
On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State

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Petra Dobner and Martin Loughlin (eds). *The Twilight of Constitutionalism?* Oxford: Oxford University Press, 2010. Pp. 368. £55.00. ISBN 9780199585007

Jan Klabbers, Anne Peters and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009. Pp. 416. £63.00. ISBN 9780199543427

1 Introduction

The idea of a 'constitutionalization' of international law and international institutions owes much to a long tradition of idealistic international law scholarship. It gained momentum with the end of the Cold War, only to be frustrated some years later. US hegemonic tendencies after 9/11, the unauthorized invasion of Iraq in 2003, and the impasse of the Doha Development Round in the WTO are only some of the factors demonstrating that the dissolution of the Eastern Bloc had not signalled the end of history.¹ These setbacks, however, did not render the academic discourse on 'constitutionalization' of global governance silent, and there is now a burgeoning literature on the subject. Recently, three books have stimulated the discussion: *Ruling the World?*, edited by Jeffery L. Dunoff and Joel P. Trachtman,² and the two books under review.

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¹ F. Fukuyama, *The End of History and the Last Man* (1992).

² J. L. Dunoff and J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009). For a review, see E. Yahyaoui Krivenko, 21 *EJIL* (2010) 789. Further, see the discussion at EJIL:Talk! (<http://www.ejiltalk.org/>), organized in December 2009 and filed under both EJIL Analysis and EJIL: Debate!

Although *The Constitutionalization of International Law*, authored by Jan Klabbers, Anne Peters and Geir Ulfstein,³ and *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, assemble voices already prominent in the debate, they do not only represent the current state of research, clearly they advance it.

2 Different Points of Departure and Different Agendas

The two books take different starting points: Klabbers *et al.* work on the assumption that a process of constitutionalization is actually taking place in international law. For them, constitutionalism is an attitude and a heuristic device, which they apply to issues such as political institutions, law-making and adjudication in the international community, membership of the global community and procedures for the framing of decisions. They share the idea that constitutionalism offers a framework within which further normative debate on a legitimate and pluralist constitutional order can occur (Klabbers, at 4, 10). By contrast, the volume edited by Dobner and Loughlin starts from the observation that globalization causes an ‘erosion of statehood’, which seriously challenges the established processes of domestic constitutionalism. This development gives cause to revisit the achievements, analyse the metamorphosis and debate the future prospects of constitutionalism, in particular its translatability to contexts beyond the state. Accordingly, the book not only refers to international law, but also to the European Union and to societal constitutionalism.

At first, it is surprising that a group of scholars meeting in Berne, Helsinki, Kandersteg, Heidelberg and Paris⁴ simply assumes an ongoing constitutionalization of international law while, simultaneously, another group of scholars convening in Berlin⁵ is concerned with the twilight of constitutionalism. But these different premises only follow from different research interests. Basically, *The Constitutionalization of International Law* is a book about international law, and *The Twilight of Constitutionalism?* is a book about constitutionalism.

Klabbers, Peters and Ulfstein envisage their book as a contribution to the constitutionalist project in international law. They concertedly wonder how a number of issues that constitutional regimes usually address may be taken up in a constitutionalizing international legal order. Their agendas, however, differ. Klabbers and Ulfstein deal with the constitutional functions of law-making and adjudication, respectively. Klabbers tackles the issue of law-making with the aim of sketching a theory of international law-making at the intersection between legal theory and international law.

³ In July–August 2010, EJIL:Talk! (<http://www.ejiltalk.org/>) hosted an online symposium discussing *The Constitutionalization of International Law*. The contributions to the debate are filed under both EJIL Analysis and EJIL: Debate!.

⁴ See J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), Preface, at v.

⁵ P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) is the product of a focus group at the *Wissenschaftskolleg zu Berlin* (the Berlin Institute of Advanced Study); see Acknowledgements, at vii.

