

The constitutionalist reconstruction of international law: Pros and cons

You are invited to look at international law through constitutionalist spectacles. Such a constitutionalist reading of current international law is to some extent an academic artefact. It has a creative moment, simply because it lays emphasis on certain characteristics of international law. But such an intellectual construct is nothing unusual in legal practice. If we accept the hermeneutic premise that a naked meaning of a text, independent of the reader, does not exist, then the reconstruction of some portions of international law as international constitutional law is just an ordinary hermeneutic exercise. It is no distortion of norms which are 'objectively' something else, but a legitimate form of interpretation.

1. Concepts

Writing in 1758, Emer de Vattel explained: '[L]e règlement fondamental qui détermine la manière dont l'Autorité Publique doit être exercée est ce qui forme la Constitution de l'Etat.'¹ Extrapolating this concept to the international political process, I use the term '*global (or international) constitutional law*' to designate the bulk of the most important norms which regulate the political activity and relationships in the global polity. Global constitutional law is a sub-set of international rules and principles which are so important that they deserve the label 'constitution'.²

Typically, State constitutions (roughly) set in place political institutions and define their competences, lay down the terms of membership (who is subject to the constitution?), the relations between the members and the community, and (again roughly) regulate the institution's core functions of law-making, conflict resolution and law enforcement.³ In the international legal order, we do find rules and principles which deal with exactly these questions, albeit often in a rudimentary form. These rules may be viewed as international constitutional law.

¹ E de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires de Nations et des Souverains* (London, 1758, repr. Carnegie Institution, Washington, 1916), livre I, chap. III, § 27 (at 31).

² Whether these norms (rules and principles) of potential constitutional quality are superior to ordinary international norms, whether they are codified in one or several documents, whether they are created by states or by other actors as well, whether they are always 'hard' legal norms, whether they embody a specific set of material principles, and whether they are 'constitutional' only to the extent that they are enforceable by some form of judicial review, remains to be seen.

³ Cf. G Jellinek, *Allgemeine Staatslehre* (Berlin, Otto Häring, 1914) at 505: 'Die Verfassung des Staates umfaßt demnach in der Regel die Rechtssätze, welche die obersten Organe des Staates bezeichnen, die Art ihrer Schöpfung, ihr gegenseitiges Verhältnis und ihren Wirkungskreis festsetzen, ferner die grundsätzliche Stellung des einzelnen zur Staatsgewalt.'

'*Constitutionalization*' is a shorthand term for the emergence of constitutional law within a given legal order. The concept of constitutionalization implies that a constitution (or constitutional law) can come into being in a process extended through time. It also implies that a legal text (or various legal texts) can acquire (or eventually lose) constitutional properties in a positive feedback process. A text can therefore be more (or less) constitution-like. It may be, in short, a constitution-in-the-making. In consequence, '*global (or international) constitutionalization*' is a catchword for the continuing process of the emergence, creation and identification of constitution-like elements in the international legal order.

Another important term in this context is '*constitutionalism*'.⁴ Historically, constitutionalism was the 17th/18th century political movement in quest for a written constitution (of a nation state). The basic purpose of the constitution was to make political power (the monarchy) subject to the law, hence to create a government of laws, not of men. In order to reach that objective, the constitution was to embody certain material principles, most importantly the separation of powers/checks and balances. It is important to realize that the concept of 'constitutionalism' is more than the term 'constitution' (which is in that respect more ambiguous) loaded with material contents: 'Constitutionalism does not refer simply to having a constitution, but to having a particular kind of constitution, however difficult it may be to specify its contents'.⁵ Constitutionalism asks for a good (*legitimate*) constitution.

I consequently employ the term 'global constitutionalism' in order to characterize a strand of thought and a political agenda which advocates the application of constitutional principles, such as the rule of law, checks and balances, human rights protection, and possibly also democracy, in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order.

⁴ O Beaud, 'Constitution et constitutionnalisme' in P Raynaud and S Rials (eds), *Dictionnaire de philosophie politique* (Paris, Quadrige/PUF, 2003) at 133-142; G Casper, 'Constitutionalism' in LW Levy and others (eds), *Encyclopedia of the American Constitution* Vol. 2 (New York/London, Macmillan, 1986) at 473-480; UK Preuss, 'Constitutionalism' in E Craig (ed), *Routledge Encyclopedia of Philosophy* Vol. 2 (London, Routledge, 1998) at 618-622; Red., 'Konstitutionalismus' in J Ritter (ed), *Historisches Wörterbuch der Philosophie* Vol. 4 (Basel, Schwabe, 1989) at 1005-1006.

