

# Constitutional “World Views”, Global Governance and International Relations Theory

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## Abstract

This paper addresses the constitutional entrenchment of foreign policy preferences, or “world views”, from the vantage point of International Relations theory. Empirically, norms that sketch out certain visions of global governance have become a popular feature of constitutional design. The paper expounds both their potential, as well as pitfalls to avoid, with a particular focus on Constructivist scholarship. In terms of their merits, they can serve as evidence of a “normative basis” for foreign policy and as parameters for legitimacy. Furthermore, they represent both evidence of, and fuel for, processes of socialization in foreign policy. However, Constructivists tempted to draw on such constitutional worldviews should heed three main caveats. Firstly, while the constitution is supreme in the legal realm, it is only one of many possible expressions of normative preferences from a political science perspective. Secondly, they should avoid confusion between domestic constitutional standards and universal ones. Thirdly, they should be aware of the problematic of the “dead hand of the past”, i.e., while constitutional entrenchment may lend norms particular gravitas, it also makes them prone to become out-dated. By staying clear of these pitfalls, Constructivist theorists can embrace contemporary constitutions in their quest to elucidate which principles and ideas shape the international order and its maturing legal framework.

Keywords

Constitutional law; Constructivism; Global Governance; identity; International Relations theory; legitimacy; norms; socialization



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## Introduction

The observation of an “ever-greater emphasis on questions of global justice”<sup>1</sup> and other normative elements of the maturing international (legal) order is not only true in political theory philosophy and international relations,<sup>2</sup> but also features increasingly as a theme in contemporary national and supranational constitutions. The post-war constitution of Japan, for example, prefaces its famous perennial renunciation of war with the words “Aspiring sincerely to an international peace based on justice and order...” (Article 9(1)).<sup>3</sup> As more recent examples, the current constitution of Lithuania stipulates that the country’s foreign policy “shall contribute to the creation of the international order based on law and justice” (Article 135(1)), while the constitutionally entrenched foreign policy goals of Bulgaria include “the promotion of a just international order” (Article 24(2)). Besides such literal evocations of “global justice” within supreme domestic laws, many other provisions exist today that outline what would constitute “global justice” or desirable hallmarks for “global governance” architecture,<sup>4</sup> and mandate their respective governments to advance certain goals in their foreign policies.

This paper addresses the constitutional entrenchment of such specific foreign policy preferences from the vantage point of International Relations (IR) theory, in particular their likely appeal for Constructivist scholarship. While elaborating on why such constitutional norms are particularly tempting for Constructivists, the paper also points out the pitfalls to be avoided for their successful utilization by IR scholars.

Before embarking upon such an endeavor, two preliminary disclaimers should be issued. Firstly, the paper neither claims that such norms have direct causal effect, nor does it set out its own theory on how the constitutional codification of norms impacts on foreign policy decisions or international behavior. While this would undoubtedly be an interesting exercise for the future, the present paper presents a perhaps rather modest start, i.e., revealing the existence of such norms in contemporary constitutions and pointing to links that can be made to existing Constructivist approaches. Secondly, it should be noted that while this piece hones in on one of the main IR theories, it still rather retains a bird’s eye perspective given the depth and wealth of different strands and issues in Constructivist thinking,<sup>5</sup> not least regarding the

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<sup>1</sup> Andrew Hurrell and Terry Macdonald, “Ethics and Norms in International Relations,” in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse and Beth A. Simmons, 2nd ed. (London: SAGE, 2013), 57. Note also Steven Ratner, “Ethics and international law: integrating the global justice project(s),” *International Theory* 5 (2013): 1: “Academic discourse on global justice is at an all-time high.”

<sup>2</sup> From the sizeable emerging literature, see e.g. Fonna Forman and Gerry Mackie, “Introduction: New frontiers in global justice,” *Critical Review of International Social and Political Philosophy* 16 (2013): 151 and accompanying special issue; Matthias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012); Darrel Moellendorf and Thomas Pogge, eds., *Global Justice: Seminal Essays* (St Paul, MN: Paragon House Publishers 2008).

<sup>3</sup> For English language translations of national constitutions, the versions from the database Oxford Constitutions of the World (formerly Oceana Online) was used: <http://oxcon.oup.com/>.

<sup>4</sup> Global governance is understood here as “the management of global problems and the pursuit of global objectives through concerted efforts of states and other international actors.” Martin Ortega, *Building the future: The EU’s contribution to global governance*, EUISS Chaillot Paper No. 100 (April 2007), 46. Actors are those that “wield authority across national borders, including states that exercise authority over other states (hierarchy), international organizations that possess authority over their member states (supranationalism), and non-governmental organizations and corporations that exert authority over communities located in two or more states (private authority).” David Lake, “Rightful Rules: Authority, Order, and the Foundations of Global Governance,” *International Studies Quarterly* 54 (2010): 590.

<sup>5</sup> Ian Hurd, “Constructivism,” in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2010), 305-309.

proper theorization of norms, rules and the law.<sup>6</sup> Constructivism should not *per se* be regarded as a homogenous theory, but rather as an umbrella or meta-theoretical approach. However, the emphasis on the explanatory force of norms and ideas can be viewed as a feature common to all Constructivist thinking.<sup>7</sup>

The paper provides an empirical, as well as a theoretical argument. Empirically, it is shown that constitutional law around the world has become a formidable repertoire for substantive “world views”, i.e., norms to underpin the international order and its maturing legal framework. Hans Kelsen already observed an implicit link between “state form and world outlook” (*Staatsform und Weltanschauung* in German).<sup>8</sup> Today, these links have become increasingly explicit in constitutional language. Hence, while Matthias Kumm argued for a general “cosmopolitan turn” in Constitutionalism,<sup>9</sup> many constitutional texts both at the domestic and regional level have come to turn towards cosmopolitan ideas of world order. This is a global legal development that I have termed the “dynamic internationalization” of constitutional law.<sup>10</sup>

In scholarship, the claim that international law and international relations occupy a shared “conceptual space”<sup>11</sup> has long been made, and recently vocally reiterated by Steven Ratner in a call for a “collaborative approach to global justice” involving these two disciplines.<sup>12</sup> However, the same can be said of constitutional law and IR, which both expound normative underpinnings for the global (legal) order.<sup>13</sup> Whereas the latter, as an academic discipline, is descriptive and explanatory, the former is highly normative and prescriptive, expressing a constitutionally entrenched view of what the world should look like and how the polity governed by a given constitution should contribute to this vision, which extends far beyond its own jurisdiction.

