remedy the issues of substantive relativism and legal indeterminacy by seeking refuge to the concept of 'pluralism under international law', according to which 'the obligations of international law set conditions upon the validity of state and of community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems'[277]. This is puzzling. By reanimating Kelsen's monism – the common subordination of the legal system of the EU and its member states to validation

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[268] The tenets of which are briefly set out by Kumm, see Kumm 2009, *cit. supra* n. 18, 259.

[269] MacCormick 1993, *cit. supra* n. 26.

[270] Loughlin 2014, *cit. supra* n. 6, 16.

[271] Reference can be made to the dichotomy between law and morality in the work of Kelsen and Hart. See H. Kelsen, *Pure Theory of Law*, M. Knight, trans., Berkeley, University of California Press, 1967; H.L.A. Hart, *The Concept of law*, Oxford, Oxford University Press, 1961, 108-116.

[272] A champion of this argument is J. Raz, *The Authority of Law*, Oxford, Oxford University Press, 1979; the claim is also recurrent in H.L.A. Hart, *The Concept of law*, Oxford, Oxford University Press, 1961.

[273] MacCormick 1993, *cit. supra* n. 26, 9.

[274] MacCormick 1999, *cit. supra* n. 27, 119.

[275] *Ibid.*, 120.

[276] See A. Somek, *The cosmopolitan constitution*, Oxford, Oxford University Press, 2014, 21.

[277] MacCormick 1999, *cit. supra* n. 17, 118.

by some third system[278] – MacCormick explicitly contradicts his own ontological architecture. According to the latter, the international legal order surely constitutes a legal system with a distinct rule of recognition, *i.e*. a 'third perspective on the relationships in question, a further non-hierarchical interacting system'[279]. But the norms of international law can take myriad different forms in each legal system, depending on diverging grounds of validity and different interpretative practices: some systems might completely absorb them, others not at all. To construct hierarchy, one would have to go further and assume that international law does not only provide norms and interpretative tools to be used by authoritative judicial actors in different legal systems, but also penetrates these legal systems on its own grounds of validity and according to its own interpretative practices. Thereby, the possibility arises that an institutionally construed rule of recognition within a legal order (the EU for example) is exogenously invalidated. This clearly defeats the very premises on which constitutional pluralism is built, *i.e.* the *autonomous, self-referential* constitution of legal validity and constitutional authority. Since 'pluralism under international law' assumes the existence of a legal system with the authority to invalidate divergent rules of recognition – however dynamic and argumentative they are construed by authoritative powers in the distinct institutional spheres – it is conceptually incompatible with the dynamic interpretation of Hart's positivist system theory, which gave rise to MacCormick's theory on CP in the first place. In sum, 'constitutional pluralism under international law' is logically inconsistent and self-defeating. Employing MacCormick's concept of law that gave birth to the concept of CP, there can only be 'radical pluralism'.

Conclusion

In this section I have demonstrated that MacCormick's account of CP is not preoccupied with the constitutionalization of pluralism or fragmentation, *i.e.* with providing a constitutional frame that overarches and organizes the co-existence and intersection between national and transnational law. On the contrary, his notion of CP embraces normative multiplication: the model pluralizes the concept of constitutionalism, it does not constitutionalize the reality of pluralism. This pluralization is achieved by dynamically applying Hart's institutional concept of law to the contemporary phenomenon of transnational law or global regulatory governance. MacCormick instrumentalizes Hart's jurisprudential theory not only in favor of a broad descriptive claim on the current state of global governance, but also in building a normative argument in favor of constitutional heterarchy, political conflict-resolution and the end of national sovereignty. This line of argumentation, the paper has demonstrated, dismisses the fundaments of orthodox constitutional theory (*i.e.* legality, fundamental rights and democracy) that figured implicitly on the background of the jurisprudential theories that MacCormick borrows.

Ironically, MacCormick's notion of radical pluralism in the global sphere opposes him to what his very own concept has become. MacCormick used a constitutional discourse to stress the depth of the abyss of pluralism and clearly not to provide a heuristic for constitutional settlement of this legal plurality, since he considers settlement of these issues to be a political task. This is clearly opposite to the contemporary torch-bearers of the discourse, whose goal is to revive the constitutional discourse as a way to systematize and control legal polycentrism[280]. I will turn to their arguments now.

[278] MacCormick 1993, *cit. supra* n. 26, 8-9.

[279] MacCormick 1999, *cit. supra* n. 17, 118.

[280] See, for example, Kumm 2009, *cit. supra* n. 18, 258-324; Walker 2002, *cit. supra* n. 6.

The constitutionalization of pluralism

Both Neil Walker[281] and Mattias Kumm[282] claim that constitutional language in the international arena is 'viewed with skepticism'. This purported skepticism, Kumm and Walker lament, ties the constitutional paradigm to 'statehood and sovereignty'[283] and therefore claims that the merits of constitutionalism vanish in the contemporary polycentric legal landscape, which is described and desired by MacCormick's seminal work. Indeed, as argued above, many of the normative tenets of the orthodox constitutional paradigm stand in tension with the original 'radical' account of CP. Contemporary constitutional pluralists, however, refute this restriction of constitutionalism's normative dimension to the limited contours of the national political space. Facing the reality of institutional normative plurality, they argue, constitutionalism can provide 'an *integrative* basic conceptual framework for a *general theory of public law* that integrates national and international law'[284]. I will argue that, while MacCormick's original account of radical pluralism provided a conceptual framework for the pluralization of ultimate legal authority, contemporary writing attempts to tie the diverging chains of validity back together in a singular constitutional knot. The paper shows that this is achieved in two ways: by employing constitutionalism as a 'meta-methodological' adjudicative hermeneutic (2.2.1), or by developing a constitutional paradigm grounded in normative political theory (2.2.2). The innovative contribution of the argument is to reveal the ontological underpinnings of both models of transnational constitutionalization.

Constitutionalism as hermeneutic for conflict-resolution

Echoing MacCormick, Maduro recognizes the possibility of 'constitutional conflicts between different constitutional orders' and the challenge of resolving those in a 'nonhierarchical manner'[285]. While MacCormick claims that this inter-constitutional conflict-resolution belongs to the realm of politics (see above), Maduro focuses on the role of courts and adjudicators and thereby pulls the issue back into the legal sphere. Building on a specific constitutional paradigm, Maduro distills a set of 'contrapunctual principles'[286] or 'meta-principles of constitutional pluralism'[287] that overarch the adjudicative practice within the European legal 'system' and thereby resolve or reduce constitutional conflict. This argument can be broken down in three different building blocks: (i) legal ontology and the concept of CP; (ii) the management of constitutional pluralism within the European legal 'system'; and (iii) the normative claim of constitutional pluralism. This account will be compared with MacCormick's in the discussions on ontology, legality, legal sovereignty and morality.

Legal ontology and the concept of constitutional pluralism

Maduro, first of all, disagrees with MacCormick that the constitution of the EU as an autonomous legal system has been achieved in a self-referential dynamic. He argues that 'this process of creation of a

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[281] Walker 2002, *cit. supra* n. 6, 317.

[282] Kumm 2009, *cit. supra* n. 18, 258;

[283] *Ibid.*, 261.

[284] *Ibid.*, 264 (emphasis added). There is a risk in making Kumm speak for the entire spectrum of contemporary constitutional pluralists, but with regards to this statement it seems justified.

[285] M. Maduro, "Courts and pluralism: essay on a theory of judicial adjudication in the context of legal and constitutional pluralism", in in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World*, Cambridge, Cambridge University Press, 2009; see also M. Maduro, "Three claims of constitutional pluralism", in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Portland, Hart Publishing, 2012, 346.

[286] M. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in transition*, Oxford, Hart Publishing, 2003, 501-537.

[287] Quoted in M. Avbelj and J. Komárek (eds.), "Four Visions of Constitutional Pluralism", EUI Working Paper Law No. 2008/21, 20. He also refers to them as 'meta-methodological rules'. See Maduro 2009, *cit. supra* n. 74, 374.

European legal order was only possible because the Court looked for and found the cooperation of different national legal actors'[288]. This does, however, not put the national actors in a hierarchically superior position: 'The relationship established between national courts and individuals on the one hand and the European Court of Justice on the other [is] one of dialogue rather than dictation'[289]. In other words, it is a non-hierarchical inter-institutional dialogue that has generated the distinct European constitutional order, and not a self-referential practice. For Maduro, this is not only an empirical observation, it builds upon a specifically defined legal ontology. Contrary to MacCormick, Maduro does not conceive of law as an institutional normative order of which the validity is determined from an internal perspective[290]. Law, it is claimed, is the result of discursive practice, it is 'invariably a consequence of a multilogue between […] different institutional actors[291]. The validity of a legal norm, in this reasoning, is not determined by hierarchical lineage to a jurisprudential vanishing point[292], but by the relational market logic of discursive practice: legal validity is a result of the supply and demand of different legal reasonings in different adjudicative venues, which is determined by contingent and indeterminate factors. What is eventually constituted as 'law', for Maduro, is a result of this multipolar discursive dynamic. Contrary to MacCormick, who pointed to the self-referential institutional creation of law, Maduro claims that there is a 'plurality of actors' defining 'what the law is'[293] through inter-institutional dialogue. This ontological position heavily determines Maduro's constitutional paradigm.

The management of constitutional pluralism within the European legal 'system'

The second building block of Maduro's theory is that this discursive practice – which is shaped by a heterarchical dialogue between constitutional orders – not only constituted the European legal order, but also harmonizes the constitutional polycentrism between the EU and its member states[294]. The argument is that 'we can conceive of the EU and national orders as autonomous but part of the *same European legal system*'[295]. This is a remarkable claim that, again, stands in direct opposition to MacCormick, who defines constitutional pluralism as the clash *between* legal systems. Maduro bases his argument on the dichotomy between legal order and legal systems, which he borrows from Tuori[296]. Tuori uses this typology to distinguish between law as merely a symbolic-normative phenomenon, *i.e.* a legal order, and law as an institutional normative order that formalizes the production and adjudication of these norms, *i.e.* a legal system[297]. Contrarily to Maduro, however, Tuori concludes on the basis of this typology that the EU is the most explicit example of *systemic pluralism*, arguing that there is no pan-European legal system due to the lack of an institutional structure that overarches the EU on the one hand and the member states on the other[298]. The point of divergence is located in a different ontology of law: while Tuori's distinction is based on an institutional approach (similar to MacCormick), Maduro claims that law derives its validity and systemic character from a commonly constituted discursive practice. In other words, for Maduro, legal validity is not determined *within* any constitutional order,

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[288] Maduro 2003, *cit. supra* n. 75, 512.

[289] *Ibid.*, 513.

[290] This relates back to his Hartian origin.

[291] Maduro 2003, *cit. supra* n. 75, 514.

[292] Such as Kelsen's metaphysical *grundnorm,* or Hart's socially constituted *rule of recognition*.

[293] Maduro 2003, *cit. supra* n. 75. 515-516.

[294] A similar claim is developed by Walker 2002, *cit. supra* n. 6, 339. See M. Croce and M. Goldoni, "A sense of self-suspicion. Global legal pluralism and the claim to legal authority", *Ethics and Global Politics,* Vol. 8:1, 2015, 6: '[Walker's theory] limits itself to providing a thin meta-discourse as a shared discursive platform for all legal entities to interact meaningfully'.

[295] Maduro 2012, *cit. supra* n. 74, 70 (emphasis added).

[296] *Ibid.*; Tuori 2014, *cit, supra* n. 1, 25-26. For reasons set out below it has to be argued that Maduro bases this assimilation on a misreading of Tuori's argument.

[297] Tuori 2014, *cit, supra* n. 1, 25.

[298] *Ibid.*, 26-34.

but in the discursive practice *between* these orders. Maduro's notion of 'legal system' therefore does not require a hierarchical and institutionally embedded lineage of legal validity, but merely an institutional platform for discursive exchange, which is grounded in a sufficient degree of epistemic and normative commonality. In other words, Maduro's system-theory is not grounded in institutional homogeneity, but in the existence of shared semantics. Remarkably, as with MacCormick, Maduro's ontology determines his analytical reconstruction of the transnational legal space.

Connecting this ontological claim to the observation that different levels of adjudication in the European political space share a common discursive space, Maduro is capable of constructing a pan-European legal 'system' that bridges the abyss of CP through common 'hermeneutics'[299]. The latter are defined as 'principles of contrapunctual law'[300], which are founded on a 'normative commitment to European constitutionalism'[301] and contain 'common meta-methodological principles of substantive and procedural character'[302]. The use of legal terminology (*principles* of contrapunctual *law*, *constitutionalism*, etc.), however, is misplaced and holds the risk of analytical confusion. Clearly, if these principles would consist of a set of hermeneutic requirements that determine the *legal validity* of adjudicative decisions, they would construct a new legal hierarchy above the heterarchical relationship of the EU and its member states. Establishing this hierarchy is the last thing Maduro wants, since the 'commitment [to these principles] is voluntary'[303]. The state of heterarchy has to remain intact. The meta-methodological principles are simply 'forms of reducing or *managing* the potential conflicts between legal orders while promoting *communication* between them'[304]. Management is the key word in Maduro's constitutional model, not legality[305].

In conclusion, Maduro follows MacCormick in the observation that the conflict between constitutional orders cannot be integrated into a hierarchical jurisprudential model. By claiming that these constitutional conflicts are located *within* a European legal system that is shaped by a common discursive practice, Maduro does, however, hint at a holistic understanding of legal validity across the abyss of pluralism. The latter is grounded in the specific ontological understanding of law as a discursive practice. Consequently, inter-court or inter-institutional dialogue has the capacity to counter the concerns of hierarchy, unity and legality and transform the concerns of pluralism into 'a kind of melodious blend'[306]. To achieve this, a managerial strategy of conflict-avoidance is formulated in the form of 'principles of contrapunctual law'.

The normative claim of constitutional pluralism

In a third line of reasoning, Maduro turns to the following question: is the constitutional authority of the EU and the constitutional state of heterarchy within the European political space to be considered legitimate[307]? Maduro argues that this 'justification and legitimacy […] must be derived from its

[299] Maduro 2012, *cit. supra* n. 74, 70.

[300] These principles are: (1) pluralism; (2) consistency and vertical and horizontal coherence; (3) universalisibility; and (4) institutional choice. See Maduro 2003, *cit. supra* n. 75, 526-531.

[301] Maduro 2012, *cit. supra* n. 74, 74.

[302] *Ibid.* 82.

[303] Maduro 2003, *cit. supra* n. 75, 524.

[304] *Ibid.* (emphasis added).

[305] He also refers to the task of 'managing potential conflicts' in Maduro 2009, *cit. supra* n. 74, 374.

[306] Quote from N. Walker "The philosophy of European Union Law", forthcoming in A. Arnull and D. Chalmers (eds), *Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, 26

[307] This question of legitimacy is, contrary to Kumm, not of constitutive importance. Even if the constitutionalization of the EU legal order would not be legitimate, it would still be validated by discursive practice. Maduro 2012, *cit. supra* n. 74, 75-76.

constitutional added value with respect to national constitutionalism'[308]. Again contrary to MacCormick, we notice that constitutionalism has become a value-laden concept. For Maduro, these different constitutional values can be synthesized in 'two opposing pulls of modern constitutionalism. One, towards pluralism, linked to the values of freedom, diversity and private autonomy. The other, towards unity or hierarchy, linked with the ideals of equality, the rule of law and universality'[309]. For Maduro, pluralism is thus intrinsically part of the constitutional project. His claim is that this constitutional balance between political pluralism and legal hierarchy has to be reconsidered in the contemporary 'postnational context'. Since there is no longer a closed political space with ultimate authority at the level of the nation state, constitutionalism has to extend beyond those borders in order to protect its political values[310]. This becomes concrete when we see the examples that Maduro gives of how constitutional pluralism contributes to the values of modern constitutionalism: by increasing democratic inclusiveness beyond state borders; by regaining political control over transnational processes that evade national control; and through the correction of political malfunction on the national level[311]. To counter this extension of the constitutional paradigm in favor of its political merits, Maduro describes the necessity to develop new jurisprudential models to address the constitutional values of hierarchy and legality[312]. This is precisely what he intends to achieve with the 'principles of contrapunctual law'.

This first attempt at the *'constitutionalization of pluralism'* differs from MacCormick on three levels of analysis that have been developed above. Only the claim regarding the end of *sovereignty* (a unified understanding of ultimate legal authority) is maintained[313]. First of all, Maduro's legal *ontology* is substantially more restrictive than the one employed by MacCormick. The shift from law as an 'institutional normative order' to law as a result of 'discursive practice' entails that the determination of legal validity is now made through a process of inter-court dialogue. This specific 'institutional choice' closes the door to the myriad different sources of law that were considered as valid by MacCormick but that are not recognized by the adjudicative practice of the CJEU or the EU member states (e.g. church law, the law of transnational economic organizations, the law of universities, etc.). Departing from Maduro's legitimacy claim, it could even be argued that the subordination of these different sources of normativity to the centralized political sphere is considered an inherent value of constitutionalism. While MacCormick provides a conceptual frame to integrate the wide variety of legal norms, as described in theories on transnational law or global legal pluralism[314], Maduro reserves the concept of constitutional pluralism for the formally entrenched venues of adjudication within the European legal space. The *'constitutionalization of pluralism'* thus also seems to be an ontological restriction: many contemporary sources of transnational regulatory governance are excluded from Maduro's concept of law.

Secondly, where MacCormick's theory did not ask any questions of *normative legitimacy*, Maduro roots his theory on pluralism in a strong normative claim: constitutional pluralism 'provides a closer approximation to the ideals of constitutionalism than either national constitutionalism, or a form of EU constitutionalism'[315]. *A contrario,* it seems clear for Maduro that the establishment of autonomous constitutional authority in an institutional regime that does not promote or strengthen modern constitutional values is considered illegitimate.

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[308] *Ibid.,* 76

[309] *Ibid.,* 80.

[310] *Ibid.,* 82.

[311] *Ibid.,* 77.

[312] *Ibid.,* 82

[313] One could argue that this is symptomatic for the discourse of jurists with a strong focus on the EU, since, as Kumm argues, 'in the law of the European Union, the language of subsidiarity has completely replaced the language of sovereignty'. See Kumm 2009, *cit. supra* n. 18, 293.

[314] Tuori 2014, *cit, supra* n. 1; Halliday and Shaffer 2015, *cit. supra* n. 1; Kingsbury 2012, *cit. supra* n. 2; Twining 2009, *cit. supra* n. 33.

[315] Maduro 2012, *cit. supra* n. 74, 77-78.

Finally, Maduro refutes the claim that CP necessarily has to give up the notions of universality, coherence and the rule of law, *i.e.* legality[316]. To this end of ensuring coherence and unity, his theory develops a set of constitutional[317] 'principles of contrapunctual law' that serve as hermeneutic guidelines for adjudicative conflict-resolution. These principles do not, however, reinstall legal hierarchy in the strict sense. They represent a doctrinally construed tool for managing the interface between different constitutional orders and do not offer legal norms for the determination of validity.

The rationalist approach: cosmopolitan constitutionalism

While Maduro acknowledges the value of a constitutional paradigm as a hermeneutic for adjudicative convergence, he is reticent to reinstate legal hierarchy. Kumm's model of CP goes further and develops a cosmopolitan constitutional paradigm with the ambition of holistically redefining the concept of legality in the context of transnational law[318]. His claim is that the end of the statist monopoly over the production of (international) law[319] should not lead to the demise of constitutional thinking, since 'constitutionalism does not require the framework of a state to be meaningful'[320]. Instead, '[t]he statist paradigm of constitutionalism needs to be replaced by a cosmopolitan paradigm of constitutionalism'[321]. Remarkably different from MacCormick, this paradigm overarches the plurality of autonomous constitutional orders by a set of formal, jurisdictional, procedural and substantive principles. In contrast to Maduro, these principles are not induced from adjudicative practice, but deduced from moral theory[322]. Ultimately, I will demonstrate that Kumm's constitutional paradigm – building on a specific ontological perspective on transnational law – completes the process of reversal of MacCormick's radical pluralism back to a monist structure. I will set out his argument focusing on three intertwined elements: (i) his concepts of law and the implications on his constitutional paradigm; (ii) the universal application of the paradigm in practice; and (iii) his rejection of both dualism and monism – regarding the latter, unrightfully so – in favor of CP.

The turn to Dworkin in Constitutional Pluralism

It is, first of all, necessary to explore Kumm's legal ontology, since this fundamental understanding of what law *is*, shapes his constitutional paradigm. While MacCormick explicitly identified Hart's *Concept of Law* as his ontological starting point, Kumm's cosmopolitan paradigm, I want to argue, has to be understood by reference to Dworkin. Echoing Dworkin's *'best fit' formula*, Kumm argues that 'the identification and interpretation of [law] requires engagement with moral arguments, that is arguments about what is efficient, fair, legitimate or just'[323]. This relative detachment of law's existence and validity with sources of positive law is pivotal to Kumm's constitutional paradigm, which, he claims, 'provides a cognitive frame for the construction of public authority'[324].

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[316] This is a response to the critique of J. Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement", *European Law Journal* Vol. 14, 2008, 389-422.

[317] N. Krisch, "Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space", *Ratio Juris* Vol 24:4, 386-412, 2011, 8.

[318] Kumm 2009, *cit. supra* n. 18, 258-324; M. Kumm, "The moral point of constitutional pluralism", in J. Dickson and P. Eleftheriadis, *Philosophical foundations of European Union Law*, Oxford, Oxford University Press, 2012, 216.

[319] A claim that is put forward by, for example, Twining 2009, *cit. supra* n. 33.

[320] Kumm 2009, *cit. supra* n. 18, 263.

[321] *Ibid.*

[322] References to the moral underpinnings of legitimate constitutional authority are made on plenty of occasions. See *ibid.* 262, 265, 290 and 303.

[323] *Ibid.* 262, footnote 10. The link between Kumm and Dworkin is also made in Somek 2012, *cit. supra* n. 4, 363.

[324] Kumm 2009, *cit. supra* n. 18, 267. This 'particular cognitive frame for the construction of legitimate authority' is what makes the cosmopolitan paradigm constitutional, see *ibid.*, 321.

This jurisprudential perspective determines Kumm's constitutional paradigm, and his answer to the question of ultimate legal authority. The latter, it is argued, 'is not located in a particular institution (e.g. a constitutional court), a particular text (the Constitution), or a [sociopolitical] source ('We the People' as pouvoir constituent)'[325], but results from the alignment with moral principles[326]. Taking the normative status of free and equal individuals as an abstract moral horizon[327], four principles are considered to be constitutive of cosmopolitan legality: 'besides the principle of legality, which establishes a presumptive duty to enforce international law, the potentially countervailing principles are the jurisdictional principles of subsidiarity, the principle of due process, and the substantive principle of respect for human rights and reasonableness'[328]. These principles might be reflected is some sources of positive law, *i.e.* in national states' 'commitments to democracy and the protection of rights'[329], but they are not bound by them – as reflections of natural law they determine constitutional authority independent from any positivist constraints[330]. In sum, Kumm's cosmopolitan constitutional paradigm formulates of a set of rationally deduced[331] principles that provide a holistic, universal concept of legality, which can be applied across the polycentric legal landscape of transnational governance. This constitutional paradigm builds on the ontological position that the fabric of law is ultimately of a moral quality.

Cosmopolitan constitutionalism as universal and decentralized judicial practice

This constitutional paradigm is both descriptive and normative in nature. It comprises not only 'the basic conceptual framework to be used for the interpretative reconstruction of an existing public law practice'[332], but also 'necessarily ha[s] an idealizing element'[333]. In other words, the cosmopolitan constitutional paradigm is both a descriptive claim about the contemporary practice of (international) public law and a 'normative horizon within which the future can be imagined and contested'[334]. This allows for 'the analyses *and* assessment'[335] of *all* public authority.

The universe of public law practice sketched by Kumm is, therefore, one in which all splintered sources of transnational law *are* and/or *should be* evaluated on the basis of his principle-based cosmopolitan constitutional paradigm. Following from their universal nature, these omnipresent principles not only determine the legality of every freestanding act of public authority, but also regulate the (potentially conflictuous) interface between different constitutional venues[336]. The different chains of legality that inspired MacCormick's heterarchical jurisprudential model are tied together in one normative knot. It is important to underline that this normatively thick meta-legal framework is not designed for mere doctrinal purposes, but provides practical judicial tools intended to describe and inform constitutional adjudication on both the national and the international level: the application of the cosmopolitan constitutional paradigm is decentralized and determines ultimate validity *within, across* and *between*

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[325] M. Kumm, "The best of times and the worst of times: between constitutional triumphalism and nostalgia", in P. Dobner and M. Loughlin (eds.), *The twilight of constitutional law: demise or transmutation?*, Oxford, Oxford University Press, 2010, 203.

[326] Kumm 2009, *cit. supra* n. 18, 267.

[327] *Ibid.*, 315.

[328] *Ibid.,* 277. This rationalist methodology is underlined by the claim that the 'cosmopolitan perspective recovers constitutionalism's universal perspective', see *ibid.,* 322.

[329] *Ibid.*

[330] This is heavily criticized in Somek 2012, *cit. supra* n. 4, 365.

[331] This echoes Kant's claim that moral law is a product of reason and allows for objective universalization.

[332] Kumm 2009, *cit. supra* n. 18, 311.

[333] *Ibid.*

[334] *Ibid.*, 324.

[335] *Ibid.*, 263 (emphasis added)

[336] The principles provide 'a coherent framework for addressing conflicting claims of authority', see *ibid.*, 274.

every constitutional *locus*[337]. Concretely, as a judge of the CJEU, the German *Bundesverfassungsgericht* or the WTO's Appellate Body, one would ultimately be reasoning within the same meta-legal framework – *i.e.* legal validity would be traced back to the same *corpus* of procedural and substantive criteria[338]. This implies that, when different institutionally embedded normative complexes substantively converge in one specific legal issue – imagine a human rights conflict that is simultaneously prone to the jurisdiction of the Italian judicial system, the European Court of Human Rights, the Court of Justice of the European Union, and the UN Human Rights Committee –, principle-based adjudication in one institutional complex can invalidate any act of public authority emerging from another legal system. In short, in the cosmopolitan approach to global constitutionalism, jurisdiction is both decentralized and universalized[339]. The 'constitutionalization' of MacCormick's radical pluralism is now complete[340]: Kumm's theory provides a constitutional paradigm derived from natural law that binds and guides every actor across the splintered postnational spectrum and provides a decentralized and universalized model for judicial review. No degree of epistemic independence of self-referential institutional practice can immunize venues of public authority from this omnipresent normative oversight. Therefore, the concerns regarding legality and morality that were intrinsic to MacCormick's paradigm are no longer valid: every autonomous institutional practice is now recollected under the umbrella of cosmopolitan constitutionalism, which comprises both a theory on legal hierarchy and moral validity. Heterarchy is recollected, pluralism unified, relativism moralized. CP's original taste of postmodernism seems far gone in this monist and universalist normative account.

The return of monism under cosmopolitan principles

Kumm, however, denies this unification, arguing that his model remains pluralist and that 'the different legal orders making up the world of public law are not hierarchically integrated'[341]. Consequently, when turning to the monist-dualist dichotomy, Kumm chooses a third way out: the path of pluralism. His arguments for this move are that his paradigm 'is not connected to the establishment of an ultimate authority'[342] and that the 'potential for legally irresolvable conflict between national and international law remains'[343]. Therefore, it is argued, his paradigm cannot be labeled as monist. This claim, however, can only work under the assumption that monism is inextricably linked with *institutional* homogeneity. That is what Kumm points at: considering the absence of unified 'coercive powers' and 'federal world state', the pluralist model should be obtained[344]. This lack of unification, clearly, does not relate to legal authority (*potestas*), which is explicitly unified under his cosmopolitan paradigm, but to power (*potentia*), *i.e.* the power of one institutional model or set of positive laws (either statist or international) to claim superiority[345]. While Kumm maintains the pluralist position on the level of institutional capacity and positive law, his unification of legal authority under a rationally deduced set of formal and substantive principles clearly gives the paradigm a monist taste. He can only maintain the claim of pluralism by referring to an institutional concept of law (along the line of MacCormick) that is at odds

[337] Somek warns that this decentralized application of constitutional principles leads to the 'privatization' of the jurisdictional space'. See Somek 2012, *cit. supra* n. 4, 366.

[338] Obviously, the model leaves space for substantive differences between different legal systems. This is guaranteed by the procedural principle of subsidiarity and the normative principle of public reason.

[339] Somek notes that '[p]rinciples without sources are deemed to be capable of interfering with source-based systems at any point and at any time'; Somek 2012, *cit. supra* n. 4, 365.

[340] Note that for the same reasons the cosmopolitan constitutional paradigm also stands in direct tension with the notions of epistemic pluralism or autopoietic system-theory.

[341] Kumm 2012, *cit. supra* n. 107, 216.

[342] Kumm 2009, *cit. supra* n. 18, 260.

[343] *Ibid.* 279.

[344] *Ibid.* 259-260.

[345] This distinction between *potentia* and *potestas* is borrowed from Loughlin 2014, *cit. supra* n. 6, 11-12.

with the rationalist concept of law that informs his constitutional paradigm. In providing a unified conceptual framework for the determination of ultimate legal authority, Kumm's cosmopolitan framework performs the same function as Kelsen's *Grundnorm* or Hart's *rule of recognition*[346]; it provides a legal vanishing point for different chains of validity. Indeed, a diverging and conflictuous application of this unified paradigm in positive law or institutional practice might testify of dispersed political power (which is a rather pedestrian claim), but it does not pluralize ultimate constitutional authority. When Kumm's conflation between the political and jurisprudential concepts of authority and sovereignty are analytically disentangled, it becomes clear that, in the *legal* sense of the word, Kumm's theory is of a monist nature and directly opposes the jurisprudential core of MacCormick's original account.

We conclude that with Kumm's cosmopolitan constitutional theory the reversal of MacCormick's constitutional pluralization is complete. While acknowledging that today's postnational *institutional* landscape is splintered, Kumm reintroduces and universalizes *legal* sovereignty with a unified normative and jurisprudential model for the determination of ultimate legal authority. Kumm's set of cosmopolitan principles that organize the multiplicity of national, international and transnational legal sources in a unified and hierarchical conception of legality, the paper demonstrates, is derived from a normative, Dworkinian concept of law. MacCormick's ontological perspective on transnational law, his analytical abolishment of legal sovereignty, his theory on the political mediation of heterarchical constitutional conflicts and his positivist notion of moral equivalence, are all reversed by Kumm's cosmopolitan paradigm, which ties together the loose ends of heterarchy in a universalist moral knot. This constitutionalization of pluralism, the paper demonstrates, is based on a normative understanding of law that reinstates legal sovereignty, conceptual unity and moral hierarchy in a monist constitutional paradigm. From a *pluralization of constitutions*, stressing the heterarchical and decentralized nature of transnational regulatory governance, the heuristic of CP has hereby become a project for the *constitutionalization of pluralism*. This radical shift in the constitutional approach to transnational law, I argue, can be traced back to the fundamental question of law's ontology: is the existential fabric of law of an institutional or a moral quality? By linking the different strands of CP to this ontological question, the paper reveals that, within the constitutional approach to transnational regulatory governance, the classic jurisprudential schism between Hart's positivism and Dworkin's non-positivist normative theory revives.

Framing the democratic deficit of Constitutional Pluralism

In this section, I turn back to the three constitutional paradigms addressed above and assess their relationship with the concern for democracy. This democratic assessment is based on following question: is the legitimacy of a certain legal norms impacted by the question if the addressees of this norm – directly or indirectly – participated in its formulation[347] or do other criteria determine this legitimacy? The core of the argument is that both major strands of CP – *i.e.* the *'pluralization of constitutionalism'* and the *'constitutionalization of pluralism'* – disconnect the legitimacy of legal norms from any democratic endorsement (*i.e.* procedural legitimacy). The origin of this democratic deficit lies in the extension of the respective ontological positions – respectively, law as an 'institutional normative order', a 'discursive practice' or a 'rationally deduced set of principles' – to the description and normative evaluation of contemporary global governance.

As noted above, in MacCormick's Hartian model, 'law' is generated by 'official institutional practice', while for Maduro 'law' is the result of an 'inter-institutional dialogue', *i.e.* a discursive practice. Though both theories result in different constitutional paradigms, they are both loyal to the positivist tradition in

[346] Kumm seems to acknowledge this, see Kumm 2009, *cit. supra* n. 18, 267.

