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Klabbers, Jan

Cambridge University Press
2022

Klabbers , J 2022 , Constitutionalism as Theory . in J L Dunoff & M A Pollack (eds) , International Legal Theory : Foundations and Frontiers . Cambridge University Press , Cambridge , pp. 220-239 . https://doi.org/10.1017/9781108551878.010

http://hdl.handle.net/10138/353873
https://doi.org/10.1017/9781108551878.010

other
acceptedVersion

Subsequently published in revised form in *International Legal Theory: Foundations and Frontiers* edited by J. L. Dunoff, & M. A. Pollack. https://doi.org/10.1017/9781108551878.010

Constitutionalism as Theory

Jan Klabbers[1]

I. Introduction

Amongst international lawyers, the approach to international law often labelled constitutionalism properly emerged at some point in the late 1990s, perhaps mostly inspired by millenarian anxieties. A short century after Oswald Spengler declared the decline of the West, and three quarters of a century after José Ortega y Gasset bemoaned the revolt of the masses marking the end of civilization, some international lawyers expressed concern about the survival of mankind, and proposed that only a reconstructed international law could come to the rescue – and quite a few of these international lawyers hailed from Germany.[2]

This was curious, or so it seemed. The West, far from declining, had just triumphed over the East in the beginning of the 1990s. Western values (typically those endorsed by constitutionalist international lawyers) had already assumed prominence, so much so that Francis Fukuyama could famously proclaim the end of history, inspired by Germany's national philosopher G.W.F. Hegel.[3] And Germany itself had just been re-united (or united, as the case may be – these matters are politically sensitive). As yet another German – Friedrich Nietzsche - could have proclaimed, 'God is dead; long live the market'.[4]

What these international lawyers saw, perhaps more clearly than others, was that the international legal order as it stood was unlikely to rein in the forces of evil, and on second thought, their ideas may not have been all that eccentric after all. The restructuring of markets in Eastern Europe, under auspices of the IMF and the World Bank, quickly resulted in 'cowboy capitalism', never more hilariously (and accurately) described than by novelist Jonathan Franzen.[5] Some people got very rich very quickly, and ended up buying football clubs in

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[1] Professor of International Law, University of Helsinki.
[2] Some non-German (or non-German speaking) international lawyers chipped in, but in relatively isolated ways. See, e.g., Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press, 1990).
[3] See Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).
[4] On Nietzsche, see Rüdiger Safranski, *Nietzsche: A Philosophical Biography* (London: Granta, 2003, Frisch trans.).
[5] Jonathan Franzen, *The Corrections* (New York: Farrar, Straus and Giroux, 2001).

London or Monaco. Others got very rich very quickly but ended up in Siberia, having upset the newly created Russian Federation's government. In Africa, proxy wars became civil wars after the fall of the Wall, resulting in the novel phenomenon of the 'failed state' or, worse, in genocide, with all the world turning their heads when close to a million people were slaughtered in Rwanda.[6] And closer to home, too close for comfort really, the artificial creation that was Yugoslavia unraveled amidst much bloodshed and another genocide and a bout of ethnic cleansing. And then there were some terrorist activities in the late 1990s as well, in retrospect serving as the prelude for the resonant big bang of 9/11. The Cold War, it turned out, had maintained a precarious balance; its end unleashed unexpected forces. Its ending moreover, in retrospect may have had more to do with communism's failings than with the merits of neo-liberalism, as some already noted during the 1990s.[7]

In an important sense, the constitutionalization of international law emerged in response to the aftershocks of the end of the Cold War. This was not the only reason[8], nor would it be fair to say that constitutionalization came out of the blue – the German international lawyers could tap into a long line of earlier thinkers, whether thinkers endorsing world government, a world confederation or, indeed, the constitutionalization of the international legal order – and this already assumes the existence of such a legal order in a meaningful way.[9] And more generally, thinking about international organization or world government, antecedents to a more focused constitutionalist approach, has been traced back to at least the thirteenth century and the writings of Pierre Dubois[10], with some special prominence usually reserved for Immanuel Kant's design of a confederation to achieve eternal peace.[11] And it is no doubt possible to claim that something of the constitutionalist spirit can also be discerned in classic works written a century ago endorsing international government[12] – although much here depends on how constitutionalism is defined. This latter is an important point and shall be returned to:

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[6] A harrowing eyewitness account is Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York: Carroll and Graf, 2003).

[7] Mark Mazower, *Dark Continent: Europe's Twentieth Century* (London: Penguin, 1998).

[8] See further Jan Klabbers, 'Setting the Scene', in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009), 1-44.

[9] The list would include the likes of Christian Wolff and Immanuel Kant, but also more recent protagonists such as Alfred Verdross and Hermann Mosler. Many of Tomuschat's contemporaries, moreover, display constitutionalist sensibilities to a greater or lesser extent (Bruno Simma, Jochen Frowein, Rüdiger Wolfrum, Jost Delbrück), as does – again to a greater or lesser extent - the next generation, including scholars such as Armin von Bogdandy, Anne Peters, Bardo Fassbender and Andreas Paulus.

[10] The *locus classicus* is Jacob ter Meulen, *Der Gedanke der Internationalen Organisation in seiner Entwicklung 1300-1800* (The Hague: Martinus Nijhoff, 1917).

[11] Immanuel Kant*, Zum ewigen Frieden* (Stuttgart: Reclam, 1984 [1795]).

[12] John A. Hobson, *Towards International Government* (London: George Allen and Unwin, 1916); Leonard Woolf, *International Government* (London: George Allen and Unwin, 1916).

there is no constitutionalism in the absence of interpretations of the world through constitutionalist lenses. Constitutionalism, so to speak, lacks an ontology of its own.

