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The Merits of Global Constitutionalism

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ABSTRACT

Global constitutionalism is an agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere. Global constitutionalization is the gradual emergence of constitutionalist features in international law. Critics of global constitutionalism doubt the empirical reality of constitutionalization, call into question the analytic value of constitutionalism as an academic approach, and fear that the discourse is normatively dangerous because it is anti-pluralist, artificially creates a false legitimacy, and promises an unrealistic end of politics. This article addresses these objections. I argue that global constitutionalization is likely to compensate for globalization-induced constitutionalist deficits on the national level, that a constitutionalist reading of international law can serve as a hermeneutic device, and that the constitutionalist vocabulary uncovers legitimacy deficits of international law and suggests remedies. Global constitutionalism, therefore, has a responsabilizing and much-needed critical potential.

INTRODUCTION: THE MEANING OF GLOBAL CONSTITUTIONALISM

Global constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order.¹ Global constitutionalization refers to the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist ele-

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1. See Anne Peters & Klaus Armingeon, *Introduction—Global Constitutionalism from an Interdisciplinary Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385 (2009) (discussing the terms “constitution,” “constitutionalism,” and “constitutionalization”).

ments in the international legal order by political and judicial actors, bolstered by an academic discourse in which these elements are identified and further developed.

The global constitutionalist discourse has challenged the traditional view that the international sphere is "a sort of constitutional wasteland or empty quarter."² The articles in this issue deal with various aspects of global constitutionalism, such as constitutional procedures for resolving value conflicts, and balancing as a constitutional technique. They examine the constitutional functions of the law of international responsibility as well as sectoral constitutions in special fields of international law. They also discuss the chances for and exigencies of democratic global constitution; the way global constitutionalism impacts individuals nested in nation-states; and the empirical standards that may be used to gauge global constitutionalism.

There are four important elements of constitutionalization that are not analyzed in depth in the following articles and which I therefore wish to discuss here.³ First, the principle of sovereignty is being ousted from its position as a *Letztbegründung* (first principle) of international law. The normative status of sovereignty is derived from humanity, that is, the legal principle that human rights, interests, needs, and security must be respected and promoted. This normative status is also the *telos* of the international legal system.⁴ Humanity is foundational in a normative sense because states are not ends in themselves, but are composite entities whose justification lies in the fulfilment of public functions needed for human beings to live together in peace and security.⁵ State sovereignty is foundational for international law only in an ontological sense, because the states' mutual respect for each other's sovereignty constitutes the "horizontal" system of juxtaposed actors, and governs international lawmaking activity. A humanized state sovereignty implies responsibility for the protection of basic human rights and the government's accountability to humans. When human needs are taken as the starting point, the focus shifts from states' rights to states' obligations vis-à-vis natural persons, and a state that does not discharge these duties has its sovereignty suspended. The possibility of a suspension of state sovereignty leads, in a system of multilevel governance under the principle of solidarity, to a fallback responsibility

2. Philip Allott, *Intergovernmental Societies and the Idea of Constitutionalism*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 69, 92 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

3. See generally Anne Peters, *Conclusions*, in JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (forthcoming 2009).

4. See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 *EUR. J. INT'L L.* (forthcoming 2009).

5. This justification is accepted by theories of the state of all shades, and even Hegel can be read in that way.

of the international community, acting through the U.N. Security Council. The ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centered on individuals.

Second, the principle of state consent is partly replaced by majoritarian decision-making. This is apt to improve the effectiveness of global governance, and thus contributes to output legitimacy of the system. However, the equality, inclusion, and representation of states in international organizations are in tension with the idea of equal representation of world citizens because states contain populations of vastly different sizes. Equality of more populated states results in the inequality and skewed representation of global citizens. Accepting the premise that the ultimate reference points of democracy are natural persons, state majoritarianism is, in a democratic perspective, ambiguous.⁶

Third, certain basic values, such as human rights protection, climate protection, and maybe even free trade, seem to have acquired universal acceptance, as manifested in the universal ratification of relevant multilateral treaties. An important caveat is that this interstate consensus is vague and general, whereas the real problems lie in the details. Another concern is that widespread ratification does not necessarily reflect genuine commitments, but is often the result of power imbalances and strategic maneuvers. The formal acceptance of universal treaties enshrining constitutional values is not the end, but rather the beginning, of the constitutionalization of international law.