He comes up with a presumption of legally binding force: normative utterances should be presumed to give rise to binding law, unless and until the opposite can be proven (at 115). With this presumption of bindingness, Klabbers refines and expands the argument already developed in his dissertation on the concept of treaty,⁶ and links it with Lon Fuller's ideas about 'procedural natural law'.⁷ Still, presumptive normativity does not give satisfying answers to persistent questions about democratic accountability in international law-making processes. In contrast, Ulfstein's chapters on 'Institutions and Competences' and 'The International Judiciary' outline deficits with regard to due process, consistency, and democratic control in international institutions, and he puts forward practical suggestions for improvement, rather cautiously weighing their pros and cons. For example, Ulfstein regards plenary organs of international organizations as the most legitimate fora for undertaking legislative activities because they indirectly allow for participation by citizens of member states through their representatives (at 55). From the perspective of separation of powers, he finds it difficult to see why decisions on the listing and delisting of persons and organizations suspected of financing terrorism should be made in committees under the Security Council as political organs (at 61).

Peters, in turn, shifts the perspective from the function of institutions to 'membership in the global constitutional community' and discusses the role of individuals, states, international organizations, non-governmental organizations, and business actors in the global constitutional community. She refers to problems of accountability and the rule of law in international organizations (at 210–215), issues already raised by Ulfstein (at 55–67). In her three closely interrelated chapters on members of the global constitutional community, on dual democracy and on the pros and cons of the constitutionalist paradigm in general (altogether covering 200 of the 352 text pages of the book), she draws her conclusions after a very well-informed presentation of the theory, whilst unhesitatingly offering her own preferences – which ultimately are political – as 'constitutionalist'. In particular, she endorses, on behalf of international constitutionalism, certain developments in international law which can be interpreted as trends towards inclusiveness and empowerment of the individual. Thereby, she seeks to carve out 'the' constitutionalist perspective.⁸ Based on a normative individualism, Peters regards individual human beings as the ultimate unit of the global constitutional community. However, in order to meet fundamental criteria of legitimacy, international law and governance must remain essentially linked to states (at 264–265). For Peters, it is crucial that states are not merely (the no longer exclusive) creators of international law, but that they are first and foremost constituted by international law (at 179). States are not ends in themselves, but instrumental for the

⁶ J. Klabbers, *The Concept of Treaty in International Law* (1996), at 164 and 249.

⁷ L. Fuller, *The Morality of Law* (Rev. edn., 1969).

⁸ For Peters, global (or international) constitutionalism is both a strand of thought (an outlook or perspective) and a political agenda. See Peters' earlier work, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *LJIL* (2006) 579, at 583.

rights and needs of individuals (at 201). Viewed together, the different approaches taken by Klabbers, Ulfstein, and Peters offer a multi-faceted account of what legal scholarship can contribute to research on globalization.

Whilst *The Constitutionalization of International Law* is co-authored, *The Twilight of Constitutionalism?* is an edited volume and features contributions by 17 political scientists, sociologists, constitutional lawyers, international lawyers, and legal theorists. Most of the contributors reflect on constitutionalist approaches in different contexts beyond the state from an external normative perspective and evaluate their suitability. Since the views of the 17 contributors are rather diverse, it is particularly commendable that the editors managed to create a kind of dialogic structure of propositions and concepts, counter-arguments and alternative concepts, which runs through the entire volume. Grimm, Preuss, Loughlin, Kumm, Wahl, Krisch, and Walker are particularly concerned with the concepts of constitution, constitutionalism and constitutionalization. In Part II of the book, Börzel, Scharpf and Puntischer Riekmann focus on the legitimacy of EU actors. This part does not intersect with *The Constitutionalization of International Law* at all. The largest overlap with the issues discussed by Klabbers *et al.* can be found in Parts III and IV of the book. Dobner takes the lead in Part III, which deals with the question of ‘Constitutionalism without Democracy’. For her, the neglect of democracy in research on globalization is a consequence of a shift in attention and evaluation ‘from legitimacy to efficiency, from political to legal constitutionalism’, and ‘from democracy to legal technocracy’ (at 160–161). Llanque does not share her premise of congruence between constitution and state, but reconstructs republican citizenship as ‘constitutional membership’ (at 177). Finally, Brunkhorst traces the ambivalence of constitutionalism, which embodies both inclusion and exclusion, emancipation and oppression. Considering the impact of the emerging ‘world society’ on constitutional democracy, and fundamentally criticizing the doctrines of dualism and representation, he proposes a radical democratization of all institutions.