Either way, and curious enough, the constitutionalization discussion that took off in the 1990s disappeared about as rapidly as it had appeared: by the end of the first decade of the new millennium, many had left the discussion behind. It would not be too fanciful, albeit a bit self-indulgent perhaps, to bookend the debate between the years 1999, when Christian Tomuschat delivered an influential set of lectures at the Hague Academy of International Law[13], and 2009, with the publication of two books, one emanating from the US and addressing largely US concerns, titled *Ruling the World?* (edited by Jeff Dunoff and Joel Trachtman), and the other, emanating from Europe and oozing European sensibilities, authored by Jan Klabbers, Anne Peters and Geir Ulfstein, titled *The Constitutionalization of International Law*.[14] At the risk of considerably over-stating the differences (and mindful of the circumstance that *Ruling the World?* comprises many European authors in addition to Americans), the former offers a somewhat external perspective, with the latter more interested in the internal point of view: establishing public power on the one hand, controlling public power, controlling public power on the other.[15]

To the extent that international lawyers have written about constitutionalization after 2009, they have done so mostly as sociologists of science: they study the debate rather than reflect on the substantive meaning (*vel non*) of constitutionalism[16] or its manifestations in the international legal order.[17] And to the extent that the debate continues, it seems to have been taken over by and large by political theorists, replacing the international lawyers.[18] Most curious of all perhaps, is that with a few notable exceptions the discipline of International Relations has largely remained silent.[19] While it would not be amiss to claim that this discipline in particular had something to make up for having singularly missed out on the end of the Cold War, its strongly

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[13] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 297 *Recueil des Cours*, 9-438.

[14] Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); Klabbers et al., *The Constitutionalization*.

[15] Then again, it is often thought that viewing public law or constitutions as establishing public power is something the French tradition would heartily subscribe to as well.

[16] For present purposes, I will use the terms constitutionalization and constitutionalism as two sides of the same coin, with the former denoting, roughly, a social process and the latter, equally roughly, its accompanying body of thought.

[17] Christine Schwöbel, 'Situating the Debate on Global Constitutionalism', (2010) 8 *International Journal of Constitutional Law*, 611-635; Aoife O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalization Debate', (2012) 32 *Oxford Journal of Legal Studies*, 799-822. Much the same applies to related debates, such as that on fragmentation: see Anne Charlotte Martineau, *Une analyse critique du débat sur la fragmentation du droit international* (Brussels: Bruylant, 2015).

[18] See below.

[19] One early exception is Andrew Linklater, *The Transformation of Political Community* (Cambridge: Polity, 1998). Few like-minded later works come immediately to mind.

'statist' assumptions entail that anything undermining or overcoming state power (as constitutionalism typically implies) is treated with suspicion – or simply neglected.

In what follows I will aim to discuss the underpinnings of the theory (if that is what it was) of constitutionalization in its various manifestations, loosely informed by the puzzle that is my starting point: how could a star that burned so brightly suddenly seem so pale? How, in other words, can it be explained that constitutionalization burst on the scene and disappeared quickly again, even by the sometimes ephemeral standards of international law discussions? Put in perspective: the discipline can spend years discussing the plight of single individuals (such as messrs Pinochet or Kadi), and can spend huge amounts of time and energy discussing hypothetical prosecutions before the International Criminal Court; by contrast, constitutionalization came and went with unmatched speed, despite the fact that its relevance for the international legal order is immensely greater than questions such as under what precise conditions members of the Qaddafi family could possibly be prosecuted before the ICC if ever they would find themselves in the docket – which is rather unlikely to begin with.

I will start by discussing the various uses of theory (section II). This will be followed by a discussion of distinct approaches to the constitutionalization of international law (section III), after which I will zoom in on one such approach, what I label the cosmopolitan approach (section IV), and situate it somewhere between explanatory and normative theory. Section V will briefly discuss the aftermath of the constitutionalization debate, while section VI concludes. The general argument will be that constitutionalization (or constitutionalism) has not been particularly successful as theory, predominantly because it was never intended to do much serious theoretical work. Put differently, constitutionalism was never intended as explanatory theory; to the extent that it can be considered as theory, it is strongly normative in nature (or, more accurately perhaps, exploits the space in-between the explanatory and the normative – I will get back to this below), in much the same as theories of justice typically lack explanatory force but are strongly normative in nature.

II. The Uses of Theory?

Theories of and about (international) law come in various shapes and guises and answer to different sets of questions. Traditionally, in the first half of the twentieth century, much theorizing went into the ontological status of international law (is it really law?) and the ramifications of possible answers thereto, and the various theories could easily be summarized under four headings: the skepticism of Hans Morgenthau and generations

of International Relations scholars after him; the policy-oriented approach pioneered by Myres McDougal and associates; the positivist, rule-based approach of Georg Schwarzenberger and many, many others; and the type of natural law-inspired idealism for which Alejandro Alvarez may well serve as an exemplar.[20]

By the end of the twentieth century, with international law having reached its post-ontological phase[21], the focus had shifted and sharpened. International law, so many agree, actually exists, and the constructivists have taught us that even if it does not always constrain state behavior, the function of law is not merely to constrain behavior – law also structures how we think, and in which terms we think, about political events and phenomena. Law creates the vocabulary and the grammar, and in doing so its fruits will always be contested.[22] There is, for instance, no such thing as a neutral description of a bounded political community with people, territory and a form of government. Such a community may be referred to as a state (and in everyday language is usually so described), but attaching that very label may be considered undesirable: think Kosovo, think Palestine. Likewise, it makes a huge difference whether a military operation is discussed as an invasion or as a humanitarian intervention: the activities may look the same (troops moving across a boundary and killing people), but the qualification makes all the difference, legally as well as otherwise. Even at the extreme end of politics this matters: whether the killing of close to one and a half million Armenians a century ago should be labelled a 'genocide' or not is politically and ethically hugely significant.[23]

Theories comes in all kinds of shapes and guises, and address questions on all possible levels of abstraction. Some remain firmly *internal to the law* itself: one can think, for instance, of a theory about the status of military forces abroad[24], or about the powers of international organizations[25], or about the reception of international law within the European Union.[26] Other theories may move up the level of abstraction or generality: one can imagine theories about jurisdiction for purposes of human rights protection[27] or, more

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[20] This is modelled after Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), chapter 3.

[21] The term is Franck's: see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995), at 6; the only dissenters are so-called realist scholars of international politics who still treat international law as epiphenomenal, and their progeny among students of law, most notably Jack L. Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005). Importantly though, much of their conclusions follow directly from their assumptions, in such a way as to render nugatory much of the intervening analysis.

[22] Pivotal here is Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International relations and Domestic Affairs* (Cambridge University Press, 1989).

[23] Jan Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics', (2017) 6 *Rivista di Filosofia del Diritto*, 27-50.

[24] Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge University Press, 2017).

[25] Viljam Engström, *Constructing the Powers of International Institutions* (Leiden: Martinus Nijhoff, 2012).