Fourth, the settlement of international disputes is increasingly legalized and juridified through the establishment of international courts and tribunals with quasi-compulsory jurisdiction. This juridification is in some regards merely a manifestation of the legalization of international relations. However, judicial review also has specific constitutionalist aspects which need further clarification.

A host of objections against global constitutionalism have been raised.⁷ They relate both to the legal soundness of the reconstruction and to its arguably negative policy effects. The critique is thus both an epistemic and analytical, and political and normative. I submit that, despite the somewhat serious problems associated

6. An interpersonal view of democracy must take into account the democratic formation of collective preferences among the citizens of the nation-states. We then face a paradox. In the inter-state perspective, it seems illegitimate and undemocratic that in a consensual system a minority (even one state) can block a treaty. On the other hand, such a veto power seems necessary to preserve interpersonal democratic decision-making on the "lower" level, within the smaller community.

7. For a discussion of some of the objections, see Anne Peters, *Reconstruction Constitutionnaliste du Droit International: Arguments Pour et Contre*, in SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 361 (Hélène Ruiz Fabri et al. eds., 2006).

with global constitutionalism, the epistemic and normative benefits prevail. The constitutionalist paradigm does some analytic work and generates additional insights.⁸

I. A PAPER TIGER?

The constitutionalist reading of international law might raise dangerously high expectations.⁹ The term “constitution” might be a misnomer when applied to the international sphere. Therefore, says the critique, the very terms on which the constitutionalization debate takes place are erroneous. The vocabulary makes it virtually impossible to escape from the assumptions that accompany it. And “social legitimacy is being artificially constructed through the use of constitutional language.”¹⁰ Thus, the constitutionalist reconstruction might fraudulently create the illusion of legitimacy of global governance. Constitutionalist language—in the eyes of the critique—abuses the highly value-laden term “constitutionalism” in order to reap profit from its positive connotations and to dignify the international legal order. However, the danger that constitutionalism might be misunderstood “as a mechanism that can instantly bestow legitimacy”¹¹ is, in my view, not or no longer serious. International and constitutional lawyers are discerning enough to realize that “constitutionalism” is not a ready-made answer, but, on the contrary, a perspective which might bring into focus the right questions of fairness, justice, and effectiveness.

A related objection is that international law lacks the symbolic-aesthetical dimension inherent in national constitutional law. According to this perspective, the primary function of constitutions is storing the meaning of a political community. They embody revolutionary ideas, not in an abstract fashion, but by (physical) sacrifice. Consequently, a constitution is genuinely “owned” by a people mainly because its meaning is transported by the sacrifice made for it.¹² But, because all this is lacking on the international plane, the idea of international constitutional law is, so the argument goes, a sham. However, this criticism places a premium on bloody wars and risks overstating the importance of irrational and mythological

8. See also Peters, *supra* note 3.

9. See Ronald St. John MacDonald & Douglas M. Johnston, *Introduction to TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY*, at xiii, xvii (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005).

10. DEBORAH Z. CASS, *CONSTITUTIONALIZATION OF THE WTO* 208, 237 (2005).

11. Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31, 48 (2004).

12. See Ulrich Haltern, *Internationales Verfassungsrecht?*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511, 533–34 (2003). See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991).

foundations of constitutional law. The realist theory of international relations raises another important objection. The constitutionalist paradigm became popular after the final demise of the socialist bloc, in a period marked by an excess of optimism.¹³ Realists point out that international law must content itself with a more or less “symbolic constitutionalization,”¹⁴ or that any international constitution is in any case a “nominalist” one in the sense proposed by Karl Loewenstein.¹⁵ The gist of this critique is that the constitutionalist reading of international law is not grounded in or backed by a real common political will and corresponding power structures and sanctions at the international level, which would allow the international constitution to be enforced. The constitutionalist reading, so the argument goes, is too idealist and does not adequately reflect the realist view of governments. In the event of a problem or conflict, the critique suggests, any constitutionalist attitude will be given up.¹⁶ For instance, governments do not advocate universal protection of human rights because they believe it is a good thing, but rather because they are exposed to internal pressures by their constituencies to observe human rights standards and simply want to prevent other states from gaining a competitive advantage by refusing to be restricted by human rights concerns. Likewise, the U.N. and other international organizations are, for most member states, only a means of realizing their national interests.¹⁷