[347] This is inspired by J. Waldron, "Can there be a democratic jurisprudence?", New York University Public Law and Legal Theory Working Papers, Paper 97, 2008, 20-21.

the sense that they judge law's *existence* and *validity* in the light of positive institutional practice. The claim of both writers with regards to CP is exactly that these sources of positive law, these institutional practices, can also auto-generate constitutional authority, which determines ultimate legal validity. With regards to this extension of the positivist concept of law to the constitutional level, Martin Loughlin argues that 'since law can only be understood in terms of positive law, the 'law' that establishes the authority of government does not exist'[348]. Here, Loughlin points exactly to the oxymoronic question-begging nature of MacCormick's theory on the self-referential constitution of constitutional authority, which was exposed above[349]. The problematic character of this circular reasoning is only exacerbated by the fact that legal validity, for MacCormick, stands equal to substantive and procedural *legitimacy*[350]. Both law's internal validity and external legitimacy, for MacCormick, are determined by the institutional practice of 'legal officials', outside the reach of any democratic participation or contestation[351].

For Maduro, on the other hand, law's validity and normative legitimacy are disconnected. While internal validity is merely determined by institutional praxis, external legitimacy is determined by law's conformity with the meta-methodological principles of contrapunctual law, which resonate strongly with Kumm cosmopolitan constitutional principles. For both authors, the determination of legitimacy is not dependent on positivist sources but on either rationally induced principles belonging to the 'European legal system' or rationally deduced principles originating in universal moral reason. Similar to MacCormick, however, there is no role for any constituent power in the determination of legitimacy[352]. Both Maduro's principles of contrapunctual law and Kumm cosmopolitan constitutional principles are located on an esoteric level beyond social contestation or democratic evaluation and are given substantive shape on the level of constitutional adjudication. The central actors in the determination of normative legitimacy in the transnational legal space seem to be judges rather than citizens. By grounding legitimacy in sources that exist independent of positive enactment or political contestation, the *'constitutionalization of pluralism'* lost sight of the *demos.*

Kumm defends the democratic merits of his constitutional paradigm by pointing out that his cosmopolitan principles serve the 'general will' of 'free and equal citizens' through the protection of human and constitutional rights *i.e.* substantive legitimacy[353]. To this requirement of substantive 'cosmopolitan legitimacy', Kumm argues, procedural democratic legitimacy is subordinate[354]. The substantive structure of Kumm's cosmopolitan paradigm, however, is remarkably open-ended (e.g. as a result of its reliance on the notion of 'public reason') and relies entirely on the judiciary (on the national or international level) for its concretization. In sum, the absence of democratic participation in Kumm's paradigm is justified by reference to abstract substantive principles, which rely on adjudicative interpretation. This subordination of democratic input-legitimacy to normative abstraction is exemplified by Kumm's argument that the notion of 'constituent power' should not be understood as a sociopolitical-, but as a normative concept[355]. In other words, in Kumm's model of CP, it is not the material, political expression of values and beliefs by the *demos* that normatively delineates the political

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[348] Loughlin 2014, *cit. supra* n. 56, 223.

[349] This boils down to the following question: how can a certain institutional practice legitimize the authority of this institutional practice to determine its own validity?

[350] See MacCormick 1999, *cit. supra* n. 17; See also, Loughlin on the 'fallacy of equivalence' in MacCormick; Loughlin 2014, *cit. supra* n. 6, 17.

[351] This is in line with the critique on CP formulated by D. Kennedy, "the mystery of global governance", in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World,* Cambridge, Cambridge University Press, 2009.

[352] Kumm explicitly refutes the importance of the constituent power for the determination of ultimate legal authority, Kumm 2009, *cit. supra* n. 18, 313-315.

[353] This strongly echoes Rousseau political concept of the '*volonté générale'.* See Kumm 2009, *cit. supra* n. 18, 315.

[354] *Ibid.* 301.

[355] This argument was made by Kumm at the Workshop 'Global Constitutionalism without Global Democracy', EUI, Florence, January 2016.

space[356], but a doctrinally deduced set of substantive principles grounded in an abstract normative concept of 'constituent power'. Consequently, the material *expression* of constituent power is ontologically impossible: Kumm's constitutional space is void of actors and outside historical contingency[357]. Surely, actors move around in the political space, but they are not constitutive of it in any way[358]. Moral reason, not social interaction, shapes Kumm's political space.

Following a similar logic, Maduro asserts the normative superiority of the 'ideals of constitutionalism' over any conception of democracy that relies on direct or indirect participation of contestation[359]. For both authors, substantive legitimacy – which is determined by the practice of constitutional adjudication – overrules the procedural input-legitimacy provided by democratic control over law-making and constitutional authority.

Ultimately, we notice how both MacCormick's radical pluralism and the principle-based accounts of Maduro and Kumm connect law's legitimacy to institutional or adjudicative practice rather than any participatory democratic model. While the paradigm of CP might provide a good descriptive account of the current phenomenon of transnational law, it falls short of offering a template for democratic legitimacy in the sphere of global governance. The contribution of this paper is to root this democratic deficit in the ontological presumptions that underlie the different strands of CP, *i.e.* the concept of law as an 'institutional normative order', a 'discursive practice' or 'a rationally deduced set of principles'. The *demos* is ontologically banned from the realm of global constitutional pluralism.

Conclusion

This paper started by rooting the origins of CP in the contemporary proliferation of modes and venues of law-making that substantively overlap with the regulatory competences of the nation state. CP, the paper underlines, emerged as a jurisprudential heuristic aimed at analytically grasping and normatively guiding this phenomenon of transnational law. More specifically, I argue, the constitutional language was employed to express that in the era of transnational governance, the question of *ultimate legal authority* between different venues of law-making is at stake.

The very nature of this question, the paper points out, implies the necessity of a meta-legal framework, *i.e.* a holistic theory of general jurisprudence that assesses the ultimate validity of 'law' from an ontological perspective, beyond the jurisprudential or epistemic boundaries of any specific legal tradition or system of thought. The first (and often unarticulated) step of CP, which contends to answer the question of ultimate legal authority[360], is therefore to ontologically recognize and frame the contemporary sources of transnational regulatory governance, and their vertical and horizontal interactions with other transnational venues or national legal systems, in an innovative holistic theory on legal validity that fits the contemporary practice of global governance[361]. While pivotal in understanding the normative and analytical tenets of CP, an inquiry into this ontological dimension of the model is absent in the literature. It is this abyss the paper aims to bridge.

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[356] This reflects the notion that the constituent power generates 'political right', as argued by Loughlin 2014, *cit. supra* n. 56.

[357] I am heavily indebted to Dennis Patterson for this insight.

[358] It should be noted that this insight reflects the metaphysical approach to morality at the heart of Kumm's cosmopolitan paradigm. In line with Kant's *Critique of Practical Reason*, Kumm's moral law is considered to be constituted through processes of objective reason, which hold the promise of universality. Since this rationally deduced moral law is considered to be the ultimate source of legal authority, democracy is redundant.

[359] Loughlin argues that 'it is constitutionalism, rather than any conception of democracy understood as the will of the people, that provided the essential legitimating instrument of modern politics'; see Loughlin 2014, *cit. supra* n. 6, 28.

[360] Even though the distinct answers might leave space for heterarchy, *i.e.* indeterminacy.

[361] In other words, the questions asked and answered by the heuristic of CP do not primarily belong to the realm of international law or comparative constitutional law, but specifically to field of general jurisprudence. CP inquires into the *grundnorm* of the contemporary international legal order.

Based on an analysis of the jurisprudential assumptions of CP's main proponents, the paper provided an innovative conceptual roadmap that traces different ontological approaches to (transnational) law to radically divergent analytical schemes and normative agendas under the umbrella of CP. Three different ontological foundations were explored in the writings of MacCormick, Maduro and Kumm. While MacCormick employs the concept of law as an 'institutional normative order' to grasp with transnational law, Maduro considers law as an 'inter-institutional discursive practice' and Kumm provides a natural law-account in which legal validity is derived from a set of rationally deduced normative principles. The relevance of these different approaches was measured with regards to the debates on (i) ultimate legal authority (*i.e.* legal sovereignty); (ii) legality in global governance; and (iii) the substantive legal constraints of transnational law; in which different strands of CP put forward radically different arguments.

Informed by these insights, the paper describes a general trend in CP from a focus on pluralism and heterarchical interaction[362] to a rationalist renaissance of legal monism under constitutional principles. This was described as the shift from a *'pluralization of constitutionalism'* to a *'constitutionalization of pluralism'* in the theory and discourse of CP. These two templates of CP, the paper pointed out, translate the traditional dichotomy in general jurisprudence between legal positivism and normative legal theory to the realm of transnational law. This translation provides for two distinct models of CP, the former being characterized by radical heterarchy, the end of sovereignty, moral relativism and political conflict-mediation, while the latter reinstalls legal hierarchy under a normatively thick set of principles, substantively shaped on the level of (international) constitutional adjudication. Between both jurisprudential models, Maduro's discursive theory provides hermeneutic tools for translation and convergence, which manage the interface of pluralism without formally reinstalling legal hierarchy.

The transposition of these different jurisprudential paradigms to the transnational level, however, raises profound analytical and normative questions. Regarding MacCormick's interpretation of Hart, the following concerns arise: how can the radical pluralist constitutional model – based on the inherent validity of self-referential transnational institutional practice – be morally contained, once all bridges with orthodox constitutional ordering are burned? How can the concept of legality prevail in the transnational realm when multiple *rules of recognition* internally overlap in a state of constitutional heterarchy? In other words, can the systemic nature of Hart's positivist theory survive MacCormick's transnational dynamism? Or, more rhetorically, is a jurisprudential theory based on self-referential institutional practice justifiable in the jungle of global governance[363]? While the *'constitutionalization of pluralism'* addresses several of these concerns by overarching heterarchy in a monist constitutional frame, it gives rise to entirely new questions: how can the Dworkian interpretative 'best fit' approach be applied in the transnational era, where legal conflicts are disconnected from the moral fabric of any specific social ordering? How can legality prevail when abstract substantive principles, which function as *Grundnorm* of the revived monist structure, are able to invalidity any act of public authority through any adjudicative venue at any time? And how can the doctrinally deduced set of universal principles legitimately reflect the demands for 'conversation, heterogeneity, interaction [and] ethical pluralism'[364] in the face of ever-increasing integration and substantive overlap between diverse and asymmetric sites of national, regional and transnational governance? Finally, and fundamentally, the paper demonstrated how the underlying jurisprudential structures of the different branches of CP disconnect transnational law's legality and legitimacy from the *demos*.

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[362] Interestingly, the concept of radical pluralism by MacCormick shares many features of the critiques *against* the constitutional approach to global governance. This reflect the deep abyss within the paradigm of CP. See Kennedy 2009, *cit. supra* n. 140; N. Krisch, *Beyond constitutionalism: the pluralist structure of postnational constitutional law*, Oxford, Oxford University Press, 2010.

[363] This is a reference to Somek, for whom '[constitutional] pluralism […] marks the point at which constitutional law comes to an end' and where 'the law of the jungle' determines legal outcomes. See Somek 2014, *cit. supra* n. 65, 197-198.

[364] Kennedy 2009, *cit. supra* n. 140, 67.

It has not been the aim of the paper to answer these myriad different and fundamental questions that flow from the paradigm of CP. By exploring the different and opposing ontological underpinnings of the paradigm, however, the paper has added focus and analysis to the jurisprudential gap inside CP; to the analytical, epistemic and normative arguments articulated by its different strands; and to the questions that remain unresolved in the ongoing and ever-expanding debate on legality and legitimacy in transnational regulatory governance. To understand the merits and pitfalls of the constitutional hermeneutic, the paper fundamentally argues, requires us first and foremost to consider it as an answer to Socrates' ancient question: 'What is the law for us?'.

Tyranny and the anxieties of law beyond the state

Aoife O'Donoghue*

Of late, a constitutional ethic has gained momentum amongst international legal academics.[366] This movement seeks to go beyond traditional international law tropes such as Westphalian sovereignty, state equality and subsidiarity to an understanding of the global legal order as incorporating public law components into its operation. A potential role both normative and organisational for a constitutional ethic that has traditionally been associated with the internal workings of a state is either recognised as pre-existing or declared as emergent. Whilst this ethic is furthermost established amongst EU scholars, with increasing frequency it also forms part of international scholarship.[367] This article asks what has compelled international scholarship toward constitutionalism and what can be deduced about the nature of this scholarship from an analysis of its genesis.

Unquestionably public international law always contained a quality of 'publicness.' International law possesses foundational myths and legitimating language that is not contingent upon appropriating tropes from other systems. Albeit this is not to suggest an isolated legal system immune from cross-pollination but rather that the international legal order always possessed a separate publicness in its discourse and governance. These public elements comprise, amongst many others, the formation of international law, the structures of international organisations and the operation of international courts and tribunals. Nonetheless, most obviously displayed in the constitutionalisation debate but clearly demonstrable elsewhere, is a move to adopt domestic constitutional characteristics. This chapter seeks to ask why this has occurred, why lawyers whose concerns were not bound to questions of the rule of law, division of power, checks and balances, the incorporation of human rights, or democratic legitimacy have become engrossed in such debates.

The underlying rationales for choosing what traditionally were and are domestic constitutional and public law tools may range from a number of anxieties with the global legal order. These anxieties include; a perceived need to divest constituted power from a narrow set of global actors, a role in underpinning both individual and collective rights, a provision to check both the legitimacy and legalism of power, the possibility of recognising diverse points of governance within the global order, a perceived move beyond the state-consent based order to something new but as yet unarticulated and, critically, to locate a global rule of law. While legal theory has been concerned with questions of legitimacy and power, whether this is a concern with regard to public international law was often dismissed as unnecessary in a contractual consent based legal order.[368] Yet, clearly an inner anxiety exists that has pushed scholars into considering whether public international law may gain in legitimacy from either

* Thanks to Ruth Houghton, Máiréad Enright and Colin Murray for their comments on earlier drafts. A version of this article will be published in an upcoming volume Robert Schütze and Markus Gehring *Governance and Globalization* (CUP, 2016)

366 This includes global constitutionalism/constitutionalisation, global administrative law, global legal pluralism, global public goods and EU constitutional law amongst several others.

367 N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 MLR 317-359, P. S. Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301, G. Teubner *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP, 2012), N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1

368 H.L.A. Hart *The Concept of Law* (Clarendon Press, 1961) 227

recognising pre-existing constitutional accounts of existing formations, both institutional and legal, or from pushing the global order to adopt these structures onto itself.

One potential explanation for the move toward public law is an underlying dread amongst international lawyers that law beyond the state underpins a system of tyrannical power. That global constitutionalisation alongside global legal pluralism, global administrative law and the concern for global public goods is a response to disquiet amongst scholars that international law would fail to meet the minimum standards of governance inculcated within domestic legal orders when they adopted modern constitutionalism. That rather international law currently forms an a-constitutional order. The global legal system has moved beyond the state-consent based order of the 19th and 20th centuries but the accumulation of power beyond the state has yet to be entrenched with forms of legitimacy that would be expected when constituted power is exercised across a number of governance points. Global constitutionalism, in this scenario, provides a basis to make an argument that what is expected of a constitutional order such as the rule of law, checks and balances, democratic legitimacy and human rights, are present or are likely to be in the near future beyond the state.[369] Conversely, if a-constitutionality is the correct description of the current state of international law than tyranny may be the more appropriate term by which to describe its operation.

Other accounts also attempt to answer this question and this piece is not intended to challenge these but rather aims to sit alongside their explanations.[370] For example, Schwöbel considers that hegemony has long been a concern of international law but argues that 'the language of constitutionalism enshrines a hegemonic potential but also an alternative aspect of making visible and giving voice to those who would not be heard if it were exclusively for power politics,' and argues this is a partial explanation for the choice of constitutionalism.[371] On the other hand, Buchanan discusses whether constitutionalism acts a supplement to fill in what is absent from global governance.[372] The apprehensions raised by Hart's assessment of international law, the formalist versus natural law debate, or the purely statist view of international law are not intended as the basis for this discussion of the global legal order but rather a wish to understand what lies behind the choice of a constitutional ethic. The piece asks whether global constitutionalism is a response to a disquiet amongst scholars that international law would meet the standards of governance that took domestic legal orders toward constitutionalism. Nor is this article suggesting that there is any inevitability to the evolution of international law and that constitutionalisation is an inexorable process rather it examines the potential rationales for choosing this path.

Describing the order as tyrannical neither proposes that there is no global legal order nor makes a claim toward anarchy. Rather, this article will develop a taxonomy of tyranny based in both classical Greek philosophy and the work of Hannah Arendt both of whom presuppose a form of governance which is a-constitutional. These two models of tyranny move beyond its contemporary use instead focusing on it as a form of governance order. Of course tyranny is not unknown to scholarship beyond the state, for

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[369] E. De Wet, 'The International Constitutional Order' (2006) 55 ICLQ, 51, J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalisation of International Law* (OUP, 2009), M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, C.J. Schwöbel *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, 2011), E.U. Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 JIEL 19, 20

[370] C.J. Schwöbel, 'Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13 *German Law Journal* 1, A. L. Paulus, 'The International Legal System as a Constitution' in J. L. Dunoff & J. P. Trachtman, (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP, 2009) 72

[371] C.J. Schwöbel, 'Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13 *German Law Journal* 1 2-3

[372] R. Buchanan, `Legitimating Global Trade Governance: Constitutional and Legal Pluralist Approaches' (2006) 57 *Northern Ireland Legal Quarterly* 1, 6. See also the critique of D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP, 2008) 14

example, as a riposte to Kant's global government nonetheless both the classical and Arendtian view add an additional layer of understanding by asking what such governance consists of in its operation.

The form of tyranny at the core of the anxieties pushing scholars toward constitutionalism is as Finnis describes it 'the co-optation of law as a mask for fundamentally lawless decisions cloaked in the forms of law and legality',[373] where using the language of law is a tool of governance rather than forming part of a legal governance order. For public international law the reliance on law as the basis of a legitimate governance order opens this trap in which rule by law cloaks the exercise of political power that within a domestic order would be considered illegitimate and contrary to the rule of law. Georgiev notes the strong symbolic value of the ideal of the rule of law but suggests that, '[t]he ideal itself cannot bring about international order but without it the concept of international order loses its attractive force.'[374] As such, this article is proposing wariness toward the claims to an existent constitutionalism where such claims ignore the possibility of rule by law in favour of the ideal of a rule of law order and the legitimisation it brings.

There are also several theories of tyranny that are omitted here including Machiavelli, Erasmus, Kant, Schmitt and Montesquieu.[375] Further this piece does not engage in the debate as to whether there was break in the ancient and modern articulations of tyranny but rather acknowledges that there is no single all-embracing idea of its governance form. The focus here is on whether a conception of tyranny is of relevance in considering the origins of the global constitutionalism debate. Tyranny is not necessarily a precursor to constitutionalism and stands as its own form of governance order. This article examines tyranny and its relationship with governance by establishing a taxonomy of tyranny by which it is possible to consider whether elements of the global legal order resemble its form. In doing so, the article considers whether it is possible to argue that it is the response to a perceived, but undeclared, tyranny within international law that has pushed scholarship to cloak itself with a constitutional ethic.

Classical Greek tyranny

Whilst the classical Greek tradition often contains contradictory or, at the very least, unhelpfully vague definitions of the term typically tyranny is associated with the coming to power of a force, either a single actor or group, by other than constitutional means.[376] Tyranny is an exceptional form of governance rather than a permanent order and thus it is separate to monarchy, oligarchy or democracy though for some it may be extrinsically linked to the weaknesses in each of these forms of governance. Critically, for the classical tradition it is not necessarily always a negative state of affairs.[377] Indeed, Lane argues that within some classical approaches tyrants may be viewed as benevolent.[378] Tyrannies offered justice, order and protection from the wealthy in contrast to dictators placed at the pinnacle of a particular regime. This section will not present a unified idea of tyranny from the classical tradition but rather

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[373] J. Finnis, "Natural Law Theories", The Stanford Encyclopedia of Philosophy (Fall 2014 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2014/entries/natural-law-theories/, see also John Finnis *Natural Law and Natural Rights* (OUP, 2011) 273

[374] D. Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law'(1993) 4 EJIL 1, 3

[375] D. Erasmus, William Watson Barker(ed) *The Adages of Erasmus* (University of Toronto Press, 2001), N. Machiavelli *The Prince* (OUP, 2005), C. Schmitt, *The Tyranny of Values* (Plutarch Press, 1996), Montesquieu: *The Spirit of the Laws* (CUP, 1989)

[376] See variously, in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013), R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 23 G. Anderson, 'Before turannoi were tyrants: rethinking a chapter of early Greek history' (2005) 24 *Classical Antiquity* 173

[377] G. Anderson, 'Before turannoi were tyrants: rethinking a chapter of early Greek history' (2005) 24 *Classical Antiquity* 173., V Parker, 'The Semantics of a Political Concept from Archilochus to Aristotle' (1998) 126 *Hermes* 145

[378] M. Lane *Greek and Roman Political Ideas* (Penguin UK, 2014) 75. Also within Greek tragedy tyrant is most often simply a synonym for King see V. Parker, 'The Semantics of a Political Concept from Archilochus to Aristotle' (1998) 126 *Hermes* 145, 158

attempts to bring together several strands of thought to suggest some common attributes in how it was understood.

Tyranny forms the starting point of Plato's Republic.[379] Here, tyranny is antithetical to the constitutional structures within other forms of governance that possess the attributes of justice necessary to resolve conflicting tensions.[380] For Plato tyranny forms the end point of collapsed governance systems, for example, tyranny springs from failed democracy but unlike democracy, the tyrant gains obedience by threat of violence. This link to democracy was contested by Aristotle who argued that Plato was unable to provide any historic examples for his claim.[381] For Plato, tyranny was connected to the human tyrannical form. Those who are tyrannical are ruled by lawless appetitive attitudes that are also displayed in democracy in its most inclusive operation. Within tyranny there is little differentiation between the tyrant(s) and their subjects as both reflect and create the political order in which they live a life without reason.[382] Preferring rule through the educated class, albeit he does acknowledge the ongoing tensions in choosing an elitist governance form perhaps a form of bureaucracy or technocracy in contemporary systems, for Plato neither democracy nor tyranny form good governance orders.[383] It is from reason that the perfect form of governance emerges but one that is restricted in who takes part in governance. Indeed, whilst rejecting tyranny Popper argues that Plato is adopting a form of totalitarianism.[384] Certainly Plato regarded hierarchy, even amongst citizens, as important in creating a common good and constitutional governance structure.[385] But even where good governance orders were established there is no guarantee of tyranny's absence. For instance, states which domestically would be considered democratic and constitutional can operate in their imperial conquests in a manner considered tyrannical. This was particularly significant in considering Athens's imperial governance of conquered territories in comparison to its domestic arrangements.[386]

Boesche argues that Aristotle's view of tyranny, above other Greek iterations, has had the most enduring effect on the development of the philosophical concept.[387] For Aristotle, tyranny came in three forms, within barbarian countries in accordance with established law and practice, within Greece on an elective basis and, third, an entirely self-serving form that stands alongside oligarchy as an unjust or harmful system.[388] It is the third form which was the basis of his critique.

> For there is by nature both a justice and an advantage appropriate to the rule of a master, another to kingly rule, another to constitutional rule; but there is none naturally appropriate to tyranny, or to any other perverted form of government; for these come into being contrary to nature[389]

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[379] Plato *The Republic* (trans Tom Griffith) (OUP, 2000)

[380] D. Roochnik. 'The Political Drama of Plato's Republic' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177 http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007

[381] D. Roochnik. 'The Political Drama of Plato's Republic' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177 http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007, a critique of Plato that argues it is the basis of authoritarianism,

[382] Plato *The Republic* (trans Tom Griffith) (OUP, 2000), 254 R. Boesche *Theories of Tyranny: From Plato to Arendt* (Penn State Press, 2010) 28-29

[383] D. Roochnik. 'The Political Drama of Plato's Republic' in S. Salkever (ed.) *The Cambridge Companion to Ancient Greek Political Thought* (CUP, 2009) pp. 156-177 http://dx.doi.org.ezphost.dur.ac.uk/10.1017/CCOL9780521867535.007

[384] K. Popper *The Open Society and Its Enemies* (Princeton University Press, 1963) 533-537

[385] R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–256

[386] M. Lane *Greek and Roman Political Ideas* (Penguin UK, 2014) 112, See for example, J. Barnes (ed) *The Complete Works of Aristotle* (Princeton University Press, 1984)

[387] R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 2

[388] Aristotle *Politics* (Penguin, 2000), 1285a39-1285b1, R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–253

[389] Aristotle *Politics* (Penguin, 2000), Part XVII

The impact of the 'Thirty Tyrants' in Athens on Aristotle together with his uneasiness regarding democracy's potential under mob rule to descend into tyranny extends tyranny's structure beyond the lone figure.[390] Thus, while Aristotle regarded tyranny as government by one in their own interest the wish for power, pleasure and wealth which forms its driving force could also be held by a group. Aristotle also acknowledged that tyranny may come about due to the recognition by a group that their current form of governance is not what they wished. This draws them to look to an individual or group to provide an alternate which is, at times, is tyranny.[391] There are also examples of elected tyrants or kings who became tyrannical by overreaching.[392] As such while tyranny may personally be for the tyrant's own ends its emergence can be for other reasons.

In its Aristotelian form tyrannies create 'economic incentives to depoliticize their subjects' and create a form of governance that resembles the relationship between craftsman and tool.[393] It creates a system which establishes an unnatural political order which prohibits the development of humanity.[394] Tyrannies return governance to a pre-political state of dispersal which keeps individuals away from collective discussion or engagement with the rest of the polity that even a limited democracy allows. For Aristotle citizens meeting as equals and forming constitutional rule based on a limited number of actors much smaller than the broader polity but one that would serve the common good rather than the base purposes of tyranny was preferred.[395] Whilst Aristotle's democracy included deliberation it certainly was not the modern idea of constitutional democracy. It specifically excluded women, slaves and anyone involved with trade thus tending toward an elite that while not as extreme in its exclusion as the Platonic model but creates a rather thin line between who is considered able for governance and who is not.

Boesche categorises Aristotle's guidance to tyrants who wished to maintain power into five strands. First de-politicize the population, second, divide citizens to prevent them from organizing politically against the tyranny, third, tyrants must know how to use and be effective with violence as well as maintaining a monopoly over it, fourth, they must be adept at deception including inventing terrors and bringing distant dangers near and finally they must appear to rule constitutionally even if in reality their rule is arbitrary.[396] This advice provides an intriguing insight into the maintenance of tyranny albeit arguably it is of utility to anyone who wishes to maintain governance control no matter their system of governance even liberal constitutional democracies.[397] Most importantly however is, as Boesche suggests, that 'tyrants must make bows towards legality.'[398] That while it remains an a-constitutional structure, it is important to retain the pretence of legality and critically constitutional legality. Donning the cloak of constitutional law is thus an essential characteristic for an Aristotelian tyranny.

Five core elements may be gleaned from this brief overview of classical tyranny; the single or collective figure, tyranny's emergence outside of a constitutional structure, its relationship with imperialism, the

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[390] D. Teegarden *Death to Tyrants!: Ancient Greek Democracy and the Struggle against Tyranny* (Princeton University Press, 2013) 15-56. Arendt argues that this fear of the masses or mob rule was also a consistent fear of 19th century. H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 316

[391] K. von Fritz, *ëAristotleís Contribution to the Practice and Theory of Historiographyí,* (University of California Publications in Philosophy 1958), 137

[392] Aristotle *Politics* (Penguin, 2000),, 1310b18-20, 26-28

[393] *Aristotle Politics* (Penguin, 2000), 1311a9ñ11; 1311a3ñ6, R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 10, Aristotle, Nicomachean Ethics, 1161a30ñ1161b4.

[394] Aristotle *Politics* (Penguin, 2000), 1279a22ñ1279b10;

[395] Aristotle, *The Athenian Constitution* (trans. P.J. Rhodes) (New York, 1984), Ch. 6

[396] R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–25, 18 – 20 , 97

[397] T. Hale, D.Held, K. Young Gridlock, *Why Global Cooperation is Failing when We Need It Most* (Polity Press, 2013) 94

[398] R. Boesche, 'Aristotle's science of tyranny' (1993) 14 *History of Political Thought* 1–2520, Boesche also discusses the tyrant's need to appear religious and to appear to rule like a king.

benefit accrued to the tyrant(s) and finally the need to de-politicise governance. First, whilst the single tyrant is by far the most common form this is by no means definitive. The firm link to democracy as mob rule or the Thirty Tyrants in Athens suggests that the form tyranny can take is myriad thus enabling a much broader idea of a plurality of tyrants to co-exist with single iterations and, as such, allows for the integration of more modern ideas of tyranny which will be discussed later such as bureaucracies, technocracies or class.[399]

Second, gaining power outside of a constitutional structure is a common thread in classical discourse on tyranny, indeed tyrants are not regarded as constitutional bodies. Albeit the lack of constitutionality appears to be a matter of gradation rather than a specific historical attribution to any particular tyrant. As such, whether a particular governance structure is a tyranny can appear to be in the eye of the beholder. Nonetheless, its a-constitutional structure establishes an idea of law and power being intertwined in understanding tyranny even if that tyranny creates an unjust system that merely has the attributes of a constitution rather than embodying constitutionalism.[400]

Third tyranny's relationship with the exercise of imperial power. States can be considered tyrannical in their exercise of power beyond the state whilst maintaining a constitutional order at home. This of particular consequence when considering whether democratic states acting beyond their state boundaries can claim to be less tyrannical in their actions because of their domestic structure.

Fourth, tyranny is generally to the advantage of tyrant. As Aristotle argued,

> tyranny is just that arbitrary power of an individual which is responsible to no one, and governs all alike, whether equals or better, with a view to its own advantage, not to that of its subjects, and therefore against their will. No freeman willingly endures such a government.

Yet, as Lane also suggests tyrants can also be regarded as benevolent and for Plato were an inevitable reaction to the failures of governance that emerge from democracy. The advantage gained by being a tyrant may be material or political but is never regarded as purely altruistic on the part of the instigator(s) of tyrannical governance. Fifth, tyranny seeks to de-politicise governance. In creating an order that denies humanity and natural democratic discussion it must operate in a space where deliberation and debate are denied.

What can be gleaned about the nature of tyrannies from this summation, first tyranny does not mean the absence of legality. Whilst it is a-constitutional it operates within a surround of law and indeed may lean toward couching decisions that ought to be political in their character as purely legal and technocratic in its attempts to de-politicise. Systems of governance which may be regarded as legitimate may be tyrannical or have traits in that direction, for Plato that included democracy for others it is not democracy but it may be democracies acting beyond the state. The tyrannical system is to the benefit of the tyrant, what this advantage may be varies but there is a significant advantage to being a tyrant. When this advantage aligns with the interests of the population the benefits shared by the tyranny may be regarded as benevolent. Tyranny can emerge from other systems operating inefficiently and the intent can be benign or positive and have more generalised support but tyranny remains the tool of the power holders. Indeed, in looking toward pre-constitutional systems as tyrannical or alternately as occasional moments where constitutional structures lapsed due to bad governance, thus including elected tyrants, there is a wider understanding of how tyranny operates. Whilst for Plato the focus was on the extra-legal character and Aristotle upon the pursuit of a particular interest, what is evident is that for both tyranny was a-constitutional.

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[399] K. A. Morgan, 'The Tyranny of the Audience in Plato and Isocrates' in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013) 182 – 183, K. A. Raaflaub, 'Stick and glue: The function of tyranny in fifth-century Athenian democracy' in K. A. Morgan (ed) *Popular Tyranny: Sovereignty and Its Discontents in Ancient Greece* (University of Texas Press, 2013) 182 – 183, B. M. Lavelle, *Fame, Money and Power: The rise of Peisistratos and "democratic" tyranny at Athens* (Michigan Univ. Press. 2005)

[400] Aristotle *Politics* (Penguin, 2000), Book VII

Arendt and tyranny

Arendt's view of tyranny is very much tied to her consideration of totalitarianism and in particular the latter's emergence in the 20th Century as a form of governance. Although not adhering to all of its precepts her conception is also situated within the historical development of tyranny since the classical period. According to Canovan, Arendt is attempting to move away from imposed notions of governance dating from Plato by accounting for human plurality in her work.[401] In doing so, Arendt develops a particular view of tyranny which is both classical in its origins but very much contemporary in its understanding of governance in the modern era.