[26] Jan Klabbers, *The European Union in International Law* (Paris: Pedone, 2012).

[27] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011).

general still, about jurisdiction in international law at large[28], or about international organizations law generally[29], or about the relations between domestic and international law.[30] Either way, here the law is largely an exercise in hermeneutics: the validity of theorizing does not depend on any correspondence with empirical reality, but depends, one might say, on alignment with legal materials. A theory on jurisdiction should take the relevant treaties, statutes and case-law into account – if it does so well and plausible, it would seem to be a valid theory, at least for the time being. A theory of jurisdiction need be less concerned about actual state practice going against the relevant treaties or statutes, unless it becomes clear that the state practice is changing the relevant instruments. Thus, the unauthorized abduction of a criminal suspect from foreign territory need not be a decisive blow to any theory of jurisdiction; it need not even have a role in any such theory.

Things are different with theories about the *role of law*; here the testing cannot remain an exercise in hermeneutics, but needs to have some grounding in empirical reality – whatever empirical reality. This applies to feminist theory[31], or systems theory[32], theories relating to imperialism and colonialism[33], or generally critical legal studies[34], as well as work utilizing assumptions borrowed from economics – although here in particular the empirical testing rarely gets done.[35] This type of work has called forth further work attempting to answer the challenges thrown up by critical work on the role of law.[36] Some work aspires to make visible in Foucauldian mode how law structures power relations[37] or how it is – or can be - strategically used[38]; other work stays closer to the analytical tradition.[39]

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[28] The closest, though its theory is mostly implicit, is Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008).
[29] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law*, 9-82.
[30] Veijo Heiskanen, *International Legal Topics* (Helsinki: Finnish lawyers' Publishing Company, 1992), 1-199.
[31] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).
[32] Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006).
[33] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).
[34] Koskenniemi, *From Apology to Utopia*; David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987).
[35] There are obvious exceptions though. See, e.g., Eyal Benvenisti, 'Exit and Voice in the Age of Globalization', (1999) 98 *Michigan Law Review*, 167-213.
[36] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011).
[37] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).
[38] Karen Knop, *Diversity and Self-determination in International Law* (Cambridge University Press, 2002); Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press, 2014).
[39] Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996).

Either way, legal theory comes with a few issues. Traditionally, in the social sciences at least, it has been common to distinguish between positivist explanatory theory, and normative theory.[40] John Rawls' *A Theory of Justice* is a work of normative theory[41]; it does not even begin to aspire to explain any empirical findings, and the same applies, not coincidentally, to such works as Charles Beitz's *Political Theory and International Relations*[42] or Mervyn Frost's *Ethics and International Relations*.[43] By contrast, a typical representative of explanatory theory, grounded in rich empirical materials, is Beth Simmons' work, including her work on human rights but also her work on investment, for instance.[44]

The problem now is that the explanatory and the normative are often difficult to disentangle. Much work, in particular on constitutionalization as we will see, carries a vaguely empirical promise but is mostly normative in nature. What adds to the mystique is that legal studies in some mysterious way can become part of the very object of study.[45] Put differently, it would not at all be surprising if negotiators, trying to settle a maritime boundary dispute, would let their solution be influenced by a good recent study on the settlement of maritime boundary disputes. It would not be surprising if treaty drafters aiming to make a treaty work quickly would take their cues from a good recent study on the provisional application of treaties, or even if an international criminal tribunal were to be influenced by a good recent study on, say, command responsibility. Indeed, sometimes academics are asked by states, international organizations or law firms to write expert opinions, precisely in a bid to have academic reflections influence practice – and sometimes academics do so on their own initiative in the form of *amicus curiae* briefs. Theory and practice have tricky ways of intersecting in international law[46], and much of what sometimes gets labelled 'theory' is not even that; sometimes 'theory' is merely everything that it not immediately 'practical'.[47]

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[40] See generally e.g. Mark Neufeld, *The Restructuring of International Relations Theory* (Cambridge University Press, 1995).
[41] John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971).
[42] Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1999 [1979]).
[43] Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge University Press, 1996).
[44] See in particular Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).
[45] This is not unique to legal studies: Kuhn has helpfully suggested that we all work through paradigms (or would-be paradigms), and surely, teaching generations of political science majors that politics is always (and only) about 'who gets what, when and how' has created its own reality: the policy advisor who would suggest that politics is also about a common global responsibility is likely to be without a job soon. See Thomas Kuhn, *The Structure of Scientific Revolutions*, 2nd edn (University of Chicago Press, 1970).
[46] And law generally: 'Studying the law, we become part of it.' See Paul W. Kahn, *The Cultural Study of Law* (University of Chicago Press, 1999), at 2.
[47] Bianchi scathingly dismisses what he refers to as 'armchair theorizing', and suggests that theory and practice are two sides of the same coin. See Andrea Bianchi, *International Legal Theories* (Oxford University Press, 2016).

In what follows, it will be my contention that much of the international legal work on constitutionalization has been normative rather than explanatory theory, or rather, has exploited the space between the two. Its empirical bases have always been sketchy, and constitutionalization theories have done little work in explaining what is going on around us. Instead, they tend to paint a picture of how the world could possibly come to look like, but do so without much detail, or really planting their feet in the empirical mud. Typically, constitutionalization theories have been happy to be neither fish nor fowl, and have derived much of their attraction from this ambiguity. Before discussing this further, however, it will prove useful to provide an analytical overview of the various versions of international constitutionalist thought that have been circulating, in order to focus the subsequent discussion.