From this development in constitutional design follows a question with regard to how IR theory should respond to it. A particular emphasis will be put on Constructivism in view of its reliance on norms and ideas as explanatory factors. The paper argues that for Constructivists, such norms can be of great value in underpinning their arguments, but that certain caveats have to be observed in doing so.

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<sup>6</sup> See Adriana Sinclair, *International Relations Theory and International Law* (Cambridge: Cambridge University Press, 2010), especially ch 1.

<sup>7</sup> See Ian Hurd, “Constructivism,” 299-305, on the distinguishing features of Constructivism.

<sup>8</sup> Hans Kelsen, *Essays in Legal and Moral Philosophy*, trans. Peter Heath (Dordrecht: D. Reidel, 1973), 95-113.

<sup>9</sup> Matthias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State,” in *Ruling the World? International Law, Global Governance, Constitutionalism*, ed. Jeffrey L. Dunoff and Joel P. Trachtman, (Cambridge: Cambridge University Press, 2009), 258-326.

<sup>10</sup> Joris Larik, “Shaping the international order as an EU objective,” in *The European Union’s Shaping of the International Legal Order*, ed. Fabian Amtenbrink and Dimitry Kochenov (Cambridge: Cambridge University Press, 2013), 65-70.

<sup>11</sup> Anne-Marie Slaughter, “International Law in a World of Liberal States,” *European Journal of International Law* 6 (1995): 503, using this term with regard to international law and international relations theory; for a well-written account of the two disciplines complex relationship see Jeffrey L. Dunoff and Mark A. Pollack, “International Law and International Relations: Introducing an Interdisciplinary Dialogue,” in *Interdisciplinary Perspectives on International Law and International*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 3-32.

<sup>12</sup> Ratner, “Ethics and international law,” 34.

<sup>13</sup> One may even more appropriately speak of a shared conceptual space between IR and “public law”, encompassing both domestic constitutional and public international law, as proposed by Matthias Kumm, “The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,” *Indiana Journal of Global Legal Studies* 20 (2013): 605-628; and earlier Jack Goldsmith and Daryl Levinson, “Law for States: International Law, Constitutional Law, Public Law,” *Harvard Law Review* 122 (2009): 1791-1868.

The paper proceeds as follows. Firstly, it provides an overview of the global trend in constitutional design towards “dynamic internationalization”. Subsequently, it assesses the likely import of this trend for IR theory through the respective lenses of its three classic main currents. The main parts of the paper elaborate on the principal merits of such norms for Constructivists (normative basis, legitimacy and socialization), and then address the main pitfalls to be avoided in their utilization (legal hubris, parochialism and obsolescence). The paper concludes that by heeding these caveats, Constructivist IR theorists can embrace contemporary constitutions in their quest to elucidate the ideas, norms and principles that guide and govern the international order and its maturing legal framework.

## Contemporary constitutional design and ‘dynamic internationalization’

When looking at the grand trends in constitutional design over the past decades, it becomes apparent that for many constitutional drafters around the world, dividing and limiting governmental authority was not enough anymore.<sup>14</sup> Neither was the outlining of the contours of the “common” good at home.

Alongside the examples referred to in the introduction, also other constitutions include notions of global justice or claims to universally valid norms. The German Basic Law, for instance, refers to “inviolable and inalienable human rights as the foundation of every community, of peace and justice in the world” (Article 1(2)), while the constitution of India mandates the state to “endeavour to [...] promote international peace and security” (Article 51(a)). Also the constitution of the world’s youngest nation, South Sudan, actively partakes in this trend, specifying as a foreign policy objective the “promotion of dialogue among civilizations and establishment of international order based on justice and common human destiny” (Article 43(d)).<sup>15</sup>

Beyond those explicit references to global justice and order, certain constitutions also contain sets of foreign policy principles and objectives, which oblige their respective governments to adhere to and pursue, respectively. As an illustration, the constitution of Brazil contains both tenets in Article 4. On the one hand, the chapeau of the provision states that “[t]he international relations of the Federative Republic of Brazil are governed by the following principles”, which include among others, “prevalence of human rights”, “self-determination of peoples”, “peaceful solution of conflicts” and “cooperation among people for the progress of humanity”. On the other, the sole paragraph of Article 4 stipulates that “Brazil shall seek the economic, political, social and cultural integration of the people of Latin America, with a view toward forming a Latin-American community of nations.”

Such principles and goals may also include self-interested goals such as national security,<sup>16</sup> the domestic economy<sup>17</sup> or the protection of citizens abroad,<sup>18</sup> but in many cases also exhibit more general norms of a cosmopolitan nature such as the promotion of human rights,<sup>19</sup> the rule of law,<sup>20</sup> democracy<sup>21</sup> or international law.<sup>22</sup> The instances of the latter category can be

<sup>14</sup> Louis Henkin, *The Rights of Man Today* (London: Stevens, 1979), 31-32, where he notes that the constitution of the United States, given its particular historical circumstances, was primarily concerned with restricting the powers of government.

<sup>15</sup> This refers to the Transitional Constitution of the Republic of South Sudan, which entered into force on 9 July 2011.

<sup>16</sup> Article 24(2) Constitution of Bulgaria.

<sup>17</sup> Article 54(2) of the Constitution of Switzerland.

<sup>18</sup> Article 10(1) Constitution of Croatia; Article 62 Constitution of Turkey.

<sup>19</sup> Section 1(3) Constitution of Finland.

<sup>20</sup> Article 54(2) of the Constitution of Switzerland.

understood as different aspects of what a “just” or “good” international order should look like, from the point of view of the respective constitution and its framers.

Also certain regional organizations have taken upon themselves, according to their founding charters, to shape not only the governance of their own region, but also on a much larger scale, thereby extrapolating their internal model and its normative foundations to others countries, regions and the global level. In the vanguard of this trend, the current version of the EU Treaties, as the EU’s “constitutional charter”,<sup>23</sup> oblige it to “contribute to peace, security, the sustainable development of the Earth, [...] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (Article 3(5) Treaty on European Union (TEU)), as well as to “promote an international system based on stronger multilateral cooperation and good global governance” (Article 21(2)(h) TEU).<sup>24</sup> Similarly, the ASEAN Charter stipulates as one of the purposes of the organization “[t]o ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment” (Article 1(4)). Moreover, “[t]he external relations of ASEAN shall adhere to the purposes and principles set forth in this Charter” (Article 41(2)), which include, *inter alia*, strengthening “peace-oriented values” (Article 1(1)) as well as “adherence to the rule of law, good governance, the principles of democracy and constitutional government” (Article 2(h)), “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” (Article 2(h)(i)).<sup>25</sup>