The role of law and its relationship with power and violence is particularly significant in Arendt's break from classical conceptions of tyranny. Power, violence and law are three distinct elements and tyranny must be understood in that frame. Arendt argues that the relationship between law and power has been overshadowed by classical clichés suggesting that eighteenth-century philosophy and more modern conceptions of government have erroneously relied upon classical categorisations of law, power and interest and variations therein.[402] Arendt contends that there are two sides to law; law as a limitation on power and contemporaneously power's enforcement of law.[403] Arendt argues that what the Enlightenment incorrectly took from antiquity's creation of republics was the supremacy of the rule of law. In doing so obedience to law simply replaced obedience to men and the dichotomy between law and power, and in particular, how to bring about lawfulness became largely absent from consideration.[404] As a result of this error Arendt argues tyranny mistakenly became a term of art used to describe any lawless government or more particularly the difference between a lawful or constitutional government and a lawless or tyrannical government, or perhaps to put it in constitutional terms, the absence or presence of the rule of law.[405] For Arendt this entirely misses how power and law interact. Arendt argues that tyranny raises the boundaries of law leaving behind a system which is not based on liberty. Though unlike totalitarianism is still leaves room for action and in doing so it remains egalitarian in that it is the tyrant(s) against all others.[406]

Benhabib argues that Arendt regards constitutional government as a system where law acts as a hedge allowing people to orientate themselves whereas tyranny is more akin to a desert.[407] For Arendt the work of Montesquieu is of particular import in breaking from the Platonic view of law and power. In recognising that power could be divided between the making of law, the executing of decisions and judging Montesquieu by recognising action and change was able to depart from Plato's view of the inevitability of failure in all forms of governance and their ultimate dissent into tyranny.[408] Critically it was this introduction of what was to become a constitutional norm, the division of power, which was essential. For Montesquieu danger lies where the only protection from tyranny is custom. Law, and what would become modern liberal constitutionalism, is required to prevent the emergence of tyranny. For Montesquieu the separation of powers stood as a safeguard against tyranny as it prevented power from

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[401] M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (CUP, 1994) 207

[402] H. Arendt *On Violence* (Harcourt 1969), 40, H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713-726

[403] H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713-726

[404] H. Arendt *On Violence* (Harcourt 1969), 40

[405] H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713, 714

[406] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 466, Hannah Arendt, Between Past and Future (Penguin Classics, 2006) 98

[407] S. Benhabib *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield, 2003)

[408] H. Arendt 'The Great Tradition: I Law and Power Hannah Arendt's Centenary: Political and Philosophical Perspectives' (2007) 74 *Social Science* 713, 722, Montesquieu *The Spirit of the Laws* (CUP, 1989) 72

settling into one set of constituted power holders and gave each point of governance the ability to curtail the action of the others if such activity was deemed *ultra vires*. Montesquieu brought about a break in democracy as potentially tyrannical with the introduction of a new form of constitution, a 'legally unrestricted majority rule, that is, a democracy without a constitution' suffocates dissent but new constitutionalism which renovates the classical form prevents this occurrence.[409]

Arendt divides power from violence and this is critical in her understanding of tyranny, in that it can (occasionally) exist without violence.[410] Power is all against one whereas violence is one against all, power doesn't need to be justifiable as it inherent within political action but needs to be legitimate whereas violence may be justifiable but not legitimate.[411] For Arendt, violence can destroy power but cannot substitute for it, the combination of force and powerlessness creates 'impotent forces' which leave very little behind.[412] She argues that this combination in classical theory is understood as tyranny. But, the fear of tyranny comes not from cruelty, which she argues can be countered by benevolent tyrants and enlightened despots, more exactly it is the impotence and futility which condemns both rulers and ruled that establishes our discontent with it as a form of governance.[413]

Powerlessness is key to understanding tyranny because it isolates the ruler from the ruled. The drive toward the establishment of a political community is absent in tyranny, no matter its benevolence and the absence of the public realm removes power.[414] Yet, for Arendt, tyranny's short-term advantages, stability, security and productivity in themselves pave the way toward its own end as these gains lead to participation and from this political action which in turn creates power beyond the tyrannical form brings about its demise.

As was discussed in the previous section tyranny need not necessarily be a negative attribute of governance and indeed as Arendt suggests some have advocated it as a form of good governance.[415] For example, according to Arendt, Hobbes is proud to admit that the Leviathan amounted to a permanent government of tyranny, 'the name of Tyranny signifieth nothing more nor lesse than the name of Soveraignty'.[416] Arendt suggests that Hobbes was in actuality attempting to justify tyranny which she argues had not, up to that point, been honoured with a philosophical foundation.[417] By taking account of the rise of the bourgeois class, a property owning elite where the acquisition of wealth can only be guaranteed by the seizure of power, Hobbes was advocating the creation of a form of tyranny.[418] Arendt regards Hobbes' commonwealth as leaving each individual powerless as they are without the right to rise against tyranny leaving space only for the submission of power to the tyrannical body politic.[419]

Arendt's historic view of tyranny typically stands alongside three modern forms of domination; imperialism, bureaucracy and totalitarianism. Totalitarianism is a system of rule which is for nobody's interest, not even the rulers and has no concern for individuals. Arendt clearly distinguishes between tyranny and totalitarianism, the latter insists on establishing each individual in a lonely state whilst the former leads to mere impotence. This makes totalitarianism far more dangerous and destructive. Unlike

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[409] Montesquieu *The Spirit of the Laws* (CUP, 1989) 72

[410] H. Arendt *On Violence* (Harcourt 1969), 37 -42

[411] H. Arendt *On Violence* (Harcourt 1969), 50-52

[412] Montesquieu *The Spirit of the Laws* (CUP, 1989) 72202-203

[413] H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 202-203

[414] H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 221

[415] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 144- 146

[416] T. Hobbes *Leviathan* (CUP, 1996) 486

[417] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 144- 146

[418] T. Hobbes, *The Leviathan*, (CUP, 1996), 486, H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), *144*- 146

[419] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 146, H. Arendt, *Between Past and Future* (Penguin Classics, 2006) 96

tyranny which is lawless, totalitarianism operates in accordance with what it presupposes to be the law of nature or history.[420] Tyrants never identify themselves with subordinates whereas the totalitarian leader must be all encompassing and be responsible for all thus no criticism of any element of governance can be countenanced as it would be a censure of the leader and the system in its entirety.[421] For Arendt the fundamental difference between modern dictatorships and tyrannies is that terror is no longer aimed at opponents but in ruling the masses, it has turned inward.[422] As such a rights discourse can remain in tyranny, particularly the right to resist the tyrannical power as it tends away from consistent arbitrariness, as such, one has to oppose it to be punished by it.[423] The tyrant takes away the right to possess rights whereas the totalitarian regime operates on the basis that none exist.[424] Arendt views totalitarianism as the absolute and most destructive form of governance that moves beyond all previous forms of negative regime.

Echoed in antiquity is Arendt's consideration of imperialism and its relationship with tyranny. For Arendt 'tyranny, because it needs no consent, may successfully rule over foreign peoples, it can stay in power only if it destroys first of all the national institutions of its own people.'[425] Using both the French and British imperial structures, with the former attempting to spread its values and cultures and the latter staying aloof from this enterprise, Arendt builds a picture of imperial tyranny in operation. Arendt argues that imperialism can only result in the destruction of the nation state when the flag becomes a commercial asset and patriotism loses its value in its use for money making purposes and centres this critique in a historical analysis of imperialism in the 19th Century.[426] The British imperial structure being the exemplar in that it attempted to keep national institutions separate with administrators consistently resisting any attempts to export justice or liberty from home.[427] In contrast to Roman imperialism in which all became bound by a common law in modern imperialism this is absent. Consent is enforced and tyranny prevails no matter the domestic arrangement of the home nation-state.[428] Thus, constitutional states acting outside their state boundaries may, much as in antiquity, be tyrannical.

Arendt suggests that rule by nobody, bureaucracy, may be one of the cruellest and most tyrannical forms of governance.[429]

> We ought to add the latest and perhaps most formidable form of such domination: bureaucracy or the rule of an intricate system of bureaus in which no men, neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly call rule by Nobody. (If, in accord with traditional political thought, we identify tyranny as government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done.)

Bureaucracy establishes haphazard universal settlements and procedures from which there is no appeal. There is nobody behind the will out of which decisions emerge and because of this bureaucracy is more

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[420] M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (CUP, 1994) 88, H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 484

[421] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 374

[422] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 6

[423] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 433

[424] H. Arendt *The Origins of Totalitarianism* (Harcourt, 1951), 297

[425] H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 128-129

[426] H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 125

[427] H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951) 131, see further, T. Frost and C.R.G. Murray, 'The Chagos Islands Cases: the Empire Strikes Back' (2015) 66 *Northern Ireland Legal Quarterly* 263-288

[428] H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), 125

[429] H. Arendt, *The Human Condition* (University of Chicago Press, 1958) 40, H. Arendt, *The Promise of Politics*. (Schocken, 2009) 78

dangerous than mere arbitrary tyranny.[430] The creation of vast systems of faceless decisions from which no answers emerge creates a new form of tyranny that has become ever more present in the contemporary era.

For Arendt, tyranny is not of the kings and despots of history but has contemporary character. Not in totalitarian regimes but in other authoritarian forms, including bureaucracy and imperialism. Law is central to Arendtian tyranny as it is situated within lawlessness. Constitutional tyranny is not a possibility, not only due tyranny's existence only in the absence of law but also because constitutional norms such as division of power and the rule of law provide bulwarks against the dissent of some forms of governance, such as democracy, into tyranny. It is the limitations to what tyranny can achieve that underlies the wish to have alternate forms of governance. Arendt points to the fear of tyranny coming from impotence and futility of action rather than a terror of cruelty. This limitation emerges from the absence of a public realm within tyranny and the push toward a plurality or political community that often signals the end of tyrannical governance. Constitutionalism is an agent against tyranny in that the division of power, its limits on majoritarian democracy, and the rule of law provide the lawful space in which plurality can occur, an anathema to tyrannical governance. As with antiquity, tyranny can be benevolent but this benevolence is caged by the need to keep the public realm from emerging, as such, it is inadequate. Arendt suggests that constitutional democracies states can, particularly through imperialism but not just in that instance, be tyrannical in their dealings beyond the state. In combination, this understanding of tyranny means that it has a modern form and may be identifiable in contemporary governance.

Understanding tyranny?

Whilst this was not a comprehensive overview of either classical or Arendtian tyranny the purpose was to draw together some of the essential themes which underlie our understanding of tyranny and to suggest why there may be an underlying fear of being engaged in a system which has all or some of its traits. Both the classical and Arendtian notions of tyranny clearly have contemporary resonances but perhaps more critically overlap in some of their articulations of its governance form. This article suggests that it is within this intersection between the two forms in which we may find a common understanding of tyranny from which a taxonomy of tyranny maybe adduced.

First, tyranny remains relevant. Some of its characteristics may evolve, as it did, for instance, during the Greek classical period, but there remains a common core to how it is understood. Second, tyranny is consistently a-constitutional. For Arendt this includes a lawlessness that goes beyond the Greek construction, but, critically, such lawlessness does not suggest chaos or anarchy. Rather, it is the manner and form in how law emerges which is of import. For the Greeks law exists but as a form to de-politicise the public realm and with technocracy taking its place. So too for Arendt where the emergence of bureaucracy as a new form of tyranny demonstrates the de-politicisation and the creation of rule by Nobody, not in the complete absence of law but in a lawless realm where the public realm removes the legitimate creation of law and the politics to which it ought to adhere.

Third, constitutionalism plays a key role in understanding what tyranny is not. Constitutional systems, for Arendt, stand as a bulwark against tyranny. The rule of law, the division of power and the limits upon majoritarian politics are critical constitutional norms that prevent democracies in particular from dissent into tyranny. For the Greek tyrannical form this is not as straightforward in that democracy was for Plato itself tyrannical or would ultimately descend towards it and so too for Aristotle when democracy moved beyond a limited class. But critically tyranny lacks the legitimacy that is associated with the other forms of constitutionalism identified in the Greek period. Thus, constitutionalism stands to defeat tyranny either by its creation out of a tyrannical system or its restoration after an interregnum.

[430] H. Arendt, *The Promise of Politics*. (Schocken, 2009) 78

Fourth, in both its emergence and its practice tyranny may be benevolent. Nonetheless, there are limits to what its benevolence can achieve. For the Greeks tyranny can emergence from bad or malfunctioning systems but its limitations is based on it being the tool of the power holders. Similarly, for Arendt but its limitations emerge from the absence of a public realm. Indeed, the more benevolent the tyranny the more likely it is to sow the seeds of its own ends as the push toward a public community and politics will become ever more pressing. The benevolence of a tyranny thus limits what can be achieved by that governance order.

Tyranny, whilst it may be benevolent is generally to the benefit of the tyrant(s). As such, its fifth characteristic is that those holding power benefit most from the system. This does not necessarily mean avarice or cruelty but it does imply a governance order which inculcates a system of benefits to the holders of power within that system ensuring that the monopoly over power will always accrue a profit.

Sixth, and finally, a domestically constitutional state may be tyrannical in actions beyond its borders. Imperialism is the key example for the both the Greeks and Arendt, but the underlying thesis for both is important. Domestic constitutionalism is no bulwark against tyrannically action beyond the state and indeed both were able to point to clear examples where this was the case. Both considerations of tyranny regard such external tyranny as ultimately having a detrimental impact on whom such action is pointed toward but also upon the tyrannical actors themselves.

These six characteristics establish a taxonomy of tyranny under which a core understanding of its form may be uncovered. The resonances with some elements of contemporary governance is evident and in the next section this taxonomy will be utilised to grasp whether the current global legal order could be said to be in part or in sum tyrannical in nature and if this is the case whether this is the anxiety that pushes academic discourse toward constitutionalism beyond the state.

Rule of law and global constitutionalism

Generally considered to be a desirable element of any governance system the rule of law forms a core element of any order pertaining toward constitutionalism albeit its presence does not of itself establish the existence or a trajectory toward a constitutional order.[431] Focusing on instances where it is questionable whether it is rule of law or rule by law that subsists within international law this section asks whether there are resonances between attempts to identify the presence of the rule of law and the possibility of international law being regarded as possessing some elements of a tyrannical order. At times, what is tantamount to complacency regarding the presence of the rule of law within international law permeates debates on constitutionalism and beyond this to wider discussions on global governance. This tendency relies on an almost unquestioning belief in the rule of law's presence that arguably suggests that its absence may hint at something unpalatable about the legal order. Raz is correct in cautioning against using the rule of law to describe all the positive elements of a legal order while Waldron's warning against regarding it as nothing more than the assertion that our side is great are perhaps the most critical in considering international law.[432] At its core the rule of law requires law to be applied equally, created openly and administered fairly and it is from this basis that it is understood here.[433] The taxonomy of tyranny put forward, whilst not directly concerned with the rule of law as such, requires that aspects of these three elements of the rule of law be absent for tyranny to flourish.

The extension of governance alongside the creation, administration and adjudication of law beyond the state raises questions regarding why power is wielded at certain points, who the constituted power holders are and from where they gain their legitimacy. From a more traditional perspective, some proffer

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[431] A O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014, CUP) 14

[432] J. Raz *The Authority of Law* (OUP, 1979) 210, J. Waldron 'Is the Rule of Law an Essentially Contested Concept' in J. Bellemy (ed) *The Rule of Law and the Separation of Powers* (London, Ashgate, 2005) 119

[433] A O'Donoghue, Constitutionalism in Global Constitutionalisation (2014, CUP) 31

that states make the law and thus whilst it is imperfect governance anxieties with its operation are not as seriously compromising as what may be imagined.[434] Alternatively, states are the constituted power holders, they are internally legitimate and thus they legitimately create law beyond the state.[435] Yet, there is a disjuncture between the constituent power holders who choose the constituted power holders within their state and their interests and the global interests for which public international law and global public law operate in response to.[436] Within a domestic constitutionalised system constituted power holders act in the interests of constituent actors not, as in this instance, for global or other interests.

Dyzenhaus argues for a distinction between rule of law and rule by law, the latter meaning compliance with whatever laws have been positively enacted no matter their content whereas rule of law also requires adherence to the principles of legality. This legality being in line with Fuller's list of generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy and congruence, the majority of which must be complied with most of the time for a system to be in conformity with the rule of law.[437] Both also argue that rule by law is to some degree legitimate as it implies some degree of rule of law. However, what the tipping point from one to the other is remains obscure. Dyzenhaus goes on to argue that 'not only is the choice to abide by the rule of law a matter of political incentives, the same is true of the choice to use rule by law to achieve one's own ends... [o]ne who is in a very powerful position will submit to ruling at various points away from the rule by law end of that continuum only when it is expedient to do so.'[438] As such, it is possible to have pockets of rule of law.[439] Nonetheless, having pockets or elements of legality may be on a continuum toward rule of law, they do not necessarily comport with a public law ethic that could be described as constitutional. Yet, can it be described as tyrannical and is this what is pushing scholars toward proclaiming global governance as constitutional law.

Identification of the rule of law beyond the state comes in several forms. For instance there is Henkin's oft quoted statement that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all the time' with some considering such compliance as a satisfactory demonstration of a rule of law ethic.[440] There is also much reliance on the UN Charter as a core constitutional document in an international rule of law based on the UN as an organisation whose status emerges from its common place amongst members. For Fassbender this means that the 'United Nations is an organization based on the concept of the rule of law. The organs of the UN are bound to comply with the rules of the UN Charter, which is the constitution of the United Nations.'[441] For Brownlie the

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[434] J. Crawford, 'International Law and the Rule of Law' (2003) 3 *Adelaide Law Review* 24

[435] A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579

[436] J. L. Goldsmith and E. A. Posner The Limits of International Law (OUP, 2005) 200, T. Macdonald and K. Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17 EJIL 89

[437] L. L. Fuller, *The Morality of Law* (Yale University Press,1969), chapter 2 and J. Raz, *The Authority of Law* (OUP, 1983) 223

[438] D. Dyzenhaus 'The Compulsion of Legality' in V. Ramraj (ed) *Emergencies and the Limits of Legality* (CUP, 2008) 37, see also D Dyzenhaus, 'The Legitimacy of the Rule of Law' in D. Dyzenhaus, M Hunt, and G. Huscroft (eds) *A Simple Common Lawyers: Essays in Honour of Michael Taggart* (OUP, 2009) 33-54

[439] D. Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP, 2010)

[440] L. Henkin, *How Nations Behave: Law and Foreign Policy* (New York: 2nd Ed. Colombia University Press, 1979), 47

[441] B. Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter www.un.org/law/counsel/Fassbender_study.pdf 19, 25, 28, B. Fassbender, 'The United Nations Charter as Constitution of The International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, J. Wouters and M. Burnay, 'Introduction: The International Rule of Law: European and Asian Perspectives', 46 *Revue Belge de Droit International* 2013, 299-306

'moral purpose of the United Nations was the promotion of the rule of law.' [442] Albeit not arguing that the Charter established an international rule of law rather he suggests that the concept is not unfamiliar to law beyond the state. A political willingness to employ the term certainly appears to exist with UN Member states in 2005 affirming that 'an international order based on the rule of law and international law' was the ideal. But what is telling about this last statement is the notion that this was the ideal perhaps acknowledging that it is not as firmly established as some commentators such as Fassbender might suggest. The premise of an institution focused on the rule of law extends beyond the UN to other organisations such as the WTO, where the focus tends to be on its Dispute Settlement arm but has a similar ethos that, without really defining its content, there is a rule of law beyond the state we just have to identify it.[443]

Yet, contemporaneously disquiet regarding increased governance beyond the state has become more consistent with questions of whether a rule of law or, perhaps in reality, rule by law endures. There are several examples of this angst. Some are based on the historical role law played in creating a global governance order that continues to favour the Global North.[444] Others focus on the actual operation of the legal order. Bianchi questions whether the ad hoc nature of international law suggests an absence of the rule of law arguing that the exceptionalism in the period running up to the 2003 invasion of Iraq demonstrates a reliance on hard cases rather than rule of law in decision making. This, he argues, undermines any constitutionalisation process.[445]

The multitude of international bodies, NGOs and corporations engaged in the administration of post-conflict territories poses questions as to what oversight and regulation they are subject to in their exercise of constituted power.[446] Critically such transitional governance raises issues around the open creation, equal implementation and fair administration of law with regard to the individuals living within their power.[447] Whilst bodies established beyond the state are often engaged with the implantation of human rights, criminal law, constitutionalism and economic transformation of the transitional states this is only rarely reflected back on their own operation to hold them more fully accountable for their exercise of constituted power.[448]

Emerging first as a legislative body and second as a body with direct engagement with individual lives the actions of the Security Council have caused much debate.[449] The Security Council's role as a

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[442] I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Martinus Nijhoff, 1998), 1

[443] E.U. Petersmann, 'How to Promote the International Rule of Law-Contributions by the World Trade Organization Appellate Review System' (1998) *Journal of International Economic Law* 25, D. Cass, *The Constitutionalization of the World Trade Organization* (OUP, 2005)

[444] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004), B. S. Chimni *International law and world order: a critique of contemporary approaches* (Sage Publications, 1993)

[445] A. Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13 EJIL 263, 270

[446] M. Saul *Popular Governance of Post-Conflict Reconstruction: The Role of International Law* (CUP, 2014)

[447] E. De Brabandere, 'Post-conflict administrations in international law: International territorial administration, transitional authority and foreign occupation in theory and practice' (Leiden/Boston: Martinus Nijhoff Publishers 2009), S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-building* (OUP, 2005) A. O'Donoghue, 'The exercise of governance authority by international organisations: The role of due diligence obligations after conflict.' in M. Saul and J. Sweeney, *International Law and Post-Conflict Reconstruction Policy* (Routledge, 2015) 45-66

[448] R. Freedman 'UN Immunity or Impunity?: A human rights based challenge.' (2014) 25 EJIL 239

[449] S. Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175, I. Johnstone, 'Legislation and adjudication in the UN Security Council: Bringing down the deliberative deficit' (2008) 102 *American Journal of International Law* 275-308.

legislative body has taken hold since the beginning of this century.[450] The creation of the International Tribunal for the Former Yugoslavia and the questioning of the Security Council's ability to create an adjudicative body was one of the first such actions and remains hotly debated.[451] The decision to pass Chapter VII resolutions requiring states to undertake legislative actions regarding but not confined to terrorism coupled with the creation of Terror Lists which includes over 200 individuals and the Committee designed to oversee this list have added to these discussions. This has brought the UN body into a new governance position where the manner in which law is created and implemented is brought to the fore and is central in questioning whether the Security Council is acting *intra vires*.[452] Fassbender's Report on the Security Council and due process found that it did comply with all its obligations under the Charter, including several references to the rule of law but this conclusion has been much contested.[453] Whilst this report led to the creation of an ombudsperson to review the terror listing process this was a very limited step in a situation where the listing process itself and the system of appeal remains opaque.[454] In particular, the ombudsperson's remit still leaves many questions best exemplified by the cases taken by those fortunate to live within the jurisdiction of the ECJ and thus possessing an avenue to question their inclusion on the list.[455]

These examples may be added to by many others. For instance, the role of principally non-public actors in judicial activities within international economic law where hearings are most often heard in private and where the appeal processes are limited.[456] Or, the role of economic institutions such as the World Bank Group, the IMF or a supranational body such as the EU in setting both micro and macroeconomic policies within states and the potential lack of ownership of global constitutionalism by constituent actors who may be subject to a pre-ordained hegemonic constitutionalism.[457] Each of these suggest that international law has moved well beyond it sovereign equality base, if that ever existed, to a scenario where individual lives are now directly affected by decisions and actors which operate beyond the state. In such a scenario the presence of the rule of law becomes a significant factor and allows us to question whether law is made openly, administered fairly and applied equally. If the conclusion is in the negative is it more honest to describe the system as rule by law and to question what the constitutionalisation process says about an order which on this brief summation appears to be entirely absent an ensconced rule of law.

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[450] J. E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 874, S. Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175

[451] Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities (2009) 7 *Journal of International Criminal Justice* 333

[452] Security Council resolutions 1373 (2001) and 1624 (2005) Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, www.un.org/sc/committees /1267/aq_sanctions_list.shtml

[453] B. Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter http://www.un.org/law/counsel/Fassbender_study.pdf E. Cannizzaro 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189–224

[454] https://www.un.org/sc/suborg/en/ombudsperson, G. L Willis, 'Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson' (2010) 42 *Georgia. Journal of International Law* 673

[455] P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351, See for example E. Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 International Organisations Law Review 189, O. Schachter, 'Self-Defence and the Rule of Law' (1989) 83 *American Journal International Law* 259

[456] M. Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, (Hart 2003), There is a move within the WTO to open some of its hearings to the public which are advertised on its website www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

[457] G. W. Anderson, 'Beyond 'Constitutionalism Beyond the State' (2012) 39 *Journal of Law and Society* 359, 378

These instances are not intended to create an apocalyptic or overly negative image of international law. Rather, they are to be set against the very positive outlook of an operational rule of law that is at times presented in the constitutionalisation debate. It also demonstrates the types of anxieties that exist as constituted governance extends beyond the state. As such this discussion is not about considering a domestic analysis of the rule of law, a Hartian approach or other bastions such as Hobbes to find that international law is not up to scratch or is not a legal order thus coming to the conclusion that such constitutional questions are unnecessary. Rather, it considers whether the public law ethic and the adoption of the rule of law as *in situe* is a response to an entirely different issue, not the absence of law but the global governance order's creation of law, its adjudication and administration and whether this could be considered to presently be a form of tyrannical governance. This discussion is not to be confused with foundational discussions of how we perceive law within the global order when the traditional tropes of commander and force have such little purchase. In particular, a traditional form executive, legislature and judiciary cannot be relied upon to necessarily fill the roles that a domestic system requires and indeed where qualms regarding the form that global democracy may take have led some to argue that it will, as Plato feared, descend into tyranny.[458]

The underlying rationales for choosing what traditionally are domestic governance tools could have emerged from a number of anxieties including: the divesting of power from a narrow set of global actors, a role in underpinning both individual and collective rights, a provision to check both the legitimacy and legalism of power and the possibility of recognising diverse points of governance within the global order and, critically, to locate a global rule of law. These brief examples demonstrate that these anxieties are real. The question is what has global constitutionalism done in response to them. This is not a discussion of the existence of law beyond the state but rather whether there is a concern that there is a rule by law system rather than rule of law and whether this anxiety has its roots in a tyrannical view and to consider whether in a legal order that has few, if any, democratic underpinnings or a division of power infused with checks or balances, the requirement of a strong rule of law becomes greater. In differentiated system with a weak judicial arm it would be inadvisable to simply rely upon those with the law-making authority or constituted power to both establish and maintain the rule of law.

Raz argues that the rule of law ought not to be used to merely describe all the positive attributes of a particular legal system yet this appears to be the form in which the rule of law has been accepted by some international scholars. [459] In such instances legalisation, institutionalisation and rule by law are confused with the rule of law and questions regarding international law's evolution. Koskenniemi contends that 'the rule of law hopes to fix the universal in a particular, positive space (a law, a moral or procedural principal or institution).[460] Too often its employment within global constitutionalism instead hides insufficiencies in global governance where perhaps more positively it could be used to critique the system. Critically, is it possible to call the anxieties and the push toward identifying a rule of law a wish to leave behind what could be described as a tyrannical order.

An assurance of democratic legitimacy within the global legal structure would militate towards simply accepting Fuller's procedural rule of law as satisfactory however the global order operates with very weak constraints thus requiring a more substantive approach.[461] Even if Fuller's formation were accepted the basic substantive structure would have to set the parameters of both legal and political action to prevent the development of a 'wicked system.'[462] This problem may be remedied by a

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[458] M. Koenig-Archibugi, 'Is global democracy possible?' (2011) 17 *European Journal of International Relations* 519, 520, D. Otto, 'Subalternity and international law: the problems of global community and the incommensurability of difference.' (1996) 5 *Social & Legal Studies* 337, 357

[459] See for a further discussion, M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907

[460] M. Koskenniemi, *The Gentle Civilizer of Nations The Rise And Fall Of International Law 1870-1960* (CUP, 2001) 507

[461] L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), chapter 2.

[462] D. Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP, 2010)

substantive rule of law capable of acting as a safety valve albeit presently this appears absent from law beyond the state. While Fuller's arguments against a substantive rule of law are not without import within the global order the lack of judicial positioning, strong democratic systems or other forms of restraint suggests rule of law in its substantive form would be necessary. If the argument is that the rule of law, either substantive or procedural is absent or at the very least is weak within the global legal order does this automatically imply that the governance order is tyrannical? This section has certainly not argued for an absence of law, there is plenty of law, but potentially this could be better described as rule by law.

Tyranny, international rule of law

Coming back to tyranny and its six characteristics; it continued relevance, its a-constitutional content and lawlessness, constitutionalism as a bulwark against tyranny, its potential benevolence, the benefit accrued to tyrant(s), and finally that domestic constitutionalism does not necessarily prevent states from acting tyrannically beyond the state. From the foregoing discussion it is certainly not obvious that international law contributes to a purely tyrannical governance order yet some of the issues raised in the previous discussion certainly suggest some of tyranny's attributes may be present.

Leaving its first element, its continued relevance to the end, tyranny's a-constitutional character and Arendt's argument for lawlessness proffer some interesting insights. If we follow Fuller and Dyzenhaus than rule by law requires rule of law and as such there is lawfulness. Thus, if international law remains, on the whole, a rule by law system, it does not quite meet the threshold of tyrannical power that Arendt would recognise. Yet, Greek tyranny remains relevant particularly the notion that tyranny de-politicises and tends toward the technocratic. Certainly the law may be instrumentalised and Bianchi's warning against ad hocism may suggest that replacing political with legal arguments can result in the political context being replaced. This is also linked to Arendt's view of bureaucracy, or the rule of Nobody, as the modern era's worst form of tyranny. The Security Council's Terror List or the creation of micro/macro-economic policies beyond the state could be interpreted as falling into this category. This bureaucratic or technocratic turn toward expertise is not specific to law beyond the state but perhaps adds to the unease felt with regard to these actions and indeed the rise of global administrative law suggests that, at the very least, administration and, as such, bureaucracy, is a live issue.

Constitutionalism's role as a bulwark against tyranny is very close to this last argument and could be considered to be the biggest trigger for the turn to constitutionalism. If there is an acceptance that constitutionalism and tyranny cannot co-exist than a push toward constitutionalism ought to resolve the issues identified in the last section. Indeed, it suggests that the real benefit of a constitutional ethic beyond the state is that it gives tools to scholars to offer critique when the continuum between rule by law and rule of law tends toward the former. Of course beyond the rule of law constitutionalism also requires division of power combined with checks and balances, democracy and limits upon majoritarian politics but the potential to both push for reforms and be critical of areas that they do not reach what would be considered legitimate minimum standards of governance within states provides the global constitutional ethic with a platform to push against any tyrannical tendencies within international law.

The potential for benevolence is also critical in understanding law beyond the state as examples such as UN Sanctions Committee or the administration of states in transition demonstrate the positive tasks that international law contributes toward. It forms part and parcel of the governance system that creates the processes by which these are set up, administered and are held account. Yet, the very lack of fulfilment of very basic levels of accountability and oversight taints this benevolence with tyrannical form and as previously discussed limits what it can achieve. Both Arendt and the classical tradition agreed that tyranny included the seeds of its own end as benevolence created the groundwork and drive toward a public realm. This may also be part of the trigger toward the constitutional ethic, in that the existing benevolence is in itself fuelling a wish for the system to more fully engage and go further perhaps toward constitutionalism but also other governance possibilities.

In many ways, within the global governance order, the fifth characteristic is directly related to the sixth, that domestic constitutional structures do not necessarily mean that states acting beyond the state will not behave as tyrants. The rise of imperialism was concomitant with the rise of modern international law and both remain deeply intertwined.[463] Albeit authors such as Tully argue that the constitutional language can accommodated anti-imperial undertakings through its flexibility this has not prevented states from taking on the role of imperial actors.[464] This imperialism was largely led by states that had full domestic constitutional orders. In the contemporary era Third World Approaches to International Law clearly demonstrate ongoing acts of imperialism suggesting that the spread of constitutionalism at the domestic level has not impeded this tendency.[465] Other authors also question whether it is possible to consider democracy at the domestic level as offering compensation for its absence beyond the state.[466]

To return to the first characteristic, the continued relevance of tyranny. Whilst it is arguable whether the global governance order is fully or partially tyrannical and this article certainly cannot claim to sufficiently cover the constitutional ethic beyond the state to make such a claim probing this possibility is critical. The relevance of tyranny is that it both questions the motivations for the push toward constitutionalisation and other public law forms but also adds an additional purpose to these debates in suggesting that even if they are incorrect in their claims they can usefully point to insufficiencies in global governance beyond the state. Perhaps this last element is the most important, that constitutionalism offers a basis to shine a spotlight on international law's tyrannical tendencies. It is thus essential that scholars in this field take the opportunity to offer critique rather than an ever purposeful utopian view of the future of law beyond the state.

Conclusion

This piece is not intended to question the utility of the move toward a constitutional ethic within international, regional and supra national law nor is it envisioned as an assault on the existence of law beyond the state. Rather, it is intended to add to the debate on constitutionalisation at the supranational and global levels by asking whether in making the claims toward an already realised or in train constitutional process ought we ask what the impetus for identifying these processes is, why has it resulted in a turn to constitutionalism and what it means for law's place within global governance. Further if we find that a fear of tyrannical power, and this article is certainly suggesting this, is a partial explanation for the turn to constitutionalism we can usefully engage the tools provided by it and a public law ethic more broadly, to expose where gaps in global governance exist and advise where this tends toward the tyrannical. What is evident from this overview of tyranny is that ultimately it is always a-constitutional and it is this characteristic which this article suggests is the core rationale for the turn to constitutionalism. Tyranny and constitutionalism are not concomitant thus if there is an existent constitution international law and governance cannot be tyrannical.