III. International Constitutionalisms

The terms 'constitution' and variations thereon (constitutionalism, constitutionalization) come with a number of associations. It is often thought that constitutionalism relates to the Rule of Law.[48] This need not strictly be the case: Stalin's Soviet Union also had a constitution, although few would mistake the erstwhile USSR for a Rule of Law state. But nonetheless, by and large, if a state is deemed 'constitutional', it is often deemed to adhere to some version of the 'rule of law' – and as Weber already knew, what matters here is that there is some stability and predictability, rather than arbitrariness.[49] It does not matter as much what the law provides as that there actually is some law. Admittedly, the concept of the rule of law has acquired considerable normative baggage over the years, starting perhaps with the libertarian version espoused by Hayek, but this need not detain us here.[50]

The word constitution also taps into political legitimacy, in the sense that a political order deemed 'constitutional' is often, and precisely for that reason, considered to also be a legitimate political order. Again, the connection is not waterproof, and clever theorists may no doubt posit that some political orders can be simultaneously constitutional and illegitimate, or unconstitutional yet legitimate, but such will have to owe much to precise definitions and working concepts. Many would find that a claim such as 'Erdogan's Turkey is

[48] Useful are Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), and Leonardo Morlino and Gianluigi Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010).
[49] Max Weber, *Economy and Society* (Berkeley CA: University of California Press, 1978, Roth and Wittich eds.).
[50] Friedrich Hayek, *The Road to Serfdom* (London: Routledge, 2001 [1944]).

constitutional yet illegitimate' sounds somehow incongruent; in order for it to make sense, it would have to be based on an unorthodox concept of legitimacy, or an unorthodox (or rather formalist) concept of 'constitutional', for in the normal course of events, a constitutional regime is a legitimate regime, and a legitimate regime is likely to be constitutional.[51]

If this is plausible, then the symbolic value of positing the international legal order as 'constitutional' is not to be underestimated. To refer to international law as somehow 'constitutional', is to make a claim that it aligns with the rule of law, and that the international order is a legitimate order. And this, in turn, does not merely mean, empirically and with Weber, that the order meets with general acceptance, but has the further ramification that it also *should* meet with general acceptance even if, for some reason, it does not at present. The legitimacy accompanying constitutionalization is not necessarily empirical legitimacy, to be measured by polling citizens. Instead, it is a normative legitimacy which, while it may be empirically supported, nonetheless stands on its own feet. To refer to the international order as constitutional is to make a claim that the order should be accepted because it is legitimate, rather than that it is legitimate because it has been accepted. Consequently, it is not difficult to see that, regardless of its precise manifestation, the constitutionalization of international law represented (and still represents) a political project.

There is a considerable irony at work here, in that much of what unites the constitutionalization literature (internal differences notwithstanding) is the attempt the substitute law for politics. Whether it concerns the trade diplomacy so characteristic of the old GATT and its wake the young WTO[52], or the 'might makes right' associated with Realpolitik, or the often-posited existence of a 'culture of impunity' concerning heads of state and other political leaders suspected of foul play, the perceived Achilles' heel of international law has always been its (again perceived) toleration of political behavior and misbehavior. Politics would often be seen to have free reign, and would need to be tamed, with the constitutionalists typically embracing a constitutional vocabulary. Hence, and somewhat bluntly put, a particular political project (constitutionalism) was invoked in order to combat a different political project (diplomacy or power politics). Put like this, moreover, it is not difficult to spot what made constitutionalism seem such an attractive project: who in her right mind could be against the taming of politics?

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[51] Note that since the intervention over Kosovo, the same no longer applies to the tandem legal and legitimate; since 1999 it is considered perfectly possible that an activity may be illegal yet legitimate. See, representing many, Bruno Simma, 'NATO, the UN, and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law*, 1-22.

[52] See already Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17 *European Journal of International Law*, 647-675.

The constitutionalization of international law that moved so many pens and word processors during the early 2000s came in, roughly, four manifestations.[53] There were, first of all, the cosmopolitans who, in the wake of Tomuschat, held that the international legal order was constitutionalizing *in toto*, as manifested by the emergence of human rights, the invention of *jus cogens* norms and *erga omnes* obligations, the hierarchy embedded in the UN Charter, and similar related phenomena. Representative papers of vaguely ordo-liberal[54] ilk were published by Erika de Wet[55] and Ernst-Ulrich Petersmann[56], embracing a wide catalogue of human rights including quite a few market rights, while Anne Peters published from a more traditional liberal mindset and focused more on democracy.[57] Related if distinct, Mattias Kumm devoted more attention to legitimacy than to constitutionalization[58], but eventually is difficult to distinguish from others. This group of scholars then endorsed a classical liberal (or ordo-liberal, in the case of De Wet and Petersmann) agenda.

The second group may be termed the institutionalists, focusing on the possible constitutionalization of specific institutions (the EU, the UN, the WTO)[59]. These writers presented themselves as trying to control and channel public power, typically that of the states comprising the specific international organization concerned, but in doing so often ended up presenting arguments that would consolidate and strengthen the organization under study. The net result would be controlling some form of public power (that of the state) by unleashing a different manifestation of public power (the UN, the EU, the WTO). It is no coincidence that the EU could happily embrace its own constitutionalization in the mid-2000s; nor that some of its member states and their

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[53] See Jan Klabbers, 'International Constitutionalism', in Roger Masterman and Robert Schütze (eds.), *The Cambridge Companion to Constitutional Law* (Cambridge University Press, forthcoming).

[54] Ordo-liberals typically feel that the role of public power is to facilitate market activities; public regulation is to encourage private activity. Hence, ordo-liberals can conceptualize the freedom of contract or the freedom to set up a business as human rights that require public protection. Note that the label 'ordo-liberal' is based on my reading of De Wet and Petersmann; there are few (if any) direct references to this body of thought in their work.

[55] Erika de Wet, 'The International Constitutional Order', (2006) 55 *International and Comparative Law Quarterly*, 51-76. Her later work is more measured in tone: see, e.g., Erika de Wet, 'The Constitutionalization of Public International Law', in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), 1209-1229.

[56] Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of the World Trade Organization', (2002) 13 *European Journal of International Law*, 621-650.

[57] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law*, 579-610; Anne Peters, 'Dual Democracy', in Klabbers et al., *The Constitutionalization*, 263-341.

[58] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework for Analysis', (2004) 15 *European Journal of International Law*, 907-931.

[59] Seminal works include Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law*, 1-27; Bardo Fassbender, 'The United Nations Charter as the Constitution of the International Community', (1998), 36 *Columbia Journal of Transnational Law*, 529-619; Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford University Press, 2005).

populations objected, suggesting that that the 'constitutionalization' of the EU would strengthen the EU, at the expense of its member states. Likewise, constitutionalizing the UN was never much about holding the UN to account, but was rather about strengthening its position, and much the same applies to the WTO.