The proliferation of such norms, especially in post-Second World War constitutions can be best understood as the confluence of two main trends in constitutional design: entrenched aspirationalism and internationalization in constitutional law. Regarding the former, the legal codification of goals that a state is to pursue in the exercise of its powers has reached its highest laws, as constitutionally codified objectives have proliferated in constitutional documents around the world. They represent legal norms that highlight certain aspects of the general pursuit of the “common good” of a polity. This trend has been comprehensively identified by Karl-Peter Sommermann and coined *Dynamisierung des Verfassungsrechts*, i.e., “dynamization of constitutional law”.<sup>26</sup>

Regarding the second development, Hans Kelsen’s note that the legal system of a country bespeaks also a certain “world outlook”,<sup>27</sup> has become increasingly apparent in the course of what has been called “the internationalist fever” following the end of the Second World War.<sup>28</sup> This denotes that links between the domestic and international legal order have been made explicit in constitutional documents. Today, many national constitutions make ample references to regional or global standards, in particular human rights,<sup>29</sup> and regulate a

<sup>21</sup> *Id.*

<sup>22</sup> Article 51(c) Constitution of India; Article 90 Constitution of the Netherlands.

<sup>23</sup> As the Court of Justice of the EU (CJEU) famously called the Treaties in the judgment of Case 294/83 *Parti écologiste ‘Les Verts’* [1986] ECR 01339, para. 23; further on the constitutional credentials of the EU, Paul Craig, “Constitutions, Constitutionalism, and the European Union,” *European Law Journal* 7 (2001): 126-135.

<sup>24</sup> See further Larik, “Shaping the international order as an EU objective”.

<sup>25</sup> See further Marise Cremona et al., *ASEAN’s External Agreements: Law, practice and the question for collective action* (Cambridge: Cambridge University Press, forthcoming 2015).

<sup>26</sup> (in the original: “Dynamisierung des Verfassungsrechts”) Karl-Peter Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck, 1997), 374.

<sup>27</sup> Kelsen, *Essays in Legal and Moral Philosophy*, 95-113.

<sup>28</sup> (in the original: “la fièvre internationaliste de l’immédiat après-guerre”) Paul De Visscher, “Les tendances internationales des constitutions modernes,” *Recueil de Cours* 1 (1952): 573.

<sup>29</sup> Article 55(1) Constitution of the Russian Federation; Article 39(1)(b) Constitution of South Africa.

country's relations with international law<sup>30</sup> and international organizations.<sup>31</sup> This is commonly known as the "internationalization" of constitutional law.<sup>32</sup>

These two trends of constitutional design taken together resulted in a wealth of constitutionally entrenched norms on the conduct of foreign policy around the world, many of which can be seen as intimations of principles for a "just international order", or what the international order *should* look like. This joint trend in contemporary constitutional design opens up a shared "conceptual space"<sup>33</sup> between constitutional law and IR theory. However, to what extent IR scholars will embrace such codified desiderata for "good global governance" will depend on their views on both law and norms as useful factors in explaining global politics.

## Significance for International Relations theory

Having recognized this empirical trend in constitutional design, what are IR theorists to do with it? How and to what extent would this be useful? The answer these questions will "depend quite substantially on one's views on the nature of the international system",<sup>34</sup> in particular the degree to which laws and norms are seen as explanatory factors in international relations. Given the traditional (also simplified) strands of international relations theory – (Neo-)Realism, (Neo-)Liberalism and Constructivism – it is strongly surmised here that the latter will have the most interest in these norms.

Neorealists, in general terms, "have been generally dismissive of law and ethics".<sup>35</sup> They focus on states as the predominant – if not solely relevant – units of international politics operating in a world characterized by anarchy and the quest for survival, rather than mutual trust, rules, norms or ideals. This view places an emphasis on power politics (*Realpolitik*), balancing, and the constant possibility of war as the hallmarks of the international order.<sup>36</sup> Both law and norms have but a distinctly secondary role to play.<sup>37</sup> Instead of law and morality, the proverbial "law of the jungle"<sup>38</sup> is said to reach beyond the borders of the state.<sup>39</sup> This coincides with the idea that while law may have some function and merit in a domestic setting, the same cannot be said internationally, which is said to be fundamentally "different" from the domestic arena.<sup>40</sup> Therefore, whatever may be portended in constitutions, the actual functions of the state in its international relations are a given, i.e., above all self-preservation. For Realists, states do not differ in terms of their basic objectives, but what matters is the

<sup>30</sup> Article 94 Constitution of the Netherlands.

<sup>31</sup> Article 7(6) and (7) Constitution of Portugal; Article 140(1)(b) Constitution of Switzerland.

<sup>32</sup> See Hélène Tourard, *L'internationalisation des constitutions nationales* (Paris: L.D.G.J., 2000); and Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, "Commitment and Diffusion: How and why national constitutions incorporate international law," *University of Illinois Law Review* (2008): 201-237.

<sup>33</sup> Slaughter, "International Law in a World of Liberal States," 503.

<sup>34</sup> Karen Smith, *European Union Foreign Policy in a Changing World*, 2nd ed. (Cambridge: Polity Press, 2008), 13, used in the context of the assessment of the EU as an international actor.

<sup>35</sup> Ratner, "Ethics and international law," 23.

<sup>36</sup> See William Wohlforth, "Realism," in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2010), 131-149.

<sup>37</sup> Robert Gilpin, "The Richness of the Tradition of Political Realism," in *Neorealism and Its Critics*, ed. Robert O. Keohane (New York, NY: Columbia University Press, 1986), 304.

<sup>38</sup> Frederick L. Schuman, *International Politics: The Western State System in Transition*, 3rd ed. (London: McGraw-Hill, 1941), 9.

<sup>39</sup> See in particular the useful collection of definitions of Realism in Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000), 7-8.

<sup>40</sup> Thomas Franck, *Political Questions/Judicial Answers: Does the rule of law apply to foreign affairs?* (Princeton, NJ: Princeton University Press, 1992), 14; also Hurrell and Macdonald, "Ethics and Norms in International Relations," 58.

distribution of resources and capabilities among them.<sup>41</sup> Any cosmopolitan aspirations, whether constitutionally entrenched or not, are secondary to the struggles for power and survival.<sup>42</sup> Most Realists can thus be seen as inherently prone to discarding such norms as useful factors in their analyses.<sup>43</sup>

Neoliberal theory, assuming a less gloomy perspective, generally posits that next to states, other actors also exert influence on the international stage, including supranational organizations, corporations, interest groups and non-governmental organizations. It stresses the importance of domestic politics and its links to the international sphere. Consequently, it posits that anarchy and lack of trust in international politics can be mitigated by means of cooperation, networks and institutions. In doing so, it reveals the individual ambitions of institutional actors, which shape outcomes through iterative processes or bargaining and negotiation across different levels of governance.<sup>44</sup> From this perspective, while constitutionally entrenched objectives may provide some indication as to what these ambitions are, they are only one of many sources, and arguably less interesting than what Liberal scholars would see as the “real” interests of all relevant actors in a given negotiation scenario.