Thus, rather than relying on positive examples of where the rule of law is *in situe* to ignore where rule by law prevails, this new constitutional ethic could be utilised as a critique of existing fissures within law beyond the state. Instead of relying on an ever positive account of the process of constitutionalisation

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[463] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004), B. S. Chimni *International law and world order: a critique of contemporary approaches* (Sage Publications, 1993)

[464] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995) 31

[465] N. White *Democracy goes to war: British military deployments in international law* (OUP, 2009), P. Clark, Z. D. Kaufman *After Genocide: Transitional Justice, Post-conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Columbia University Press, 2009), A. Anghie 'Decolonising the idea of "Good Governance"' in B. Gruffydd (ed) *Jones Decolonizing International Relations* (Rowman & Littlefield, 2006) 109

[466] A. Duxbury, *The Participation of States in International Organisations* (CUP, 2011) 299 and R. Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case' in in A. Føllesdal, J. Karlsson Schaffer and G. Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspective*s (CUP 2014) 243

to make a case for its existence by adding a tyranny based understanding to the debate an account of the failure to fully engage with the entire panoply of rule of law or other public law elements such a democratic legitimacy, checks and balances or a rights based discourse would be required. Further it would make it necessary to consider what form constitutionalism must take if it is to leave behind all elements of tyranny.

Global public law will need to take up the challenge of moving from tyrannical to constituted power. The incidences within global public law where tyranny's rudimentary elements may be found are far too frequent. Yet the political and legal question is whether we wish to undertake fundamental reform based within constitutionalism or are we content with tyranny beyond the state and satisfied that the constitutional narrative may be used to cover the fissures that exist in the system rather than highlighting them. The existing ambiguities should not be used to enable an otherwise questionable constitutionalisation, or other public law process, to pass muster simply because it assuages our concerns that international law contributes to tyranny in law beyond the state.

International institutions and legitimacy

Pavlos Eleftheriadis*

The theoretical debate on pluralism in law has only indirectly overlapped with the debate on global justice. It has often seemed that the former appears as a merely institutional concern of experts in law, whereas the second as a moral preoccupation for philosophers, economists and activists. In my view the two issues are closely related. They both turn on a view of the legitimacy of international institutions. It is wrong for philosophers to ignore institutions of law and it is equally wrong for lawyers to ignore global justice. In order to see this we will need to set aside the artificial distinction that is often drawn between legal and political obligation. This is the epicentre of the 'positivist' theory of law, which is currently popular among legal philosophers. Legal positivism is an attractive theory because it simplifies law and legal reasoning. It is nevertheless misleading because it fails to capture both our basic common sense assumptions about law and the content of technical legal doctrine. Under the legal positivist dogma legal obligations and rights become inscrutable. They come to mysteriously occupy a space occupying both the world of fact and the world of value. Legal positivism is incoherent because law is another area of practical reason, a series of arguments that run parallel to morality and ethics. In my own earlier work I offered a theory of law as practical reason, which is constructivist in method and egalitarian in inspiration, based on the work of Kant and Rawls.[468] I believe that the same theory can illuminate international institutions. In this essay I argue that once we understand the law as a body of rules, practices and institutions with moral standing, the question of pluralism and the question of global justice are seen as two sides of the same coin. Lawyers and philosophers have a common task, to understand and interpret the moral nature of the division of the world into states.

Global justice

The debate on global justice has arisen out of the question of whether or to what extent the affluent peoples of the world have a duty of justice to assist poorer countries and peoples. Some philosophers argue that the duty is as strong as the duty of distributive justice that wealthy citizens have to assist their fellow citizens within the same society.[469] Other philosophers disagree.[470] Although they start from the same universalist premises, they argue that state borders create a morally significant distinction between fellow citizens, to whom a duty of social justice is owed, and all others, to whom such a duty is not owed. For this view outsiders have only a weaker – although real and demanding - duty of humanitarian assistance, if and when essential human needs vital to survival are at risk. These theorists give different reasons why this is the case, but all of them consider that a special and distinctive political relationship that ties citizens together is a necessary requirement if any bonds of social justice are to arise.

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* Fellow and Tutor in Law, Mansfield College, Oxford. I am very grateful to all the participants at the Florence workshop for their extremely helpful comments. An earlier draft of this paper was presented at the workshop 'In Pursuit of Pluralist Jurisprudence' at the National University of Singapore in February 2015.

[468] Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008).

[469] See for example Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), Charles Beitz, *Political Theory and International Relations*, revised edition (Princeton: Princeton University Press, 1999), Peter Singer, *The Life you Can Save*: *How to do your Part to End World Poverty* (New York: Random House, 2010), Peter Singer, 'Famine, Affluence and Morality' 1 *Philosophy and Public Affairs* (1972) 229-243.

[470] See for example John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), Thomas Nagel, 'The Problem of Global Justice' 33 *Philosophy and Public Affairs* (2005) 113-147, Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000).

This debate, important though it is, covers only part of the relevant ground. It has not dealt with the question of the legitimacy of existing institutions. In my view, an account of the legitimacy of international institutions is a prerequisite for all theories of global justice. The distinction between legitimacy and full justice is generally accepted for the domestic case.[471] Legitimacy is normally the result of a set of standards of justice that protect the standing of citizens as free and equal in the normal operation of institutions and procedures, but do not constitute a full social ideal. How this basic idea applies to international institutions is a relatively new area of political and legal theory.[472] But the question is highly relevant to global justice. If a certain distribution of wealth were to be delivered through unjust processes, for example through colonial conquest or some other type of violent imposition, it would be for that reason alone unjust and unacceptable. Lesser forms of violations of legitimacy, through non-violent electoral fraud, for example, would also have the effect of rendering outcomes unjust, even if they meet substantive tests of distribution.

I will address these issues by discussing three cases of action across borders. Assume that motivated by a desire to be the best moral person he can be, one of my postgraduate students, let us call him Karl, sets out to act on global inequalities.[473] He collects money and provisions through donations from affluent well-wishers in Oxford and sets off on a cargo ship for Freetown in Sierra Leone. Karl chooses this place over others because of the stories of great suffering that have reached him about it.

Here are three scenarios of how Karl's venture may end up:

1. *Benevolent Harm:* When Karl arrives in Freetown, he sees a large group of women and children. They look desperate, so he gives them what he can and returns to his ship. On the way back a passer-by tells him that these people were part of a rebel group that has terrorised the countryside. They recruited child soldiers and forced them to commit atrocities. Their armed friends were out rampaging, so he did not see them. To his horror, Karl realises that he has assisted a group of criminals.
2. *Helpless Delegation*: Karl chooses to delegate his choice of recipients of aid to Ernest, a local politician who seems powerful and knowledgeable enough. Ernest knows about the local needs and could – potentially - enforce a fair distribution, if he wanted to. He is educated and sounds serious. But Karl has no way of controlling Ernest. He cannot guarantee that Ernest's decisions will be the right ones, or that his actions will be overseen by an independent judge. Ernest could, conceivably, use the money and provisions for his own ends, for example to favour his clan or his allies. Karl has no mechanism at his disposal for preventing this or for holding Ernest to account after the fact.
3. *Benevolent Good*. Before he ventures out on the field Karl sends representatives with the task of establishing patterns of a desired distribution according to an acceptable social model for Sierra Leone. When he arrives in Freetown, he has already identified those in need on account of demographic data. He gives the required provisions only to those charities working in the relevant

[471] See for example Allen Buchanan, 'Political Legtitimacy and Democracy' 112 *Ethics* (2002) 689-719, Thomas Nagel, 'Moral Conflict and Political Legitimacy' 16 *Philosophy and Public Affairs*, (1987) 215–240, Fabienne Peter, *Democratic Legitimacy* (New York: Routledge, 2008), Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity,* trans. by Arthurh Goldhammer (Princeton: Princeton University Press, 2011).

[472] For some relevant discussions see Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' 20 *Ethics and International Affairs* (2006) 405–437, Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, John Tasioulas, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 97-116, Allen Buchanan, 'The Legitimacy of International Law' in Besson and Tasioulas (eds.), 79-96 and Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), Ronald Dworkin, 'A New Philosophy of International Law' 41 *Philosophy and Public Affairs* (2013) 1. I shall return to these issues in section VI below.

[473] I shall assume that Karl is motivated by something like Peter Singer's argument in 'Famine, Affluence and Morality' for direct individual action.

areas. He cannot monitor the charities but he is optimistic that they will do what he asked them to. They also have some internal processes of accountability.

Has Karl helped the people he wanted to help in each one of these cases? In the first case of 'benevolent harm' it is clear that he has not. His motives were good, but the outcome was obviously disastrous. In the second case of 'helpless delegation' it is impossible to know the outcome. There is no guarantee that the provisions will end up in the right hands. These are the risks of a personal crusade. The problems raised by this example have been well documented by development economists who raise the spectre of unintended consequences of aid. William Easterly, for example, has argued extensively that aid has been ineffective, through lack of local knowledge or through such unintended consequences as assisting corruption, creating the wrong incentives etc.[474] So there are reasons to doubt the effectiveness of Karl's giving.[475] Peter Singer acknowledges these difficulties by saying that 'in the past, a lot of official aid has been misconceived and misdirected and has done little good'. He still concludes with optimism that if more money were available, it would be spent more wisely: 'But it scarcely seems possible that, if we truly set out to reduce poverty, and put resources into doing so that match the size of the problem – including resources to evaluate past failures and learn from our mistakes – we will be unable to find ways of making a positive impact'.[476] I am not sure this is an adequate response in general. In any event does not assist Karl.

What about the third case, that of 'benevolent good'? We may say that Karl has done some good. He has delivered provisions to people in need. But is this enough to meet the tests of social justice? The problem is that Karl has no overall account or idea of the pattern of distribution he intends to achieve. Surely distributive justice is about a pattern of distribution, not indiscriminate giving. But Karl does not seem to have an overview of the distribution of resources among the people of Sierra Leone. He does not seem to have a pattern of desired distribution among this people and all the other peoples of the world. Nor is it possible that his small contribution will do anything to remedy any overall pattern. His involvement, we have assumed, is time limited and does is not being assisted by established institutions. He acts on his own out of a sense of personal duty, having perhaps read the books of Peter Singer. He cannot correct any errors with a second or third shipment of aid, in case his first shipment went wrong. There is a great deal of uncertainty about the longer terms effects of this attempt.

I believe that in this case Karl has violated the requirements of distributive justice, irrespective of the outcome. Many cosmopolitan theorists, Peter Singer being one of them, fail to distinguish between alleviating destitution and distributive justice which means narrowing the gap between rich and poor. But these are distinct moral aims that require different actions. Destitution is, for Rawls, the subject of a 'duty of assistance' in favour of 'burdened societies'.[477] It is a true moral duty, but it is something that is very different from ordinary social justice. Such a duty has a cut-off point, namely the point where a society becomes 'well ordered'. This is not a principle of 'distributive justice' because it is not about inequality, i.e. relative wealth. The aim of the duty of assistance is not adjusting inequality, but providing relief for absolute destitution. Similarly, when Thomas Nagel discusses global justice he is concerned with differences of wealth, not absolute levels of poverty that call for a humanitarian response. Nagel says quite clearly that humanitarian duties 'hold in virtue of the absolute rather than the relative level of need of the people we are in a position to help'.[478] He contrasts these duties to the duties of social justice,

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[474] Wililam Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done so much Ill and so Little Good* (Oxford: Oxford University Press, 2006), which argues that ambitious plans for development aid often fail for lack of local knowledge or because they create the wrong incentives.

[475] Singer reponds to similar objections in *The Life you Can Save* 105, where he notes Easterly's arguments and responds that aid has been ineffective because it is normally politically motivated in order serve the interests of the giving power (p. 106-110).

[476] Singer, *The Life You Can Save* 110-111.

[477] Rawls, *The Law of Peoples* 106.

[478] Nagel, 'The Problem of Global Justice' 119.

which are 'concerned with the relations between the conditions of different classes of people, and the causes of inequality between them'.[479]

By mixing the two questions together, Karl has failed to provide any reason or plan or strategy as a response to the challenges of inequality. By not providing any overall such plan or desired end Karl has not even started promoting his cause. Giving money or resources to the poor is not the same thing as achieving social justice. What if Karl's continuous giving made the people of Freetown unusually well-off compared to their countrymen? Karl does not take social justice seriously.

This, however, is not the most important failure of Karl's venture. In the view that I wish to defend, there is a deeper moral failure and all three cases are examples of it. In all of them Karl has violated his duties of justice to the persons that share the world with him. In each case his actions were *illegitimate*. This is so even though in the last case, he may have caused no harm. Karl acted unjustly because in each case he ignored the self-governing institutions of the citizens in Sierra Leone. These institutions may not be perfect, but they are delivering a multi-party democracy with free and fair elections. For example, the current President of Sierra Leone is Ernest Bai Koroma, a former insurance executive, who won the presidential election of 2007 and was re-elected in 2012. By treating the national institutions of government as non-existent or irrelevant, and by seeking in each case to impose his own account of social ideal on Sierra Leone, Karl has treated the citizens that set them up as inferior to himself. Irrespective of whether he had good intentions – which he did – and irrespective of whether he produced any good results – which he also did in the third case – Karl's actions did not promote the cause of justice. Justice in political matters requires respect for the equality of persons as free and equal citizens. This equality of persons is the most important principle of any political community and it is only possible through the creation of political institutions. This is true both for the domestic case and for the international case. This is not a formality or a detail. If one undermines these institutions one undermines equality. And the duties to respect them are prior to any duties of social justice. This is the point I wish to develop in the next three sections.

Illegitimacy as injustice

Thomas Nagel argued for a 'political conception' of social justice, according to which only those sharing a state are subject to the requirements of social justice. His interest, as we have seen, was not in humanitarian assistance alone, but on the requirement of justice that arises out of relative poverty. He wrote that whereas 'humanitarian duties' bind us in virtue of the absolute rather than the relative level of need of the people we are in a position to help, justice by contrast is relative. It is concerned with 'the relations between the conditions of different classes of people, and the causes of inequality between them'. He then set out to answer the question of 'how to respond to world inequality in general from the point of view of justice and injustice rather than humanity alone.'[480] Nagel argued that when we share a state with others we are subject to the same coercive rules and involuntary terms of association. Such terms of association are imposed on all of us 'in the name' of each member, so that we are all considered 'joint authors' because our will is actively 'engaged' in their production.[481] These facts create a certain social relation with other citizens, Nagel claims, which creates on us an obligation that our relations are guided by the principles of egalitarian social justice. But when this social relation is absent, the duties are absent too. Outside these political relations we are only bound by weaker ties of humanitarian moral concern. Nagel's conclusion is that social justice is the exclusive domain of sovereign states and cannot be extended to the domain of global society. For his political conception 'states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign

[479] Nagel, 'The Problem of Global Justice' 119.

[480] Nagel, 'The Problem of Global Justice' 119.

[481] Nagel, 'The Problem of Global Justice' 128-129.

state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice'.[482]

One group of Nagel's critics have responded by challenging his major premise. They challenge the idea that social justice requires a 'political relationship' and argued that membership had no serious moral significance. Simon Caney argues, for example, that for the cosmopolitan outlook there is no fundamental difference between the domestic and global realms 'such that the values that are appropriate in the former realm are inappropriate in the latter' and that the principles to be applied in the global realm should be 'continuous' with those we think appropriate in the domestic realm.[483] For cosmopolitan arguments of this type, borders make little difference.

Another group of critics challenge the minor premise, namely the position that modern international institutions and transactions have not created a sufficiently robust relationship among distant strangers. Cohen and Sabel, for example, argue that in contemporary global politics 'we have a mix of precisely the conditions of interdependence, cooperation and institutions that have justice-generating implications' according to Nagel's theory.[484] In their view international regimes and institutions entail justice-generating conditions of collective normative engagement, similar to that which exists in the domestic case. The appropriate response to these interactions, of course, is not a world republic, but institutions of rule-making that ought to be flexible and creative under what they call a 'pluralist' view. For their position, these new forms of international interrelations should create novel institutional moral responses. These, however, are a matter of social justice, not a matter of mere humanitarian concern. I shall call this view '*institutional cosmopolitanism'* and will contrast it to the '*global cosmopolitanism***'** of Caney and Singer.

How do these positions respond to the scenarios of direct aid I outlined above? The facts of Karl's expedition concern a strictly bilateral relationship. They link a citizen of one state with the citizens of another. It follows that under Nagel's 'political conception' no issue of social justice arises between them. Since givers and recipients are not part of the same political community and belong to different states, their relations are outside the framework of social justice. Karl was under no duty of social justice to assist in adjusting inequalities (although he well have had a duty of humanitarian assistance in extreme cases). Of course, this is only part of the assessment of the overall situation.

I believe that under 'institutional cosmopolitanism' the answer with regard to the applicability of social justice would have been the same. For the view defended by Cohen and Sabel there is no relevant institutional relation connecting the agents and the recipients of aid in such a way as to create obligations of social justice. This is true even though the UK and Sierra Leone may have had strong connections and interactions via the United Nations, the Commonwealth of Nations, the IMF or other international institutions. If this is the case, the resulting duties will not be bilateral, however, but international. Just like the 'political conception' the 'institutional cosmopolitan' theory will most likely interpret Karl's expedition as a private event among unconnected persons. No issues of social justice arise between them. What Karl did was, at most, an act of supererogation.

For the 'global cosmopolitan view', however, the answer will be different. It must follow from Singer and Caney's arguments that a moral relationship already exists between Karl and the citizens of Sierra Leone, irrespective of national borders and membership. A basic human relationship connects Karl to

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[482] Nagel, 'The Problem of Global Justice' 120.

[483] Simon Caney, *Justice Beyond Borders* (Oxford: Oxord University Press, 2005) 265, See also Beitz 1999*a*: 288; P. Jones2000

[484] Joshua Cohen and Charles Sabel, '*Extra Rempublicam Nulla Justitia*?' 34 *Philosophy and Public Affairs* (2006) 147, at 166. See also Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) 11-53. Pogge's view is distinct in that it sketches an argument concerning a duty not to cause social injustice through our own institutions, which is not, strictly speaking, an argument for 'distributive justice' but an argument for corrective justice which seeks to remedy a direct moral wrong.

the residents of Freetown and creates duties of social justice. For this view, whatever happened in the three cases or Karl's adventures, it happened under a framework of duties of social justice. The real contrast therefore is between this view and the other two.

These issues, however, not the most important moral questions raised by Karl's actions. The three theories of global justice just surveyed make no difference at all to the justice or injustice of the situation Karl finds himself in. Whatever view one takes of social justice, Karl's actions exhibit a violation of a more fundamental problem of political morality. All three examples are cases of a violation of political or constitutional justice as it applies to international institutions. They are all examples of illegitimate action. The cases are interestingly complex because they record what appears to be a failure of the attempted offer of aid. The degrees of failure are clearly relevant to our moral response to them, but they do not exhaust the morally relevant considerations. Far from it, they are actually secondary to a deeper moral concern. The injustice of these actions in these cases is not on account of their outcome but in the very attempt. Karl acted wrongly merely by setting out to achieve his benevolent aims. Even under 'global cosmopolitanism' his actions were unjust.

First, he ignored Sierra Leone's local institutions, because he did not seek to cooperate with them. He bypassed all domestic authority, local or national. He behaved as if those authorities did not exist, or if they were morally irrelevant. But by doing this he failed to show equal respect to the citizens of Sierra Leone. These citizens made their country's institutions possible, for example, by voting in elections and holding office. He treated them as if these institutions did not matter. He treated them as if they were his social inferiors.

Second, he acted unilaterally in seeking to impose a social ideal with the force of his money. His actions sought to bring about a benevolent ideal, but an ideal that was strictly a unilateral imposition. The recipients of his aid had no opportunity to contribute to the formulation of a social ideal as a public political project. He acted simply on his own conception of Sierra Leone and the world. By setting out to impose a social ideal unilaterally and without engaging with local institutions, Karl usurped the legitimate political functions of legislation and policy-making. These functions, however, the citizens of Sierra Leone have entrusted to their own political institutions of self-government.

His actions are wrong in a further sense. He provides no account of a process or method for ensuring that his project of social justice could succeed. Every aspect of his plan to bring social justice in Sierra Leone was based on chance. He hoped that his agents would be reliable, but has no method of assessing them or holding them to account. He hoped that they had the ability to deliver, but he did not train them. Finally, his project of bringing about a fair distribution was hopelessly incomplete, since the means he had chosen were entirely inadequate for achieving the aims. In all such respects, delivering effective social justice requires institutions that only a state possesses: it requires a democratic legislature and a process of legislation, a mechanism of administration through an effective government and the oversight of courts through a fair judicial process. These are not just matters of instrumental value. They are matters of justice.

One does not need to settle on a view regarding the political conception, institutional cosmopolitanism or global cosmopolitanism to see this point. One of our most basic moral duties, one that is a universal, general and comprehensive moral duty, is the duty to respect the legitimate political institutions that were set up by our fellow human beings. This duty, which I shall call the duty of jurisdiction, exists whenever these institutions meet the basic tests of legitimacy for political institutions.[485] Karl was misled by his failure to take into account that domestic legitimacy entails a cosmopolitan duty of respect for other people's institutions.

[485] This is what Rawls calls a 'reasonably just constitutional democratic society' in *The Law of Peoples*, 49-51

Cosmopolitan legitimacy

What do we learn from these examples? A constitutionally legitimate state does not guarantee social justice. This is the key to the distinction between legitimacy and justice. The so called paradox of democracy is that I may consider the government just and unjust at the same time: just, because it was elected and unjust because of what it does to inequality. The position appears to be a paradox because the government's actions are both just and unjust at the same time.

An ideal of legitimacy is the only way out of the paradox and it explains our common sense judgments. Processes, elections and governments can be just in themselves. Whether their outcomes is just is a separate issue. Legitimacy is thus a matter of institutions and procedures.[486] This type of justice determines the acceptability of political processes, the scope of the separation of powers, the powers of courts and the like. Whether a legitimate political process delivers a social ideal is another question entirely. This is also a common view among the social contract tradition. Rousseau outlined this view when he wrote that it 'in order… that the social compact not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body…. In this lies the key to the working of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical and liable to the most frightful abuses'.[487] Rousseau in effect says that the institutional enforcement of the general principles that come with the social contract is key for legitimising civil offices. Without such enforcement mechanisms, a civil association would be tyrannical and open to abuse. The whole range of civil offices the 'political machine' is relevant to this issue, however: legislature, executive and judiciary. Institutions make justice possible. There are constitutional and procedural rules about how to set up these institutions fairly. Kant and Rawls have said similar things in vindicating the constitutional state.[488]

But this answer, even if true in the national domain, is not enough to answer the international question. Why not set domestic legitimacy aside when the international problems require it? After all, the problem of global poverty is a humanitarian disaster of extreme urgency. For this reason Simon Caney dismisses Rawls' argument regarding self-government out of hand. Rawls had argued that it would be unfair to seek to equalise conditions among two societies, where one of the had chosen to industrialise and the other had not.[489] He assumed that it would be unfair to seek to reverse decisions they took freely. Caney considers Rawls' argument 'extremely unjust toward individuals'.[490] He asks: 'Why should a member of a Third World country be economically disadvantaged because of a decision that the political elite in that country made and with which they disagreed?'[491] Caney mistakenly thinks that Rawls' argument derives its force from the consent of those disadvantaged. But Rawls' argument is entirely different. It derives its force from the need for legitimate constitutional institutions, which of course may not be consented to by many, and the fact that in the absence of a world state, legitimate states must have a 'democratic peace' between them built on the basis of international law.[492] The answer is the same both for developed and developing countries: without constitutional institutions, there can be no justice.

Caney rejects this argument because his way of thinking is entirely instrumental. Caney sees all institutions as the means to a higher end, namely the satisfaction of people's interests. He derives, for example, a 'human right' not to suffer from poverty, from the fact that 'persons have an interest in

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[486] I argue in detail for this point in my 'A Theory of Jurisdiction' (forthcoming).

[487] Rousseau, *Social Contract*, in *The* Social *Contract and Discourses*, trans. By G. D. H. Cole (London: Dent, 19730, bk bk. I, ch. 7, p. 195.

[488] I discuss some of these issues in Eleftheriadis, *Legal Rights* 51-60.

[489] Rawls, *The Law of Peoples* 117-118.

[490] Caney, *Justice Beyond Borders*, 130.

[491] Caney, *Justice Beyond Borders*, 130.

[492] Rawls, *The Law of Peoples*, 44-54. For the basic principles of international law see Rawls, *The Law of Peoples* 37.

having the opportunity not to suffer from poverty'.[493] He dismisses arguments from the legitimacy of institutions or the self-government of states by claiming that such arguments 'penalize' those born into an impoverished system and 'depriving them of the very means to live, simply because of their 'place of birth'.[494] On this basis Caney concludes that there is an overwhelming duty of justice to 'eradicate poverty'.[495] But this argument fails to see that nobody is 'penalizing' the poor by respecting their legitimate institutions. Poverty is not caused by our inaction to relieve it. As Karl's examples show, no individual persons has the power to alleviate poverty around the world or to bring about justice single-handedly. We should alleviate suffering whenever we can. But the questions raised by the demand social justice are entirely different and far more comprehensive. No individual can answer them.

A similar but more sustained argument for the relative insignificance of institutions is made by John Tasioulas, who argues that as a matter of principle an institution, national or international makes little difference to our moral position. Tasioulas postulates that an authority is legitimate when its outcomes are correct, or 'when its putative subjects would likely better conform with the reasons that apply to them by treating the putative authority's directives as content-independent and exclusionary reasons for action than if they adopted some other guide'.[496] Tasioulas adopts here Joseph Raz's view of authority and concludes that what matters for legitimacy is 'enhanced conformity with reason', even if it is not 'perfect conformity'.[497] Nevertheless, as I have argued elsewhere,[498] this is no theory of legitimacy at all. Under such a theory the structures of law have no priority. It is a theory of outcomes, not processes. But this comes at a cost. The instrumental view would perhaps see nothing wrong in Karl's usurpation of state authority, it would produce the desired outcomes. For if global poverty could be addressed through a new colonialism, then colonialism becomes a duty of justice. Caney and Tasioulas provide little argument to deflect this unattractive conclusion.[499]

Most philosophers would wish to retain legitimacy as a standard feature of all international law and politics. They would wish to maintain just processes. One such attempt to show that legitimacy is prior to outcomes is offered by Allen Buchanan, who specifies, contrary to Tasioulas, that 'the rules of a legitimate institution have a privileged status vis a vis our reasons for acting' and that 'their having this privileged status is not dependent on their content'.[500] In his view legitimacy is less demanding that justice and it is for that reason much easier to reach.[501] Buchanan argues that for what he considers the 'dominant' philosophical view legitimacy justifies a 'right to rule' and requires six elements, namely that a) the institution's agents are morally justified in engaging in governance functions, b) use morally justified coercion, c) are exclusively justified in exercising coercion, d) are justified in excluding others from exercising governance activities, e) those whom the institution attempts to govern have a content-

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[493] Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' in Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*? (Oxford: Oxford University Press, 2007) 275, at 277. I have argued that the interest theory is a very poor fit for a theory of human rights in Pavlos Eleftheriadis, 'Human Rights as Legal Rights' 1 *Transnational Legal Theory* (2010) 371. I argue there that human rights are not 'summaries of value' but institutional protections of liberty.

[494] Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' 283. See also Caney, *Justice Beyond Borders* 111-112.

[495] Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' 288.

[496] Tasioulas, 'The Legitimacy of International Law' 100.

[497] Tasioulas, 'The Legitimacy of Inernational Law' 102.

[498] See Eleftheriadis, 'A Theory of Jurisdiction'.

[499] This problem also makes less persuasive Samantha Besson's argument that 'individual autonomy' is the legitimating ground of international law because she too fails to explain the distinct moral standing of state institutions. See Samantha Besson , 'The Authority of International Law—Lifting the State Veil' (2009) 31 *Sydney Law Review* 343, 374.

[500] Buchanan, 'The Legitimacy of International Law' 83. Buchanan contrasts legitimacy to 'authority', which entails the 'right to be obeyed' as well; see for example Buchanan, 'Political Legitimacy and Democracy' 691 and Buchanan, *Justice, Legitimacy and Self-Determination* 237.

[501] Buchanan, 'The Legitimacy of International Law' 81.

independent moral obligation to comply with all the rules the institution impose and f) citizens have a duty not to interfere with the institution's effort to secure compliance. Buchanan considers these requirements to be too strong to apply to anything except states. A different set of requirements should apply, he thinks, to international institutions which would not include, for example, the exercise of coercion.

His argument is that in the international context political power is legitimate if it does a credible job of protecting at least the most basic human rights of those over whom it wields power, as long as it provides this protection through processes, policies and actions that themselves respect the most basic human rights and is not a usurper.[502] On the basis of these premises Buchanan postulates a 'robust natural duty of justice, which is related to a 'moral equality' principle.[503] Buchanan's overall argument is very rich in detail and suggestive. However, it lacks clarity on one question. Why should anyone be concerned only with the *most basic* human rights and not the full range of human rights and justice? Why not consider that an situation is only legitimate if it protects all available human rights, basic or not? The problem is that if legitimacy is *less* than full justice then the paradox emerges in another form. For why should we prefer less justice than more? I don't think Buchanan's effort to elevate legitimacy on the basis of 'basic rights' can therefore succeed. His argument, however, points to the correct answer, which is in my view is an argument for the moral distinctness and priority of constitutional justice. This is the argument we find, I believe, in Kant and Rawls.

Legitimacy, for this view, concerns the way in which citizens are related to one another as free and equal. Legitimacy depends on a foundational constitutional principle of equal citizenship which protects everyone's rights to participate in a democratic process and to have equal standing before the law. The argument has been outlined in great detail by Kant, who explains that the creation of a legal order (or a 'civil condition') according to the principles of constitutional justice (or 'public right') is a natural duty of justice that binds everyone.[504] Kant writes that the 'civil condition' is not simply a union for some common end, but a union which is 'in itself an end' and which is the 'unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another'.[505] Setting up a constitutional order that complies with the principles of equality and reciprocity is thus the 'supreme formal condition' (*conditio sine qua non*) of all other external duties, without which no external duty is possible. The principle is necessary and formal because no empirical end can be the focus of a similar agreement: 'for, since people differ in their thinking about happiness and how each would have it constituted, their wills with respect to it cannot be brought under any common principle and so under any external law harmonizing with everyone's freedom'.[506] As I read him Kant make a simple point about the priority of legitimate institutions. An effective and egalitarian legal order is a pre-condition for any other form of social justice.[507]

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[502] Buchanan, *Justice, Legitimacy and Self-Determination*, 247 and Buchanan, 'Political Legitimacy and Democracy' at 703.

[503] Buchanan, *Justice, Legitimacy and Self-Determination*, 85-97 and Buchanan, 'Political Legitimacy and Democracy' at 704.

[504] Strictly speaking this is a 'postulate' for which no further proof is possible, see Kant, *Metaphysics of Morals*, translated by Mary Gregor, in Kant, *Practical Philosophy*, edited by Allen Wood (Cambridge: Cambridge University Press, 1996) 6:231, p. 388. For this 'postulate' see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009) 355-388. The principle is however backed by a duty of virtue of 'respect' for other human beings: 'Every human being has a legitimate claim to respect from his fellow human beings and is *in turn* bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end'; Kant, *Metaphysics of Morals*, translated by Mary Gregor, in Kant, *Practical Philosophy*, 6:462, p. 579.

[505] Kant, 'On the Common Saying: That May be Correct in Theory, but is of no Use in Practice' in Kant, *Practical Philosophy*, trans. and edited by Mary J. Gregor (Cambridge: Cambridge University Press, 1996) 8:289, p. 290.

[506] Kant, 'On the Common Saying', 8:290, p. 291.

[507] I discuss these issues in greater detail in Eleftheriadis, *Legal Rights* 44-67

Rawls makes a very similar point. He tells us that the natural duty of justice to support legitimate institutions is separate but on a par with other natural duties, such as the duty of mutual aid, i.e. 'the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself', the duty 'not to harm or injure another'; and 'the duty not to cause unnecessary suffering'.[508] These are horizontal relations to other persons with whom we come into contact, without having any special relationship with them. These natural duties are moral duties that apply irrespective of one's relationship to a given state. In that sense they are 'natural': 'A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally'.[509] These duties, Rawls tells us, are owed to every person.