Moreover, the agents of constitutionalization seem to be primarily scholars, not political actors. Empirical findings do not confirm an all-encompassing global trend of constitutionalization. Rather, empirical evidence points to uneven processes of constitutionalization in various constitutional dimensions and different world regions.¹⁸ All this suggests that global constitutionalism may be a paper tiger.

This observation is very pertinent. Theoretically, academic reconstructions do not depend on the moral attitudes of governments, and a good idea does not become bad simply because politicians do not accept it. However, law, legal constructs, and arguments are supposed to have an impact on the exercise of power. The specific practical function of law to organize society and to structure gover-

13. Sandra Szurek, *La Charte des Nations Unies Constitution Mondiale?*, in 1 *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE* 29, 32 (Jean-Pierre Cot et al. eds., 3d ed. 2005).

14. See MARCO NEVES, *SYMBOLISCHE KONSTITUTIONALISIERUNG* (1998).

15. See KARL LOEWENSTEIN, *VERFASSUNGSLEHRE* (1957).

16. See Walter Kälin, *Der Menschenrechtsschutz der UNO: Ein Beispiel für die Konstitutionalisierung des Völkerrechts?*, 2005 *RECHT SONDERHEFT* 42, 47, 49.

17. *Id.* at 49.

18. See generally Klaus Armingeon & Karolina Milewicz, *Compensatory Constitutionalisation: A Comparative Perspective*, 22 *GLOBAL SOC'Y* 179 (2008) (footnote omitted).

nance mandates that lawyerly (re-)constructions be palatable to relevant political actors. Thus, global constitutionalism as an academic agenda should follow the middle path between merely dignifying the status quo and hanging onto academic pipe dreams. In order to gain acceptance in the political realm, global constitutionalists might highlight the current situation of global interdependence. With such a state of affairs, national and global public interests tend to converge more and, increasingly, national interests and universal idealism are not necessarily in opposition. Therefore, global constitutionalism, at least in the long run, may even further national economic and political interests, although some states may benefit more than others. Moreover, microconstitutionalization seems to actually be effective. In comparison to many national constitutional systems throughout history, the treaty regimes of the European Union (EU), the European Court of Human Rights (ECtHR), and the World Trade Organization (WTO) can probably be ranked in the top group of constitutional regimes.

A related strand of criticism insinuates that an important function of global constitutionalism is to symbolize a simplified, compact order in a world that, in reality, is complex and amorphous. From this perspective, the myth of the unity of the constitution must be rejected. According to this criticism, a spontaneous self-coordination of interests must instead be chosen as a starting point of analysis, legally anchored in individual liberties (human rights) and the cognitive “social capital” anchored within society. “The constitutional concept then remains an (imaginary) reference point for a nation-state-like past . . . ,” says the critique.¹⁹ However, the term “constitution” has never been exclusively reserved for state constitutions. Today, the conceptual link between constitution and state has been further loosened in everyday language and in the legal discourse, perhaps thereby broadening the meaning of “constitution.” It is therefore not per definitionem impossible to conceptualize constitutional law beyond the nation or the state. Global constitutionalism advocates non-state constitutional law, and tends to demystify the state and the state constitution.

II. UNPACKING GLOBAL CONSTITUTIONALISM?

Another concern is that the concept of international constitutionalism suffers from oversell and vagueness. International law, politics, and economics are being mixed, if not confused. Indeed, there is the danger that reliance on constitutional-

19. Thomas Vesting, *Constitutionalism or Legal Theory: Comments on Gunther Teubner*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 29, 35 (Christian Joerges et al. eds., 2004).

ism is actually counterproductive because it may postpone, rather than encourage, concrete debates on concrete problems, such as decision-making in the WTO, the composition of the U.N. Security Council, or how to liaise national parliaments to the U.N. In this issue, Daniel Bodansky pointedly asks whether it would not be better to consider both the descriptive and the normative claims associated with constitutionalism on their own merits.²⁰ For instance, judicial review and a diminished role for state consent could be descriptively analyzed and normatively propagated without introducing the concept of constitutionalism. Because the meaning of constitutionalism is so unclear, it may be a confusing, rather than a helpful, shorthand.