What both Neorealism and Neoliberalism share, according to their critics, is an exaggerated focus on positive, exogenous factors (military or economic) and the unquestioned assumption of the rationality of actors (state and non-state alike). With a view to countering this overemphasis, Constructivist and other critical approaches “consider actors’ motives as an ‘endogenous’ variable dependent on certain cognitive conditions”.<sup>45</sup> They emphasize the significance of “the social origins of behaviour” and “the power of ideational variables”.<sup>46</sup> Interaction between different actors is capable of altering and gradually aligning their respective “world views”. This can in turn contribute to changing the international order itself, away from an anarchical system towards an international order based on norms – or to use Robert Cooper’s term, a ‘post-modern’ world.<sup>47</sup>

This “post-positivist”<sup>48</sup> turn in IR scholarship, in particular with regard to the role of the European Union (EU) in the world, was also the point of departure for Ian Manners’ concept of “normative power”. Moving beyond the dichotomy of an emphasis on either military or civilian power, he observed that “both value direct physical power in the form of actual empirical capabilities”.<sup>49</sup> With the demise of the global system as defined by the Cold War,

<sup>41</sup> Kenneth Waltz, *Theory of International Politics* (New York, NY: Random House, 1979), 96.

<sup>42</sup> Donnelly, *Realism and International Relations*, 161-188.

<sup>43</sup> However, some Realists might still have some interests in such norms to the extent that they can be invented and instrumentalized to further a state’s interests. See W. Julian Korab-Karpowicz, “Political Realism in International Relations,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2013 ed., accessed 8 October 2014, <http://plato.stanford.edu/archives/sum2013/entries/realism-intl-relations/>.

<sup>44</sup> Arthur Stein, “Neoliberal Institutionalism,” in *The Oxford Handbook of International Relations*, ed. Reus-Smit and Snidal, 200-220; and Andrew Moravcsik, “The New Liberalism,” in *The Oxford Handbook of International Relations*, ed. Reus-Smit and Snidal, 234-254.

<sup>45</sup> Filippo Andreatta, “The European Union’s International Relations: A Theoretical View,” in *International Relations and the European Union*, ed. Christopher Hill and Michael Smith, 2nd ed. (Oxford: Oxford University Press, 2011), 36.

<sup>46</sup> *Ibid.*; and further Ian Hurd, “Constructivism” in *The Oxford Handbook of International Relations*, ed. Reus-Smit and Snidal, 298-316.

<sup>47</sup> Robert Cooper, *The Post-modern State and the World Order* (London: Demos, 2000).

<sup>48</sup> Andreatta, “The European Union’s International Relations: A Theoretical View,” 36.

<sup>49</sup> Ian Manners, “Normative Power Europe: A Contradiction in Terms?” *Journal of Common Market Studies* 40 (2002): 238.



and reflecting on the reasons for its demise, Manners argued for stronger emphasis “on the power of ideas and norms rather than the power of empirical force”.<sup>50</sup>

IR theory thus offers its own variety of “world views”, each with a different conceptual framework regarding what constitutes and characterizes the international system, and what drives the actors within it. Given the particular emphasis that Constructivism places on norms, and given that it can be regarded as “IR theory’s best effort to understand law”,<sup>51</sup> constitutional norms on “global justice” can be assumed to be of interest to scholars from this current. The “dynamic internationalization” of constitutional law, as a global trend, caters to the proposition that alongside other factors such as power and institutional politics, norms matter as well, so much so that they were considered important enough to be codified into the highest laws of various polities. Consequently, constitutional foreign policy objectives can be seen as “positive” legal fuel (using the term in the legal sense) for such “post-positivist” approaches (using the term in the sense of IR theory). How Constructivists can utilize them, and with which precautions, however, requires further enquiry.

## The merits of constitutional norms

Proceeding from the likely general interest Constructivist scholarship may have for constitutional norms addressing substantive goals for global governance, the usefulness of such provisions for the former can be broken down into three main baskets: Normative basis; legitimacy; and socialization.

### Normative basis and identity

Constructivists’ interest in norms stems from seeing them “as helping to form the identity of states rather than merely emanating from the interactions of states expressing predetermined interests.”<sup>52</sup> Constitutional norms can be seen as a particularly important site for discerning the “normative basis” of a particular actor’s foreign policy and approach global governance at large, and give insight into key traits of its “international identity”.

Compared to other sources of law, Constitutions are very well suited to this end as they are “more deeply rooted in a nation’s history and culture” and more “political in nature”.<sup>53</sup> They can be understood as an expression of what Joseph Raz terms the “common ideology” of a political community.<sup>54</sup> The explanatory power of constitutional documents is, therefore, considerable “since contemporary ideas are condensed within them with particular (also conceptual) ‘exertion’”, as Peter Häberle argues.<sup>55</sup> Concerning the allegedly exceptional “normative basis” of EU foreign policy, for instance, Ian Manners posited that “the EU’s normative difference comes from its historical context, hybrid polity and *political-legal*

<sup>50</sup> *Ibid.* See also Steven Lukes, *Power: A Radical View*, 2nd ed. (Houndmills: Palgrave Macmillan, 2004), 108 et seq. on the multidimensionality of power, i.e. economic/military (coercive), agenda setting, and background conditions which are not always consciously accepted but nonetheless exert considerable influence.

<sup>51</sup> Sinclair, *International Relations Theory and International Law*, 170.

<sup>52</sup> Ratner, “Ethics and international law,” 24.

<sup>53</sup> Monica Claes and Maartje de Visser, “Reflections on comparative method in European constitutional law,” in *Practice and Theory in Comparative Law*, ed. Maurice Adams and Jacco Bomhoff (Cambridge: Cambridge University Press, 2012), 157.

<sup>54</sup> Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries,” in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 1998), 154. See also in this respect Günter Frankenberg, “Comparative constitutional law,” in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei (Cambridge: Cambridge University Press, 2012), 173.

<sup>55</sup> (in the original: “[...] weil sich in ihnen in besonderer (auch begrifflicher) ‘Anstrengungen’ Ideen der Zeit verdichten.”) Peter Häberle, “Das ‘Weltbild’ des Verfassungsstaates – eine Textstufenanalyse zur Menschheit als verfassungsstaatlichem und ‘letztem’ Geltungsgrund des Völkerrechts,” in *Staatsphilosophie und Rechtspolitik, Festschrift für Martin Kriele*, ed. Burkhardt Ziemke et al. (Munich: C.H. Beck, 1997), 1280.