The cosmopolitan dimension is inherent in the argument for legitimacy. All social institutions, ours and the institutions of others, are human creations. This is why different nations and peoples are responsible for the basic structure of their own societies (and should feel a measure of shame for their failures). Success in setting up a legitimate constitutional structure is, conversely, something of value because it recognises and respects our creative and moral potential as agents. A legitimate state is, thus, not a set of ephemeral encounters, nor is it a series of agreements. Its value lies not in the goodness of the results it secures, but in that it is an attempt at securing equal respect for everyone through institutions of justice. As Rawls and Kant explain, this kind of excellence derives from justice, not goodness and it is a kind of performance, not a pursuit of any particular end.[510] I can show respect to people as free and equal agents, even if they are living very far away from me.

Everyone can understand the difficulties and challenges of creating and sustaining legitimate institutions. Michael Walzer, for example, has explained that the moral standing of states depends on the political communities that underpin them and on an idea of a 'communal integrity' which 'derives its moral and political force from the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves'.[511] We do not need to accept this picture in its entirely. The moral standing of political communities has been explained by Kant somewhat more austerely with the metaphor of a tree with its own trunk and roots:

'for a state is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots; and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea for the original contract, apart from which no right over a people can be thought'.[512]

Whenever constitutional justice has been achieved I shall call the resulting set of institutions a 'jurisdiction'. The personal duty of respect to any legitimate state that exists, however far away from us, I shall call the duty of jurisdiction. The duty of jurisdiction requires us to respect appointed officers in the host state and recognise in them the moral standing of all the co-legislating citizens and their success in setting up just or nearly just institutions. It is a natural duty that binds everyone, irrespective of their actions or the particular way in which they relate to a state. The moral basis of jurisdiction, however, has a reciprocal effect.

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[508] Rawls, *A Theory of Justice* 98.

[509] Rawls, *A Theory of Justice* 99.

[510] We could perhaps say that they have 'adverbial' value, as explained by Dworkin in *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011).

[511] Michael Walzer, 'The Moral Standing of States: A Response to Four Critics' 9 *Philosophy & Public Affairs (1980)* 209-229, at 211.

[512] Kant, Towards Perpetual Peace, 8:344, in Kant, *Practical Philosophy*, p. 318.

Jurisdiction entails the recognition of reciprocal duties owed by all sates to all persons, citizens or non-citizens. Kant refers to this as the cosmopolitan right to 'conditions of universal hospitality'. Any foreigner can claim before any state official that they be treated with respect and without violence or mistreatment:

'What he can claim is not the right to be a guest (for this a special beneficent pact would be required, making him a member of the household for a certain time), but the right to visit; this right, to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely, but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth.[513]

It is obvious that such a cosmopolitan duty cannot derive from a relation of citizenship. The duties are moral duties to all human beings. Our duties are to each other.

Legitimacy and international law

What does this mean for our examples? I conclude that in all cases, Karl violated his duty of jurisdiction. By usurping the functions of the political institutions of Sierra Leone he failed to show equal respect to the citizens he was trying to help. His failure was not one of outcome, but one of attitude. His very intentions failed to respect the citizens of Freetown as equals, as persons whose joint efforts create legitimate institutions with cosmopolitan moral standing. By using one's money to impose a social ideal on them, whether they want it or not, one treats them as inferiors or as persons whose political rights can be bought or sold. What can be done about this? Does it follow that in the absence of a world state the only avenue for the legitimate pursuit of social justice is that of bilateral state relations? Is foreign policy the only option? I do not think so. International law and institutions may also enjoy legitimacy, even though it will be based on different grounds to the legitimacy of states. But to see how this is possible we need to have a new account of the legitimacy of multilateral international action and international organisations. This includes Security Council resolutions, European Union regulations and directives, International Court of Justice judgments, law-making mechanisms such as treaties, customary international law and even *jus cogens* create law. When are they legitimate?

It is obvious that there cannot be a duty of jurisdiction to international entities, since by definition jurisdiction is exclusive to a state. So the account of the legitimacy of international institutions cannot be the same one as that offered by Kant and Rousseau for the emergence of states since there is no attempt here to set up a legitimate 'civil condition'. International bodies do note exercise the same comprehensive political powers that states do, nor do they embody the creative moral work of equal citizens. So there is no duty of jurisdiction to them. This means that the legal institutions of international law and those of a constitutional law do not compete. They have different moral purposes. The key here is again to see this again as a problem of the required respect for persons. We saw that a legitimate state has special moral standing because and to the extent to which it sets up institutions guided by just and equal moral concern. But if a state is to recognise the equal moral standing of all persons, it must also at the same time recognise the moral standing of all those outside it. They too must at least receive recognition for their efforts to set up legitimate political institutions. This is not an external duty, imposed from outside, after such foreign political entities have been formed, so to speak. It follows that our state ought to endorse a principle of the *mutual recognition of states* and the recognition of international organisations that states bring about. This is what Rawls calls the requirement of 'democratic peace', which applies to the mutual relations of peoples and which leads to the basic principles of international law.[514] These establish, among others, the principles that peoples are to be free and independent, that treaties are to be respected and that human rights are to be protected. Rawls

[513] Kant, Towards Perpetual Peace, 8:358, in Kant, PP, p. 329.

[514] Rawls, *The Law of Peoples*, 44-54.

says that 'peoples are free and independent, and their freedom and independence are to be respected by other peoples'.[515]

Kant, like Rawls, concludes that democratic peace among nations (or as he calls it 'perpetual peace') does not need a world state, but the 'federalism of free states' that come together voluntarily in creating a league of nations under international law.[516] Having such principles of international law is, thus, required by the natural duty of justice because domestic institutions are incomplete without them.[517] Respecting institutions of public international law, international organisations and treaties is a domestic duty of justice, a duty we owe to each other.[518] These are very general principles, whose details of course will have to be filled out, just like the details of a constitution need to be filled out by constitution-making, legislation and adjudication.[519] But they show how the justice of the domestic constitution and the framework of international law are elements of the same project of justice. We cannot achieve one without the other.[520]

The continuity of international law with the natural duty of justice shows that the legal obligations of international law are not dissimilar to legal obligations in domestic law. They both derive from the same argument for legitimacy. But the argument also shows that international law is not a new legal system for the world as, for example, Kelsen assumed. It is the basis for the mutual respect of all the various different legal systems, properly understood as jurisdictions, and of ever closer and deeper coordination among states, from international trade to intellectual property and environmental protection. Understood as a legitimate basis for the self-government of all peoples at the same time, international law creates a duty of justice.

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[515] Rawls, *The Law of Peoples* 37.

[516] Kant, Towards Perpetual Peace, 8:354, in Kant, Practical Philospohy, p. 326. For an excellent account of the Kantian argument for international law see Amanda Perreau –Saussine, 'Immanuel Kant on International Law' in Besson and Tasioulas (eds.), *The Philosophy of International Law* 53. See also B. Sharon Byrd and Joachim Hruschka, 'From the State of Nature to the Juridical State of States' 27 *Law and Philosophy* (2008) 599-641.

[517] A very similar argument is made by Dworkin, when he says: 'A state is also defective in its legitimacy when it cannot protect those over whom it claims a monopoly of force from the invasions and pillage of other peoples. Any state therefore has a reason to work toward an international order which guarantees that the community of nations would help it to resist invasion or other pressure'; Ronald Dworkin, 'A New Philosophy of International Law' 41 *Philosophy and Public Affairs* (2013) 1, at 17.

[518] A similar argument is made by Leif Wenar who notices that any more directly 'cosmopolitan' argument for the global scope of distributive justice fail to acknowledge the need for principles outlining the rights and duties of states in their mutual relations. In effect, if the scope of justice is the globe, then international law must be replaced by (global) constitutional law – which would rule out treaties, custom and the other standard sources of international law. See Leif Wenar, 'Why Rawls is not a Cosmopolitan Egalitarian' in Rex Martin and David A Reidy (eds.), *Rawls' Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006) 95-114.

[519] And the most taxing duty of this specification is the determination of relations with states that are not legitimate. How are just states to treat unjust states or even barbaric regimes? This is a highly contested subject of international justice. Public international law has adopted so far a most cautious or conservative stance. It does not use internal political justice as a test for international recognition or legitimacy. If what we have said above is correct, this position is unjustifiable (and to some extent contradicts other parts of international law, such as human rights law or the statute of the international criminal court). See the pertinent comments by Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*. On the other hand, international law is not an independent constitutional order and its tools are limited. States are supposed to be self-governing. Peace and stability is unusually important. As in all public political decisions (where we make decisions that affects the lives of thousands or millions others) the consequences on others matter much more than the consequences on us. The difficulties are here genuine and deep, because policy and principle are inextricably tied together.

[520] A theory of international law along these lines is also defended by Ronald Dworkin who argues that the aim of international law is: 'the creation of an international order that protects political communities from external aggression, protects citizens from of those communities from domestic barbarism, facilititates coordination when this is essential, and provides some measure of participation by people in their own governance across the world. These goals must be interpeted together: they must be understood in such a way as to make them compatible'; Ronald Dworkin, 'A New Philosophy of International Law' 41 *Philosophy and Public Affairs* (2013) 1, at 22.

Pluralism and legitimacy

I will now turn, very briefly, to theories of pluralism. Recent arguments have made the case for seeing the relations between national law, international law and transnational law in terms of a new theoretical framework of pluralism.[521] These theories respond to the emergence of a significant body of transnational or international legal rules and scholarship. They tend to say very different things, however. One type of theory sees the problem that pluralism addresses as that of overlapping and therefore conflicting 'legal systems'. The problem they address is effectively one of a turf war fought by the various legal systems that claim exclusive effect or authority over a territory. Such theories are implicitly or explicitly inspired by the legal positivist view of law according to which law is a hierarchy of norms or rules, the ground of which is some significant event or fact, for example a 'rule of recognition', as Hart argued in the *Concept of Law*.[522] For law to exist, Hart argued, a special structure is necessary, which he called the 'union' of primary and secondary norms under a rule of recognition. The emergence of law depended, he thought, on the convergence in attitude and belief of officials and other relevant persons. The unity of the law depended on the clarity of the rule of recognition. If two rules of recognition existed at the same time they would create a constitutional crisis. A crisis occasionally happens but it is a 'substandard, abnormal case containing with it the threat that the legal system will dissolve'.[523] Hart's view on international law was that it does not meet these factual tests because 'there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties'.[524] A similar position is offered by Joseph Raz.[525] Raz takes the same view as Hart that states have legal systems, because a legal system requires a rule of recognition and consistent practices of officials, features that are evidently absent from international relations.[526] In a discussion of the institutional nature of law Raz leaves it open that international law may not be a proper legal system.[527]

Starting from these or similar premises, some pluralist theories identify a conflict between the overlapping systems or their 'rules of recognition'.[528] They conclude that transnational law has upset the unity or order or rules assumed by legal positivism and has created radical uncertainty about what law is and where its borders lie. Some theorists welcome such uncertainty as something positive. Nico

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[521] See for example Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), Roger Cotterrell, 'Transnational Communities and the Concept of Law' 21 *Ratio Juris* (2008) 1, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) and Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press, 2013). For my own criticism of pluralist theories as they apply to European Union law see Pavlos Eleftheriadis, 'Pluralism and Integrity' 23 *Ratio Juris* (2010) 365.

[522] H. L. A. Hart, *The Concept of Law*, second edition (Oxford: Oxford University Press, 1994).

[523] Hart, *The Concept of Law*, 123.

[524] Hart, *The Concept of Law* 236.

[525] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 98-99.

[526] Raz writes for example: 'Nothing is part of a legal system unless either it is a rule of recognition of the system, or the courts ought to recognize and apply it'; *The Authority of Law* 97. Raz's views are explored by Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010) 41-78. See also Joseph Raz, 'Human Rights Without Foundations' in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321, where Raz recognises that human rights are valid reasons for the limitation of state sovereignty but leaves it open whether the limitation is legally valid, as well as morally so.

[527] Raz, *The Authority of Law* 105. See also Joseph Raz, 'Human Rights Without Foundations' in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321, where Raz recognises that human rights are valid reasons for the limitation of state sovereignty but leaves it open whether the limitation is also legally valid, as well as morally so.

[528] This is well explained by Neil MacCormick who speaks of a risk of 'constitutional conflict' in MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 102-121. See also Nick Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010) 145-171.

Krisch for example, relying explicitly on Hart's theory, interprets recent developments towards the strengthening of international and transnational legal structures as a challenge to law's unity or 'anchor'.[529] He advocates an alternative 'pluralist' theory which explicitly 'eschews the hope of building one common, overarching legal framework that would integrate postnational governance, distribute powers, and provide for means of solving disputes between the various layers of law and politics'.[530] He believes that the division of labour between the different domains should be set by each domain by itself, without a 'common legal point of reference to appeal to for resolving disagreement'.[531] It is very hard to place these arguments against any political theory of global justice. These arguments entail, for example, that a stronger state could lawfully force a constitutional position on another state or a stronger court on a weaker court, without any legal redress. All such things contradict establish ideas about international law. More generally, I cannot see how 'fragmentation' or, more appropriately, incoherence is to be welcomed and reconciled with legitimate institution. Without a coherent institutional structure to speak of, every argument about the merits of any institutions will be futile. Even the debate on global justice would become impossible, because no institutional structure would available to guide us.

But perhaps the most obvious flaw in Krisch's arguments is his narrowness of scope. He sees only two options for accounting for postnational or transnational law, one being the appropriation of constitutional architecture for the globe and the other the abandonment of any attempt at coherence. These are the two sets of theories that Krisch discusses in his book as respectively the 'constitutional' view and the 'pluralist' view.[532] The mistake is forced, in my view, by the theoretical framework he adopts form Hart and Raz. If you believe in a rule of recognition, it either exists or it does not. But as I have argued in this chapter a more sophisticated account of law can account for international legal structures with a moral dimension. This is how we sought to explain the legitimacy of international and therefore global law.

Some theories of pluralism have indeed departed from the Hartian paradigm and have been much more successful. Although not explicitly about pluralism, Ronald Dworkin's view of international law, searched for the grounds of international law not in any kind of 'rule of recognition', but in arguments of political morality.[533] It therefore offered a glimpse of a much righter idea of 'democratic peace'. Other theories addressed pluralism directly. Nicole Roughan, for example, begins by rejecting the legal positivist analysis of Raz (and Tasioulas).[534] She proposes the idea of 'relative authority' or relative claims to legitimacy, according to which 'when there are multiple prima facie legitimate authorities in interacting or overlapping domains, and there is no outweighing reason to have just one singular authority, then those prima facie legitimate authorities can have only relative authority and must coordinate or cooperate or tolerate one another in order to be legitimate for their subjects'.[535] The distinctness of this argument is that it seeks the unity of law and the legal order not in a 'rule of recognition' or the creation of a positive 'authority' by some kind of fact, but in considerations of substantive practical reasoning, including the questions of legitimacy and authority. On the basis of this

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[529] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 11.

[530] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 69.

[531] Krisch, *Beyond Constitutionalism*, 69. Nick Barber similarly welcomes this kind of incoherence suggesting that it is sustainable if the resulting conflicts remain unresolved indefinitely: '[I]nconsistent laws need not demand inconsistent action; the constitutional dilemma can remain unresolved, provided that each side exercises restraint'; Barber, *The Constitutional State* 170.

[532] See Krisch, *Beyong Constitutionalism*, 23-24.

[533] See Dworkin, 'A New Philosophy of International Law'.

[534] She states that her books sets out to: 'to treat plurality and relationships between legal orders/institutions/officials/norms as matters concerning legitimate authority, and thus as being part of any question about the existence and/or legitimacy of authority over subjects'; Roughan, *Authorities*, 3.

[535] Roughan, *Authorities* 158.

practical view of law she can explains how relative authority 'is simply a claim to have legitimate authority through appropriate relationships with other authorities'.[536] Her argument is not about legal systems, but about the substantive content of law as an attempt to meet the tests of justice and legitimacy while regulating social life.

It must be evident now that a theory of legitimacy of international law depends partly on having a clear view of the practical nature of law and of the way in which states and international institutions create parallel structures of legitimacy. For the positivist point of view, by contrast, an overlap or a pluralism of 'legal systems' is always an anomaly because it undermines the hierarchy and exclusivity that all law requires. The problem arises because in their zeal to present law as a content-independent order of rules, legal positivists close their eyes to the specific moral aims of the international legal order. As I argued above, the tasks of the international legal order are entirely different to those of the domestic legal order. International institutions never seek to approximate those of a state. Because international law and state law have different aims they can come together as a mutually supportive system of reasons.

We can therefore say that pluralism is correct in this sense. International law is a legal order, meaning it provides standards of conduct for international actors and individuals within a systematic intellectual framework. State law, however, is more than a legal order. It is also a *jurisdiction*, which creates a system of offices and institutions securing the comprehensive determination and enforcement of standards of conduct. Only jurisdictions claim sovereignty or 'dominion' in this way. International law does not. This also means that the relationship between international laws and domestic claw can be understood as one of 'dualism', not monism. How they are to fit in a singular case is just another interpretive problem for legal reasoning.[537] It is to be resolved according to the internal principles of constitutional law, international law and transnational law. The answer is not to be found in an extra-legal search for foundational but not legal events or patterns of power. The task of reconciling domestic and international law is just another doctrinal puzzle, whose answer is to be found through the ordinary toil of legal reasoning.

Conclusion

The debate on legal pluralism and the legitimacy of domestic and international law is the same debate. And it is also a debate that, as I argued above, is crucial for global justice. A theory of legitimate political institutions is prior to any theory of global distributive justice. This is because a fair distribution needs a legitimate agent of distribution in the form of a complete set of executive, legislative and adjudicative institutions. I defended such a theory of legitimacy on the basis of a Kantian natural duty of justice to set up an egalitarian civil condition, where the equal status of all persons is recognised and protected. In the argument that I defended, the priority of the equal moral standing of all persons as citizens, leads to a basic theory of constitutional justice for the domestic state, but also to the first principles of international law as the law bringing together different jurisdictions under terms of reciprocity and mutual respect. A just distribution of resources for the peoples of the world is not therefore a constitutional principle of international law. It ought to become, I believe, a chosen *end* of international law, through the adoption of appropriate agreements and measures within international law, starting perhaps from the 'millennium goals' for global development and the climate change agreements as appropriate starting points and continuing with even more ambitious multilateral treaties. We must not, even if we could, take an illegitimate shortcut to arrive at a desired result, even if this is about social justice. The legitimacy of law and institutions takes priority over any social ideal.

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[536] Roughan, *Authorities*, 158.

[537] I show how the English courts have been doing just this in Eleftheriadis, 'Pluralism and Integrity' 380-385.

Global Constitutionalism and the Challenge of China's Exceptionalism

Maria Adele Carrai

Scholarship on Global Constitutionalism is often grounded in a normative monism and in a teleological vision of history that perceives the Chinese approach to the global legal order and its underlying normative assumptions as exceptional. In this paper, I argue that thinking Chinese experience simply in terms of exceptionalism or deviance limits our understanding of the assumptions that underpin some of the theories on the current international legal order as well as the Chinese conception of normativity. In the paper, I first look at the Chinese approach towards the elements that constitute the so-called Trinitarian mantra promoted by Global Constitutionalism (human rights, rule of law, democracy). Next, I examine the limits of adopting the notion of 'exceptionality' in characterizing Chinese international behaviour. In conclusion, I call for a more pluralistic approach.

This paper was originally presented at the Workshop 'Global Constitutionalism without Global Democracy,' held at the European University Institute of Florence in January 2016. I am extremely grateful to Claudio Corradetti, Andreas Kulick, Prof. Matthias Kumm, Monika Leszczyńska and Thomas Streinz, for their valuable and insightful comments on the early draft of the paper.

Introduction

The process of globalization and the 'crisis' of international law brought about by the War on Terror has prompted many debates about the future of the international legal order and the necessity of its reconceptualization.[538] Recent developments in international law, in particular the rising importance attributed to human right law, the consequent expansion of the legal personality of individuals and the judicialization of international law produced by the multiplication of international courts, have encouraged scholars to talk about a 'constitutionalization' of international law.[539] This scholarly discourse has been labelled as 'Global Constitutionalism,' and its supporters argue that international law is developing in accordance with the principles of constitutionalism.[540] According to it, international

[538] Despite the fact that it has been widely criticized, an early work that pointed out the limits of international law in the aftermath of the terrorist attacks of September 11, 2001 is that of Professors Jack Goldsmith and Eric Posner. They sustained that international law has become even more a matter of politics. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, Oxford: Oxford University Press, 2005. See also Craven M. Craven and M. Fitzmaurice, *Developments in International Law 58: Time, History and International Law*. Leiden, Brill, 2006; M. Koskenniemi, 'The History of International Law Today,' *Rechtsgeschichte* (2004). An article that discusses the challenges, transformations and perspectives on the legal order in a global world see Ulrich Sieber, 'Legal order in a Global World – The Development of a Fragmented System of National, International, and Private Norms' *Max Planck UNYB* 14 (2010).

[539] Over recent decades the juridical function of judges seemed to have expanded both nationally and internationally, limiting the legislative power of parliaments and eroding the national sovereignty of states. This is clear if one looks at the multiplication of international courts. In this regard see: Anne Peters, *Global Constitutionalism*, in the *Encyclopedia of Political Thought*, Michael Gibbns (ed.), London: Wiley-Blackwell, 2015, 1484-1487; Anne Peters, Manel Devers, Anne Marie Thevont Werner, Patrizia Zbinden, *Les Acteurs à l'Ère du Constitutionnalisme Global/ Actors in the Age of Glogal Constitutionalism*, Paris: société de législation comparé 2014; Anne Peters, Are we moving toward the Constututionalization of the World Community?, in *Realizing Utopia: The future of International Law*, by Antonio Cassese, Oxford: Oxford University Press, 2012, 118-135;

[540] What they share in common is the belief that the profound changes in the international legal order and its seemingly constitutionalization are having a deep impact on the way people started to imagine the legal and political world, and the institutions for the future global legal order. Matthias Kumm, 'The Best of Times and the Worst ofTimes,' in P. Dobner,

society and international law, are undergoing a process through which the traditional horizontal order based on states sovereignty is gradually being replaced by a more vertical one, in which the judicialization of international law allows individuals and other non-state actors to take a more direct role in the development of international law.[541] In this vision, the sovereign state system should be gradually surmounted, leading to a paradigmatic shift in which the statist conception of constitutionalism will be replaced by a new more cosmopolitan and globalist one.[542]

Global Constitutionalism, as it will be further discussed below, tends to be grounded on a normative monism and on a fundamentally progressive vision of history that often perceives experiences that do not conform to its constitutional norms and predictions as exceptional or deviant. This is certainly the case of China, which is considered an exception in the development of a global constitutional order. Human rights, democracy, and the RoL seem in fact to serve the Chinese Communist Party (CCP), rather than its people, and this is clearly in conflict with Global Constitutionalism dicta. What does Chinese exceptionalism tell us about the existence and the development of Global Constitutionalism? The objective of this paper is to highlights some of the assumptions beyond Global Constitutionalism, and contrast some of its claims with Chinese normative and political reality. The People's Republic of China (PRC) is still the largest country in the world in terms of population, and it is the largest world economy. It is here taken as a case study to reflect upon the possible development of Global Constitutionalism and its legitimacy in the absence of a 'global demos.' In this paper after having identified as key characteristics of Global Constitutionalism its normative monism and its progressive narrative of history, I will proceed by looking at how China is considered exceptional with regard to the key elements of Global Constitutionalism, focusing on the notion of the so-called 'Trinitarian mantra.' I will then discuss the limits of treating it as an exception, pointing out some of the assumptions of Global Constitutionalism. In the last section of the article, in which I adopt, John Rawls' theory of 'decent people,' I will call for a more pluralistic model, in order to take into account other non-liberal and non-Western experiences that diverge from the normative universality advocated by Global Constitutionalism.

Qualifying Global Constitutionalism and Chinese Exceptionalism

There are various political and legal projects that strive to describe the current world order, in an attempt to predict its future development.[543] Global Constitutionalism is one of these competing projects.

M. Loughlin, *The Twilight of Constitutionalism*, Oxford: Oxford University Press, 2010, p. 219. Mattias Kumm, Anthony F. Lang Jr., James Tully, and Antje Wiener, 'How large is the world of Global Constitutionalism?' in *Global Constitutionalism*, 3, 1, (March 2014) 1-8, p. 6-8.

[541] There are different positions within the global constitutionalist discourse. For instance, Anne Peters considers the sovereignty of the state a value that should not be ignored. See Anne Peters, 'Membership in the Global Constitutional Community,' in Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, p. 198. Christine E. J Schwöbel shows the differences within the global costitutionalism discourses, see Christine E. J Schwöbel, 'Situating the debate on Global Constitutionalism,' *Int J Constitutional Law* (2010) 8 (3): 611-635; Christine E. J Schwöbel, *Global Constitutionalism in international legal perspective*, Leiden [Netherlands]; Boston: Martinus Nijhoff Publishers, 2011.

[542] See for instance Anne Peters 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law* 19 (2006), 580. E. de Wet, 'The International Legal Order,' *International & Comparative Law Quarterly* 55 (2006), 51-76, 51. T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism,' *Max Planck Yearbook of United Nations Law* 7 (2003), 261-328, p. 264. Matthias Kumm argued that states are increasingly subjected to external legal obligations that they might not have consented to, and these include usually environmental issues and human rights questions that have been usually dealt by domestic institutions. These external limits are called justice-relevant negative externalities, that challenges the authority of 'We the People,' and limits the authority of national constitutions. Matthias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,' *Indiana Journal of Global Legal Studies* 20, 2 (2013), 605-628, p. 614.

[543] Over recent decades 'global' has been the adjective *du jour*, with scholarship on Global Constitutionalism, Global Administrative Law and Global Governance on the increase. Surendra Bhandari, *Global Constitutionalism and the path of*

Although it is not the most prominent discourse, it is interesting to look at its claims, in that some of the challenges it encounters are equally faced by other theories. But what it is exactly Global Constitutionalism, or at least what do I mean here with Global Constitutionalism? As Christine Schwöbel pointed out, there is no common understanding of 'Global Constitutionalism.'[544] This is not surprising as the very term constitution is itself quite ambiguous and polysemous; constitutionalism as well can be interpreted in many different ways. Qualifying it as 'global' adds even more to the complexity of this term. The risk of referring to 'Global Constitutionalism' in fact, is to mischaracterize it, and start a straw man attack against something that does not exist. Its characterization, as described in the following paragraphs, is a simplification of the complex and articulated discourse of Global Constitutionalism. Nevertheless, I hope to have captured some of its key elements that determine Chinese exceptionalism. I will particularly focus on its normativism grounded on the Trinitarian Mantra and its progressive narrative of history. Here I am not considering the debate on the constitutionalization of international law, in which the main question is whether international law have constitutional elements and if for instance the UN could be considered as a world constitution, but rather to the political and normative project of Global Constitutionalism, which looks for specific common elements across jurisdictions in an attempt to define the criteria for the legitimate power of state at the international level.

It might be useful to refer to the different stages of constitutionalism as described by Alexander Somek. In his *Cosmopolitan Constitution*, he argues that constitutionalism is a project that belongs to our modern time, and that is characterized by a particular understanding of law as constraining the exercise of public power. Somek claims that there were two key transformations in the history of constitutionalism, and these gave rise to three stages of constitutionalism. Without going into details, the last stage, called 'constitutionalism 3.0,' or 'cosmopolitan constitutionalism' expands the value order reached by 'constitutionalism 2.0' after the second World War, beyond national boundaries.[545] What is interesting, leaving aside the cosmopolitan justification and rationale, is that a set of normative values of Western constitutionalist tradition are now promoted globally, beyond the sovereign border. But what is the content of these normative values promoted by Global Constitutionalism? I think that to answer this question one should go back in time, and look at the peculiar history of constitutionalism, as it emerged in the West.

Constitutionalism is about limiting the exercise of public power through designated structures, institutions, processes and values of a constitution, a formal contract drafted in the name of the people.[546] The origins of this idea can be found in the transformation of the relationship between government and the people that took place after the American Revolution (1776) and French Revolution (1789), as articulated in the *Declaration of Independence* of the United States and in the French *Declaration of the Rights of Man and of the Citizens*.[547] As expressed in these founding texts, there was a belief that the

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international law : transformation of law and state in the globalized world, Leiden, Netherlands ; Boston, Massachusetts: Brill Nijhoff, 2016; Gábor Halmai, *Perspectives on Global Constitutionalism : the use of foreign and international law*, The Hague, The Netherlands : Eleven International Publishing, 2014; Eyal Benvenisti, *Law of global governance*, The Hague: Hague Academy of International Law, 2014; L. S. Finkelstein, 'What Is Global Governance?' *Global Governance*, Vol. 1, No. 3 (Sept.–Dec. 1995): 367-372; B. Kingsbury, 'The Concept of Law in Global Administrative Law,' *European Journal of International Law* 20, 1 (2009); B. Kingsbury, N. Krisch, R. B. Steward (eds.), 'The Emergence of Global Administrative Law,' *Law and Contemporary Problems* 28, 15 (2005): 15-61.

[544] Schwöbel, *Global Constitutinslism in a Global Perspective*, op. cit. Here I mainly refer to the type of Global Constitutionalism described in the first volume and issue of the Journal Global Constitutionalism. See Antje Wiener, Anthony F. Lang, James Tully, Miguel Poiares Maduro and Mattias Kumm, 'Global Constitutionalism: Human rights, democracy and the rule of law,' in *Global Constitutionalism*, 1, 1 (March 2012): 1-15. For Trinitarian mantra see Kumm, 'How large is the world of Global Constitutionalism?', op. cit.

[545] Alexander Somek, *The Cosmopolitan Constitution,* Oxford: Oxford University Press, 2014.

[546] Martin Loughlin, 'What is Constitutionalization?' in Petra Dobner and Martin Loughlin (ed.), *The Twilight of Constitutionalism?* Oxford: Oxford University Press, 2010, p. 48.

[547] Maurizio Fioravanti, *Costituzionalismo. Percorsi della Storia del Costituzionalismo Moderno*, Bologna: Il Mulino, 2004; Maurizio Fioravanti, *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*, Turin: Giappichelli, 2014.

government had to serve the people, and that its legitimacy had to be based on their consent. As Martin Loughlin suggested, the idea of constitution is grounded on the promotion 'of a particular theory of government: based on contract, enumeration of powers, and protection of the individuals' basic rights, they were founded on a theory of limited government.'[548] Despite the fact that constitutions evolved, the principles enucleated above, remained the pillars on which the greatest number of theories of constitutionalism, including Global Constitutionalism, developed. Current constitutionalist principles continue to be grounded on the independence of the judiciary, the separation of powers, the respect of individual rights, and the role of the judiciary as guardian and interpreter of constitutional norms.[549]

The idea that there is a process of constitutionalization is what gives constitutionalism its legs, and that makes it assume a progressive narrative of history. Such process is 'a political theory that was developed as part of a liberal philosophy to guide the formation of modern constitutions,' and that establishes 'the authoritative standards of legitimacy for the exercise of public power wherever it is located.'[550] Global Constitutionalism is about a constitutionalisation of international law beyond the borders of states. Not only it sees this process happening in the current international legal order, and in this sense Global Constitutionalism is descriptive, but it also expand it beyond its borders and beyond the present, into the future, and in this sense it is normative. In both cases (descriptive and normative), this implies a separation of the process of constitutionalisation from the governing traditions of specific 'we the people' and an elevation of constitutionalism to an autonomous set of norms that have a broader validity.[551] In particular, as Matthias Kumm pointed out, there are three types of constitutional norms: 'basic institutions and their respective powers; procedures that allow for the appropriate forms of participation and deliberation; and norms – which generally take the form of rights – for assessing whether outcomes are justifiable to those burdened by them as free and equal.'[552] These constitutional norms roughly correspond to the so called Trinitarian Mantra, namely human rights, democracy and the RoL, and any state authority in order to be legitimate should respect them.[553]

This liberal 'legimatory trinity' is, some global constitutionalists have argued, a contingent phenomenon and the meaning of its elements and their relationship is contested and it changed through time.[554] In this sense it is pluralistic and open to different interpretations and perspectives.[555] However, the scholarship of Global Constitutionalism I considered in this paper, seems to be grounded more on a normative monism that tends to promote a unitary global legal order.[556] Progress, although it might be never reached in reality, is possible if certain specific ethical principles are shared by all human beings and if these are enforced by strong supranational powers that transcend the 'polytheism' of the ethical

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[548] Loughlin, 'What is Constitutionalization?', op. cit., 48.

[549] Loughlin, 'What is Constitutionalization?', op. cit., 56.

[550] Loughlin, 'What is Constitutionalization?', op. cit., 60-61.

[551] Loughlin, 'What is Constitutionalization?', op. cit., p. 69. See also Martin Loughlin, 'In Defence of Staatslehre,' *Der Staa*t 48, (2009), 1-27, 17-23.

[552] Kumm, 'The Best of Times and the Worst of Times,' op. cit., pp. 214-215.