⁵ Casper (n 4) at 747. JH Weiler and M Wind have correctly pointed out 'that there is a difference between constitution and constitutionalism. Constitutionalism ... embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution. At this level, separating constitution from constitutionalism would allow us to claim, rightly or wrongly, for example, that the Italian and German constitutions, whilst very different in their material and institutional provisions, share a similar constitutionalism vindicating certain neo-Kantian humanistic values, combined with the notion of the *Rechtsstaat*' (JH Weiler and M Wind, 'Introduction', in *idem* (eds), *European Constitutionalism beyond the State* (Cambridge, Cambridge UP, 2003) 1 at 3). See extensively on the 'divorce' of constitution and constitutionalism Beaud (n 4) at 136-142.

2. Objections against the constitutionalist reading of international law

A host of objections against the constitutionalist reading have been raised. They relate both to the legal soundness of the reconstruction, and to its arguably negative policy effects.

Lack of constitutional mythology?

One criticism is that international law lacks the 'symbolic-esthetical dimension' which is inherent within national (constitutional) law.⁶ According to this perspective, constitutions have the prime function of storing the meaning of a political community. They embody revolutionary ideas not in an abstract fashion, but by (physical) sacrifice. Consequently, a constitution is genuinely 'owned' by a people mainly because its meaning is transported by the sacrifice made for it.⁷ But because all this is lacking on the international plane, the idea of international constitutional law is – so the argument goes – a sham.

However, this criticism appears to suffer from a gender-bias, and risks overstating the importance of irrational and mythological foundations of constitutional law. For example, the German constitution enjoys a high reputation among German citizens, although nobody has been sacrificed for it in a physical sense in a war or a revolution.

Over-expectations?

A second objection is that the constitutionalist reading raises dangerously seductive 'over-expectations'.⁸ The term 'constitution' might be a misnomer when applied to the international sphere.⁹ Therefore says the critique, the very terms on which the constitutionalization debate takes place, is erroneous. The vocabulary makes it virtually impossible to escape from the assumptions that go with it. And 'social legitimacy is being artificially constructed through the use of constitutional language'.¹⁰ So the constitutionalist reconstruction might fraudulently create the illusion of legitimacy of global governance. Constitutionalist language – in the eyes of the critique – abuses the highly value-laden term 'constitutionalism' in order

⁶ U Haltern, 'Internationales Verfassungsrecht' (2003) 128 *Archiv des öffentlichen Rechts* 511-556.

⁷ *Idem* at 533-34, drawing on B Anderson, *Imagined Communities* (London, Verso, 1983).

⁸ R MacDonald and DM Johnston, 'Introduction' in *idem* (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden, Martinus Nijhoff, 2005, xiii, at xvii).

⁹ Cf. DZ Cass, *Constitutionalization of the WTO* (Oxford, Oxford UP, 2005) at 208 relating to the WTO.

¹⁰ Cf. Cass (n 9) at 237 (on the WTO).

to reap profit from its positive connotations and to dignify the international legal order through it.

However, the danger that constitutionalism is misunderstood 'as a mechanism that can instantly bestow legitimacy'¹¹ does not seem very real. International and constitutional lawyers are discerning enough to realize that 'constitutionalism' is not a ready-made answer, but – on the contrary – a perspective which might help the right questions of fairness, justice, and effectiveness to be asked.

Unrealist?

Another important objection is raised by legal realists. The constitutionalist paradigm became popular after the final demise of the socialist bloc, in a period marked by an 'excès d'optimisme contre lequel le juriste n'est pas toujours immunisé'.¹² Realists point out that international law must content itself with a more or less 'symbolic constitutionalization',¹³ or that any international constitutional is in any case a 'nominalist' one in the sense of Karl Loewenstein.¹⁴

The gist of this critique is that the constitutionalist reading of international law is not grounded in and backed by a real common political will and corresponding power structures and sanctions at the international level, which would allow the international constitution to be enforced. The constitutionalist reading, so the argument goes, is too idealist, and does not adequately reflect the realist calculus of governments. In the event of a problem or conflict, any constitutionalist attitude will be given up, says the critique.¹⁵ For instance, (Western) governments do not advocate universal protection of human rights because they believe that it is a good thing, but because they are exposed to internal pressures by their constituencies to observe human rights standards, and they simply want to prevent other states' competitive advantages by not being themselves restricted by human-rights concerns. Likewise, the UN and other international organizations are, for most member states, only a means of realizing their national interests.¹⁶ To sum up: In the absence of compliance and universal acceptance, the idea of international constitutional law may simply be an academic pipe dream.¹⁷

¹¹ J Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31 at 48.