*constitution*".<sup>56</sup> Closely related to the idea of this distinctly normative basis is that of the international "identity",<sup>57</sup> for which constitutional law is also seen as an importance source. According to Manners, "constitutional norms represent crucial constitutive factors determining its international identity."<sup>58</sup> To some extent, they may be more illuminating regarding a particular actor's identity than international law,<sup>59</sup> given that constitutions are specific to a certain polity, outlining the type of international legal order that particular polity (or at least its constitutional framers) would like to see emerge.

Manners goes on to dismiss what he sees as a "a cynical viewpoint", i.e., "that such treaty articles and the policies they drive are at best unimportant, or at worst provide cover for more covert commercial interests".<sup>60</sup> These perspectives dovetail, respectively, the likely Realist or Liberal perceptions of such provisions as outlined in the previous section. He contends to the contrary "that the constitutionalization of these normative principles in the highly contested Lisbon Reform Treaty marks the crystallization and culmination of norms and practices which have been evolving over the past 15 years."<sup>61</sup>

In sum, what the exact impact of these norms is on an actor's foreign policy in any particular situation, and whether this automatically excludes their utilization for ulterior motives, remains unclear. However, while they may fail to explain normative behavior as such, constitutional foreign policy objectives nonetheless can be understood as important factors in discerning the overall normative basis of an international actor.

## Legitimacy

Constitutional foreign policy objectives can moreover prove useful for enquiries relating to questions of legitimacy of foreign policy, both in the sociological as well as normative sense of the term. Legitimacy is understood here as the justification for the exercise of political power.<sup>62</sup> According to Buchanan and Keohane, legitimacy in the normative sense is the assertion of a "right to rule", while the sociological sense denotes that an institution "is widely *believed* to have the right to rule".<sup>63</sup> More specifically, such a belief can be seen as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions".<sup>64</sup>

<sup>56</sup> Manners, "Normative Power Europe: A Contradiction in Terms?" 240 (emphasis added).

<sup>57</sup> See Charlotte Bretherton and John Vogler, *The European Union as a Global Actor*, 2nd ed. (London: Routledge, 2006), 6, who see a direct link between the concepts of "actorness" and "identity".

<sup>58</sup> Manners, "Normative Power Europe: A Contradiction in Terms?" 241.

<sup>59</sup> On international law and identity, see e.g. Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law," in *Interdisciplinary Perspectives on International Law and International*, ed. Dunoff and Pollack, 125-142; on the Schmittian analogy of constitutional and international law as inherently "political law", see Lars Vinx, "Carl Schmitt and the analogy between constitutional and international law: Are constitutional and international law inherently political?" *Global Constitutionalism* 2 (2013): 91-124.

<sup>60</sup> Manners, "Normative Power Europe: A Contradiction in Terms?" 241.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Fabienne Peter, "Political Legitimacy," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2014 ed., accessed 8 October 2014, <http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>.

<sup>63</sup> Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (2006): 405.

<sup>64</sup> Mark Suchman, "Managing Legitimacy: Strategic and Institutional Approaches," *Academy of Management Review* 20 (1995): 574.

Legitimacy has received a “recent burgeoning of interest” in both international law and IR.<sup>65</sup> It is said to represent what some call “the hard currency of future international relations”<sup>66</sup> and the “new frontier of multilateralism in the twenty-first century”.<sup>67</sup> Legitimacy is also seen as a crucial component of power, seeing that “[e]ven the world’s largest, perhaps only, superpower appears ultimately to be dependent on legitimacy in order to achieve its foreign policy objectives.”<sup>68</sup>

Applying the debate on legitimacy to constitutional objectives in the domain of global governance, such norms can be seen both normatively as an assertion by the constitutional framers to shape the international order accordingly, and sociologically as expressing a belief within that polity that a foreign policy along these lines would be “desirable, proper, or appropriate”. This is also closely linked to the distinction between “input” and “output” legitimacy,<sup>69</sup> also known as “consent” and “beneficial consequences” of choices and certain policies.<sup>70</sup> On the one hand, “input” into such choices and policies through different modes of participation and consultation bolsters the claim that they are “derived from the authentic preferences of the members of the community”.<sup>71</sup> Asserting that certain “outputs” are beneficial for the “common good”, on the other, is an inherently normative claim.

Constitutional norms, including foreign policy objectives benefit from “input” legitimacy<sup>72</sup> to the extent that they are enshrined in a document that has been approved and is upheld through democratic procedures, at least from the point of view of the political community of which they form part (see on the problems of “parochialism and the “dead hand of the past” the section below).

At the same time, constitutional objectives, stipulate, albeit in often vague or ideal terms, certain “outputs” to be pursued. This includes the domain of foreign policy and global governance. Policies and actions which produce such constitutionally willed “outputs”, can consequently be seen as a normative assertion of legitimacy “because they effectively promote the common welfare of the constituency in question”,<sup>73</sup> at least from the point of view of the constitutional framers. In other words, such norms represent domestically sanctioned benchmarks for the output of government action on the international stage.

## Socialization

Linked to both the issue of normative basis and legitimacy, is that of socialization. The emergence of foreign policy objectives in national constitutions and the founding charters of regional and international organizations can be seen as both evidence of, and fuel for, processes of socialization. Socialization is understood as “a dynamic and increasingly dense

<sup>65</sup> Daniel Bodansky, “Legitimacy in International Law and International Relations,” in *Interdisciplinary Perspectives on International Law and International Relations*, ed. Dunoff and Pollack, 321; see also Ian Hurd, “Legitimacy and Authority in International Politics,” *International Organization* 53 (1999): 379-408.

<sup>66</sup> Nicole Gnesotto and Giovanni Grevi, *The New Global Puzzle: What World for the EU in 2025?* (Paris: EUISS, 2006), 198.

<sup>67</sup> Mario Telò, “Introduction: The EU as a model, a global actor and an unprecedented power,” in *The European Union and Global Governance*, ed. Mario Telò (London: Routledge, 2009), 30.

<sup>68</sup> Helene Sjursen, *‘Doing Good’ in the World? Reconsidering the Basis of the Research Agenda on the EU’s Foreign and Security Policy*, RECON Online Working Paper No. 9 (September 2007), accessed 8 October 2014, [http://www.reconproject.eu/main.php/RECON\\_wp\\_0709.pdf?fileitem=50511934](http://www.reconproject.eu/main.php/RECON_wp_0709.pdf?fileitem=50511934), 8.