A third group (I refer to them as administrativists, coining an awkward neologism) shared some of the accountability sensibilities with cosmopolitans, but shied away from the thickness of constitutionalism. For them, it would be next to impossible to overcome cultural differences relating to values – where to draw the limits of free speech, e.g. But what might be possible, so they felt, was general concord on procedural notions: the usefulness of judgments being reasoned, of transparency in policy-making, of participatory politics, or of notions such as proportionality.[60] And a separate strand aimed to capture manifestations of international public power in decidedly legal instruments, so as to render them cognizable to a legal system.[61] Again, then, there is some clumsiness in including this approach in a discussion on constitutionalism, precisely because the label is self-consciously shunned.

And much the same applies to a fourth group, the skeptics. These hold that there may be some merit in the broad idea of constitutionalism, in holding public power to account, but that it should not be taken too literally. For some, the pluralism characterizing world society would need to be overcome by politics facilitated by law, but not by law alone[62]; others highlighted how thick versions of constitutionalism could be counter-productive[63], and in yet other writings the point was made that constitutionalism was best seen not as a set of rules, but as a set of virtues[64] or a mindset[65], embodying a culture of formalism.[66] Again, though, including these skeptics in a discussion on constitutionalism as theory is clumsy, as in an important way the skeptics are not constitutionalists to begin with.

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[60] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems*, 15-62; Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2016); Eyal Benvenisti, *The Law of Global Governance* (The Hague: Hague Academy of International Law, 2014).

[61] See Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010).

[62] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

[63] Jan Klabbers, 'Constitutionalism Lite', (2004) 1 *International Organizations Law Review*, 31-58.

[64] Jan Klabbers, 'The Virtues of Expertise', in Monika Ambrus et al. (eds.), *The Role of 'Experts in International and European Decision-Making Processes* (Cambridge University Press, 2014), 82-101; Jan Klabbers, Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', (2013) 27 *Temple International and Comparative Law Journal*, 417-435.

[65] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law*, 9-36.

[66] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and fall of International Law 1870-1960* (Cambridge University Press, 2001).

At the end of the day then, it is plausible to suggest that the constitutionalization advocates were limited to a small group: the cosmopolitans. The administrativists self-consciously rejected the constitutionalist vocabulary, although they shared some of the latter's sensibilities. The institutionalists adopted the label constitutionalization, but neither its contents nor even its sensibilities. Quite the opposite: some institutionalist work actually paves the way for unfettered exercises of public authority, and is thus, in spirit, far removed from most conceptions of constitutional thought.[67] And the skeptics were skeptical, and thus were never constitutionalists to begin with.

IV. The Cosmopolitans as Theorists

Perhaps the greatest redeeming factor of cosmopolitan constitutionalism has been its attempt to bring coherence to a number of otherwise somewhat disparate notions circulating in and around international legal circles. The emergence of *jus cogens*, for instance, with its natural law and hierarchical overtones ill-fitting in a horizontal legal order, puzzled many observers, and disturbed quite a few: how can such norms even exist in the system of international law, based as it seemingly is on the consent of sovereign equals?[68] Surely, if sovereignty means anything, states can opt to remain unbound by *jus cogens*, and if so, then *jus cogens* cannot, really, be *jus cogens*. Some tried to overcome this by picturing *jus cogens* as some kind of super-customary law, which, like customary law generally, would be susceptible to the persistent objector doctrine.[69] This however, seemed conceptually confused: surely, if there is such a thing as *jus cogens*, it must be binding on everyone, regardless of their consent; this would seem to follow from the very concept itself.

Others tried, more generally, to postulate the possibility of a truly universal international law[70] by invoking legal philosopher Hart's distinction between primary and secondary rules.[71] The former are substantive in nature ('thou shalt not X'), while the latter relate to the creation, application and enforcement of the primary rules. By their very nature, secondary rules cannot depend on consent (not on consent alone, at any rate), and from this, it was derived that primary rules too could be created without consent. Again, however, the

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[67] See further Jan Klabbers, 'Functionalism, Constitutionalism, and the United Nations', in Anthony F. Lang, jr. and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017), 355-367.
[68] Emblematic is Prosper Weil, 'Towards relative Normativity in International Law?', (1983) 77 *American Journal of International Law*, 413-442.
[69] Antonio Cassese, *International Law in a Divided World* (Oxford University Press, 1986), at 178-179.
[70] Jonathan I. Charney, 'Universal International Law', (1993) 87 *American Journal of International Law*, 529-551.
[71] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

argument was missing something: what applies to secondary rules cannot without further steps be held to apply to other categories. As a result, this thesis too lacked plausibility.

Much the same riddles plagued the emerging notions of *erga omnes* obligations (obligations affecting the interests of the community of states, and not just of treaty partners or others directly affected), first launched by the International Court of Justice in *Barcelona Traction*[72], and the emerging concept of international state crimes, suggesting a division between criminal and civil liability in international law.[73] Intuitively and within their own four corners, such developments make some sense: there would seem to be an obvious difference between the breach of a bilateral treaty on trade in lightbulbs, and a breach of a treaty such as the Genocide Convention: the latter is far graver than the former. Indeed, one could coherently argue, on a philosophical level, that the genocide prohibition is a *jus cogens* norm, containing an *erga omnes* obligation, the violation of which should result in criminal liability – but how to make all this work in a Westphalian legal order?

It is here that constitutionalist thought came in, eventually, suggesting that the only way (or at least one possible way) to make sense of these developments was from a constitutionalist perspective. Through Westphalian goggles, the emergence of *jus cogens* and *erga omnes* and criminal liability would always remain incongruous, and look out of place; but the circle could be squared by replacing the goggles. Adopt a different perspective – a constitutional perspective - and all of sudden these developments seem to cohere.