¹² S Szurek, 'La Charte des Nations Unies Constitution Mondiale?' in J-P Cot and others, *La Charte des Nations Unies: commentaire article par article* Vol 1 (3rd edn, Paris, Economica, 2005) 29 at 32.

¹³ M Neves, *Symbolische Konstitutionalisierung* (Berlin, Duncker & Humblot, 1998).

¹⁴ K Loewenstein, *Verfassungslehre* (Tübingen, J.C.B. Mohr, 1959) at 152-53.

¹⁵ W Kälin, 'Der Menschenrechtsschutz der UNO: Ein Beispiel für die Konstitutionalisierung des Völkerrechts?' in W Kälin and T Cottier (eds), *Die Öffnung des Verfassungsrechts: Symposium zum 65. Geburtstag von Prof. Jörg Paul Müller* (2005) *recht Sonderheft* 42 at 47.

¹⁶ *Idem* at 49.

¹⁷ F Müller, *Demokratie zwischen Staatsrecht und Weltrecht* (Berlin, Duncker & Humblot, 2003) at 132.

This objection is very pertinent, but I will try to reply. First, academic reconstructions do not depend on moral attitudes which governments do or do not share. A good idea does not become bad if some stupid politicians do not accept it. However, law and legal constructs and arguments are supposed to have an impact on the exercise of power. This is what law is about. Indeed, international constitutionalism has both descriptive and prescriptive elements. It does not merely claim to describe some features of the status quo of international relations, but seeks to provide arguments for their further development in a specific direction.¹⁸

Because, in an epoch of interdependence, national and 'public international interests' tend to converge more and more, national interests and universal idealism are not necessarily in opposition. Therefore global constitutionalism may even, at least in the long run, further national economic and political interests, although some states benefit more than others.

End of politics?

This leads to another objection which asserts that constitutionalism is too apolitical, and is an unrealistic 'promise of the end of politics'.¹⁹ A related strand of criticism insinuates that an important function of the constitutional concept is to symbolise a simplified, compact order in a world that, in reality, is complex and amorphous. In this perspective, the myth of the unity of the constitution has to be rejected: instead a spontaneous self-coordination of interests must be chosen as starting point, legally anchored in individual liberties (human rights) and the cognitive 'social capital' anchored within it. 'The constitutional concept then remains an (imaginary) reference point for a nation-state like past ...'²⁰

However, the term 'constitution' has never been exclusively reserved for state constitutions. Today, the notional link between constitution and state has further been loosened in everyday language and in the legal discourse (and thereby the meaning of 'constitution' may have been broadened). It is therefore not *per definitionem* impossible to conceptualize constitutional law beyond the nation or the state. Global constitutionalism advocates non-state constitutional law, and tends to de-mystify the state and the state constitution.

With regard to the concern that the constitutional approach is too apolitical, it must be pointed out that law and politics should not be viewed as distinct

¹⁸ Cf. Szurek (n 12) at 32: 'En parlant de "constitution mondiale", peut-être cherche-t-on aujourd'hui davantage à conjurer des perils pressentis sinon toujours identifiés, qu'à saluer un état de fait réalisé.'

¹⁹ Klabbers (n 11) at 47.

²⁰ T Vesting, 'Constitutionalism or Legal Theory: Comments on Gunther Teubner' in C Joerges and others (eds), *Transnational Governance and Constitutionalism* (Oxford and Portland Oregon, Hart, 2004) 29 at 35.

realms, but rather as structurally coupled systems.²¹ Law is the product of political activity which has been fixed in order to organize and limit political action. In particular, constitutional law has traditionally been characterized as a branch of law which is very close to politics. In consequence, constitutionalism can be conceived as a political, not an apolitical, project (although it does suggest that there is a sphere 'above' everyday politics).

Preventing revolution?

Another objection is that global constitutionalism is a palliative which serves to obscure the elitist and aristocratic structure of international society and prevents 'revolutionary social change'.²²

This objection is a reminder of the classic socialist-marxist critique of any type of liberal reform strategy. Without entering into this long-standing debate, it is readily admitted here that the constitutionalist approach indeed implies that (international) law should be used as an instrument of evolutionary, not revolutionary, change. The basic premise of this approach is that gradual reforms are generally preferable to revolutionary ruptures in the course of which individual rights of the living risk being discarded for the promise of a better future for coming generations.

Constitutional imperialism?

A sixth and probably crucial concern is that the concept of international constitutionalism suffers from oversell and vagueness. General international law, politics, law and economics are being mixed, if not confused, and 'things formerly called institutional are being legitimized with the mantle of constitutionalization'.²³ A related concern is that an 'impérialisme constitutionnaliste'²⁴ stifles the ordinary legal process.