<sup>69</sup> On the distinction between “input” and “output” legitimacy, see Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford: Oxford University Press, 1999).

<sup>70</sup> Peter, “Political Legitimacy”.

<sup>71</sup> Sjursen, *‘Doing Good’ in the World?*, 6.

<sup>72</sup> This coincides with what Raz calls “thick” as opposed to “thin” constitutionalism, Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries,” 153-154.

<sup>73</sup> Sjursen, *‘Doing Good’ in the World?*, 36.

interplay between national policies through a complex process of negotiating and coordinating” through international and regional institutions.<sup>74</sup> This process can “create, reflect, and diffuse inter-subjective normative understandings” and advance “normative convergence among actors.”<sup>75</sup> An example of this would be how erstwhile identity defining foreign policy preferences, such as neutrality in the cases of Austria and Ireland, have been realigned in the context of European integration and cooperation in the domain of foreign and security policy.<sup>76</sup> Eventually, as Wong argues, this iterative reshaping of what is both legal and legitimate in the conduct of foreign policy can lead to “the redefinition and negotiation of identities”.<sup>77</sup>

One way to conceive of socialization is as a top-down process of national adaptation to the requirements of international law or membership in regional or global organizations.<sup>78</sup> In these processes, codified goals can serve to justify – if not urge – such adaptation for the sake of “higher ends”. One particularly strong example of this is membership of the European Union. In the quest for coherence in EU external action, legal concepts such as the “duty of sincere cooperation” are premised on the need to effectively pursue Union objectives.<sup>79</sup> This frequently results in constraining Member State behavior on the international scene.<sup>80</sup> Objectives from the EU Treaties thus serve as a constitutional tool to socialize (or ‘Europeanize’) the foreign policies of the Member States.

At the same time, constitutional foreign policy objectives can be understood as evidence for the “bottom up” understanding of socialization, according to which states “project” or “upload” “their national preferences to the regional or international level”.<sup>81</sup> In this way, the EU, and other regional organizations such as ASEAN, are used by the Member States “as a means and vehicle for the achievement of nationally defined goals.”<sup>82</sup> The EU Member States, for instance, have clearly left their mark on the Treaties also in terms of EU foreign policy. Here one can point to the careful formulations in the area of the Common Security and Defence Policy to safeguard foreign policy preferences of both neutral and strongly Atlanticist Member States (Article 42(2) TEU), or the French insistence on adding the protection of citizens as a Union objective in its relations with the wider world.<sup>83</sup> Member States thus have not only “uploaded” their national normative preferences and goals as a matter of policy, but also entrenched them in the highest laws of the EU.<sup>84</sup>

<sup>74</sup> With particular regard to the EU, see Reuben Wong, “The Europeanization of Foreign Policy,” in *International Relations and the European Union*, ed. Hill and Smith, 150.

<sup>75</sup> Lisa L. Martin and Beth A. Simmons, “International Organizations and Institutions,” in *Handbook of International Relations*, ed. Carlsnaes, Risse and Simmons, 335.

<sup>76</sup> Nicole Alecu de Flers, *EU Foreign Policy and the Europeanization of Neutral States: Comparing Irish and Austrian foreign policy* (Abingdon: Routledge, 2012); for a study focusing on NATO, see Alexandra Gheciu, “Security Institutions as Agents for Socialization? NATO and Post-Cold War Central and Eastern Europe,” *International Organization* 59 (2005): 973-1012.

<sup>77</sup> Wong, “The Europeanization of Foreign Policy,” 152; drawing on, *inter alia*, Lisbeth Aggestam, “Role-identity and the Europeanisation of foreign policy: a political-cultural approach,” in *Rethinking European Foreign Policy*, ed. Ben Tonra and Thomas Christiansen (Manchester: Manchester University Press, 2004), 81-98.

<sup>78</sup> With particular regard to the EU, see Wong, “The Europeanization of Foreign Policy,” 151.

<sup>79</sup> Bart Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London: Routledge, 2012), 69.

<sup>80</sup> Andrés Delgado Casteleiro and Joris Larik, “The Duty to Remain Silent: Limitless Loyalty in EU External Relations?” *European Law Review* 36 (2011): 524-541.

<sup>81</sup> Wong, “The Europeanization of Foreign Policy,” 152.

<sup>82</sup> *Ibid.*

<sup>83</sup> Etienne de Poncins, *Le traité de Lisbonne en 27 clés* (Paris: Lignes de repères, 2008), 75-76.

<sup>84</sup> There is a link between the idea of “uploading” and Liberal Intergovernmentalism due to the focus on domestic preferences and how they come to affect international behavior. For a Realist critique, which could be applied to the constitutional domain as well, see Adrian Hyde-Price, “A ‘tragic actor’? A realist perspective

## The pitfalls of constitutional norms

However, even though there are different contexts in which constitutional objectives outlining “good global governance” may be useful for Constructivist theorizing and applications, there are a number of pitfalls which should be avoided by Constructivist scholars. The overall reason for this is to avoid a sort of enchantment with these norms, which might detract from using them epistemologically as codified evidence of perceptions about global order, and come to view them in rather idealist or cosmopolitan terms, thereby sliding back into the historical roots from which modern Constructivist theory so vigorously tried to free itself.<sup>85</sup> More specifically, such pitfalls include avoiding a “tunnel-vision” which over-emphasizes the importance of such constitutional norms vis-à-vis other sources, to mistake them prematurely for universal values and to be oblivious to the specific inter-temporal problems that constitutional entrenchment entails.

### Legal hubris

First of all, a rather obvious critical observation to make is that putting certain “wish lists for a better world”<sup>86</sup> into a constitutional document does not automatically make it so, nor does it compel any actor to relentlessly pursue such goals. While such constitutional norms may express commonly held perceptions or even shape behavior to some extent, they should not be seen as causes *per se*.<sup>87</sup> This can already be gleaned from their weak legal force in domestic legal order, where they serve rather as an interpretive lens than as a source of power or coercion.<sup>88</sup>

Moreover, while constitutional norms may serve as a prominent source for determining the normative basis or international identity of an international actor, they are by no means the only source to be taken into account. Constructivist scholars can and should in fact use a wide variety of sources extending beyond constitutional law to this end. A tunnel vision focusing solely on constitutional norms is thus the first major pitfall to be avoided. There is no denying, as constitutional scholars readily acknowledge, that constitutional texts can be “highly incomplete, if not misleading, guides to actual practice”.<sup>89</sup>

“A constitution resembles a sharp pencil of light which brightly illuminates a limited area of a country’s political life before fading into a penumbra where the features are obscured—even if that surrounding darkness may conceal what are the most potent and significant elements of the political process.”<sup>90</sup> Hence, many

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on ‘ethical power Europe,’ *International Affairs* 84 (2008): 31, arguing that the EU merely “serves as the institutional repository of the second order normative and ethical concerns of its member states”.