In Part IV, ‘Constitutional Law and Public International Law’, Kumm develops a pluralist account of constitutionalism ‘between triumphalism and nostalgia’ (at 201), and Wahl defends the linguistic and conceptual use of the term ‘constitution’. He is sceptical about whether the ongoing change in international law is so fundamental, especially with regard to institutional anchoring and support by real political forces, that it can be qualified as a ‘constitutional turn’ (at 232). Part V asks whether Global Administrative Law (GAL) may be a ‘viable substitute’ for constitutionalism. Whilst Krisch endorses GAL’s more modest reach, he does not conceal the shortcomings of its attempt to bracket the question of how to ensure democracy on a global scale (at 257). On the basis of a formalist, Kelsenian concept of law, the GAL project for Somek even marks the triumph of administrative rationality over the legal form itself (at 273). The contributors to the remaining Part VI on ‘The Emergence of Societal Constitutionalism’ argue in favour of upholding the language of constitutionalism in a ‘post-holistic context’ (Walker, at 307). Their approaches displace the centrality of the political in a narrow sense in discussions of constitutions and address manifestations of social authoritarianism, most notably, an ‘anonymous matrix’ (Teubner, at 336) of social powers which threatens human rights. Since societal constitutionalism implies a

fundamental change in perspective, its proponents only rarely touch upon issues that the explicitly legal approach taken by Klabbers *et al.* to constitutionalization of public international law also considers. However, Teubner's account of a polycentric constitutionalization of the fragmented world society, including transnational private regimes, is to be contrasted with Peters' plea for an 'indirect third-party effect' of human rights towards business actors (at 244). Teubner is driven by his observation that individual and institutional integrity are endangered by a multiplicity of anonymous and globalized communicative processes (at 337–338); and thus, Peters' model of trilateral partnerships among governments, international organizations and NGOs and with governmental residual responsibility (at 258–262) would only be a preliminary answer for him. Apart from this, two issues discussed in both books warrant further analysis: the challenged concepts of constitution and constitutionalism and the question of democracy in the post-national constellation.

3 Constitutionalism as a Toolbox v. Constitution as a Seal of Quality

Klabbers *et al.* draw upon a rather free-hand concept of constitutionalism and borrow freely from domestic constitutionalism. They regard constitutionalism not as a ready-made answer, but as a perspective (Peters, at 348), highlighting its critical potential (Peters, at 351–352). The constitutional parameters they use when debating legitimacy issues of international law include both constitutional guarantees like democratic control, rule of law and human rights, as well as constitutional 'forms' and 'techniques' (Klabbers, at 31), such as subsidiarity, margin of appreciation, and proportionality. Despite this tentativeness, the authors of *The Constitutionalization of International Law* insist on the comprehensive nature of the constitutionalist paradigm. They act on the assumption that constitutionalism cannot be reduced to its component elements like separation of powers or judicial review.⁹ More inclusive and transparent decision-making and judicial review, for example, should go hand in hand, and in combination they assume a special normative significance. Accordingly, constitutionalism is holistic inasmuch as it is more than the sum of its parts, and the various constitutional features take on a special normative significance in combination. This comprehensive concept directs attention to the interaction between different constitutional elements, calls for complementing existing constitutional features of international law with missing ones, and opens up the perspective of constitutional 'bootstrapping' (Peters, at 345).

⁹ Focusing directly on these component elements themselves is the approach preferred by Daniel Bodansky, 'Is There an International Environmental Constitution?', 16 *Indiana Journal of Global Legal Studies* (2009) 565, at 582.