[553] Kumm later discusses for instance the fact that the authority of the European Convention on Human Rights and the United Nation Charter derive their authority not only by the treaty making procedures and by the consent of the states, but also by the constitutional principles they embody. In fact, he argues 'Common principles of constitutionalism, and not an ultimate rule either of national or European or UN constitutional supremacy, provide the ultimate norms for guiding European constitutional practices.' Kumm, 'The Best of Times and the Worst of Times,' op. cit., p. 219.

[554] Kumm, 'How large is the world of Global Constitutionalism?', op. cit., p. 3

[555] Dunoff, 'Editorial, Hard Times,' op. cit., p.13; Kumm, 'How large is the world of Global Constitutionalism?', op. cit., p. 4.

[556] D. Davis, A. Richter, A., C. Saunders, (eds.), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law*, Portland, Oregon, Hart Publishing, 2015; J. Klabbers, A. Peters, A., Geir Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009. For some the agenda of Global Constitutionalism is grounded on a moral monism already expressed in Christian Wolff's notion of *civitas maxima* and in Immanuel Kant's idea of cosmopolitan law. See D. Zolo, *I signori della pace. Una Critica del globalismo giuridico*, Rome: Carrocci, 1998.

beliefs of other normative traditions.[557] The Trinitarian mantra in fact would become the criterion to judge more broadly the legitimacy of states. It seems thus to be committed fundamentally to a single moral and normative orientation as defined by the Trinitarian mantra, which is itself very much related to particular countries histories and their specificities.

Another aspect that I would like to address before qualifying Chinese exceptionalism is the teleological and progressive narratives embraced by constitutionalism. Some scholars, in particular legal historians that have a long-term perspective on the development of international law, like Martti Koskenniemi, supported the idea that scholarship such as Global Constitutionalism is grounded on a progressive vision of history. Chinese exceptionalism would fit perfectly with Koskenniemi's thesis: it is precisely the belief that international law is somehow progressing toward its constitutionalisation, that makes perceive China as exceptional or deviant from the ideal constitutional order. This vision has been associated to the Whig interpretation of history, and for Koskenniemi such optimism dates to Kant's philosophy as it was formulated in his 1784's essay *The Idea for Universal history with a Cosmopolitan Purpose*.[558] Koskenniemi was not alone in criticizing the Global Constitutionalism project as a new form of imperialism that used this progressive narrative. To answer these criticisms and to clarify the relationship between Global Constitutionalism and the progressive narrative of history, an editorial in the journal *Global Constitutionalism* was dedicated to this theme. For the authors of the editorial, the progressive narrative of history can be summarized as 'the slow and steady progress of law against power, reason against ideology, international against national, order against chaos in international affairs.'[559] In the editorial the authors opposed the idea that Global Constitutionalism embraces a Whig conception of history, according to which Global Constitutionalism is a history of 'triumph of constitutionalism, rights and the rule of law over a series of foes, including monarchy, despotism, corruption, ignorance and religious dogma.'[560] Whenever 'progress tropes' are invoked in Global Constitutionalism, the authors argue, they are far from embracing a linear, unidirectional and progressive vision of history that exhaust all the different constitutional experiences and visions. Global Constitutionalism then would be contingent and it could be open to decline, progress and regress.[561]

However, in the light of what has been discussed above, and the normative nature of global constitutionalist project, here it is argued that there is at least in part a progressive narrative. This is not wrong per se, as long as there is an awareness of it and ideally its final goal becomes gradually more inclusive of other experiences. Progress is in fact an axiological and normative concept, and it is different from a simply descriptive concept such as 'development' or 'transformation.' For example, there is a difference if I say that A changed into B, or if I say A progressed into B, in that in the second case B is an improvement from A.[562] Global Constitutionalism for its very nature is a political project and has an

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[557] Zolo, *I signori della pace.* op. cit., p. 133. On the Whig concept of history see also Jeffrey L. Dunoff, Antje Wiener, Mattias Kumm, Anthony F. Lang Jr., and James Tully, 'Editorial, Hard Times: Progress narratives, historical contingency and the fate of Global Constitutionalism,' *Global Constitutionalism* (2015), 4:1, 1-17, p. 10. In this sense unity of the political project is very important, see Niko Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press, 2011, chap 1 and 2.

[558] Martti Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization' *Theoretical Inquires* 8, 9 (2007), 12. In his reading of Kant Koskenniemi was criticized by Robert Howse and Ruti Teitel, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History? (And Other Question for Martti Koskenniemi)' *Temple International Law & Comparative Law Journal* (2013).

[559] Quote from Kennedy, quoted in Dunoff, 'Editorial, Hard Times,' op. cit., p 10.

[560] Dunoff, 'Editorial, Hard Times,' op. cit., pp. 11-12.

[561] Dunoff, 'Editorial, Hard Times,' op. cit., p. 13

[562] Ilkka Niiniluoto, 'Scientific Progress,' *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2015/entries/scientific-progress/>.

axiological and normative value as reflected in the idea of the Trinitarian mantra.[563] Various authors have already criticized, from different angles, the excessive idealization of Global Constitutionalism. They pointed out that some global constitutionalists, seeing that the world was not changing as they had hoped, started instead to re-describe social realities in the way they wished and hoped for, pretending that the work of their imagination corresponded to the reality of things.[564]

Global Constitutionalism not only is not value neutral; it is also goal oriented. Progress is itself a 'goal-oriented concept,' and in the specific case of Global Constitutionalism its tacit ideal is the constitutionalisation of international law. Contrary to what the authors argued in the same editorial, the goal of progress does not have to be accessed: it can be accessible, but it can also be utopian or simply unreachable. Even if it is unreachable, it can still function as a regulative principle that guide people or in this case states and their behaviours so that they can progress toward their development according to their goal. This, for instance, would be the case of sanctity, which is an unreachable goal, but it nevertheless serves as a guiding principle for action.[565] The progress in this sense is not deterministic, in that the ideal, whatever it is, not necessarily becomes actual, and thus it does not clash with the freedom of people are left free to follow it or not. As Global Constitutionalism is not only descriptive, its underlying goal seems to be the promotion of constitutional values beyond national borders.[566] One of the issues in the arguments of the authors is to confuse the different layers of *to be* and *ought to be*, which characterizes the very notion of 'law,' in that it has always an aspirational normative element to which the *to be* should conform to; law by nature is teleological.[567]

One of the consequences of Global Constitutionalism embracing liberal normative monism and a progressive idea of history, is that the terms, values and conditions that are supposed to define the global legal order are largely decided by only one side. Today, in the face of the emergence of China as a great economic power, the international relevance of the global constitutionalist debates depends in fact on the economic and cultural hegemony of the liberal West. Recent international events, such as the Wars on Terror in the Middle East, and the inability of the international community to find common responses to international issues, like Syria, seem however to contradict the optimism of the supporters of legal globalism, for whom the emergence of a constitutionalized global legal order would already be in the making as discussed above.[568] There is considerable political divergence and a growing multi-polarity that reflects the existence of different value systems. Interestingly, given the goal of Global Constitutionalism to promote democratic institutions, it is itself not democratic in terms of

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[563] Constitutionalism itself from its origins had a progressive nature rooted in the teleology of natural law. See for instance the work of one of its fathers in the 18th century, Thomas Paine, *Rights of Man, Common Sense and other Political Writings*, Oxford: Oxford University Press, 1995, p 216. Discussed also in Loughlin, *The Twilight of Constitutionalism,* op. cit.

[564] A. Somek, 'Administration without Sovereignty,' in P. Dobner, M. Loughlin, *The Twilight of Constitutionalism*, Oxford: Oxford University Press, 2010, p. 286; Christian Volk, 'Why Global Constitutionalism Does Not Live up to its Promises?', in *Gottingen Journal of International Law* 4 (2012) 2, 551-573; M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization,' 8 *Theoretical Inquiries in Law* (2007) 1, 9, 9; A. L. Paulus, 'The International Legal System as a Constitution,' in Dunoff & Trachtman, (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance,* Cambridge: Cambridge University Press, 2009; Eric A. Posner, *The Perils of Global Legalism*, Chicago: Chicago University Press, 2009.

[565] Niiniluoto, 'Scientific Progress,' op. cit.

[566] In this sense the critique of Robert House and Ruti Teitel to the Whig liberal progressive ideal, for which 'the ideal must become actual is antithetical to the liberal conception of freedom' is not valid in this contest, in that in this case progressivism does not imply determinism. See Howse, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History?' op. cit. p. 383.

[567] On W. K. Frankena, 'The Naturalistic Fallacy,' *Mind* 48, 192 (Oct., 1939), pp. 464-477.

[568] See for instance B. Fassbender, 'The United Nations Charter as Constitution of the International Community,' *Columbia Journal of Transnational Law* 36 (1998) 3, 529.

representation.[569] There are in fact countries like China that seem to be important exceptions to this global trend.[570] If the very word 'constitution' evokes the idea of legitimacy (if it is not legitimate is not constitutional), then such a political project, by excluding or dismissing as 'exceptional' some crucial international actors, risks to become itself illegitimate.

Against this backdrop, China runs counter to the normative unity endorsed by the cosmopolitan and globalist agenda: it has an authoritarian government that rejects democratic principles; it promotes a different understanding of human rights on the grounds of Asian values, and it supports an idea of the RoL with Chinese characteristics that appears more like a rule by law. Moreover, despite the general belief in the erosion of state sovereignty promoted by Global Constitutionalism, China is considered the last bastion of Westphalian sovereignty, and tends to oppose certain forms of global governance, seen by many Chinese intellectuals as a new form of Western imperialism aimed at continuing the century of humiliations that characterized its modern history.[571] The PRC, in other words, imposes the global constitutionalist project to face the international social reality.

Not surprisingly, China's approach to and practice of international law has often been perceived as 'exceptional' or deviant because it does not comply with the set of rules or with the morality that should allegedly inform the emerging global legal order. Here the term exceptional is not chosen at random, it echoes the history of international law, and the categorization and the treatment of non-Western nations as 'exceptional,' which would consequently justify their exclusion and different derogatory treatment.[572] 'Exceptional' etymologically derives from the Latin *excipere*, which means the act of excluding or the effect of the act of excluding, it is a limitation or a restriction.[573] The use of the term 'exception' is here instrumental for my argument. Despite China is perceived as exceptional, and it is excluded from the making of the rules and norms that should define global constitutionalism, paradoxically there is a tacit presumption that these rules and normative elements must apply to it. Moreover, China has also been described as a deviation, and not necessarily as exceptional. But here, I refer more generally to China as an exception, in that its experience constitutes a more profound challenge to Global Constitutionalism than simply a deviation, which can be at a certain point re-incorporated within Global Constitutionalism paradigm. The effects of the strategy of exceptionality applied to international law can be seen throughout its history, both in the attempts of Western powers to exclude other parties from the system, or as a way to exclude and to exempt themselves from its laws, like the case of American exceptionalism. Even China today is using the strategy of 'exceptionalism' to exclude itself from some of the new trends of international law, by promoting Chinese characteristics or Chinese models, which, as it will be further discussed in later section, are readily explainable with other paradigms.

If exceptionalism is a conceptual construct of Global Constitutionalism for excluding those who do not conform to its dicta, isn't this hampering its legitimacy, by limiting the democratic representation of the global *demos*? China and its perceived exceptionalism not only contradict the ideal democratic world described by Global Constitutionalism, but it also poses a problem to the legitimacy of the legal order

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[569] This has been discussed for instance by Petra Dobner, that shows the erosion of the relation between law and democracy at the transnational level, pointing out how the transformation of the sovereign state due to the process of global constitutionalization, provokes at the same time a deconstitutionalization, reducing the democratic control. See Petra Dobner, 'More law, less democracy? Democracy and Transnational Constitutionalism,' in Petra Dobner and Martin Loughlin (ed.), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2010.

[570] See for instance the list of countries that do not follow the liberal constitutional development such as Togo, North Korea, Guinea, Chad, Indonesia, Luxemburg, Saudi Arabia, etc… David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism,' *Legal Studies Research Papers, California Law Review* 99 (2011), 1162-1253, p. 1228.

[571] S. Kim, 'Sovereignty in the Chinese Image of World Order,' in MacDonald, J. (ed.), *Essays in Honour of Wang Tieya*, Leiden: Martinus Nijhoff Publishers, 1994.

[572] Luigi Nuzzo, *Origini di una Scienza, Diritto Internationale e Colonialismo nel XIX Secolo*, Frankfurt: Vittorio Klosrermann, 2012; Milos Vec, 'Universalization, Particularization, and Discrimination. European Perspectives on a Cultural History of 19th century International Law,' *InterDisciplines* 2 (2012), pp. 79-102.

[573] 'Eccezione,' in Ottorino Pianigiani, *Vocabolario Etimologico della Lingua Italiana*, Roma-Milano: Dante Alighieri, 1923.

envisioned by it. The structural economic reforms of the PRC of the past three decades have allowed it to re-establish itself as the second largest economy in the world and as a credible and legitimate actor in global governance. China is a crucial international player today, and its ascendency can contribute to shaping and setting the trend for the future development of the global order. As such, it is argued, thinking China simply in terms of exceptionalism or divergence reduces in the context of Global Constitutionalism, both the possibility of a better understanding of the current international legal order and the possibility of finding a proper basis for envisioning new more legitimate ones. It also does not allow to 'normalize' Chinese characteristics within a more inclusive normative and descriptive framework of reference.

Chinese 'exceptionalism' looked at from the perspective of the Trinitarian mantra

Global Constitutionalism is characterized by a shift in focus from the state to individuals, in that sovereign states are no longer unaccountable, and in order to be legitimate they have to respond to the individuals demands for human rights protection, RoL and democracy.[574] It is also characterized by a universalizing tendency, realized through a constitutionalist vocabulary that promotes a moral consensus over the global order. This becomes a sort of normative model for dealing with, if not erasing, political conflicts. The Trinitarian mantra is part of this universalized vocabulary, and its promotion promises to minimize arbitrary rule, enhance the efficiency of institutions, transparency, and accountability while increasing the participation of people in global governance and global lawmaking.

The vision of the US international law scholar Louis Henkin, who argued in 1990 that the notion of rights was achieving a greater acceptance than others, becoming universal and challenging the principle of non-intervention, seems recently to have become a reality.[575] The Japanese internationalist Yasuaki Onuma also observed that, at the end of the Cold War, the principle of non-intervention increasingly deteriorated because of the growing power of the idea of human rights and the desire to protect the environment on a global level.[576] As a matter of fact, a key feature of the past two decades has been the promotion of a rule of international law in which human rights became the paramount ideal of a new modality of civilization that defined sovereignty.[577] The new emerging normative discourse of human rights favoured by the liberal internationalism of the American School prompted a great scrutiny of the practices and violations of human rights by China, entering the agenda of the UN Human Rights Commission.[578] The crackdown on the pacific protests in Tiananmen in 1989 was certainly shocking and despicable, but it would probably not have raised the same international concern if it had happened a few decades before, when the debate on human rights was not yet that globalized. For the historian Samuel Moyn this new millennial appeal to human rights, which coincided with the end of the Cold War, has to do with the felt arrival of a post-American era, in which liberalism and the US hegemony might no longer coincide because of the emergence in the international arena of new important actors,

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[574] H. Brunkhorst, 'Constitutionalism and Democracy in the World Society,' in P. Dobner, M. Loughlin, *The Twilight of Constitutionalism*, Oxford: Oxford University Press, 2010, pp. 179.

[575] Luis Henkin, *The Age of Rights*, New York: Columbia University Press, 1990. For the US State Department's Policy Planners G. John Ikenberry and more recently Anne-Marie Slaughter, the envisioned new order led by the benign American hegemony, would have promoted not only a free market but also human rights. G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*, Princeton, N.J.: Princeton University Press, 2011; Anne-Marie Slaughter, *A New World Order*, Princeton, N.J.: Princeton University Press, 2004. The authors were both discussed in Samuel Moyn, *Human Rights and the Uses of History*, New York: Verso, 2014, chap. 8.

[576] Onuma Yasuaki, *A Transcivilizational Perspective on International Law*, Leiden: Martinus Nijhoff Publishers, Brill Publishers, 2010.

[577] Jack Donnely, 'Human Rights: A New Civilization?' *International Affairs*, 74 (1998) 1.

[578] See Ann Kent 'China and the International Human rights regime: A case study of multilateral monitoring, 1984-94,' *Human Rights Quarterly* 17 (1995) 1. US Department of State Country Reports on Human Rights Practice for 1994, delegation of Lord Howe of Aberavon, Report of the Australian Human Rights Delegation on China 14-26 July 1991.

above all China.[579] Without going much into the merits of the Moyn's work, his historical approach to rights enables us to see how, from the Cold War, there was a rise in the use of the term that coincided with their augmented normative relevance. In China, such a debate on human rights took off from the 1990s, probably also as a reaction to the international criticisms following Tiananmen, and it was very much related to the issue of sovereignty, because of the new interventionist theories that were based on human rights protection.[580]

China signed both Covenants of human rights, but it has not yet ratified the *International Covenant on Civil and Political Rights*, and its human rights record and its repressive regime still seem quite unpromising according to many NGOs. [581] It promotes a different vision of human rights, in which, according to the general CCP's rhetoric, the primacy is not of the individual understood as a separate monad, but of society, and its ultimate expression in the state, which in China corresponds to the CCP. Many Chinese authors have been critical of the human rights regime promoted by Western powers, and they see it as an instrument of the US new-imperialistic expansion and as a way to interfere and exert undue influence in domestic affairs.[582] As some studies have demonstrated there was an increasing number of cases when states recurred to economic sanctions to condemn human rights violations in the 1980s and 1990s. This was driven by the belief that fundamental human rights violations were not simply a concern of the single state, but had already acquired the status of *Jus Cogens*, providing a legal basis for international intervention in the offending states.[583]

One of the main Chinese theoretical challenges to the universality of human rights and humanitarian intervention was the relativization of human rights through the notion of Asian values, together with the claim that the difference in economic development could justify the preference for a particular set of

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[579] Moyn, *Human Rights and the Uses of History*, op. cit., 132, 72-74. See also Samuel Moyn, *The Last Utopia: Human Rights in History*, Boston: Harvard University Press, 2010. In the 1940s, Moyn argues, 'human rights preserved a memory of the rights of man and citizen more than summoning a utopia of supranational governance through law,' and they emerged in the 1970s as an alternative to the collapsed universalistic schemes, becoming a global discourse in the 1990s. Moyn, *Human Rights and the Uses of History*, 77, 82.

[580] China Human rights studies, Zhongguo renquan yanjiu huibian **中国人权研究会**编, *Lun renquan yu zhuquan – jian bo renquan gao yu zhuquan lun 论人权与主权－兼驳'人权高于主权'论* ［On human rights and sovereignty – refuting 'human rights above soveriegnty' theory］, Beijing: Dangdai Chuban she, 2001; Zhu Feng**朱**锋, *Renquan yu guoji guanxi 人权与国际关系* [Human rights and international relations], Beijing: Beijing Daxue Chuban she, 2000; Fu Xuezhe**富学哲**, *Cong guojifa kan renquan 从国际法看人权* [Looking human rights from an international law perspective], Beijing: Xinhua Chuban she, 1998.

[581] This is the case of NGOs such as Human Rights Watch, Freedom House, Reporters Without Borders. According to their reports China is among the least free countries in terms of political and civil rights.

[582] See for instance Zhou Qi周琪, 'Meiguo renquan waijiao zhengce美国人权外交政策,' [US human rights policy] in *Dangdai guoji zhengzhi congshu 当代国际政治丛书* [Contemporary International politics books] , Shanghai: Shanghai Renmin Chuban she, 2001; Zhao Lujie赵鲁**杰**, He Renxue **何仁学**, Chen Fangwu**沈方吾**, *Meiguo quanqiu baquan yu zhongguo mingyun 美国全球霸权与中国命运* ［US Global hegemony and the fate of China], Beijing: Beijing Chuban she, 1999. The Chinese were not the sole critics of the human rights regime, some Western scholars saw in the promotion of human rights, and specifically economic rights, an element of permanence of imperialism. See Anthony Anghie, *Imperialism, Soveriegnty and the Making of International Law*, Cambridge: Cambridge University Press 2004, p. 257. Also for Moyn human rights 'serve as the brand name for diverse schemes of global governance in which vulnerability and inequality persist…like all universalist projects, human rights are violated every time they are interpreted and transformed into a specific program.' Moyn, *Human Rights and the Uses of History*, p. 84.

[583] Gary Clyde Hufbauer, Jeffrey J. Schott and Kimberly Ann Elliott (ed.), *Economic Sanctions Reconsidered History and Current Policy vol.1-2*, Washington, DC: Institute for International Economics, c1990. They show that 17 cases of economic sanctions out of 106 were aimed at protecting human rights. Economic sanctions have been broadly used by the US after the Cold War. This can be considered one of the most important changes in the history of international law, in that it signifies a profound departure from the principle of non-intervention that characterized the international order until the end of the Cold War.

rights, privileging economic and social rights over political and civil rights.[584] This would be justified by the appeal to the developing status of China. Recently, the Chinese judge on the International Court of Justice Xue Hanqin remarked how 'the promotion of human rights and democracy has to be founded on a balanced economic and social development of each state.'[585] For other scholars economic development, and the differences in the political and cultural background, make it inevitable that each country has its own understanding of human rights.[586] This is the reason that justifies the superiority of the principle of sovereignty over human rights and why, whenever Chinese leaders claim Chinese international sovereignty, there is not much regard for popular sovereignty, or the rights of their own people. Chinese scholars have often supported the idea that China's sovereignty is above human rights, and that these can be protected only through a strong sovereign state. Moreover, faced with the various critiques of the human rights situation in China, and to further justify its practices, the Chinese government has started to issue White Papers on human rights to contrast the poor international perception of China and human rights by, for instance, emphasizing the US violation of human rights.[587]

The Chinese legal system is articulated within a socialist legal framework with Chinese characteristics.[588] Its logic and development are guided by values and principles interpreted by the Party. Recently the notion of the RoL started to be promoted strongly, becoming a theme of the Plenary session of the Party Central Committee of 2014, and one of the prerogatives of the 13th Five-Year Plan (2016-2020).[589] The Reforms toward an enhanced RoL and constitutionalism aim to make public administration more impermeable to corruption. However, through these reforms, which seemed to leave some hope open for China's transformation in a more liberal sense, CCP's authority is asserted.[590] The CCP's activity is controlled by legislation that is itself produced by the Party. Among the values promoted are popular sovereignty, peoples' rights and social welfare; again under CCP leadership. The judicial system of China also lacks independence, and its courts seem to be only one among the many different possible ways for solving disputes. This is certainly far from the Western constitutional model, according to which there should be an independent judiciary, whose role is to supervise over the administrative and political organs.[591] The current legal reforms promote the unity of the legal and moral norm, and the coherence of the legal system with the specific Chinese reality, thus promoting the 'fundamental values of socialism' that reflect the specific historical reality of China. In a nutshell, it seems that the biggest incentive to promote the RoL in China is the preservation of the stability of the One-party state. Thus many scholars have defined the use of the RoL in China as a rule by law, as law

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[584] Karen Engle, 'Culture and Human Rights: The Asian Values Debate in Context,' *New York University Journal of International Law* 32 (2000) 291-333.

[585] Xue Hanqin, *Chinese contemporary perspectives on international law: history, culture and international law*, The Hague, Netherlands: Hague Academy of International Law, 2012, 19.

[586] Yang Zewei杨泽伟. *Zhuquan lun: Guojifa shang xhuquan wenti ji qi fazhan queshi yanjiu主权论：国际法上主权问题及其发展趋势研究* [On sovereignty: a research on the issue of sovereignty in international law and its developments]. Beijing: Beijing daxue Chubanshe，2006, p. 162.

[587] These are available on the Chinese government website at URL = < http://www.china.org.cn/e-white/>.

[588] Albert H. Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, Singapore: Butterworths Asia, 1992.

[589] On the 13th Five-Years Plan and the rule of law see URL = <http://www.npc.gov.cn/npc/zgrdzz/site1/20160429/0021861abd66188d449902.pdf>. For people skeptical about the rule of law in China see Karen G. Turner, James V. Feinerman, R. Kent Guy (ed.), *The Limits of the Rule of Law in China*, Washington: University of Washington Press, 2014; Randall Peerenboom, *China's Long March toward the Rule of Law*, Cambridge: Cambridge University Press, 2002.

[590] Jerome Cohen, 'Laying Down the Law: Jerome Cohen on the Rule of Law in China,' in *China Focus* (April 25th 2015), URL = <http://chinafocus.us/2015/04/25/laying-down-the-law-jerome-cohen-on-the-rule-of-law-in-china/>.

[591] For an interesting analysis of the judicial system in China in the light of the recent legal reforms see Larry Catá Backer, 'A Constitutional Court for China Within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP,' *Suffolk University Law Review* 43 (2010), 101-132. See also Benjamin L. Liebman, 'China's Courts: Restricted Reform,' *Columbia Journal of Asian Law* 21, 1 (2007).

is understood more as a tool to rule by the CCP.[592] At the international level, the rule of international law envisioned by China is grounded on the primacy of the sovereignty of the state.[593]

With regard to the third element of the Trinitarian Mantra, China is an autocracy, there is only one party, opposition parties are outlawed, and in the village elections the candidates are selected and approved by the CCP.[594] For many Chinese leaders, Western style democracy is incompatible with Chinese political culture, and a government is legitimate not necessarily when people influence directly its formation and its decision making, but when it represents the higher interests of the people. In this sense the recent work by the sinologist and political theorist Daniel Bell, *The China Model, Political Meritocracy and the Limits of Democracy*, is interesting. In it the author adopts a 'contextual political theory', according to which political theorists should made the leading political ideas of a particular society coherent and rationally defensible; he identifies in China the model that he calls 'vertical democratic meritocracy.'[595] This is the model that, despite the huge gap with China's reality, has informed its political and legal system for the past 30 years. This model is proposed for China as an alternative to Western liberal democracies: while democracy is appropriate at lower, local, levels of society, at higher levels meritocracy is required, particularly in countries as large as China, in which direct representation would be so much diluted as to become meaningless. This is certainly a simplification of both the Chinese and Western systems, as there are elements of meritocracy in Western democracies, but for the sake of a systemic and theoretical analysis and with the due considerations, such divide is helpful for differentiating at a more abstract level the Chinese and the Western models.

The Chinese approach to human rights, democracy, and the RoL ultimately reflects a particular attitude toward sovereignty. In recent years China has been accused of being the stronghold of sovereignty and sovereign statism, where sovereignty has become more of a static concept rather than an idea in flux: for various Western authors the Chinese idea of sovereignty is absolute and non-compromising, because, as Allen Carlson summarizes it, 'Chinese policies preserved a static interpretation of territorial sovereignty, [and] promoted an unyielding and increasingly combative stance on jurisdictional sovereignty.'[596] This of course should be contextualized, as in some areas, like economic sovereignty, China seems less assertive.[597] In any case, strict adherence to the notion of sovereignty – as it can be seen in China's attitude toward human rights, and in its opposition to the principle of the reasonability to protect and humanitarian intervention –, ultimately reflects a more Westphalian approach to the international legal order, which has to do with Chinese modern history, the Opium Wars and China's forced introduction into the Western family of nations. Sovereignty became one of the guiding principles of Chinese foreign policy; it has been the cardinal principles of the five principles of Peaceful Coexistence enshrined in the Constitution, considered by many Chinese scholars to be the greatest Chinese contribution to the development of international law.[598]

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[592] See the 13th Five-years plans official document. URL = <http://www.npc.gov.cn/npc/zgrdzz/site1/20160429/0021861abd66188d449902.pdf>.

[593] Wang Yi, 'China: A Staunch Defender and Builder of the International Rule of Law,' 13 *Chinese Journal of International Law* (2014), 635-638.

[594] Wang Guohui, *Tamed Village 'Democracy' Elections, Governance and Clientelism in a Contemporary Chinese Villager*, Berlin, Heidelberg: Springer Berlin Heidelberg; June Teufel Dreyer, *China's political system: modernization and tradition*, New York : Pearson Longman, c2008.

[595] Daniel Bell, *The China Model, Political Meritocracy and the Limits of Democracy*, Princeton: Princeton University Press, 2015.

[596] A. Carlson, *Unifying China, Integrating with the World, Securing Chinese Sovereignty in the Reform Era*, Stanford: Stanford University Press, 2005, p. 3.

[597] Carlson, *Unifying China*, op. cit.; see also Potter, Pitman B., 'China and the International Legal System: Challenges of Partecipation,' *The China Quarterly* 191 (2007), 699-715; James V Feinerman, 'Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?' *The China Quarterly* 141 (1995), 186-210.

[598] The first full enunciation of the five principles of Peaceful Coexistence was contained in the Preamble of the Agreement between the PRC and the Republic of India on Trade and Intercourse between the Tibet Region of China and India of 1954.

From the descriptions above, Chinese experience does not seem to be even close to the constitutional paradigm of democratic statism criticized by Kumm.[599] This position, called also 'nostalgic position,' is characterized by three propositions: 'constitutional law, paradigmatically codified in the form of a written constitution, establishes the supreme law of a sovereign state; the authority of the Constitution is based on the idea that it can be fairly attributed to 'We the People' as the constituent power; and this constituent power is tied to the existence of a genuine political community that is the prerequisite for meaningful democratic politics.'[600] China is an authoritarian government, and at best it can follow a constitutional paradigm of 'authoritarian statism.' Moreover, there is nothing 'constitutional' in China to be nostalgic about, as the introduction of the first written constitution and constitutionalist thought is something related to its most recent modern history, in particular the history that followed the First Sino-Japanese War (1894-1895).[601] Despite the fact that there is a number of scholars that debate about constitutionalism in China and some of them even associated the China dream to the realization of constitutionalism, the CCP is quite sensitive to the word, and in the most official sources constitutionalism is dismissed as a Western imperial concept that can play the role of a Troy Horse if brought into China.[602]

The limits of 'exceptionalism'

In the eyes of global constitutionalists, China, from what has been described above, is considered 'exceptional' or deviant; because of this, it has been harshly criticised by the international community. For instance it has been defined as the least-likely case of compliance.[603] According to Ann Kent the reason for such behaviour is rooted in Chinese history, cultural tradition and power: 'It has historically considered itself to be the 'Middle Kingdom,' unconstrained by international society; it lacks a tradition of the RoL; and it is powerful enough to ignore its international obligations. Therefore it is less likely to comply with the norms, principles, and rules of international organizations and their associated treaties.'[604] China is often perceived as a country that cheats with the rules of international civilized society; the way Chinese tradition is described and characterized transforms China into a country inept at international law, which, because of its very nature, is almost incapable of complying and respecting

According to it the five principles were: 1) mutual respect for each other's territorial integrity and sovereignty; 2) mutual non-aggression; 3) mutual non-interference in each other's internal affairs; 4) equality and mutual benefit; and 5) peaceful coexistence. Agreement between the PRC and the Republic of India on Trade and Intercourse between the Tibet Region of China and India, April 29, 1954.

599 Kumm, 'The Best of Times and the Worst of Times,' op. cit.

600 Kumm, 'The Best of Times and the Worst of Times,' op. cit, p. 205.

601 Zhao Xiaogeng, 赵晓耕, *Zhongguo jin dai fa zhi shi zhuan ti yan jiu, 中国近代法制史专题研究* [Monographic study on Chinese Modern Legal History], Beijing: Zhongguo ren min da xue chu ban she, 2009.

602 Albert Chen, 'The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi's Studies on China's Political Constitution,' *China Review* 14, 2 (Fall 2014); Roogier Creemer, 'China's Constitutionalism Debate: Content, Context And Implications,' *The China Journal* 74 (2015); Yang Xiaoqing, 楊曉青, 'Xianzheng yu renmin minzhu zhidu zhi bijiao yanjiu'宪政与人民民主. 制度之比较研究 [A Comparative Study of Constitutionalism and People's Democracy], Hongqi wengao 10 (May 2013), available at http://www.21ccom.net/articles/zgyj/xzmj/article_20130052183896.html; Zheng Zhixue, 鄭志學, 'Renqing 'xianzheng' de benzhi'認清「憲政」的本質 [Understanding the True Nature of Constitutionalism], Dangjian 6 (May 2013), available at http://theory.people.com.cn/n/2013/0529/c83855-21652535.html (accessed 11 August 2014); Yin Hanning, 尹汉宁, 'Shenke renshi yishi xingtai gongzuo de jiduan zhongyaoxing'深刻认识意识形态工作的极端重要性 [Understanding Deeply the Utmost Importance of Ideological Work], Qiushi 18 (September 2013), available at http://www.qstheory.cn/zxdk/2013/201318/201309/t20130912_270588.htm.

603 Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance*. Philadelphia: University of Pennsylvania Press, 1999, p. 2.