<sup>85</sup> This criticism is also voiced by Sinclair, i.e. that a “common sense idea of law” is prevalent among many IR scholars which would assume that “law is seen as (a) good” *per se*, Sinclair, *International Relations Theory and International Law*, 175.

<sup>86</sup> (in the original: “Wunschzettel für eine bessere Welt”) Wiebke Drescher, “Ziele und Zuständigkeiten,” in *Der Vertrag von Lissabon: Analyse und Bewertung*, ed. Andreas Marchetti and Claire Demesmay (Baden-Baden: Nomos, 2010), 68.

<sup>87</sup> Sinclair, *International Relations Theory and International Law*, 22, referring to Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991).

<sup>88</sup> Larik, “Shaping the international order as an EU objective”.

<sup>89</sup> S.E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995), 1.

<sup>90</sup> *Ibid.*, 2.

constitutional features, also in the international sphere, can indeed be “invisible”.<sup>91</sup>

Applying this to the discussion concerning “normative basis”, for Manners constitutional norms are by no means the only ingredients comprising what he calls “normative basis”. Alongside references to legal norms in the EU Treaties, he also considers declarations, speeches and other sources to be part of this basis. For instance, he points to Romano Prodi’s inaugural speech at the European Parliament and Commission white papers.<sup>92</sup> Similarly, regarding international identity, Sonia Lucarelli defines the “political identity” of the EU as “the set of social and political values and principles that Europeans recognize as theirs and give sense to their feeling of belonging to the same political entity”.<sup>93</sup> This includes but also goes beyond legal norms alone.

### Parochialism vs. universality

Finally, parochialism, meant here as the failure to take into account the global context when drawing on constitutional objectives in the field of global governance, may result both in misleading conclusions about the normative distinctiveness of a particular actor and the legitimacy of its actions on the international stage.

Regarding normative distinctiveness – or “exceptionalism” – Anu Bradford and Eric Posner have argued that great powers usually claim to have a foreign policy that is “exceptional” in one way or the other, which “typically support[s] a view of international law that embodies their own normative commitments but is presented as a universal set of commitments”.<sup>94</sup> This also applies to any unreflective reliance on the codified norms in supreme domestic laws regarding foreign policy. This in itself cannot answer the question whether an international actor is in fact normatively “exceptional” or particularly beholden to “good global governance”.

A caveat should be applied regarding legitimacy in the sociological sense in foreign policy, i.e., a distinction between what may be perceived as legitimate at home on the one hand, and in the proverbial “court of world opinion” on the other. Legitimacy in the latter category, even if bolstered by a textual hook in the domestic constitution, diminishes to the extent that policies and actions objectives do not reflect norms and standards which stem from deliberation processes by the international “community” and which are widely accepted beyond one’s own political community.<sup>95</sup> Manners, in revisiting his “normative power” concept also concluded that

“The creative efforts and longer-term vision of EU normative power towards the achievement of a more just, cosmopolitical [sic] world which empowers people in the actual conditions of their lives

<sup>91</sup> Antje Wiener, *The Invisible Constitution of Politics Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2012).

<sup>92</sup> Manners, “Normative Power Europe: A Contradiction in Terms?” 243.

<sup>93</sup> Sonia Lucarelli, “Introduction: Values, principles, identity and European Union foreign policy,” in *Values and Principles in European Union Foreign Policy*, ed. Sonia Lucarelli and Ian Manners (London: Routledge, 2006), 13.

<sup>94</sup> Anu Bradford and Eric Posner, “Universal Exceptionalism in International Law,” *Harvard International Law Journal* 52 (2011): 12.

<sup>95</sup> This is in line with the Rawlsian approach of deducing universality from “background conditions of international society”, Peter Sutch, *Ethics, Justice and International Relations: Constructing an International Community* (Routledge, 2001) 76; on universality as “propensity towards global acceptance”, Rainer Arnold, “Reflections on the Universality of Human Rights,” in *The Universalism of Human Rights*, ed. Rainer Arnold (Berlin: Springer, 2013), 1.

should and must be based on more universally accepted values and principles that can be explained to both Europeans and non-European alike.”<sup>96</sup>

Hence, while such constitutional norms continue to serve domestically as empirical evidence (but not conclusive proof) for certain preferences within that polity regarding international order, they are *a priori* normative from the outside perspective. Further scrutiny as to their “global acceptance”<sup>97</sup> would be required to determine whether they indeed reflect preferences that are universally accepted. At any rate, as Lisbeth Aggestam notes, “universal values” should “exist independently from the specific identity of an actor”.<sup>98</sup> Drawing on constitutional provisions as a source of sociological benchmarks for legitimate foreign policy from a global perspective will be challenging, as it requires the determination of the universal validity of these norms beyond the specific legal and political context of a given constitution. Where such links can be made between constitutional norms and norms in other legal orders, as well as in the global discourse, constitutional foreign policy objectives can indeed also be regarded as a source of sociological legitimacy beyond its own jurisdiction.<sup>99</sup>

In the case of EU external relations, such a hinge between the internal and external sphere exists (at least partially) in the constitutional norms themselves. In the case of EU development policy, while it can gain legitimacy, internally, through pursuing constitutional objectives of the Union,<sup>100</sup> externally, its legitimacy depends on complying with commitments, as the EU Treaties acknowledge, which have been “approved in the context of the United Nations and other competent international organizations.”<sup>101</sup> While this alone certainly does not suffice to render the entirety of foreign policy objectives of the EU norms of universal value, there are at least clear inroads towards “universality” as a threshold for their legitimizing potential.

### Obsolescence (or the “dead hand of the past”)

A third caveat, which afflicts constitutional law in particular, is its stability and longevity. While this bolsters the prominent standing of constitutional norms in terms of “common ideology”, as time passes it may lead to the ideas expressed therein becoming out-dated. Norms on “global justice” and the like are no exception to this. This is known in constitutional theory as the problematic of the “dead hand of the past”.<sup>102</sup> Why should current generations adhere to rules enacted by people who have long since passed? Also in the area of foreign policy, codified objectives would then amount to this proverbial dead hand resting at the helm of the ship of the state. In other words, the older the constitutional norms, the more likely their potential for no longer accurately reflecting a “normative basis” or identity, lending legitimacy or being relevant for ongoing socialization processes.

<sup>96</sup> Ian Manners, “The normative ethics of the European Union,” *International Affairs* 84 (2008): 60 (emphasis added).

<sup>97</sup> Arnold, “Reflections on the Universality of Human Rights,” 1.