Constitutionalism as a free-standing set of norms is rather disputed in *The Twilight of Constitutionalism?* On the one hand, Loughlin is sceptical whether constitutionalism can serve as a meta-theory that establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located (at 61). On the other hand, Kumm considers constitutional authority to be in part directly derived from constitutional principles (at 214), and for Walker, constitutionalism refers to a species of practical reasoning which, in the name of some defensible locus of common interest, concerns itself with the organization and regulation of collective decision-making (at 296). Basically, Loughlin fears that constitutionalism will be repacked lopsidedly as an expression of liberal-legal constitutionalism if certain constitutional norms acquire the status of fundamental law not because they have been authorized by a people but because of their self-evident rationality (at 61). This is a warrantable objection against palliating as constitutionalization the mere juridification of global governance with recourse to constitutional doctrines. However, it does not preclude the use of constitutional techniques and principles as empirical parameters and as a basis for constructive critique in normative discourses. Whilst for Klabbbers *et al.* constitutionalism, so understood, is a toolbox of analytical instruments – a well-equipped toolbox, *nota bene*, and not a random set of tools – a dominant view in *The Twilight of Constitutionalism?*, shared by Grimm, Dobner, Loughlin and Wahl, seems to be that ‘constitution’ must be diligently guarded as a seal of quality. From this perspective, constitutionalism is to be distinguished from a mere legalization of public power since its democratic element and its rule of law element cannot be separated, and its effectiveness depends on certain preconditions that, to date, only the nation-state has provided for extensively. For Grimm and Dobner, a constitution comprehensively establishes legitimate public power and regulates its exercise (Grimm, at 10; Dobner, at 143). Although Loughlin plausibly denies that national constitutions have ever been comprehensive in their reach (at 69), the fundamental question for Grimm is whether ‘an object capable of being constitutionalised’ exists at all at the international level (at 17).

In the face of a multi-faceted constitutional tradition, it is questionable whether Grimm’s approach of drawing normative consequences from a historically reconstructed ‘clear notion of what constitutionalism entails’ (at 5) is not methodologically doomed to failure. At least Grimm does not offer the only plausible history of the concept of constitution.¹⁰ In the same volume, Preuss explicitly disagrees with Grimm’s premise that constitutions must originate from the constituent power of a people and that they are directed at binding state power (at 42). According to this account, it is the society, not the state, whose order is secured by a constitution. Essentially, the constitution does not limit political power, but guarantees freedom *inter socios*, i.e., liberty in the society. On this basis, it is possible to reconceptualize the idea of collective

¹⁰ To the same effect, Kumm discusses the ‘nostalgist’s position’; see Kumm, in Dobner and Loughlin (eds.), *supra* note 5, at 203.

self-determination, epitomized in the constitution, as the capacity to interact with other communities on a global scale, irrespective of territorial boundaries (at 35–39). By contrast, under the present conditions of globalization, the return to a democratically self-constituted people with comprehensive powers of self-legislation is no longer plausible and thus Grimm's 'culturalist' (Walker, at 294) constitutionalism finishes up a blind alley. If transferred to the international level, this kind of constitutional holism can only be criticized as over-ambitious and purely normativist or legalistic (Kumm, at 252–253; see also Wahl, at 233).

4 Individualistic v. Holistic Democracy

At the centre of this conceptual question of the translatability of constitutionalism lies a substantial concern to which both books pay close attention: the question of democracy in the post-national constellation. For Peters, the reason to focus particularly on the principle of democracy is that it is 'conspicuously absent' in global governance, and it is particularly difficult to integrate democratic elements into the design and operation of global governance (at 263–264). Comparably, Dobner views democratic legitimation for legal arrangements in the globalized world as a 'blind spot' in transnational constitutionalism (at 148). However, since their concepts of democracy differ, the books reach different conclusions.