This chimed well with two further (and related) developments. One was the emergence and consolidation of international human rights law from the 1970s onwards.[74] International courts such as the European and Inter-American Courts of Human Rights started to work overtime, suggesting a new-found sensibility to the plight of individual human beings and the possibly corrective role that international human rights standards could play. In fact, domestic courts slowly started to embrace the same body of rights in well-known decisions such as *Filartiga*.[75] And while, admittedly, genocides were taking place in the 1990s in Yugoslavia and Rwanda, at least this time around the international community responded by putting in place two ad hoc criminal tribunals in order to prosecute individuals guilty of war crimes, genocide and crimes against humanity, followed by a spate of hybrid tribunals and a permanent International Criminal Court. And thus, despite all the bloodshed, this too

[72] See *Case Concerning the Barcelona Traction, Light and Power Company, Ltd* (Belgium v Spain), Preliminary Objections, [1970] ICJ Reports 3.
[73] Nina Jorgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000).
[74] Some have even suggested that human rights only seriously started in the 1970s; see Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge MA: Harvard University Press, 2010).
[75] See *Filártiga* v *Peña-Irala*, US Court of Appeals, 2d Circuit, 30 June 1980, 630F.2d 876.

could be seen not as a defeat for cosmopolitan thought, but as a minor victory – provided one would adopt the appropriate constitutionalist perspective.[76]

The second related development was the 'emerging right to democratic governance'.[77] Slowly but surely, it seemed, states were becoming democratic in increasing numbers, however thin perhaps the idea of democracy at stake may be; and slowly but surely, international bodies too were embracing democratic procedures. The powers of the European Parliament had seriously been expanded with the 1991 Maastricht Treaty; the 1998 Aarhus Convention provided civil society organizations with an explicit role in environmental governance[78], and civil society organizations, nominally representing 'the people', increasingly claimed – and occupied – a seat at the table.[79] This was not just necessary, in that the internationalization of decision-making processes would mean an erosion of domestic democracy unless compensated for by international procedures; it was also, actually, taking place before our very eyes. But, again, in order to see it, and to make sense of it, the old Westphalian spectacles would have to be replaced by a newer set of goggles.

And then there was a third development seemingly inaugurating an international constitutional order: the increasing role for the international judiciary, and the massive explosion in the sheer number of international courts and tribunals alone. Some deemed this to celebrate the 'legalization' of world politics[80], suggesting that law is only relevant if accompanied by courts. Others however linked the development to a nascent constitutionalism: if constitutionalism and the Rule of Law are related, and courts and the Rule of Law are related, then it would seem to follow that courts and constitutionalism are related. A constitutional order surely could use a few courts, but happily those courts were also being created: hence, looked at from the proper perspective, it did not seem too far-fetched to suggest that constitutionalization was taking place.

Put like this, it would seem that constitutionalism had considerable explanatory force: it seemed able to make some sense of, and bring coherence to, developments such as the rise of human rights and democracy and

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[76] Bass concludes that the two ad hoc tribunals 'stand largely as testaments to the failure of America and the West' but even so, they represent 'all we have now.' He uses the vocabulary of legalism rather than constitutionalism, but many constitutionalists would appreciate and share the sentiment. See Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000), at 283.

[77] Thomas M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 *American Journal of International Law*, 46-91. Franck was not a constitutionalist in the same way as the cosmopolitans discussed above, but his liberal credentials are undisputed. Something of a manifesto is Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 1999).

[78] This refers to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice, concluded in 1998.

[79] For an overview, see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005).

[80] Judith Goldstein et al. (eds.), *Legalization of World Politics* (Cambridge MA: MIT Press, 2001).

courts, and the emergence of concepts such as *jus cogens*, *erga omnes* obligations, and international state crimes. There are, however, two things to consider here. First, developments such as the creation of *jus cogens* norms, or the rise of human rights, can be captured (even if other developments cannot) through a constitutionalist vocabulary. The problem, however, is that nothing forces the adoption of precisely this vocabulary, as opposed to any other vocabulary. It proved possible to interpret some developments in constitutionalist light, and not without some intuitive plausibility. But nothing in the materials themselves suggests that they are to be seen as constitutionalist. *Jus cogens* norms do not come with a label attached saying that they are part and parcel of a constitutional international order; the prohibition of genocide does not carry on its forehead a note saying that it is 'constitutional'. The material substratum exists, so to speak, but is not necessarily related to any particular interpretation thereof, in much the same way as Jastrow's famous rabbit-duck drawing illustrates the proposition that objects can only be seen through their interpretations.[81] And constitutionalism is but one possible interpretation of what went on from the 1960s and 1970s onwards.

Second, even in the most flattering light, constitutionalism could only offer a partial explanation for what was going on – or perhaps a narrow explanation is a better term. Constitutionalist thought proved unable to make any sense of the failure of the New International Economic Order, inaugurated with great hopes in the 1960s and 1970s[82], or the more recent failure of the New International Information Order. The constitutional order proposed could not find a place for extreme poverty, for famines, for the continued exploitation of natural resources, for the destruction of the environment. It could not incorporate the creation of the World Trade Organization as of 1995 except through ordo-liberal insistence on the right to trade also being a fundamental right, on a par with the prohibition of torture and the freedom of assembly. It could not account for the highly divisive emergence of bilateral investment regimes. And the genocides occurring in Rwanda and Yugoslavia (and later in Darfur) had to be ignored: swept under the rug so as not to disturb the pretty picture. If constitutionalism suggests a thick political community, a fabric including strands of solidarity and mutual respect, then surely the constitutionalization of international law still had some ways to go. It may have seemed, fleetingly, that such a thick community was conceivable in the aftermath of the fall of the Berlin Wall, but any remaining illusions must ultimately have been shattered by Trump's Make America Great Again

[81] See the brief discussion in Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1967 [1953]), at 194. On 'conceptual pluralism' more generally, see Hilary Putnam, *Ethics without Ontology* (Cambridge MA: Harvard University Press, 2004).

[82] See, e.g., Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

campaign or the 'sovereignty first' declaration promulgated in a rare showing of unity by Russia and China[83] – suggesting that the world's three major powers have absolutely no interest in anything even remotely resembling international constitutionalism – however defined or conceptualized.[84]

If constitutionalism is mostly interpretation, it would not be too difficult to think of rival interpretations, and two immediately come to mind. One can think, first, of the above developments as manifestations of the flexibility and adaptability of the Westphalian system, which manages to incorporate, at least in practice, such developments as the emergence of human rights or the growing influence of civil society movements or even the creation of *jus cogens* norms, which on such a conception come to function not as absolute legal prohibitions but rather as signposts of moral disgust.[85] The ease with which the ICJ could reconcile a *jus cogens* norm with the existence of state immunity speaks volumes.[86] Or, second, one may think of the above developments as merely continuing Friedman's classic law of cooperation, offset by the simultaneously growing law of co-existence as manifested in, e.g., the rise of bilateral investment regimes or the explicitly member-state driven WTO.[87] Neither of these is entirely persuasive, but that is not the point: the point is that often the chosen perspective drives the subsequent analysis and description - as a result the analysis and description have a hard time being taken as anything other than the result of the adopted perspective. Constitutionalism as theory was largely self-validating.