Indeed, it would be detrimental to use the constitutionalist vocabulary to describe the current international system in an inflationary manner. If all (international) law is somehow constitutionalized, then nothing is constitutional. The explicative power of the concept would be reduced to zero.

However, the value of the constitutionalist paradigm might lie in its comprehensive nature. The normative claim is that the different features of constitutionalism are not merely additive, but that the whole is more than the sum of its parts. Bodansky remains skeptical about this holistic claim. He prefers to “unpack” the concept of constitutionalism into its component elements and then consider the proper role of each in international governance.²¹ In contrast, I suggest that the various constitutionalist features, such as more inclusive and transparent decision-making and judicial review, should go together, and that in combination they take on a special normative significance. If this is true, the constitutionalist reconstruction does possess an additional explicative and prescriptive value. It reminds us of the linkage between the various features of constitutionalism and calls for complementing the existing constitutional features of international law (such as judicial review of governmental acts) with missing ones, such as democracy and judicial review of the acts of international organizations. To some extent, there is indeed constitutionalist bootstrapping.

III. CONSTITUTIONAL PLURALISM

Another concern is culturalist. The constitutionalist reading of international law may be genuinely anti-pluralist. It may have a uni-civilizational, notably European, bias built into it. “[T]he interests and distinctive cultural traditions of Third

20. See Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 *IND. J. GLOBAL LEGAL STUD.* 565 (2009).

21. *Id.*

World Countries . . . may be eroded by the evolution of such a system.”²² In response, we might point to the numerous constitutionalist stories that are currently being told within international legal scholarship: a single, uniform, consented-to constitutionalist approach does not exist. While constitutionalist thought has, historically, been developed in Europe, it is a reaction to the universal experience of domination by humans of other humans. In eighteenth- and nineteenth-century Europe, constitutionalism was asserted against the dominant culture and the establishment. A “moderate” constitutionalist reading in no way implies a uniform, coherent world constitution, and certainly does not imply a world state. The idea is not to create a global, centralized government, but to constitutionalize global, polyarchic, and multilevel governance. This project must indeed take more fully into account the needs and interests of developing countries and their populations.

A related concern is that if Europeans “acquire disproportionate leverage on the workings of a more highly ‘constitutionalized’ global system, the constitutional model of international law is unlikely to command American allegiance, especially if it is promoted as the paramount ethic of the global community.”²³ However, reliance on cultural specificity often risks over-simplification. Even within the European international law academy, the constitutionalist approach is frequently criticized, notably by French and British scholars. This criticism is not automatically aligned with a pro-U.S. political attitude. The constitutionalist approach is directed against the disregard of the international rule of law. Even if, on average, European academics probably espouse a more legalist position than their U.S. counterparts, opposition between Europe and U.S. academic discourse appears simplistic; important impulses toward global constitutionalism have come from U.S. scholars such as Richard Falk, Thomas Franck, Fernando R. Tesón, Anne-Marie Slaughter, and Joseph Nye.

IV. COMPENSATORY CONSTITUTIONALISM

The constitutionalist reconstruction of international law might be a reasonable strategy to compensate for the deconstitutionalization on the domestic level, which is

22. Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187, 189 (2006).

23. See Douglas M. Johnston, *World Constitutionalism in the Theory of International Law*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, *supra* note 9, at 3, 20.

caused by globalization and global governance.²⁴ Globalization puts the state and state constitutions under strain. Global problems compel states to cooperate within international organizations and through bilateral and multilateral treaties. What were typically governmental functions, such as guaranteeing human security, freedom, and equality, are in part transferred to “higher” levels. Moreover, non-state actors, acting within states or even in a transboundary fashion, are increasingly entrusted with the exercise of traditional state functions, even with core tasks such as military and police activity.²⁵ All this has led to “governance” which is exercised beyond the states’ constitutional confines. This means that state constitutions can no longer regulate the totality of governance in a comprehensive way. Thus, the original claim of state constitutions to form a complete basic order is defeated. National constitutions are, so to speak, hollowed out and traditional constitutional principles become dysfunctional or empty. This affects not only the constitutional principle of democracy, but also the rule of law, the principle of social security, and the organization of territory.²⁶ Therefore, if we wish to preserve the basic principles of constitutionalism, we must ask for compensatory constitutionalization on the international plane.