For Grimm and Dobner, it is a *conditio sine qua non* of democratic legitimacy that any exercise of public authority is covered by a single constitution retraceable to an act of collective self-determination. The comprehensiveness of the constitution, both with regard to its personal range and its coverage of matters, is crucial from that point of view (Dobner, at 143). This important consideration is interrelated with their idea that democracy presupposes the existence of a community of fate: the legitimacy of majority decisions assumes a certain element of reciprocity and of repetition. It is only assured if the same people will be called upon to decide things together in the future and if any minority may gain the majority on another occasion (Peters, at 299, 309). For this reason, the fragmentation of international law is also perceived as a problem of democracy. Given that it is futile to search for a global community of fate or for a global demos (Peters, at 304), it does not come as a surprise that transnational law fails to meet Dobner's criteria for democratic legitimacy (at 147).

If the state constitution is no longer the exclusive and comprehensive basis of public authority within a given territory, Grimm spots two second-best solutions. One possibility would be to strive for a greater accumulation of public power on the international level. Since this is rather unlikely if governance on the global level intends to be democratic, Grimm proposes to put the emphasis on limiting the erosion of statehood at the national level (at 21). The reader is left puzzled as to why for Grimm the primary problem is one of strengthening the level of either the state or international public power. If democratic accountability is concerned with the relationship between public power and collective and individual self-determination, then the improvement of democratic control in external affairs by state constitutions and of democratic

accountability beyond the state complement each other. Yet Grimm's proposals reveal his holistic understanding of democracy, which does really not come to terms with multi-level systems of governance but demands a shift in the allocation of power either to one level or the other. By contrast, Peters proposes a model of multi-unit democracy, which is committed to the individual citizen. In Peters' 'dual democracy', the making of primary international law and international institutions and their secondary law-making rely both on state-mediated democracy ('statist track') and on democratic relationships between global citizens and international institutions ('individualist track'). Though democratic national states are indispensable building blocks of democratic global governance, they can no longer form its exclusive basis. National democracy is itself undermined mainly because the substance of politics in fields like trade and finances, migration, climate, diseases, and terrorism has been migrating to the international level (at 267). Hence, it must be complemented by the 'individualist track'. According to Peters, this track of legitimacy should be strengthened by introducing parliamentary assemblies in more international organizations and by expanding their powers (at 322–326), as well as by referenda and consultations (at 318–319), notice and comment procedures, and the involvement of interest groups (at 319–322).

Regrettably, Dobner does not refer to Peters' model of dual democracy when considering some approaches to post-national democratic legitimacy (at 148–154). This is most likely due to the short space of time between the dates of publication of the two books. Dobner then musters some public international law scholars as proponents of 'transnational constitutionalism', though some of them would probably object to being labelled 'constitutionalist'. She criticizes how Tomuschat,¹¹ von Bogdandy *et al.*¹² and de Wet¹³ address the problem of democratic legitimacy. Dobner has the impression, possibly due to the limited or different ambitions of Tomuschat and de Wet, and their different understandings of democracy, that their value-based concepts of constitutionalization play down the problem as merely transitional, or deny that there is any problem at all. No doubt the mere reliance on common values would be pre-modern.¹⁴ However, it seems a little unfair that both von Bogdandy *et al.* and Habermas are pigeonholed as relying on legitimacy chains as a democratic founding for the exercise of public authority beyond the state (at 150–152 and 159, respectively).¹⁵ Also, Dobner rejects Kantian thought on the basis of a decidedly liberal

¹¹ C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law', 281 *Recueil des Cours* (1999), at 339.

¹² Von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *GLJ* (2008) 1375.

¹³ De Wet, 'The International Constitutional Order', 55 *ICLQ* (2006) 51.

¹⁴ Cf. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *ZaōRV* (2004) 547, at 558.