The indeterminacy of the idea of global constitutionalism may be detrimental on various levels. First, there is the danger that reliance on constitutionalism is actually counterproductive because it may postpone rather than encourage concrete debates on concrete problems, such as decision-making in the WTO, the composition of the UN Security Council, or how to liaise national parliaments to the UN.

²¹ N Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M., Suhrkamp, 1993) at 407-439.

²² P Allott, 'The Emerging International Aristocracy' (2002) 35 *New York University Journal of International Law and Politics* 308 at 336. Allott continues: 'The consoling Kantian myth that the republicanising of national constitutions will naturally produce a constitutionalising of international society, a patchwork cosmopolis, seems more improbable than ever. The U.N. Charter, an illusionary written constitution of international society, was and is merely the groundwork of an international oligarchy of oligarchies ...'

²³ Cass (n 9) at 245 with regard to the debate on the constitutionalization of the WTO.

²⁴ Szurek (n 12) at 49 (para. 26).

Another aspect to the indeterminacy of the concept is its malleability in the service of all kinds of political projects. Actually, the term is currently also used by some American scholars with the intention of undermining the authority of international law as a whole. And finally: If all law is somehow 'constitutionalized' and becomes more or less 'constitutional' or constitutionally infused, then nothing is constitutional. It would therefore not be helpful to make constitutionalism an absolute. Building on Wolfgang Friedman, it appears plausible that patterns of co-existence and co-operation persist even in a generally more constitutionalized world order.

Eurocentrism?

A seventh concern is culturalist. Current enthusiasm for world constitutionalism is strongest in Europe. The constitutionalist reading of international law may be too holistic and genuinely anti-pluralist. It may have a uni-civilizational bias built into it. The interests and distinctive cultural traditions of Third World Countries may be eroded by the evolution of such a system.²⁵

In response, we might point to the numerous constitutionalist stories that are currently being told within international legal scholarship; a single, uniform, consented constitutionalist approach does not exist. While constitutionalist thought has in historic terms been developed in Europe, it is a reaction to the universal experience of domination by humans over other humans. In 18th- and 19th-century Europe, constitutionalism was asserted against the dominant culture and the establishment.

A 'moderate' constitutionalist reading in no way implies a uniform, coherent world constitution, and certainly does not imply the quest for a world state. The idea is not to create a global, centralized government, but to constitutionalize global (polyarchic and multi-level) governance. This project must indeed take more fully into account the dramatic situation in many developing countries.²⁶

It has moreover been argued that the idea of international constitutional law is hegemonic in the sense of representing personal interests as universal. However, the constitutionalist reconstruction of international law is primarily a scholarly suggestion. Academics can exercise at best indirect political hegemony, by influencing politicians. In order to exercise power in the academic discourse itself, one does not need the constitutionalist approach.

A related concern about policy makes the point that if Europeans acquire disproportionate leverage on the workings of a more highly constitutionalized global system, the constitutional model of international

²⁵ C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187 at 189.

²⁶ A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223 at 241 fn. 85.

law is unlikely to command American allegiance, especially if it is promoted as the paramount aspect of the global community.²⁷

However, reliance on cultural specificity often risks over-simplification. Even within the European academia of international law the constitutionalist approach is frequently criticized, notably by French and British scholars. This criticism is not automatically aligned with a 'pro-US-American' political attitude. The constitutionalist approach is directed against the disregard of the international rule of law. Even if, on average, European academics probably espouse a more 'legalist' position than average US-American ones, opposition between Europe and US-American academic discourse appears simplistic; important impulses towards global constitutionalism have come from US-American scholars such as Richard Falk, Thomas Franck, Fernando R. Tesón, Anne-Marie Slaughter, or Joseph Nye.

Anti-democratic juristocracy?

Global constitutionalism is criticised by those whose conception of a healthy constitutional order at national level places a premium on common civil values and strong institutions directly accountable to the people. They ask for 'democratic constitutionalism', which is arguably lacking on the international plane.²⁸

However, this critique, although it may be formulated as a critique of global constitutionalism, is not in fact genuinely concerned with the constitutionalist reading of international law. The pertinent point is rather that global governance suffers from democratic deficits. Global constitutionalism seeks to unveil those deficits and suggests remedies.