604 Ann Kent, *Beyond Compliance: China, international organizations, and global security*, Stanford: Stanford University Press 2007, p. 2.

international standards.[605] There are also various IR authors that have discussed Chinese exceptionalism and Chinese divergence from the current world order.[606]

However, if we look at the international society, the practice and the understanding of public international law, China is not that exceptional; ultimately, and quite unoriginally, any great power is exceptional in the way it understands, uses or promotes international law for the sake of affirming its own interests and values. There is a vast literature that discusses, for instance, American exceptionalism.[607] After the Second World War, the United States, which had the largest percentage of the world GPD at the time, was the major contributor to the formation of the new institutions and rules of international law.[608] At the same time, it has also greatly disobeyed these rules: its refusal to ratify most of the human rights treaties while committing itself serious human rights violations, its adoption of protective measures in the international economy, and its occasional disregard for the rules of international law when waging war on other states, has meant the US becoming perceived as exceptional.[609] Europe as well has often been considered exceptional; its exceptionality rests in its pacifist social welfare model which strongly promotes human rights.[610] If we look at the behaviour of any major power, its interpretation and application of the rules of international law is always somehow exceptional. In a way exceptionalism is the rule in the international arena. Apart from a set of international legal rules and values that have been agreed upon by states, the remaining areas are open to the 'exceptionalism' of the interpretations of the contending actors of international society.[611] This can also be partly related to what Stephen D. Krasner defined as 'organized hypocrisy,' in which institutional norms endure but they are frequently ignored.[612] It is, in other words, a straw-man attack on Chinese deviation or exceptionalism in the practice of public international law. But what is interesting here is to see how China is exceptionally challenging not in its not respecting in practice public international law, but in its challenging the very normative core of Global Constitutional political project. As Anu Bradford and Eric Posner suggested, instead of looking at whether a particular vision or position is exceptional, it would be much more interesting to see whether that vision of international law is appealing in terms of a country's foreign policy and morality.[613]

The idea that China is exceptional or deviating in reality betrays a particular set of assumptions: states should comply with the rules of a particular juridical system and a legal and political culture, predicated

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[605] Alastair Iain Johnston, 'Is China a Status Quo Power?' *International Security* 27 (4) (2003), 5-56, 5-6

[606] Randall Schweller and Xiaoyu Pu, 'After Unipolarity: China's Visions of International Order in an Era of U.S. Decline,' *Journal Article, International Security* 36, 1 (2001), 41-72; William A. Callahan, 'Sino-speak: Chinese Exceptionalism and the Politics of History,' *The Journal of Asian Studies* 71, 1 (February 2012), 33-55; Barry Buzan, Michael Cox, 'China and the US: Comparable Cases of 'Peaceful Rise'?', *Chinese Journal of International Politics* (2013); Chris Alden, Daniel Large, 'China's Exceptionalism and the Challenges of Delivering Difference in Africa,' *Journal of Contemporary China* (2011), 20(68), January, 21–38; Shaun Breslin, 'China and the global order: signaling threat or friendship?' First published: 15 May 2013, URL = <http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12036/full>; Zhang Feng, 'The Rise of Chinese Exceptionalism in International Relations,' *European Journal of International Relations*, Vol. 19, No. 2 (2013), pp. 307, 315, 322.

[607] There is a vast literature on American exceptionalism. See for instance: M. Ignatieff, *American Exceptionalism and human rights*, Princeton: Princeton University Press: 2005; H. H. Koh, 'On American Exceptionalism,' *Stanford Law Review* 55 (2003); Anu Bradford, Eric A. Posner, 'Universal Exceptionalism in International Law,' *Harvard International Law Journal*, 52, 3 (2011): 3-54; Godfrey Hodgson, *The Myth of American Exceptionalism*, New Haven, Connecticut: Yale University Press, 2010.

[608] See '% of world GDP from year 1700 to 2008 (line)', URL = <https://infogr.am/Share-of-world-GDP-throughout-history>.

[609] Koh, 'On American Exceptionalism,' op. cit.

[610] Bradford, 'Universal Exceptionalism in International Law,' op. cit.

[611] Koh, 'On American Exceptionalism,' op. cit.

[612] Stephen D. Krasner, *Sovereignty, Organized Hypocrisy*, Princeton, N. J.: Princeton University Press, 1999. In a similar token see Posner, *The Perils of Global Legalism*, op. cit.

[613] Bradford, 'Universal Exceptionalism in International Law,' op. cit., p. 54.

on global terms, beyond the state. Constitutional principles, however, are grounded in the European Enlightenment, its intellectual history and in the French and American Revolution that promoted the formation of the liberal democratic state. There is a tendency to apply a positive content to the rules that should be globally valid, as reflected in the formulation of a content specific/positive Trinitarian mantra. This was expressed, as Larry Catá Backer pointed out, in the shift in the way constitutions were understood in the twentieth century. The new form of constitutionalism that emerged from this shift is grounded on the belief that not all constitutions are legitimate and thus not every political form is acceptable. This new current of thought is rooted in the belief that legitimate constitutions share a set of positive universal common characteristics. Specifically, legitimate constitutions obey the higher laws of the community of nations that should reflect a global consensus. From a procedural point of view such law should be against the arbitrary use of state power, and from a substantive point of view it should limit the type of political decisions that states could make when forming their government and exercising their governance power.[614] This constitutionalist language and the tacit positive universals contained in it, are increasingly becoming a common language among some Western international law scholars when describing the international legal order.

To ground the values that should define the current and future global legal order on positive universals, could lead to a possible hegemonic instrumentalization of such values and also to a potential marginalization of particular realities and experiences that do not fully conform to such universals. This fear echoes the critiques of globalization of the French sociologist Pierre Bourdieu, for whom globalization is the most complete form of imperialism, which consists in the attempt of a particular society to universalize its own particularity. He sees globalization as an ideology; besides its descriptive value it has a prescriptive one that aims to legitimize the liberal cosmopolitan project.[615] A strategy of exclusion that goes hand in hand with it, is that which labels other countries experiences as exceptional. These kind of critiques, including mine, namely accusing liberal legal globalism for being a false universalism, are well known and probably trite as Howse and Teitel suggested.[616] The issue in the end is how to reach a critical normativity capable of coordinating in a globalized world the experiences of countries with very different histories and traditions. But a first step is also to detect the aporia contained in the current doctrines, so that one can redirect general efforts toward better results.

I do not intend here either to be dismissive of the important role that invoking some constitutional principles in name of humanity and universal values had, or to be apologetic about China and its authoritarian government.[617] I simply want to argue that if we think of China in terms of exceptionalism we are incapable of understanding the current international legal order. Moreover, the adhesion of China is crucial for the overall legitimacy of the Global Constitutionalist project, and its behaviour cannot simply be marginalized. I also criticize China's promotion of its own exceptionalism. In fact, as mentioned above, the strategy of exclusion of exceptionalism, functions in two opposite ways: it has been used by great powers to exclude other actors from international law, but also to justify their lack of compliance with the general rules. Chinese scholars and leading political figures oppose the way China is portrayed as 'exceptional,' while promoting 'Chinese characteristics.' Not only they want to avoid international sanctions for their lack of compliance with certain international rules but they also want to emphasize Chinese cultural and historical diversity. While implicitly accepting the universality of some values, they assert the difference of the Chinese approach to those values. This approach helped Chinese scholars to emphasize the historical and cultural difference of China, to avoid being swallowed

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[614] Larry Catá Backer, 'Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age,' 16 *Ind. J. Global Legal Stud.* 85 (2009).

[615] P. Bourdieu, *Contre-feux 2. Pour un movement social europeen*, Paris, Liber, 2001, p. 95. This was discussed also in Zolo, *I signori della pace.* op. cit.

[616] Howse, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History?' op. cit.

[617] For the role that invocations to 'humanity' had in the real world see Ruti Teitel, *Humanity's Law,* Oxford: Oxford University Press, 2011, pp. 105-38.

up by the value-homogenizing force of global constitutionalism. However, recently some scholarship has tried to deconstruct Chinese model and Chinese exceptionalism, arguing that in many respects, in the fields such as tax, property and corporate law, Chinese behaviour 'is not esoterically peculiar but readily explainable.'[618]

There are a series of issues related to the global projection of the liberal Trinitarian mantra. One of them is the use of the domestic analogy. Most of Global Constitutionalism supporters have developed their theories on the grounds of an analogy with their domestic systems, and very often with the constitutions of their own countries.[619] For instance Kumm, recalling the domestic system, argues that also at the international level there should be a structured constitutional procedure that authoritatively and impartially determines what is just, in order to address the disagreement over questions about justice. To this end, the various actors of international society, including states, should establish a constitutional authority and subject themselves to it.[620] But such analogy cannot be used to transpose things that happen at the domestic level to the international level. This was a warning given also by one of the fathers of the idea of sovereignty, Hobbes: if there are common elements in the domestic and international system, while at the national level the state of nature among men is limited by the Leviathan, at the international level the sovereign states have not yet delegated their power to a world Leviathan and there are different elements that come into play, related to the profound differences that exist between the individuals and the state.[621] If one brings to the extremes the domestic analogy, then this would lead the formation of a world sovereign, which is something that Global Constitutionalism generally do not support. Despite the fact that constitutionalism tends to support centralization, global constitutionalists do not endorse the formation of a world state, believing that state sovereignty will continue to play an important role. Some rather share an optimistic vision about the possible emergence of a system of global governance in which it will become more difficult to wage wars or to commit genocide without being punished by an international police force or prosecuted by an international court of justice.[622] Moreover, one should notice a paradox related to the use of the domestic analogy in this context: while democracy domestically plays a major role in judging other states and potentially intervening in their domestic affairs, the democratization of global governance and the international lawmaking process play a less prominent role in the minds of global constitutionalists. As some of them have noticed, this is because democracy corresponds to electoral accountability, which would obviously be impractical at the global level. The general incapacity to consider a political opposition that radically differs from the liberal democratic model, as Christian Volk noticed, can be attributed to a liberal bias, in which contestation is not necessarily seen as an autonomous quality of political-democratic settings, and as such should be limited.[623]

Another issue is the projection of positive universals into international law and into the formulations of the global legal order. As the Japanese internationalist Yasuaki Onuma has discussed, 'international law scholars of major powers and hegemons unconsciously and unknowingly inject the thinking and theories

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[618] Weitseng Chen, 'Debating the Consensuses: The Beijing Consensus vs. The Washing Consensus,' in Weitseng Chen (ed.), *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development*, Cambridge: Cambridge University Press, forthcoming 2016, p.5.

[619] This would be the case of the ideas of world constitutionalism formulated in the book *World Peace Through Law* by Grenville Clark and Louis Sohn after the Second World War, and which where modelled according to the US Constitution. See Akihiko Kimijima, 'Japan's Contribution to Global Constitutionalism,' *Societies Without Borders* 4 (2009) 105-116, p. 106.

[620] Kumm, 'The Cosmopolitan Turn in Constitutionalism,' op. cit., pp. 615-161.

[621] David Singh Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order,' *The Yale Law Journal* 3, 125 (2016).

[622] Peters, 'Compensatory Constitutionalism,' op. cit., 580. Jeffrey L. Dunoff and Joel P. Trachman, *Ruling the World: Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009.

[623] Volk, 'Why Global Constitutionalism Does Not Live up to its Promises?', op. cit.

of their own countries' domestic laws into the discipline of international law.'[624] This limits the possible meanings of the terms that should constitute the Trinitarian mantra. Despite the aspirations of global constitutionalists to be more pluralistic – recognizing accordingly other histories and traditions –, the meaning attributed to each single element of the Trinitarian Mantra leave little space to other interpretations.[625] It is as though there is only one definition that corresponds to one experience of constitutionalism, or democracy, or human rights. This, however, means we lose sight of the complexity of the different experiences in the international social reality. There are many meanings and many types of constitutionalism that work differently according to the particular cultural and historical context of a specific country. There are different types of political systems, and liberal democracy is not necessarily the best system for all the various political realities. In this sense it is interesting the empirical study of David Law and Mila Versteeg that shows how besides an increased global constitutionalization determined by a general trend of 'right creep,' there is a polarization of the constitutional ideologies: on the one hand there is a conglomerate of state that support the more liberal paradigm of constitutionalism; on the other hand, there is another group of states, including China, that is opting for the more statist conception of constitutionalism. As the authors argued, for now there is very little evidence that these two paradigm are converging any time soon.[626] It seems thus that actors like China are characterized as exceptional at least in part because we are incapable of understanding the diversity of context and the diversity of meaning that one concept can acquire in such a different context. We seem ultimately incapable of seeing and understanding the specificity of other historical, cultural and social realities, which I believe should be legitimately taken into account.

Toward a more pluralistic model

New 'global' issues have arisen out of the globalization process, and these need to be solved at a more global level. This, however, does not imply a homogenization what we value. If we do not find the answers in the more traditional Westphalian perspective, Global Constitutionalism might seem at least partly an option, as long as it takes a more pluralistic outlook, otherwise the risk is to become another form of Western hegemony, in which its deemed universality becomes, as Danilo Zolo argued, a Holy Alliance of the 21st century.[627] Given the implicit assumptions that underpin the globalist agenda, what is called for is a more pluralistic model of Global Constitutionalism, if not a more pluralistic 'international' legal order, which looks at the leading political ideals within a particular society rather than applying a set of values and norms defined univocally as positive universals. China indeed poses a challenge, and possibly an exceptional one, to Global Constitutionalism. The question then is, can Chinese authoritarian statism be 'normalized' within a broader understanding of Global Constitutionalism, or it is doomed to be an 'exception'? There are certainly moral and normative limits implied in any order, but where and how to place them? In this sense it is interesting to look at how one of the leading liberal thinkers, John Rawls, has attempted to reconcile his liberal theory and its high requirements in terms of human rights, freedoms and political standards, with different non-liberal experiences.

John Rawls is famous in particular for his theory of a just liberal society, known as *justice as fairness*.[628] Without going into the merits of his theory and political thinking, here it is interesting to look at how he applied his theory of the decent peoples to international society, in an attempt to reconcile liberal standards with an international reality made up also of non-liberal states. His liberal theory of foreign

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[624] Yasuaki, *A Transcivilizational Perspective on International Law*, op. cit.

[625] Dunoff, 'Editorial, Hard Times: Progress narratives,' op. cit., p. 13

[626] Law, 'The Evolution and Ideology of Global Constitutionalism,' op. cit., p. 1243.

[627] Zolo, *I signori della pace.* op. cit.

[628] John Rawls, *Justice as fairness: a restatement*, Cambridge, Mass.: Belknap Press of Harvard University Press;2001; John Rawls, *The Law of the People*, Cambridge, Mass.: Belknap Press of Harvard University Press, 1999.

relations and the international legal order is grounded on his 'domestic' theory of political liberalism, as described in his *Political Liberalism*.[629] The liberal peoples or liberal society he describes are characterized by their being pluralistic but stable, and by their pursuance of a desirable deliberative democracy in which the government is chosen by the people, is under popular control, and is ruled under a legitimate constitution.[630] In such a liberal society the people who support non-liberal political doctrines are tolerated, as long as these doctrines respect a reasonable political conception of justice and what he calls, its 'public reason.'[631] They are defined as 'decent,' and they are not only tolerated but, together with the liberals, belong to the 'well-ordered peoples,' who are the sole peoples capable of adopting and promoting the law of the people, which corresponds to Rawls' ideal for a liberal, pluralistic and stable domestic regime.[632]

Such a regime is extended to the international level, and the toleration of non-liberal 'decent' peoples at the domestic level is valid also in international society.[633] For Rawls the actors of international society are neither single individuals, nor states, but societies or peoples. The peoples are ruled by one common government and they share a common conception of justice and right. Not all states qualify as 'peoples,' and states usually differ from people in that the former seek to enlarge their territory, trying to convert other people to their beliefs or to gain more economic strength. Reasonable people value freedom, equality, and respect other people with different political and social ideals. Despite being non-liberal, decent people, in order to be such, should be non-aggressive and should respect other people's rights. Moreover, they should respect the human rights of their people and impose bona fide moral duties and obligations on all persons within the people's territory; there should be a sincere and not unreasonable belief on the part of the judges and other officials who administer the legal system that the law is indeed guided by a common good idea of justice.[634]

Once peoples are ordered enough to qualify as decent, they are also treated as equal in international society. It seems thus that Rawls's theory is open to a certain degree of diversity both at the domestic and the international level. This is the reason why he promotes an 'international' rather than a 'cosmopolitan' international legal order, in which, as long as the peoples are 'decent', they are tolerated and considered equal. Rawls is aware in fact that the pluralism and diversity within international society is even greater than in any domestic liberal society, and therefore international rules, which are an extension of domestic rules, should be more tolerant of difference.[635] Liberal peoples for Rawls should not only tolerate decent peoples and acceptable ways of ordering society, but they should also avoid criticizing them or incentivizing them to become more liberal. In this sense Rawls departs partly from the Trinitarian mantra promoted by global legalism, in that the requirements for being decent, and thus treated as equal, are minimal. For instance, with regard to human rights, if it is important that human rights are respected by every people, the human rights he refers to are only core human rights; the right to subsistence, security, personal property, freedom from slavery, equality before the law, protection of ethnic minority against genocide and some liberty of conscience. There is no mention to a right to

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[629] John Rawls, *Political Liberalism*, New York: Columbia Unversity Press, 2005.

[630] Rawls, *The Law of the People*, op. cit., p. 138.

[631] Rawls, *The Law of the People*, op. cit., p. 59-63.

[632] Rawls, *The Law of the People*, op. cit., p. 63.

[633] Rawls, *The Law of the People*, op. cit., p. 60.

[634] Rawls, *The Law of the People*, op. cit., p. 65-6.

[635] He recognizes an international basic structure which is ordered and justified through eight basic principles: 1) peoples are free and independent, and their freedom and independence are to be respected by other people; 2) peoples are to observe treaties and undertakings; 3) Peoples are equal and are parties to the agreements that bind them; 4) Peoples are to observe the duty of non-intervention (except to address grave violations of human rights); 5) Peoples have a right to self-defence, but no right to instigate the war for reasons other than self-defence; 6) Peoples are to honour human rights; 7) Peoples are to observe certain specific restrictions in the conduct of war; 8) Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime. Rawls, *The Law of the People*, op. cit., p. 37.

democratic participation, which instead is taken for granted by the supporters of Global Constitutionalism.

I have mentioned Rawls briefly because probably, as European liberals, we still have to make an effort to think of different futurabilities and make sense of divergence in today's globalized world. By adopting Rawls's theory and applying it to international relations, the exceptionalism of China is brought back if not to a 'normality' at least to a 'decency' that should be tolerated in its non-liberal being. The issue is whether China would qualify first of all as people, and then as decent hierarchical society. Who is going to decide on that, however, is still an open issue. Moreover, the very notion of 'toleration' betrays the idea that something is not legitimate, or at least not fully accepted. This word, which became popular in the course of the XVI and XVII century in the context of the Protestant reform in Europe, was not surprisingly an answer to the rupture of religious unity.[636] Despite the limits of Rawls's model in taking into account China, this could be a way for Western liberal people to make sense of, and to include within their theoretical framework and their universalistic normative account, other experiences that do not completely conform to their moral ideals. Another possible solution that comes from Rawls' theory is the idea of overlapping consensus.[637] According to it, different political conceptions of justice apparently incompatible and irreconcilable, can find a point of overlapping agreement, but I will not elaborate further on this here. Even the application of Rawls's model to integrate China within the global constitutional order leaves a multitudes of issues. There is a fundamental incapacity to understand Chinese reality; rather there is a tendency to re-assimilate its experience into our own conceptual, normative and legal structures.

In this sense an interesting intellectual exercise would be to broaden the Trinitarina mantra or the constitutional principles that inform an 'appropriately structured international legal order.' As Kumm argues, 'the relationship between domestic and international law is neither one of derivation for of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure.'[638] In an editorial of *Global Constitutionalism* the authors argue that there are other elements beyond the Trinitarian mantra that might justify the political power that eventually inform and legitimizes an appropriate structured international legal order.[639] These, for instance, include the economic development, the creation of a middle class of consumers, sovereignty, national identity, ethnic traditions or divine imperatives. For the authors the fact of simply acknowledging these possibilities make Global Constitutionalism's Trinitarian mantra loose its universalist aura. However, if we read through the lines, as argued before, to recognize that there are other elements that might justify political power, is not enough to disprove the universalist tendencies of Global Constitutionalism, at least in its progressive *ought to be*. The elements outside of the Trinitarian mantra are acknowledged, but in the progressive narrative, they correspond more to A, than to the ideal B (the Trinitarian mantra). My suggestion would be, why not to expand the Trinitarian mantra, and with regard to China, considering also other normative elements, such as the stability of a society, meritocracy, or the importance of economic development? Constitutionalism is the result of a specific history, but given the fact that now it expanded beyond the borders, it is not unlikely that it opens up to other values, and that it evolves, to use Somek's terms, into a 'Constitutionalism 4.0.' By going beyond the national borders of Western states, Global Constitutionalism is enriched also by other traditions, and for instance it could assume as part of its narrative and normativity, values and principles that comes from beyond its borders. In this sense, it is

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[636] 'Tolleranza,' in Dizionario di Filosofia, Treccani, 2009, URL = <http://www.treccani.it/enciclopedia/tolleranza_(Dizionario-di-filosofia)/>.

[637] Rawls, *Political Liberalism*, op. cit., pp. 163-172.

[638] Kumm, 'The Cosmopolitan Turn in Constitutionalism,' op. cit., p. 625.

[639] Kumm, 'How large is the world of Global Constitutionalism?', op. cit., p. 5.

interesting the work of the Chinese political theorist Bai Tongdong, who claimed that the Chinese tradition could produce its own hypothetical Confu-China model, which, he argues, is even more realistic as a utopia than the model supported and predicated by Rawls.[640] This model promotes a more hierarchical political structure, based upon political considerations and on the presupposition that citizens need to be properly educated and informed before taking part in political activities. Bai, in a sense it broadens the scope of the domestic analogy that is at the core of Global Constitutionalism, so as to include the domestic experience of China and reflect it in the international or global normative domain.

To conclude, to adopt a less dogmatic view of the values and rules that should underpin the international legal order I sustain that Global Constitutionalism should be regarded more as a forum in which not only various ideas of human rights, RoL, democracy, sovereignty and other normative sources, interact with each other and reach a communicatively rational output based on an account of what is good in different social, economic, and political contexts, but also in which other normative elements can come into play. In such a forum, different normative and political experiences and different expectations are channelled in order to construct a broader discourse of Global Constitutionalism, which might influence the formation of the future international legal order. Most importantly, Global Constitutionalism is not only a critical theory of law that attempts to describe the international law as it is. It is also an ambitious normative and political project that could inform particular sensibilities and that could guide the process of globalization, but its normative ideals are still far from the current and the near-future international social reality, which might well be polycentric and not unitary.

[640] Bai Tongdong, 'A Criticism of Later Rawls and a Defense of a Decent (Confucian) People,' in Brian Bruya (ed.), *The Philosophical Challenge from China*, Cambridge: The MIT Press, 2015, 101-120.

EU leadership for 'constitutional reforms' of international trade and investment law?

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Free trade agreements (FTAs) protecting rights and remedies of citizens have been uniquely successful in European integration. Yet, the EU neglects its 'cosmopolitan foreign policy mandate' in FTA negotiations with non-European countries. European citizens increasingly criticize transatlantic FTAs for undermining fundamental rights and judicial remedies inside the EU. Rather than exercising leadership for reforming the 'disconnected UN/WTO governance' of transnational public goods (PGs) by designing FTAs among democracies as 'cosmopolitan international law', the EU institutions prioritize bureaucratic self-interests in reducing legal, democratic and judicial accountability vis-à-vis citizens, ushering in EU legitimacy- and rule-of-law-crises.

This contribution elaborates three legal propositions: *First*, the 'cosmopolitan foreign policy constitution' of the Lisbon Treaty (e.g. Arts 3, 21 TEU) requires the EU to protect EU constitutional principles and fundamental rights in treaty negotiations with third countries even if third countries insists on maintaining their different constitutional traditions (*section I*).

Second, recent EU FTAs (e.g. with NAFTA countries) risk undermining fundamental rights and judicial remedies of EU citizens (e.g. as protected in Arts 16, 17, 47, 52 EU Charter of Fundamental Rights (EUCFR)) and unnecessarily discriminate against EU investors (*section II*). *Third*, EU law requires stronger EU leadership for protecting democratic, republican and 'cosmopolitan constitutionalism' in multilevel governance of transnational PGs, for instance through transatlantic FTAs and other mega-regional agreements (e.g. EU-India and EU-ASEAN FTAs) that could serve as models for reforming the 'disconnected' UN/WTO governance dominated by government executives. The more globalization transforms *national* into *transnational 'aggregate PGs'*, the more citizens must insist on 'constitutionalizing' multilevel governance of PGs so that citizens can hold multilevel governance institutions legally, democratically and judicially more accountable for failing to limit 'market failures' and 'governance failures' by protecting constitutional and cosmopolitan rights more effectively (*sections III-IV*).

The EU's 'cosmopolitan foreign policy constitution'

The EU Treaty provisions on 'democratic principles' (Articles 9 ff TEU) and on conferral of limited EU powers subject to constitutional restraints (e.g. also on EU *foreign policy powers*, cf Articles 3, 21 TEU) illustrate the need for supplementing national democracies for collective supply of *national PGs* by multilevel participatory, deliberative and representative, democratic governance, cosmopolitan rights and judicial remedies protecting *transnational PGs* with due respect for the constitutional principles of limited conferral of powers, subsidiarity, proportionality and rule of law (cf. Article 5 TEU).

In order to protect rights of EU citizens and PGs across national frontiers, the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity,

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the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' (Article 21:1 TEU). Article 3:5 TEU specifies this 'cosmopolitan foreign policy mandate' by requiring, *inter alia*, that '(i)n its relations with the wider world, the Union shall … contribute to the protection of its citizens' and to 'strict observance and the development of international law'. The Court of Justice of the EU (CJEU) emphasizes that 'respect for human rights is a condition of the lawfulness of Community acts'[641] also in the external relations of the EU; EU law (e.g. the EUCFR) protects fundamental rights as constitutional restraints on the exercise of all public authority by EU institutions. Hence, the EU rules and principles constituting, limiting, regulating and justifying the conferral of limited EU foreign policy powers (e.g. in Articles 3, 21 TEU, Articles 205 ff TFEU, the EUCFR) for multilevel protection of transnational PGs can be construed as a 'cosmopolitan foreign policy constitution' based, *inter alia*, on the following principles for the EU external relations policies:

1. The EU's 'multilevel rights constitutionalism' – as illustrated by the inclusion of 'human rights clauses' into more than 130 EU agreements with third countries[642] and the multilevel legal and judicial protection of rights of citizens inside the EU - reflects the EU Treaty commitments to 'protection of its citizens' and of their human and constitutional rights in the EU's external relations (cf Articles 3, 21 TEU).
2. The multilevel legal commitments to the 'rule of law' (Article 2 TEU) and to effective judicial remedies at national and European levels of governance (cf Arts 47 EUCFR, 19 TEU) and beyond the EU in regional PGs treaties (e.g. by the European Court of Human Rights, the EFTA Court) and worldwide PGs treaties (e.g. by WTO dispute settlement bodies, the International Tribunal for the Law of the Sea) aim at 'strict observance of international law' (Article 3 TEU) - without delegation of EU powers to violate international treaties approved by parliaments for the benefit of EU citizens.
3. EU constitutional law provides for multilevel parliamentary, participatory and deliberative democracy in internal and external policy-making (cf Articles 9-12 TEU), as illustrated by parliamentary co-decision powers (e.g. of the directly elected European Parliament) and individual rights that go far beyond the more limited parliamentary and democratic principles in other multilateral treaties; the European Parliament has used its powers also to reject international draft agreements negotiated by EU executives without adequate involvement of the European Parliament.[643]
4. EU membership in worldwide and regional organizations has led to the incorporation into EU law of related 'PGs treaties' (like the WTO Agreement, the UN Convention on the Law of the Sea) as 'integrating parts of the Community legal system', thereby justifying legal presumptions that precise and unconditional treaty obligations of the EU (e.g. under the EEA Agreement) can be invoked by citizens also in domestic courts as relevant legal context; such judicial protection of individual rights (e.g. based on EU trade agreements with EFTA countries, Russia and Turkey)

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[641] Opinion 2/94, ECR 1996, I-1759, para.34. On the '*Kadi*-jurisprudence' annulling 'smart sanctions' of the EU on grounds of human rights violations even though these sanctions were ordered by the UN Security Council against alleged terrorists, see: M.Avbelj/F.Fontanelli/G.Martinico (eds), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial* (London: Routledge, 2014). The relevance of the EUCFR and of Article 21 TEU as constitutional restraints on EU trade agreements was recognized by the General Court in the recent case T-512/12, *Frente Polisario v Council*, of 10 December 2015 (nyr).

[642] Cf. E.U.Petersmann, Integrating Human Rights into EU Trade Relations – The EU as a Global Role Model? in: T.Takacs/A.Ott/A.Dimopoulos (eds), *Linking Trade and Non-Commercial Interests: The EU as a Global Role Model?*, CLEER Working Paper: Amsterdam 2013/4.

[643] Cf. M. Cremona, International Regulatory Policy and Democratic Accountability : The EU and the ACTA, in: M.Cremona/P.Hilpold/N.Lavranos/S.Schneider/A.Ziegler (eds), *Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden: Nijhoff 2014, at 155 ff.

is, however, opposed by EU politicians in FTAs with non-European countries in order to limit legal and judicial restraints and accountability in external relations.[644]

The explicit 'foundation' (Article 2 TEU) of both the internal and external EU law - and the legal definition of 'the Union's aims' (Article 3 TEU) - in terms of protection of human rights, rule of law, democratic governance and specific PGs (like the common market, a monetary union) exclude path-dependent claims that the EU external relations law 'lacks a *telos*' and sets no specific goals limiting the EU's foreign policy discretion.[645] For instance, EU constitutional law protects fundamental rights also in the external relations of the EU (e.g. 'the freedom to conduct a business in accordance with Union law' pursuant to Article 16, private property rights pursuant to Article 17 EUCFR, rights to effective judicial remedies pursuant to Article 47 EUCFR); it permits limitations 'on the exercise of the rights and freedoms recognised by this Charter… only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others' (Article 52 EUCFR). The EU's 'cosmopolitan' and 'republican constitutionalism' justifies not only legal and judicial review of foreign policy restrictions of rights and freedoms of citizens, as illustrated by the *Kadi*-jurisprudence. It also limits claims that 'the EU's external policy objectives are non-teleological, non-prioritised, open-ended, and concerned more with policy orientation than goal-setting'.[646]

Disregard for fundamental rights in EU FTAs with non-European countries

The EU Commission negotiated the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada 2009-2014 with very little involvement by the European Parliament, national parliaments and civil society in Europe. As the draft treaty text published on-line on the EU Commission's website in September 2014 gave rise to parliamentary and civil society challenges (notably of the CETA investor-state arbitration rules), parts of the text were re-negotiated in early 2016 ushering in the on-line publication of a revised treaty text in February 2016.

Are 'anti-citizen clauses' justifiable in terms of Article 52 EUCFR?

The complexity of the more than 1600 pages of English treaty texts entailed that most EU citizens 'rationally ignored' this kind of 'international law-making'. Many treaty provisions and regulatory problems – such as the 'anti-citizen clause' in what is now Article 30.6 ('(n)othing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties') – were hardly ever discussed in parliaments and civil society debates; they are not justifiable as 'necessary' (e.g. in terms of Article 52 EUCFR) for protecting fundamental rights and general interests of EU citizens, for instance because EU fundamental rights and judicial remedies offer much higher legal protection than CETA's 'disfranchisement' of EU citizens. While FTAs with European countries protect citizens through multilevel judicial safeguards that citizens can invoke in national and European courts (like the CJEU and the EFTA Court), the recent EU FTAs with Asian and NAFTA countries exclude such rights and remedies; only foreign investors are granted privileged access to investor-state arbitration (Article 8.18 CETA) subject to procedural

[644] Cf. A.Semertzi, The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements, in: *CMLRev* 51 (2014), 1125-1158. More specifically on the EU's 'foreign policy constitution' see: E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods - Methodology Problems in International Law*, Oxford: Hart 2016, chapter 1.iv.

[645] The 'absence of a *telos*' and 'open-ended characteristics' in EU external policies are emphasized by Anglo-Saxon lawyers like M.Cremona, A Reticent Court? Policy Objectives and the Court of Justice, in : M.Cremona/A.Thies (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges*, Oxford : Hart 2014, at 29, 31.