It is, in all likelihood, no coincidence that the discussion on the constitutionalization of international law disappeared about as suddenly as it had appeared, and around 2009 lapsed into an analysis of the debate rather than a continuation thereof. For, several things had become clear in the course of the decade-long debate. One was, and this proved pivotal, that constitutionalism could only exist as interpretation. There is no constitutionalism in the empirical world waiting to be discovered; at most, there are events and phenomena which can be seen in a constitutionalist light and, upon reflection, even their number is fairly limited. For every humanitarian intervention in Kosovo there is at least an intervention that could have taken place, but never

[83] See http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698 (visited 24 July 2018).

[84] Note that Anne Peters, once at the vanguard of cosmopolitan constitutionalism, seems to have arrived at a similar conclusion, although she presents it more charitably: '… global constitutionalism is a useful analytic lens for understanding how international law evolves and works, as long as it is understood as 'thin' … and multilevel…'. See Anne Peters, 'Fragmentation and Constitutionalization', in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 1011-1031, at 1030.

[85] One is reminded of the old quip that some things just may work in practice even if they do not work in theory.

[86] See *Jurisdictional Immunities of the State* (Italy v Germany; Greece Intervening), [2012] ICJ Reports 99.

[87] The reference is to Wolfgang Friedman, *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

did: see Rwanda, see Darfur.[88] For every war criminal or genocidaire who ends up in jail, there are many who do not. And for every young democracy, there is an established democracy moving towards authoritarianism: even the US, traditionally the land of the free and home of the brave, cannot seem to escape this fate altogether at present. So, while some empirical materials can plausibly be seen as manifestations of global constitutionalism, many others cannot, rendering any conclusions about *the* constitutionalization of international law somewhat premature – at best, one could claim that international law starts to show elements of constitutional thought.

Perhaps partly because no conclusions can exist independent from interpretation, much of the constitutionalization discussion has remained rather aloof, somewhere in a nowhere-land between theory and practice. The theory bit has always remained thin: few have drawn out what it could mean to apply constitutionalist thought to the international legal order, or how this legal order could take constitutionalist thought seriously. Likewise, few have bothered to investigate constitutionalism on the empirical level: do states really, in their everyday activities, refer to *erga omnes* obligations? Do they ever accuse each other of violating a *jus cogens* norm, or of human rights violations?[89] Are basic human rights actually respected where it matters most, i.e. on the ground, in the prison cells, in custody, during armed conflict, in everyday community life?[90] And what good are human rights at any rate to those starving to death or those brusquely sent away from Europe's shores? Often, the constitutionalism claim consisted of not much more than a few well-chosen quotations from the European Court of Human Rights or some other authority, mixed with a little wishful thinking and some re-worked political philosophy.[91] And that should not come as a surprise, partly because lawyers are not trained in political philosophy or in developing political theory, but partly also because, at the end of the day, there are only so many cases, events and examples that can meaningfully be seen in constitutional terms.

Constitutionalism, thus, had fairly little empirical traction, but did if fare better as normative theory? To the (limited) extent that a systematic political theory could be discerned in constitutionalist writings, it was

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[88] On omissions and responsibility, see Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', (2017) 28 *European Journal of International Law* 1133-1161.

[89] The philosopher Bernard Williams once observed that a charge of human rights violations is 'the most serious of political accusations.' See Bernard Williams, 'Human Rights and Relativism', reproduced in Bernard Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005, Hawthorn ed.), 62-74, at 72.

[90] For a skeptical recent analysis (and a more or less empirical one at that), see Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Cambridge MA: Harvard University Press, 2017).

[91] An example, although not utilizing the vocabulary of constitutionalism, is Tesón's Kantian theory, which is neither very theoretical nor very Kantian. See Fernando R. Tesón, *A Philosophy of International Law* (Boulder CO: Westview Press, 1998).

invariably a Western liberal political theory presented as of global validity. This applies rather obviously to the ordo-liberalism endorsed by Petersmann or De Wet, and likewise to the work of Anne Peters. In a sense, there is little that is surprising about this: Western scholars, like all others, have difficulties shedding their backgrounds completely. The problem, for purposes of normative theory, lie elsewhere. One is that the liberalism espoused by constitutionalists is but one of a number of competing political philosophies, and comes itself in different varieties[92], with some recognizing that liberal values can be incommensurate.[93] There is no *a priori* reason to discard communitarianism or republicanism, although both might be structurally unsuitable for the international legal order given their insistence on the importance of bounded political community.[94]

The second problem is related, and concerns the elevation of the West. The problem is not so much that Western scholars have a Western bias; the problem is rather that few of them have tried self-consciously to overcome their bias. There are few references to developments in Africa or Asia in the constitutionalist international law literature (other than sometimes a facile dismissal of Asian values)[95], and even less to political thinkers and traditions not hailing from the West. And that is a problem for a normative theory with global pretentions.[96]

V. After Constitutionalism

Still, it is no exaggeration to suggest that much of the constitutionalism literature has been strongly normative in nature: those who endorse constitutionalism cannot point to strong empirical correspondence, but can claim that it would be a good thing if the international legal order would constitutionalize; that a constitutional international legal order would somehow be superior to a non-constitutional international legal order. This too was often left implicit, but is nonetheless clearly present in many of the relevant writings, and illustrated by the dramatic associations provoked by some of the titles of the relevant works. 'Compensatory Constitutionalism'

[92] Both Rawls and Hayek can be categorized as liberals, but there is a world of difference between them.
[93] This is a hallmark of the political thought of Isaiah Berlin; see e.g. Isaiah Berlin, *The Crooked Timber of Humanity* (Princeton University Press, 1990, Hardy ed.).
[94] But see, e.g., John Dryzek, *Deliberative Global Politics* (Cambridge: Polity, 2006), suggesting that even globally, some form of republicanism might be achievable.
[95] Latin America is better represented, largely due to the progressive work of the Inter-American Court of Human Rights.
[96] Approaching the matter from a different angle, the editors of Global Constitutionalism suggested not so long ago that 'the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations' should be given up. See Mattias Kumm *et al*., 'The End of the 'West' and the Future of global Constitutionalism', (2017) 6 *Global Constitutionalism* 1, at 9.

suggests the existence of a strong governance deficit, which can only be remedied, it seems, by constitutionalism; and Tomuschat's title 'Ensuring the Survival of Mankind' leaves little to the imagination.