¹⁵ For von Bogdandy *et al.*, it is decisive that international institutions are 'conscious of their largely state-mediated (and thus limited) [sic!] resources of democratic legitimacy and respectful of the diversity of their constituent polities'. This does not read as a reliance on legitimacy chains. By contrast, the basic idea of the whole project is 'to develop legal standards for ensuring that they satisfy contemporary expectations for legitimacy' (at 1376).

interpretation of the Kantian legacy. If we take state sovereignty and cosmopolitan law as important paradigms for the development of democracy under the conditions of globalization,¹⁶ then Dobner's rather pessimistic outlook (at 160–161) only allows for the reconstruction of statehood under the paradigm of state sovereignty. Peters' 'dual democracy', by contrast, tries to mediate between both paradigms and comes forward with coordinated practical proposals. Innovation lies in the details and in the refinement of the argument.

5 Conclusion

The debate on constitutionalization seems to have reached certain conclusions that may no longer be seriously challenged. The question now is not whether constitutionalization is a good thing or a bad thing. Constitutionalization of governance beyond the state rather stands for a struggle over the distribution and the appropriate institutionalization of power among political, economic and social groups.¹⁷ What matters is how global governance can correspond to the constitutional concern of how, in a post-national constellation, both private and public autonomy can be secured in a balanced manner. Most defenders of the viability of a post-national constitutionalism prefer a modest, pluralist model, which is indeed most promising both conceptually and normatively. Its most plausible normative vanishing point is the individual as a multiple citizen.

If constitutionalism is seen as a toolbox of analytical instruments that can be applied to international law, then this toolbox is of no avail if it cannot be opened and its instruments cannot be taken out. This is why it would be futile to transfer the concept of constitution from the domestic sphere to new contexts of global governance as a sealed box. If constitutionalism is a toolbox and not a shrine, then the use of constitutionalist language in international law no longer causes any fraudulent illusion of legitimacy. With these caveats, the application of constitutional vocabulary to international law does not result in the 'most ludicrous form of re-description',¹⁸ but is committed to an attitude of constructive critique, adequately informed by the common interest.

Any international lawyer interested in these questions will not want to miss *The Constitutionalization of International Law* and *The Twilight of Constitutionalism?*. They are both 'must read' references in the discussion on constitutionalism beyond the state.

¹⁶ See Von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *EJIL* (2004) 885, at 896–900.

¹⁷ These are some of the features carved out by Pruss for the process of overcoming absolutism through constitutions in England, France, and the Netherlands; see Pruss, in Dobner and Loughlin (eds.), *supra* note 5, at 24.

¹⁸ Somek, 'Administration without Sovereignty', in Dobner and Loughlin (eds.), *supra* note 5, at 286.

Individual Contributions

Petra Dobner and Martin Loughlin (eds). *The Twilight of Constitutionalism?*

Dieter Grimm, The Achievement of Constitutionalism and its Prospects in a Changed World;

Ulrich K. Preuss, Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?;

Martin Loughlin, What is Constitutionalisation?;

Tanja A. Börzel, European Governance: Governing with or without the State?;

Fritz W. Scharpf, Legitimacy in the Multi-level European Polity;

Sonja Puntischer Riekmann, Constitutionalism and Representation: European Parliamentarism in the Treaty of Lisbon;

Petra Dobner, More Law, Less Democracy? Democracy and Transnational Constitutionalism;

Marcus Llanque, On Constitutional Membership;

Hauke Brunkhorst, Constitutionalism and Democracy in the World Society;

Mattias Kumm, The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia;

Rainer Wahl, In Defence of 'Constitution';

Nico Krisch, Global Administrative Law and the Constitutional Ambition;

Alexander Somek, Administration without Sovereignty;

Neil Walker, Beyond the Holistic Constitution?;

Riccardo Prandini, The Morphogenesis of Constitutionalism;

Gunther Teubner, Fragmented Foundations: Societal Constitutionalism beyond the Nation State.

Jan Klabbers, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*

Jan Klabbers, Setting the Scene;

Geir Ulfstein, Institutions and Competences;

Jan Klabbers, Law-making and Constitutionalism;

Geir Ulfstein, The International Judiciary;

Anne Peters, Membership in the Global Constitutional Community;

Anne Peters, Dual Democracy;

Anne Peters, Conclusions.