V. GLOBAL CONSTITUTIONALISM AS A HERMENEUTIC DEVICE

The constitutionalist reading of international law contributes fresh arguments to an old controversy which has recently emerged again, namely, the controversy over whether international law is real “law.” The new deniers of international law justify the ostensibly non-legal character of international law by turning to the lack of hard enforcement mechanisms and the democratic deficit prevalent in international law. The constitutionalist approach helps to overcome the narrow focus on sanctions and on top-down enforcement. In most countries, domestic constitutional law is not enforceable. Typically, many constitutional provisions are not justiciable in the sense of being directly applicable by courts. This is especially the case in states that do not have a constitutional court, but is generally true for constitutional provisions with a programmatic, hortatory character.

24. See Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT’L L. 579 (2006).

25. In U.S.-occupied Iraq, employees of federal contractors and subcontractors worked as mercenaries, police, guards, prison officers, and interrogators. See CONG. BUDGET OFFICE, U.S. CONG., *CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ*, Publ’n No. 3053 (2008).

26. See Anne Peters, *The Globalization of State Constitutions*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 251, 270–77, 285–93 (Janne Nijman & André Nollkaemper eds., 2007).

Despite this feature, nobody denies the character of constitutional law as law for this reason alone. This observation supports the view that international law, resembling constitutional law in this respect, is indeed law.

Furthermore, the interpretation of particular norms and structures as constitutional may provide an interpretative guideline. For instance, a constitutionalist approach to reservations in human rights treaties leads to permitting such reservations. To give another example, a constitutionalist-minded international lawyer will determine the supremacy of international law over domestic constitutional law in a non-formalist way.²⁷ She will pay less attention to the formal sources of law, and more to the substance of the rules in question. In a constitutionalist perspective, the ranking of the norms at stake must be assessed in a more subtle manner, according to their substantive weight and significance. Such a non-formalist, substance-oriented perspective suggests that provisions in state constitutions with minor significance would have to give way to important international norms.²⁸

Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification) . . . Admittedly, this . . . approach does not offer strict guidance because it is debatable which norms are “important” in terms of substance, and because it does not resolve clashes between a “domestic” human right on the one side and an “international” human right on the other. However, the fundamental idea is that what counts is to look at the substance, not at the formal category of conflicting norms.²⁹

Such a flexible approach appears to better correspond better to the current state of global legal integration than the idea of a strict hierarchy, particularly in human rights matters.³⁰

27. See *id.* at 306–07; see also André Nollkaemper, *Rethinking the Supremacy of International Law*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW (Rüdiger Wolfrum ed., forthcoming 2009).

28. Peters, *supra* note 24, at 306.

29. *Id.*

30. *Id.* at 307.

VI. THE PROBLEM AND PROMISE OF POLITICS

Another objection is that global constitutionalism conveys a “false necessity and false rigidity”: it is too apolitical or pretends to be above politics.³¹ Moreover, a “constitutionalist imperialism” performed by the participants in the legal and political process would stifle the ordinary legal process.³² As far as academic observers are concerned, the constitutionalist agenda might be a scholarly attempt to channel or minimize politics. In short, constitutionalism can be criticized for embodying an unrealistic “promise of the end of politics.”³³ This is what Jeffrey Dunoff has aptly called “constitutional conceits.”³⁴ My response is that law and politics should not be viewed as distinct realms, but rather as structurally coupled systems.³⁵ Law is both the product of political activity and an organizer of, and limitation on, political action. In particular, constitutional law is a branch of law which is very close to politics. Constitutional law and politics are mutually constitutive. Consequently, constitutionalism is also a political, not simply an apolitical, project (although it does suggest that there is a sphere “above” everyday politics). Paradoxically, and in my mind laudably, the call for constitutionalism triggers precisely the contestation and politics it is said to preempt. The evolutionary dynamics of constitutionalism lead both to the legalization of politics and to stronger politicization of law.³⁶ Even if any legalization of political problems (counting constitutionalization as a special type of legalization) modifies the debate surrounding those problems by introducing a different, juridical logic, the underlying issues are thereby not totally, but only partly, depoliticized. Such a relative depoliticization of international relations is not a disadvantage because international relations are, as a general matter, rather too politicized. The introduction of legal and even constitutional principles contributes to the stability of expectations, legal certainty, and equal treatment of the relevant actors.