Furthermore, concern about a global juristocracy has been voiced. It is feared by some that unrepresentative international judges will be called upon to adjudicate disputes over the interpretation of a constitutional text. This concern reduplicates the traditional British objection to a written, 'rigid', constitution. However, international constitutional law will in the foreseeable future not be codified in a unified constitutional document. Most importantly, although the constitutional reading of international law does call for the strengthening of judicial review, the establishment of an international constitutional court with compulsory jurisdiction over constitutional matters is unlikely. An 'imperfect' international constitution, backed by punctual judicial control, would already constitute progress. And as long as international law enjoys only weak and indirect democratic legitimacy, the counter-majoritarian difficulty of constitutional review is lesser on the international plane than in the domestic legal order.

²⁷ Cf. DM Johnston, 'World Constitutionalism in the Theory of International Law' in MacDonald and Johnston (n 8) at 20.

²⁸ Johnston (n 27) at 19.

3. The strengths of global constitutionalism

A counter to uncontrolled deformalization

A strength of the constitutionalist approach to international law may be that it might help to prevent uncontrolled deformalization of international law.²⁹ 'Deformalization', as Martti Koskenniemi has called it, is the resort to some 'higher' legitimacy arguments in opposition to and in violation of international legality, as e.g., in the Kosovo crisis.³⁰

Although constitutionalism is a value-loaded concept, it is nevertheless a legal approach in which consideration for the rule of law in a formal sense, for legal stability and for predictability plays a part, and which acknowledges that legality itself can engender a type of legitimacy.³¹ Seen in this light, constitutionalism is a juridical alternative to moralizing, *tout court*.

Compensation for de-constitutionalization effected by globalization and global governance

Second, the constitutionalist reconstruction of international law might be a reasonable strategy to compensate the de-constitutionalization on the domestic level which is effected by globalization and global governance.³² Globalization puts the state and state constitutions under strain. Global problems compel states to co-operate within international organizations, and through bilateral and multilateral treaties. Previously typically governmental functions, such as guaranteeing human security, freedom and equality, are in part transferred on 'higher' levels. Moreover, non-state actors (acting within states or even in a transboundary fashion) are increasingly entrusted with the exercise of traditional state functions, even with core tasks such as military and police activity.³³ All this has led to 'governance' which is exercised beyond the states' constitutional confines.

²⁹ J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in *idem, Der gespaltene Westen: Kleine politische Schriften* (Frankfurt a M., Suhrkamp, 2004) 113 at 115.

³⁰ The Expert Commission with R Falk and others qualified the Kosovo-intervention as illegal, but legitimate (Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York, Oxford UP, 2000) at 185-198, esp. at 186).

³¹ Cf. R von Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* Part II, (5th edn, Leipzig, von Breitkopf und Härtel, 1898) at 471: 'Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zügellosigkeit das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen, dass sie sich nicht zerstreue, verlaufe, sie kräftigt sie nach innen, schützt sie nach aussen. Feste Formen sind die Schule der Zucht und Ordnung und damit der Freiheit selber und eine Schutzwehr gegen äussere Angriffe – sie lassen sich nur brechen, nicht biegen'.

³² See A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law*.

³³ In US-occupied Iraq of 2003/04, employees of federal contractors and sub-contractors (Blackwater USA, Kroll Inc., Custer Battles, the Titan corporation and others) worked as mercenaries, police, guards, prison officers and interrogators.

This means that state constitutions can no longer regulate the totality of governance in a comprehensive way. Thereby, the original claim of state constitutions to form a complete basic order is defeated. National constitutions are, so to speak, hollowed out; traditional constitutional principles become dysfunctional or empty. This affects not only the constitutional principle of democracy, but also the rule of law, the principle of social security, and the organisation of territory.³⁴ In consequence, if we wish to preserve the basic principles of constitutionalism, we must ask for compensatory constitutionalization on the international plane.

Critical potential

Most importantly, the constitutionalist reading of the current international legal process appears to possess the potential for a healthy critical approach, and may provide for many issues a solid foundation for responsible practice.³⁵ Because the idea of a constitution is associated with the quest for legitimacy in it, constitutionalist reconstruction provokes the pressing question of the legitimacy of global governance. The constitutionalist reading might even help to overcome statist expectations. It could clarify that legitimacy (however understood) of norms and of political rule does not depend on the structures of government or governance being exactly state-like.³⁶ In consequence, the constitutionalist reconstruction of international law may help rather than hinder the revelation of existing legitimacy deficiencies in this body of law, which can obviously no longer rely on state sovereignty and consent alone.

³⁴ A Peters, 'The Globalisation of State Constitutions' in A Nollkaemper (ed), *The International-National Law Divide* (2007 forthcoming).

³⁵ Bogdandy (n 26) at 242.

³⁶ M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907 at 929.