And of course, as normative work, the constitutionalization discussion answered to a need, if not a need of the international legal order then at least a need strongly felt by international lawyers: who would not want the world to be a better place? And who would not wish her or his work to contribute to such a lofty aim? And especially in the Cold War setting, characterized by insecurities, proxy wars, the oft-proclaimed fragmentation of international law[97], and with globalization rapidly picking up pace, the temptation to somehow anchor all this in a familiar normative frame was difficult to resist. The problem with constitutionalism as normative theory is not that it is normative, but that it is somehow presented as theory, but without doing the work of theory. As an explanatory theory, it leaves far too much unaccounted for; as normative theory, it lacks systematization and rigor, or even a sense of what it could contribute that is not taken care of by trained philosophers and political theorists.[98]

It is no coincidence then that the mantle has been picked up precisely by this latter category: by Jean Cohen[99], Turkuler Isiksel[100], Tony Lang and Antje Wiener.[101] Even the late John Rawls and Ronald Dworkin have engaged with more or less constitutionalist approaches to international law (although both, in fairness, remained rather skeptical[102]), and the label has enthusiastically been embraced by none other than Jürgen Habermas.[103] Some of the lawyers, in the meantime, have toned down their ambitions: much of the work self-consciously styled as constitutionalist these days is work in comparative constitutional law, a genre inaugurated in the early years of the twenty-first century and concentrating on such things as judicial review, peace and reconciliation

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[97] But see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law: Postmodern Anxieties?', (2002) 15 *Leiden Journal of International Law*, 553-579.

[98] Philosophical studies such as Simon Caney, *Justice beyond Borders: A Global Political Theory* (Oxford University Press, 2005), or Andrew Kuper, *Democracy beyond Borders: Justice and Representation in Global Institutions* (Oxford University Press, 2004) show similar sensibilities to the work of cosmopolitan constitutionalists.

[99] See Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012).

[100] See Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016).

[101] See, e.g., Anthony F. Lang, jr., and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017). Lang and Wiener also form part of the editorship of the relatively new journal *Global Constitutionalism*, together with international lawyer Jeffrey Dunoff and political philosopher Jonathan Havercroft.

[102] See John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999); Ronald Dworkin, 'A New Philosophy for International Law', (2013) 41 *Philosophy and Public Affairs*, 2-30.

[103] See Jürgen Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', reproduced in Jürgen Habermas, *The Divided West* (Cambridge: Polity, 2006, Cronin trans.), 115-193.

processes, independence and regional autonomy, et cetera.[104] These are important topics, and have obvious links to international law, but are far removed from the sort of constitutionalist work that so characterized the early 2000s.

That is not to say that the lawyers have completely stopped thinking in those terms, and some might say that it is mostly the vocabulary that has changed. While there is little talk of constitutionalizing the WTO or the EU, or even the UN, these days, some of what were earlier discussed as constitutional values are now being endorsed as 'public' values or public goods – this has perhaps mostly been visible, if not exclusively so, with respect to the investment protection regime and the vicissitudes of investor state dispute settlement[105], while others posit theories of fiduciary duties[106], proclaim the existence of 'humanity's law'[107], or suggest that humanity and the individual has become central to international law.[108]

Other lawyers (less often involving those with a specific background in international law, but rather scholars with a background in legal theory) have either concentrated on some forms of pluralism, including constitutional pluralism, or tried to find more limited applications for constitutional values. The former has more explanatory potential than its precursors among international lawyers, if only because constitutions tend to exist side by side and are reluctant to be replaced by a single overarching constitutional order.[109] The latter attempt normatively to rescue elements of constitutionalist thought without having to adopt global constitutionalism in unadulterated form. One example is Teubner's suggestion that left to their own inner logic, all social systems tend to 'run wild'; hence, they need to be infused with other, competing values in order to 'keep them honest', so to speak – Teubner refers to 'constitutional irritants'.[110] Another example is the idea of inter-legality, discussing how courts may ignore jurisdictional divides in appropriate cases involving overlapping legal spaces while aiming to do justice.[111]

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[104] Early manifestations include Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, 2003); Ran Hirschl, *Towards Juristocracy* (Cambridge MA: Harvard University Press, 2004); Christine Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100 *American Journal of International Law*, 373-412.
[105] See, e.g., Stephan Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010); Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012).
[106] Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press, 2016).
[107] Ruti Teitel, *Humanity's Law* (Oxford University Press, 2011).
[108] Anne Peters, *Beyond Human Rights* (Cambridge University Press, 2016).
[109] See, e.g., Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press, 2015); Neil Walker, Jo Shaw and Stephen Tierney (eds.), *Europe's Constitutional Mosaic* (Oxford: Hart, 2011); Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).
[110] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012).
[111] Jan Klabbers and Gianluigi Palombella (eds.), *Inter-legality* (Cambridge University Press, 2019).

VI. Final Remarks

At the end of the day, the kind of constitutionalism practiced by international lawyers during the first decade of the 2000s has little to recommend it as theory. It has neither made much of an impression when it comes to describing the world around us (let alone explaining it), nor has it made much waves in terms of providing a picture of what the world ought to look like. In fact, it has tried to exploit the space in-between the descriptive and the normative, and while this can work for a while, it is unlikely to be a sustainable theoretical practice in the longer run.

Then again, constitutionalism is far from alone in this as far as international affairs are concerned. It has been observed that '[t]heories of international relations are more interesting as aspects of contemporary world politics that need to be explained than as explanations of contemporary world politics'[112], and there is no reason to exclude international constitutionalism, or global constitutionalism, or world constitutionalism, from this characterization. The interesting question is not what constitutionalism entailed – as we have seen, it did not eventually entail all that much. The interesting question rather is whose interests it served, and the answer might be disconcerting. For all the hoopla about *jus cogens* and *erga omnes* obligations and democracy and human rights, the constitutionalization discussion well-nigh unanimously left the highly exploitative global economy, in which extreme poverty unproblematically co-exists with extreme and vulgar wealth, untouched – or even facilitated its further development by its (ordo-)liberal focus. And yet, if the survival of mankind is to be ensured, then perhaps a reform of the global economy is the place to start.

[112] See R.B.J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge University Press, 1993), at 6.