A related objection to the constitutionalist reconstruction of international law is that this reading condones an impoverished, legalist (judicially made), apolitical conception of constitutions. This objection is raised by those who place a premium

31. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 623 (2006).

32. Szurek, *supra* note 13, at 48.

33. Klabbers, *supra* note 11, at 47.

34. See Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 672 (2006).

35. See NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 407–39 (1993).

36. Cf. MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 209 (2000).

on popular sovereignty, democracy, and institutions directly accountable to the people. Those critics ask for “democratic constitutionalism”³⁷ or for a more “political constitutionalism.”³⁸ Political constitutionalism assumes that persons “reasonably disagree . . . about substantive outcomes . . . that the democratic process itself is more legitimate and effective than the judicial”³⁹ one, and that therefore, the democratic process, not rights, is the core of constitutionalization. In contrast, legalist constitutionalism assumes that society can come to a rational consensus that is best expressed in terms of basic rights that are best protected by courts. The problem with global constitutionalism is, in the eyes of critics, that it is too legalist in that sense. In the same vein, concern about a global juristocracy has been voiced. It is feared by some that unrepresentative international judges will be called upon to adjudicate disputes over the interpretation of constitutional text. This concern duplicates the traditional British objection to a written, “rigid,” constitution.

Admittedly, the constitutionalization of international law has been lopsided. The process has so far been adjudicative rather than deliberative. This is most visible in the WTO and the related microconstitutionalization debate. What has been identified by some scholars as constitutionalization of the WTO boils down to the legalization of the dispute settlement mechanism, judge-made principles, and constitutional techniques applied by the panels and the Appellate Body. The WTO’s capacity for legislative response is muted by the unanimity requirement. Such a structurally embedded preponderance of judicial engineering is not limited to the WTO, but concerns the macroconstitutionalization of the international legal system as a whole.

However, this critique, although it may be formulated as a critique of global constitutionalism, is not in fact genuinely concerned with the constitutionalist reading of international law. The criticism is, rather, that global governance suffers from democratic deficits and—to some extent correspondingly—from overly powerful courts. I submit that the danger of a global government of judges is exaggerated. Although the constitutionalization of international law has been court-driven, and although global constitutionalism even calls for further strengthening of judicial review, the establishment of an international constitutional court with compulsory jurisdiction over constitutional matters is unlikely. An “imperfect” international constitution, backed by punctual judicial control, would constitute progress, not peril.⁴⁰

37. See Johnston, *supra* note 23, at 19–20.

38. See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

39. *Id.* at 4.

40. It could also be pointed out that, as long as international law enjoys only weak and indirect democratic legitimacy, the counter-majoritarian difficulty of constitutional review is lesser on the

Most importantly, global constitutionalism unveils precisely those deficits by introducing the constitutional vocabulary. The constitutional paradigm also inspires and eventually facilitates the search for remedies. In my view, the remedy against an overly “legalist” and overly “judicial” process of constitutionalization is not to stop that process, but to democratize it.

A constitutionalist approach to international law helps to prevent uncontrolled “deformalization” of international law.⁴¹ Deformalization is the resort to arguments of some “higher” legitimacy in opposition to and in violation of international legality, as in the Kosovo crisis.⁴² Although constitutionalism is a value-loaded concept, it is nevertheless a legal approach in which consideration for the rule of law in a formal sense, for legal stability and predictability, plays a part, and which acknowledges that legality itself can engender a type of legitimacy.⁴³ Seen in this light, constitutionalism is a juridical alternative to moralizing on the one hand, and to power politics on the other.