[646] M.Cremona (note 5).

conditions (e.g. withdrawal or discontinuance of existing proceedings before a domestic court, cf Article 8.22) and to a narrow scope of applicable law excluding fundamental rights.[647]

Arguably, these intergovernmental limitations of judicial remedies of non-governmental actors in *national* and *European courts* (e.g. non-applicability of FTA provisions) as well as in *international courts* (e.g. access only for foreign investors, non-applicability of EU law) fail to transform the EU's 'cosmopolitan foreign policy mandate' of 'protection of citizens' and 'strict observance of international law' (Article 3 TEU) into legislation, administration and adjudication. The 'disempowerment' of citizens through intergovernmental trade and investment rules, the lack of effective parliamentary and democratic control of FTA negotiation, the one-sided influence of 'stakeholder interests' in these FTA negotiations, and the lack of protection of fundamental rights (e.g. those in the EUCFR) and of effective judicial remedies justify popular fears that intergovernmental trade agreements – even among constitutional democracies – risk curtailing constitutional rights of EU citizens through non-transparent 'executive governance'. Such fears provoked increasing civil society opposition against the EU negotiations of CETA and of the Transatlantic Trade and Investment Partnership (TTIP) with the USA. Even if trade politicians claim that their intergovernmental agreements do not formally limit domestic legislative procedures, national and European parliaments have a record of only rarely challenging internationally agreed 'expert texts' and intergovernmental agreements resulting from many years of secretive, diplomatic negotiations.

Is prioritization of rights of the EU over rights of citizens democratic?

The 2016 CETA text 'reaffirms' and 'recognizes' human rights in two Preamble paragraphs; yet it makes no effort at complying with the human rights requirement that 'everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (Article 29 Universal Declaration of Human Rights (UDHR)). CETA does not refer to the fundamental rights protected by the EUCFR, for instance the constitutional requirement that '(a)ny limitation on the rights and freedoms recognised by this Charter must (…) be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others' (Article 52 EUCFR). In contrast to claims by some EU officials, the Charter rights and related 'proportionality principles' also limit EU trade policy measures[648]; according to Article 21 TEU, they must guide the EU's external market regulations and implementation of trade agreements. For example, Articles 16 ('freedom to conduct a business in accordance with Union law'), 17 (right to property), 47 (right to an effective remedy and to a fair trial) and 52 (necessity and proportionality of restrictions) protect fundamental rights of 'everyone'; they risk being violated by discriminatory restrictions without effective judicial remedies inside the EU, for instance when citizens can neither invoke FTA rules in domestic courts (as excluded by Article 30.6 CETA and similar provisions in other FTAs) nor their fundamental rights in the proposed CETA investment tribunal (whose 'applicable law' is limited to international law without EU law). Arguably, such 'disempowerment' of EU citizens through Article 30.6 CETA (no conferral of private rights, no direct applicability of CETA in domestic legal systems) and the narrow definition of the 'applicable law' in the CETA investment tribunal (cf Art. 8.31 CETA) limit the 'right to an effective remedy' and the prohibition of discrimination on grounds of nationality (cf Article 18 TEU) beyond what is 'necessary' and 'proportionate' in violation of Articles 47, 52 EUCFR; as citizens and protection of their equal rights are the primary source of legitimacy in the EU, EU citizens must be entitled to

[647] Cf. Article 8.31: 'When rendering its decision, the Tribunal … shall apply this Agreement, as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties'. The treaty text and all following information on the CETA and TTIP negotiations are available on the website of the European Commission, Directorate-General for Trade: http://trade.ec.europa.eu/doclib/press.

[648] See note 1 above.

invoke democratic legislation – including FTA agreements approved by parliaments for the benefit of citizens – in domestic jurisdictions.

CETA risks undermining rights of EU citizens

The broad definition of the 'applicable law' in Article 42 of the World Bank Convention on the Settlement of Investment Disputes between States and Nationals of other States illustrates that investor-state arbitration involves all three dimensions of international investment law, i.e. national laws, investor-state contracts, and international law rules applicable in the relations among the home and host states involved.[649] The EU proposals for new FTA investment rules 're-fragment' these complex interactions among the interdependent 'three levels of investment regulation' and related adjudication; this risks harming investors, other citizens and rule of law (including national law, EU law and international treaty obligations of the EU). EU law does not authorize trade negotiators and investment tribunals to use FTAs to circumvent national and European constitutional law and judicial remedies of citizens in order to limit the judicial accountability of EU institutions.

In Opinions 1/2009 (European Patent Court) and 2/2013 (ECHR), the CJEU emphasized the constitutional prohibition of unnecessarily limiting the EU guarantees of interpreting and protecting fundamental rights within the particular structures and restraints of EU law (e.g. cooperation between national and EU Courts through preliminary rulings subject to multilevel constitutional restraints). A legal opinion by the German Association of Judges inferred from EU and German constitutional law that the CETA limitations of the jurisdiction of national and EU courts for investor-state disputes are neither necessary nor consistent with EU law in view of the alternative of more effective, and more comprehensive legal and judicial remedies in European courts.[650] The legal admissibility of 'negative discrimination' of EU investors inside the EU remains likewise contested.[651] The CETA provisions on the 'right to regulate' and on 'exceptions' do not secure that national and EU trade and investment measures remain consistent with EU law (e.g. fundamental rights). Nor does CETA secure that legally binding rulings of the investment tribunal do not adversely affect EU law (e.g. the autonomy of EU law and domestic implementation of FTAs as an 'integral part' of EU law)[652]; even though CETA will improve *arbitration procedures* and the *composition* of investment tribunals, CETA's often vague investment rules are unlikely to meet the procedural and substantive standards of EU law (cf Articles 47, 52 EUCFR) and of the ECHR (cf Articles 6(1), 13 ECHR). Rather than providing for legal and 'judicial privileges' for foreign investors that discriminate against domestic investors and citizens inside the EU and risk circumventing EU constitutional law, Articles 3, 21 TEU and the EUCFR require EU trade negotiators to protect the fundamental rights of *all EU citizens* through – comparatively more effective and constitutionally more constrained - domestic and EU judicial remedies, even if foreign trading partners insists on maintaining their different legal and policy traditions (e.g. of providing for ICSID procedures for investment disputes in NAFTA countries). Alleged judicial deficiencies inside some EU member states must be corrected and brought into conformity with EU law; they cannot justify undermining fundamental rights and rule of law inside the EU through FTAs and foreign arbitrators that risk ignoring EU constitutional law.

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[649] Cf. J.W.Salacuse, *The Three Laws of International Investment. National, Contractual, and International Frameworks for Foreign Capital*, OUP 2013.

[650] Cf Deutscher Richterbund Stellungnahme 04/16 (http://www.drb.de/cms/index.php?id=952).

[651] Cf the request of 3 March 2015 (I ZB 2/15) by the German *Bundesgerichtshof* for a preliminary ruling by the CJEU on whether investor-state arbitration inside the EU is consistent with EU law (e.g. Arts 18, 267, 344 TEU).

[652] CETA provides not only for the possibility of judicial awards of monetary damages, but also of restitution of property (cf. Article 8.39), interim measures of protection (Article 8.34), and domestic enforcement of awards (Article 8.41).

'Transformative' transatlantic FTAs without rights and remedies of citizens?

In 2006, the lack of progress in the WTO's Doha Round negotiations prompted the EU to launch a new 'Global Europe' trade and investment strategy aimed at concluding 'deep and comprehensive' FTAs with economically and strategically important partner countries in

Asia (e.g. Korea, Singapore and Vietnam) and in the Americas. The CETA and TTIP negotiations aim at 'transformative FTAs' that – similar to other mega-regional FTAs like the Trans-Pacific Partnership (TPP) agreement signed in February 2016 by 12 pacific trading countries producing more than 40% of global GDP[653] - will liberalize and regulate trade in goods and services far beyond WTO rules; it shall assume 'geo-political importance' by setting new standards for multilateral trade, investment, environmental, labour and consumer protection regulation. TTIP focuses on the following four objectives that are progressively clarified in 24 joint EU-US working groups on TTIP, which aim at finalizing a draft agreement before the end of 2016:

1. Ambitious, reciprocal liberalization of market access for goods, services, investments and public procurement at all levels of government; market access for goods and services aims at removing customs duties on goods and restrictions on services, gaining better access to public markets, and making it easier to invest; the exclusion of audio-visual services, of general free movement of workers and of other citizens illustrates that TTIP remains less ambitious than the EEA agreement.
2. Reducing non-tariff trade barriers and enhancing the compatibility of regulatory regimes through a permanent system of regulatory cooperation; improved regulatory coherence and cooperation in dismantling unnecessary regulatory barriers (e.g. due to bureaucratic duplication of procedures) will go beyond the WTO Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), for instance by means of sectorial agreements for textiles, chemicals, pharmaceuticals, cosmetics, medical devices, cars, electronics/ICT, machinery/engineering and pesticides.
3. Developing common rules (e.g. for consumer, labour, investment, social and environmental protection, civil society involvement, parliamentary cooperation) to address shared, global trade challenges; the improved international cooperation in setting international standards (e.g. for energy and raw materials, labour and environment, trade and sustainable development, public procurement, intellectual property, competition policy, small and medium-sized enterprise, trade remedies, customs and trade facilitation) aims at making TTIP countries global 'standard-setters' rather than 'standard-takers'.
4. Institutional structures for progressively implementing the TTIP; while the proposed dispute settlement provisions remain less ambitious than the EEA agreement (e.g. its EFTA Court), the TTIP Regulatory Council could introduce innovative procedures for harmonisation, mutual recognition agreements and common minimum (equivalence) standards, yet with due respect for democratic legislation in Europe and in the USA.

Evaluations of CETA and TTIP depend on their respective legal, economic and political methodologies for multilevel governance of PGs like a transatlantic market that could - in future - include all 3 NAFTA states, the 31 EEA member states and additional states (like Switzerland and Turkey). From utilitarian economic perspectives, transatlantic FTAs offer important economic welfare gains, for instance in terms of reducing the costs of production, trade and consumption and enhancing competitiveness of European industries and consumer welfare. They also offer geopolitical gains, e.g. in terms of

- promoting energy security in Europe;

[653] They include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA and Vietnam.

- setting global standards for regulation of the 'interface' between economic and non-economic PGs (like health protection, climate change prevention); and for
- facilitating future reforms of WTO law, for instance by preparing a later 'multilateralization' of mega-regional FTAs which could ultimately replace the ineffective WTO system for consensus-based, global trade liberalization by a more ambitious 'WTO II legal system' (similar to the replacement of GATT 1947 by the WTO Agreement).

Yet, welfare gains, their social distribution and the democratic acceptability of legal reforms will depend largely on empowering citizens to protect transnational rule of law so that citizens can challenge, for instance, the long-standing market failures and governance failures in transatlantic relations which gave rise to numerous transatlantic economic disputes over the past decades.[654] From the point of view of the 'cosmopolitan constitutionalism' inside the EU and the EEA, transatlantic FTAs without rights and remedies of citizens risk undermining the constitutional rights of EU citizens, as illustrated by

- the intergovernmental exclusion of rights and effective judicial remedies of citizens (e.g. in Article 30.6 CETA);
- the lack of transparency and of effective, parliamentary control of the EU negotiations of CETA (2009-2014) and of previous FTAs;
- the provision of procedural and substantive judicial privileges to foreign investors and related 'negative discrimination' against EU citizens in transatlantic economic cooperation; and
- the intergovernmental disregard for the EU guarantees of rule of law, as illustrated by the US criticism that EU proposals of authorizing EU member states to restrict genetically modified organisms (GMOs) without scientific evidence of their potential health risks run counter to WTO law and to the need to promote global food security, scientific progress and 'public reason' in conformity with rule of law.

Need for limiting transatlantic 'governance failures' through rights and remedies of citizens

Comparative institutionalism suggests that - while citizen-oriented protection of common market rules inside the EU and EEA evolved in response to the judicial remedies of citizens in European courts - the 'executive dominance' of transatlantic rule-making is the main reason for the inadequate 'democratic input legitimacy', 'democratic output legitimacy' (e.g. in terms of undermining equal rights and remedies), and inadequate protection of PGs (like rule of law) in the 'Transatlantic Partnership' since the 1990s. Empirical case-studies of the 'governance failures' in transatlantic relations - as illustrated by transatlantic economic and legal disputes over EU import restrictions on bananas, safeguard measures, antidumping and countervailing duties, industrial subsidies (e.g. for US 'foreign sales corporations'), European agricultural subsidies, EU import restrictions on hormone-fed beef and GMOs, technical barriers to trade (e.g. on 'hushkits' for US airplanes), unilateral extraterritorial application of competition laws, US interferences with transatlantic data protection, discriminatory US practices in fields like government procurement and intellectual property rights, and inadequate cooperation in environmental policies, telecommunications, shipping- and air-transports[655] - confirmed that – with regard to international law and policy cooperation – 'Americans are from Mars and Europeans are from Venus'.[656] For instance, the 'constitutional nationalism' and hegemonic power politics cultivated by US politicians favours 'legal dualism' and US scepticism towards international law (e.g. prompting the US Congress to exclude rights of citizens to invoke and enforce international treaty obligations in US courts). *Internal European integration* is built on greater trust in international law and in multilevel governance of international PGs (like multilevel legal and judicial protection of fundamental rights,

[654] Cf. E.U.Petersmann/M.Pollack (eds), *Transatlantic Economic Disputes. The EU, the US and the WTO*, OUP 2003.

[655] On these disputes see the numerous case-studies in: Petersmann/Pollack (note 14).

[656] Cf R.Kagan, *Of Paradise and Power: America and Europe in the New World Order*, New York: Knopf, 2003, at 3.

transnational rule of law, common markets and competition law systems). American and European approaches to *external economic governance* often differ, as illustrated by the comparatively lesser participation of US regulatory agencies in international standard-setting organizations and US reluctance to ratify international human rights, labour law, criminal law and environmental conventions. The stronger US preferences for science-based risk assessment procedures (as internationally agreed in the WTO Agreement on SPS Measures) are linked to the comparatively stronger parliamentary control of US regulatory agencies and their avoidance of some of the health and SPS crises (like mad cow diseases) that undermined consumer confidence in Europe regarding science-based risk assessments of product and production standards.[657]

The EU Treaty requirements (e.g. in Articles 3 and 21 TEU) to base external FTAs on the constitutional 'values' and 'principles' that successfully govern market regulation and competition throughout Europe reflect the insight that - the more international treaties assume legislative functions for protecting *transnational PGs* which no single state can unilaterally protect without international law and institutions - democracies have reasonable self-interests in applying and protecting international treaties approved by parliaments for the benefit of citizens. Inside the EU and the EEA, citizens invoking and enforcing their rights in domestic jurisdictions - as 'market citizens' (e.g. producers, investors, traders, consumers), 'social citizens' (e.g. family members of workers moving across the EU), 'democratic principals' of multilevel governance agents (e.g. electing the European Parliament) and 'agents of justice' entitled to challenge abuses of public and private powers in national and European courts - have been the most important 'drivers' for democratic acceptance, progressive development and decentralized enforcement of economic integration law, as reflected in the case-law of European Courts protecting individual rights under EU law. The multilevel judicial protection by national and European courts of rights of private plaintiffs against violations of EU law – as in the leading EU case-law triggered by complaints from the Dutch transporter *Van Gend en Loos*, the Italian lawyer *Costa*, the German vine grower *Hauser*, or the Belgian stewardess *Defrenne* – illustrated how constitutional rights and judicial remedies often prompt citizens to use their 'republican virtues'[658] for enforcing multilevel compliance with treaties approved by parliaments for the benefit of citizens. For decades, similar disputes in transatlantic relations all too often gave rise to intergovernmental power politics rather than to decentralized conflict resolution through legal protection of equal rights of citizens and impartial third party adjudication.

Transnational public goods (res publica) call for 'republican' and 'cosmopolitan constitutionalism'

This contribution has criticized the EU negotiations on transatlantic FTAs for their 'executive dominance' undermining the EU's rights-based 'cosmopolitan foreign policy constitution' and democratic support by citizens for transatlantic FTAs. EU citizenship as a 'republican duty' calls for effective judicial remedies by domestic courts of justice – rather than only by inter-state or investor-state adjudication without constitutional safeguards – in order to empower and protect democratic

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[657] Cf the numerous case-studies on American and European approaches to multilevel economic governance in: C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Oxford: Hart 2011; D.Cardoso *et alii* (eds), *The Transatlantic Colossus. Global Contributions to Broaden the Debate on the EU-US Free Trade Area* (Bertelsmann e-book 2015).

[658] Cf J.G.A.Pocock, *The Machivallian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton UP 1975 (emphasizing, *eg* on page 67, that the republican ideal of cultivating and exercising the four 'cardinal virtues' - prudence, justice, courage and temperance - for citizenship as a public office remains central to the collective supply of PGs as explained by Aristotle and Cicero). On the diverse legal traditions of republicanism and the disagreement on whether the core values of republicanism should be defined in terms of liberty (non-domination), republican virtues of active citizenry finding self-realization in political participation and collective supply of PGs, communitarianism, social and political equality, or deliberative democracy, see: S.Besson/J.Luis Marti (eds), *Legal Republicanism: National and International Perspectives*, OUP 2009.

'compliance constituencies' and transnational rule of law for the benefit of *all citizens*.[659] Inside the EEA, the cosmopolitan rights codified in the EUCFR – such as 'freedom to conduct a business in accordance with Union law' (Article 16), property rights (Art. 17) and the 'right to an effective remedy and to a fair trial' (Article 47) – have empowered citizens and foreigners alike to rely on 'strict observance of international law' (Article 3 TEU) across national boundaries. The 'emancipatory function' of FTAs among democracies – e.g. for extending multilevel protection of equal rights of citizens against abuses of foreign policy powers - is unduly neglected by diplomatic insistence on excluding rights and effective remedies of citizens under FTAs with non-European countries. The increasing civil society protests against disempowering and discriminating citizens through FTAs succeeded in forcing the EU Commission to re-negotiate the CETA investment rules and to promote transparency of FTA negotiations. Yet, the EU institutions continue to exclude private rights and judicial remedies of citizens under the EU's external trade agreements on grounds of 'political freedom of manoeuvre'[660], notwithstanding the recognition of individual rights and judicial remedies in investment and trade agreements among European countries. Arguably, such 'Hobbesian claims' - even if they have been accepted by the CJEU in order to justify its judicial self-restraint to review the legality of EU acts in the light of WTO law and UN conventions (like UNCLOS, UN air transport and environmental conventions) - are inconsistent with

- the EU's constitutional requirements of 'strict observance of international law' (Article 3 TEU) and judicial protection of rule of law (Article 19 TEU);
- the 'coherence-' and 'consistent-interpretation' requirements of domestic and international legal systems (e.g. in Articles 21 TEU, XVI:4 WTO Agreement);
- the 'network conception' linking global trading communities (e.g. in order to reduce transaction costs for global supply chains and provide 'security and predictability to the multilateral trading system' as prescribed in Article 3 WTO Dispute Settlement Understanding);
- multilevel judicial comity among domestic and international courts committed to protecting rule of law and 'administration of justice';
- the EU principles of 'conferral' of limited competences and of their 'proportionate' use (cf. Article 5 TEU); and
- the constitutional rights of EU citizens (e.g. under Articles 16, 47, 52 EUCFR).

Promotion of 'cosmopolitan public reason' by the EU's 'transparency initiative' in 2014

EU and EEA law empirically confirm that empowerment of citizens by 'cosmopolitan citizenship rights' - as decentralized instruments for constituting, limiting, regulating, justifying and enforcing

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[659] The need for limiting power-oriented foreign policies (*eg* perceiving international treaties as breakable contracts between governments rather than as instruments for protecting transnational rule of law for the benefit of citizens) by stronger rule-of-law institutions reducing transaction costs and protecting equal rights of citizens and other transnational PGs is increasingly acknowledged also by American academics; cf. K.Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton UP 2014. Stronger judicial remedies can empower 'compliance supporters' (notably civil society actors) and 'compliance partners' (e.g. domestic and international institutions) to pressure governments to comply with treaty obligations ratified by parliaments for protecting transnational PGs.

[660] The term 'freedom of manoeuvre' continues to be used by both the political EU institutions and the CJEU (e.g. in Joined cases C-120 and C-121/06 P, *FIAMM*, ECR 2008 I-6513, para. 119) as the main justification for their disregard of legally binding UN conventions, WTO rules and WTO dispute settlement rulings. The most recent CJEU judgment (Case C-21/14 P *Rusal*, judgment of 16 July 2015) justifies 'the settled case-law of the Court that, given their nature and purpose, those (WTO) agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions', essentially on utilitarian grounds such as the 'lack of reciprocity' by the EU's most important trading partners (paras. 38-39). Yet, as recognized by the CJEU in its *Kupferberg*-judgment of 1982, 'the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement' (ECJ, Case 104/81, ECR 1982, 3644, para. 18).

transnational PGs regimes and supplementing national citizenship - is a necessary part of 'cosmopolitan constitutionalism' so as to enable citizens to assume 'republican responsibility' for multilevel supply of aggregate PGs. Cosmopolitan rights pursue 'emancipatory functions' by protecting equal freedoms and responsibilities of 'citizens of the world' for institutionalizing 'public reason' as a precondition of democratic capabilities to protect transnational PGs. The democratic requirement of 'transparent governance' refers not only to public disclosure and accessibility of information; democracy also requires readability, comprehensibility and public debates of legislation at national and increasingly international levels of governance. Most EU citizens remained 'rationally ignorant' vis-à-vis the on-line publication of the draft CETA texts in September 2014 and February 2016) in English language with more than 1600 pages on complex legal issues (like thousands of product and production standards and market access commitments in diverse services sectors) that had been secretly negotiated by EU representatives invoking 'diplomatic confidentiality'. If citizens – as suggested by Rawls, 'think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact'[661], they have good reasons to insist on transparent, democratic elaboration of 'PGs treaties' with legislative functions and on explicit FTA rules on 'protection of citizens', as required by Articles 3 and 21 TEU, for instance by acknowledging in FTAs what is prescribed in Articles 1, 10 TEU and in the EUCFR for all activities of the EU:

> This Agreement places the individual at the heart of its activities by protection of his rights and by taking decisions as openly as possible and as closely as possible to the citizens.

Lack of information on confidential treaty negotiations by the EU Commission prompted the European Parliament to veto twice international draft agreements (*i.e.* the SWIFT agreement in February 2010 and the Anti-Counterfeiting Trade Agreement in July 2012). Following repeated complaints from the European Parliament, civil society and from the European Ombudsman over excessive confidentiality of TTIP negotiations and related documents, the European Commission launched - in March 2014 - a public consultation on investment protection and investor-state dispute settlement (ISDS) rules; it received almost 150.000 replies, mostly opposing the proposed investment protection and ISDS rules. In response to these democratic pressures, the EU Council finally disclosed its TTIP negotiations mandate of 2013 in October 2014. EU Trade Commissioner Malmström launched a new 'transparency strategy' in November 2014 aimed at helping 'to ensure greater access to trade documents by the general public and the European Parliament, and legitimacy of EU trade policy at large'.[662] The European Parliament's resolution of 8 July 2015 includes very detailed recommendations by the Parliament to the European Commission on many aspects of the TTIP negotiations, including proposals to replace the ISDS mechanism by a new system of public law courts. Yet, also this parliamentary resolution nowhere mentions the EU mandate to 'place the individual at the heart of its activities' (Preamble EUCFR); nor does it explain why FTAs with non-European countries explicitly exclude rights of citizens that are protected as fundamental rights in FTAs with European countries. The civil society protests succeeded in pushing the EU Commission to renegotiate the CETA investment rules and to publish more information on EU positions in TTIP negotiations. Yet, rights and remedies of citizens remain excluded under transatlantic FTAs, with the exception of privileged arbitration procedures for foreign investors. The persistently decreasing confidence of EU citizens in EU governance[663] is linked to the perception that bureaucratic disregard for the EU requirements of taking 'decisions as openly as possible and as closely as possible to the citizen' (Article 1 TEU) - and of protecting fundamental rights of all citizens

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[661] J.Rawls, The Idea of Public Reason Revisited, 64 *Chikago Law Review* (1997), 765, 769 (citizens 'fulfil their duty of civility and support the idea of public reason by doing what they can to hold government officials to it').

[662] European Commission, *Communication concerning transparency in TTIP negotiations*, 25 November 2014 (C 2014 9052 final).

[663] Cf. J.Zalc, Overcoming Democratic Breakdown in the EU, Fondation Robert Schuman, *European Issues* No 333 of 18 November 2014, at 1.

- has become systemic in EU external market regulations since the global financial crisis in 2008, the 'debt-crises' since 2010, and the EU's 'border protection'- and 'immigration-crises' since 2014.

From 'constitutionalism 1.0 and 2.0' to 'cosmopolitan constitutionalism 3.0 and 4.0'?

Democratic constitutionalism explains why, in order to be legitimate, law and governance must not only be justified by 'principles of social justice' to be agreed in 'constitutional contracts' supported by citizens; constitutionalism is even more necessary for transforming the agreed 'principles of justice' into socially effective 'living law' and 'public reason' based on democratic legislation, administration, adjudication and multilevel international regulation of transnational cooperation supported by civil society as 'just' (e.g. in the sense of sufficiently justified by 'public reason'). The impact of the globalization of markets, law, governance and related security risks on the transformation of national Constitutions can be illustrated by Somek's distinction between

- '*constitutionalism 1.0*' (like the post-revolutionary, emancipatory US and French 'constitutions of liberty' during the 18th century establishing legislative, executive and judicial powers for democratic self-government);
- '*constitutionalism 2.0*' (like many post-World War II democratic 'human rights constitutions' committed to protection of human dignity and civil, political, economic and social rights for everybody); and
- '*constitutionalism 3.0*' like the 'cosmopolitan constitutions' of EU member states supporting multilevel constitutionalization of multilevel governance of transnational PGs, such as European common market law based on common market rights, other fundamental rights, non-discrimination of citizens on grounds of nationality, and respect for the democratic reality of 'constitutional pluralism'.[664]

The constitutional principles of liberty, equality and solidarity have become universally recognized parts of UN human rights law (HRL). The legal need for multilevel regulation of 'market failures' and 'governance failures' and judicial powers of review of legislative and administrative restrictions of fundamental rights are increasingly recognized in national and international jurisdictions (e.g. by resorting to multilevel 'proportionality review' rather than only to more limited, judicial review of whether governance institutions pursue legitimate ends through rational means within their limited powers), even if many rulers inside UN member states impede effective 'constitutionalization' of HRL and empowerment of citizens.

Due to globalization and its transformation of ever more *national* into *transnational PGs* (like human rights and multilevel governance of transnational rule of law, common markets, democratic peace, 'sustainable development'), the constitutional rights and other 'principles of social justice' are progressively adjusted to the new needs for multilevel governance of collective supply of *transnational PGs*. For instance, citizens pursue their individual and social development no longer only as private citizens (e.g. invoking privacy rights), 'economic citizens' (e.g. invoking labour and social rights) and 'state citizens' (e.g. invoking civil and political rights). In multilevel governance of transnational PGs, citizens also increasingly act as 'cosmopolitan citizens' (e.g. invoking EU citizenship rights) so as to protect transnational PGs and exercise related, transnational rights (e.g. as producers, investors, traders and consumers protected by EU common market, competition and social law, as refugees, migrants, tourists entitled to human rights and other cosmopolitan rights). Also economic agreements outside Europe increasingly protect individual rights (e.g. under Chapter 11 of NAFTA, common market rights under MERCOSUR, investor rights under BITs, intellectual property rights under the WTO TRIPS and WIPO Agreements) in order to empower citizens and non-governmental actors participating in collective supply of transnational PGs. The customary rules of treaty interpretation require interpreting

[664] Cf. A.Somek, *The Cosmopolitan Constitution*, OUP 2014.

treaties 'in conformity with the principles of justice', including 'human rights and fundamental freedoms for all' too, as explicitly recalled in the Vienna Convention on the Law of Treaties (cf. the Preamble an Article 31). Yet, the related governance practices and jurisprudence (e.g. of investment and trade courts) often disregard 'principles of social justice'; inside many UN member states, they fail to transform the 'law in the books' (e.g. UN human rights law) into effective 'law in action'. How should citizens and civil society respond to such 'governance failures'?

Dis-integration rather than 'constitutionalization' of EU law?

The EU Treaty provisions on 'enhanced cooperation' among some EU member states (Article 20 TEU) and on withdrawal from the EU (Article 50 TEU) recognize that diversity and 'legal fragmentation' are democratically inevitable parts of European integration. Yet, 'enhanced cooperation' does not apply to exclusive EU competencies like the common commercial policy, where national and European parliaments may no longer approve 'mixed agreements' unless citizens and parliaments are convinced that FTAs comply with EU fundamental rights. This case-study suggests that FTAs among democracies must be designed as 'cosmopolitan international law' aimed at 'protection of citizens' and 'strict observance of international law', as prescribed in Articles 3 and 31 TEU. Unelected 'Eurocrats'[665] promoting 'Westphalian power politics' have neither constitutional nor democratic legitimacy. Even if global constitutionalism and global democracy remain *utopias* in the 21st century, constitutional and international lawyers must not succumb to claims that modern 'constitutional pluralism' and some 'disabling effects' of global integration necessarily result in a 'law of the jungle' undermining democratic self-government.[666] The dynamic evolution of EU law illustrates (e.g. by its legal and institutional creation of a European 'banking Union' in response to the financial and debt crises since 2008/2010) that market-failures also offer political opportunities for limiting related 'governance failures', for instance by using 'cosmopolitan constitutionalism' for 'bottom-up' and 'top-down constitutionalisation' of multilevel governance of functionally limited PGs like undistorted common markets. Arguably, globalisation requires to transform *national* democratic and republican constitutionalism into *multilevel cosmopolitan* and *republican constitutionalism* supported by reasonable state citizens and 'cosmopolitan citizens' alike.

This political need for reforming multilevel governance of transnational PGs - and the legal possibility of promoting 'constitutionalism 4.0' through empowering citizens, civil society, parliamentary and judicial cooperation across national frontiers - are unduly neglected in Somek's account of 'constitutionalism 3.0' and of multilevel 'constitutional failures' (e.g. to contain arbitrary abuses of foreign policy powers). The universal recognition of human rights by UN member states does not bring about 'the end of history' nor universal protection of 'social justice' for the least-advantaged members of society. Nor does UN HRL guarantee effective democratic control of the 'executive power grab' in UN/WTO governance and of its 'administrative rationality' (e.g. relying on 'experts' and 'confidentiality'). 'Cosmopolitan emancipation' and legal empowerment of citizens vis-à-vis foreign policy powers require multilevel 'constitutionalism 4.0' based on multilevel constitutional rights of citizens and corresponding restraints of foreign policy discretion. The good news is that UN, WTO and EU law already include such multilevel guarantees of equal freedoms, non-discrimination and judicial remedies that could be construed and legally protected for the benefit of citizens. Yet, as long as UN, WTO and EU diplomats prioritize their own rights and diplomatic self-interests over equal rights of

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[665] Cf. D.Chalmers *et alii* (eds), *The End of the Eurocrat's Dream. Adjusting to Diversity*, CUP 2016.

[666] Cf. Somek (note 24), at 21 ff: 'Constitutionalism 3.0 is, therefore, witness to the return of *political* constitutionalism. Effective constraints emerge not from law but from more or less subtle equilibria of power… The overall constitution of the multilevel system ceases to be law altogether. It is a factum, not a norm'; 'a form of political constitutionalism' and 'authoritarian liberalism' that fails to effectively control 'transnational fora of executive governance' and global markets owing to the lack of information and expertise of national parliaments; 'the real constraints on governance are economic'; 197 ff ('pluralism confronts us … with the law of the jungle'). For my criticism of Somek's claims see: Petersmann (note 4), chapter III.

citizens, cosmopolitan constitutionalism remains a 'Sisyphean up-hill struggle' that is difficult to win by a 'sleeping democratic sovereign'. The 'Brexit referendum' of June 2016 is a timely reminder that – unless citizens promote 'public reason' and democratic self-reflection – opportunist politicians may exploit economic and political crises for 'populist power grabs' that may even succeed in dismantling 'constitutionalism 3.0' if citizens and their 'protest communities' no longer understand the 'principles of social justice' justifying multilevel governance of transnational PGs, and no longer see EU institutions defending these principles vis-à-vis abuses of public and private powers. International trade is not only an engine of economic welfare but, as explained by Kant more than 200 years ago, also a potential engine for cosmopolitan international law and 'democratic peace'.[667] Hence, EU citizens must remind EU politicians of their promise to use transatlantic FTAs as instruments for transforming multilevel governance of transnational PGs for the benefit of citizens and their equal rights as 'the foundation of freedom, justice and peace in the world' (Preamble to the 1948 UDHR).

[667] On Kantian legal and constitutional philosophy see: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishers 2012, chapter III. On Kant's 'cosmopolitan international law' and its openness for 'institutional pluralism' see also: C.Corradetti, Kant's Legacy and the Idea of a Transitional *Jus Cosmopoliticum*, in: *Ratio Juris* 29 (2016), 105-121.