<sup>98</sup> Lisbeth Aggestam, “Introduction: Ethical Power Europe,” *International Affairs* 84 (2008): 6.

<sup>99</sup> This draws on Arnold, “Reflections on the Universality of Human Rights”, 1, who, arguing in the context of human rights, defines “global acceptance” in both vertical (acceptance at the national, regional and international level) and horizontal terms (acceptance “in all geographical parts of the world”).

<sup>100</sup> Article 208(1), first subpara. Treaty on the Functioning of the European Union (TFEU), stating that EU development policy is to be “conducted within the framework of the principles and objectives of the Union’s external action”.

<sup>101</sup> Article 208(2), second subpara. TFEU.

<sup>102</sup> Raz, “On the Authority and Interpretation of Constitutions,” 164-169.

Hence, this is a problem that concerns older constitutions, which have not been amended significantly over time, such as that of the United States,<sup>103</sup> it is not yet an issue for more recent or recently updated ones. In the domain of foreign policy, the constitution of Portugal is an illustration of this. Amendments of other parts of the document notwithstanding, Article 7(2) on international relations still clearly reflects the *Zeitgeist* of 1976 and would require some imaginative reinterpretation to apply it to current international affairs:

“Portugal advocates the abolition of imperialism, colonialism and any other form of aggression, domination and exploitation in the relations among peoples, as well as the achievement of simultaneous and controlled general disarmament, the dissolution of political-military blocs and the establishment of a collective security system, with a view to the creation of an international order capable of safeguarding peace and justice in relations between peoples.”

Moreover, a focus on constitutionally entrenched norms may also run afoul of understanding identity and socialization as iterative, long-term processes. Lucarelli, for instance, rejects the idea that identity is a “given” factor, and contends that it is “part of processes of self-identification by the individuals in a group, in which foreign policy is particularly important.”<sup>104</sup> She stresses in this respect the need for interpretation through frameworks of “[c]ulture, history, legal practices and institutions”.<sup>105</sup> These may change over time, but certain constitutional texts as such do not, or are by definition at least not supposed to.

More generally, Marise Cremona frames the emergence values in foreign policy as a product of iterative processes between different levels of governance, such as the EU, the national and the international order.<sup>106</sup> For instance, concerning human rights protection, the EU has been inspired by both the constitutional traditions of its Member States and international instruments such as the European Convention on Human Rights.<sup>107</sup> At the same time, the Union promotes human rights internationally, thereby feeding its own internal principles back into the international sphere through foreign policy. This furthermore illustrates, in tune with Constructivist thinking, that universal norms are not static, exogenous factors, but in constant flux and prone to change over time. In order to retain their usefulness in these processes, constitutional texts should at least be amenable to interpretations reflecting contemporary thinking and discourses on global order and justice.

However, as Sinclair stresses in her critical approach, such processes of norm formation are in themselves political, and formalization in legal terms privileges certain norms over others, thus creating a constraining structure rather than an apolitical, uncontested space.<sup>108</sup> The “dead hand of the past” problem as applied to the constitutional objectives on global governance issues could be seen as taking this to the extreme: A certain “world view” is allegedly taken out of the political sphere, put on the pedestal of a polity’s highest supreme

<sup>103</sup> See Adam Samaha, “Dead Hand Arguments and Constitutional Interpretation,” *Columbia Law Review* 108 (2008): 606-680.

<sup>104</sup> Lucarelli, “Introduction: Values, principles, identity and European Union foreign policy,” 13.

<sup>105</sup> *Ibid.*

<sup>106</sup> Marise Cremona, “Values in EU Foreign Policy,” in *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, ed. Malcolm Evans and Panos Koutrakos (Oxford: Hart Publishing, 2011), 275-315.

<sup>107</sup> See e.g. CJEU, Case 4/79 *Nold v Commission* [1975] ECR 00491; also CJEU, Case 222/84 *Johnston* [1986] ECR 01651, para. 13, which states that the ECHR is of ‘particular significance’ for its reasoning.

<sup>108</sup> Sinclair, *International Relations Theory and International Law*, 23-25, drawing on Maja Zehfuss, *Constructivism in International Relations* (Cambridge: Cambridge University Press, 2002), 148.



laws and is entrenched, i.e., made difficult to amend subsequently. While these are the reasons for which such norms can be regarded as noteworthy in the respects outlined in the previous section, Sinclair reminds us of the politics and social structures which produced them and then chose to make it harder for not only their contemporaries, but also later generations to change them.

## Conclusion

This paper sought to demonstrate, firstly, that constitutional texts have become tomes for norms regarding substantive underpinnings and principles on “good global governance” and “global justice.” Secondly, it showed that this opens up a thus far underappreciated conceptual space with IR theory, in particular Constructivist thinking on norms in global politics.

Constitutions can be utilized as sources for such norms in a variety of ways. Firstly, they can serve as evidence of a “normative basis” for a particular actor’s foreign policy, drawing on the idea of constitutions as expressions of “common ideology”, including an explicit external, even global, outlook. Secondly, they can be drawn upon as parameters for legitimacy in international politics, given that constitutions (those exhibiting “thick” constitutional features and that thus profit from a high degree of “input legitimacy”, at any rate) can be regarded as sociological evidence of different kinds of legitimate action based on commonly held assumptions within a particular polity. Thirdly, such constitutional norms are both evidence of, and fuel for processes, of socialization – a phenomenon that can be observed most clearly in the case of European integration and the ‘Europeanization’ of foreign policy.

At the same time, in harnessing constitutionally entrenched “world views”, three main pitfalls have been flagged, which are to be avoided by Constructivists, i.e., legal hubris, parochialism and obsolescence. Firstly, while the constitution is supreme in the legal realm, its norms relating to global governance are neither causal elements *per se*, nor are they to be mistaken as the only form of expression for normative preferences. Secondly, the domestic standards, even if constitutionally codified and addressing global governance, should not be confused with “exceptional” commitments to “global justice” or as being based on universal norms without further enquiry. From the global perspective, they are not sociological evidence of what is to be regarded as “good global governance”, but *a priori* normative statements emanating from a particular polity. Thirdly, attention should be paid to the “dead hand of the past”. While constitutional entrenchment may lend norms particular gravitas, it also makes them prone to become out-dated in the course of time, thus no longer expressing the actual “world outlook” of a polity. Moreover, the actions of this proverbial hand inscribing certain norms in a polity’s supreme laws is in itself a political act, with constraining effects on subsequent generations. By heeding these caveats, Constructivist IR theorists can embrace contemporary constitutions in their quest of elucidating which principles underpin the international order and its maturing legal framework.

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