EN LIEU DE CONCLUSION: GLOBAL CONSTITUTIONALISM’S CRITICAL POTENTIAL

The core reproach of the new deniers of international law, legitimacy, and particularly the democratic deficit, must be taken seriously. In this regard, global constitutionalism is helpful, because it provokes the pressing question of the legitimacy of global governance. However, the intrinsic link between constitutionalism and legitimacy cuts in many ways. Constitutionalism may legitimize the international system, but it may also challenge its legitimacy. On the one hand, the danger is that “things formerly called institutional are being legitimized with the mantle of constitutionalization.”⁴⁴ This is unhelpful in analytic terms and dangerous

international plane than in the domestic legal order. However, two wrongs do not make a right. The better course to take is to introduce more judicial review and more democratic decision-making.

41. Cf. JÜRGEN HABERMAS, *THE DIVIDED WEST* 116 (Ciaran Cronin ed. & trans., 2006).

42. INDEP. INT’L COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 185–98 (2000).

43. Cf. RUDOLF VON IHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* 471 (5th ed. 1880) (“Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zügellosigkeit das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen, daß sie sich nicht zerstreue, verlaufe, sie kräftigt sie nach innen, schützt sie nach außen. Feste Formen sind die Schule der Zucht und Ordnung und damit der Freiheit selber und eine Schutzwehr gegen äußere Angriffe – sie lassen sich nur brechen, nicht biegen . . .”).

44. Cass, *supra* note 10, at 245 (discussing the debate on the constitutionalization of the WTO).

from a normative perspective. On the other hand, ideas borrowed from global constitutionalism are used by some scholars with the opposite intention, namely, to call into question international law as a whole, and may constitute a pretext for noncompliance.⁴⁵ Again, the best path seems to be the middle one. Global constitutionalism should not be used to bestow false legitimacy on international law, nor should the complaint that international law lacks legitimacy undermine the authority of international law as such. Rather, the constitutionalist reading should clarify that the legitimacy of norms and of political rule does not depend on the structures of government or governance being exactly state-like. Global constitutionalism should and could help, rather than hinder, the revelation of existing legitimacy deficiencies in this body of law without throwing the baby out with the bathwater. Martti Koskeniemi sees the “virtue of constitutionalism in the international world” in its “universalizing focus, allowing extreme [injustice] in the world to be not only shown but also condemned.”⁴⁶

[S]omething like a constitutional vocabulary is needed to articulate it as a scandal insofar as it violates the equal dignity and autonomy of human beings. . . . The use of the constitutional vocabulary . . . transforms individual suffering into an objective wrong that concerns not just the victim, but everyone. . . . In a secular society, it is the political business of constitutionalism to endow such events with sacredness or with a symbolic meaning that lifts them beyond their individuality.⁴⁷

Indeed, there is, as Neil Walker put it, a “responsibilising potential in the constitutional discourse and imagination in the development of a polity.”⁴⁸ Those who

45. See Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT'L L. 403 (1996). Sellers argues “that purportedly international laws and institutions bind and should influence republican governments only to the extent that they reflect republican procedures of politics and legislation.” *Id.* at 404. “International institutions deserve political legitimacy and obedience only to the extent that they conform to republican standards of popular sovereignty and pursuit of the common good.” *Id.* at 428. “Republics properly support the United Nations Secretariat only to the extent that it maintains high standards. . . . the separate republican governments must themselves *independently decide* whether this is the case.” *Id.* at 431 (emphasis added).

46. Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 35 (2007).

47. *Id.* at 35–36.

48. See Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31, 53 (Gráinne de Búrca & Joanne Scott eds., 2001).

wish, for whatever motives, to make a plausible claim to constitutional elements in international law must at least be seen to take these values seriously. Although constitutionalism may be invoked as a way of closing the debate, in practice, it often has the opposite effect, opening up a richer and more productive normative debate. The reason is that “the tradition of constitutionalism remains the best-stocked normative reservoir from which [responsible politics] may draw and the most persuasive medium in which it may be articulated.”⁴⁹ In effect, global constitutionalism deploys—and this is what I deem crucial—a constructive, not obstructive, critical potential.

49. *Id.* at 57.

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