

Why Global Constitutionalism Does not Live up to its Promises

Christian Volk^{*}

Table of Contents

A. Introduction.....	552
B. What is “Global Constitutionalism”?	554
C. What is the Promise of Global Constitutionalism?.....	557
D. How Does Global Constitutionalism Seek to Fulfill These Promises?	559
E. What is the Problem of This Liberal Framing of Global Constitutionalism?	560
F. Why Might This Depoliticized Notion of Democracy be Problematic?	566
G. Constitutionalism of Dissent?.....	568

* Jun.-Prof. Christian Volk is professor for Political Theory and the History of Political Thoughts at Trier University. Additionally, he runs the DFG-research project “The Concept of Sovereignty in the Transnational Constellations”. Email: volkch@uni-trier.de

Abstract

This paper argues that cosmopolitan constitutionalism suffers from a liberal bias when it comes to comprehend the challenges and conflicts of international politics. This liberal bias becomes obvious in the way cosmopolitan constitutionalism conceives the meaning and function of democracy in global governance. For the cosmopolitan constitutionalism, democracy is mainly thought of as a mechanism to guarantee a political process that brings about reasonable, sustainable and fair compromises between the diverging interests of states and individuals.

Therefore, procedures have to be put in place which secure that the arbitrariness of those who govern is effectively restricted, while at the same time those who are governed are prevented from messing up the rational and reasonable decision- and law-making processes conducted by well-informed, coolheaded and responsible political leaders, judges and administrative elites. A balance is struck between responsiveness and stability, whereas politics has become a bad word. If these processes worked without anyone mentioning them, they would be perceived as sound and legitimate. But unfortunately this is not the case. The Battle of Seattle, the protest in Genoa, Davos or Heiligendamm are warning signs of how easily criticism can end up in outrage and violence, when disagreement is not institutionally recognized and the few opportunities to participate are experienced as marginal or useless. What we need, is a version of constitutionalism able to grant realm to conflict and contestation – in order to reveal the contingency of policy processes and to uncover the political character of international law and decision-making.

A. Introduction

“Since nobody appears to believe any longer in a change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities. If the world cannot be changed, you imagine it changed and pretend the work of your imagination to amount to the real.”¹

¹ A. Somek, ‘Administration without Sovereignty’, in P. Dobner & M. Loughlin, *The Twilight of Constitutionalism* (2010), 267, 286.

How to conceive law and politics in times of Supra- and Transnationalization? Among a number of legal-theoretical responses,² global constitutionalism is markedly prominent.³ The global constitutionalist approach, however, is not only descriptive, i.e. simply providing an account of *what* the law is and how legal norms have developed in times of globalization. Global constitutionalism is also a normative theory as it suggests a specific solution to the “disappearance of any settled, singular grid for defining the relations between legal orders”.⁴ In the following, I will elucidate why the global constitutionalist answer – at least in normative terms – is insufficient and does not live up to its promises. In order to explicate my objectives against the global constitutionalist approach, I proceed in five steps. My main criticism is that global constitutionalism argues a case for non-politics, for a de-politicized mode of global governance. Referring to the tradition of republican thinking in the last part of my article, I will outline the contours of an alternative cognitive frame for analyzing and evaluating the normative consequences of global governance. This alternative cognitive frame highlights the importance of political dissent and explicates the reasons why any constitutionalization of international law and politics can only live up to its promises if it has been designed in a framework which takes political dissent seriously.

² Other possible frameworks to conceive the global legal development are e.g. the Global Administrative Law (GAL) approach by B. Kingsbury, N. Krisch & R. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3/4, 15 or Teubner’s societal constitutionalism in G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, in C. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism*, (2004), 3 [Teubner, Societal Constitutionalism]; A. Fischer-Lescano & G. Teubner, *Regime Kollisionen: Zur Fragmentierung des globalen Rechts* (2006) [Fischer-Lescano & Teubner, Regime Kollisionen].

³ See for example the recently released journal by Cambridge University Press “Global Constitutionalism”, edited *inter alia* by M. Kumm.

⁴ N. Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, 6 *International Journal of Constitutional Law* (2008) 3/4, 373, 376.

B. What is “Global Constitutionalism”?

From a legal-theoretical perspective, global constitutionalism is a general framework to conceive the “process of proliferation of diverse, overlapping, and interconnected legal orders at subnational, supranational, international, and private levels”⁵ in constitutional terms. For this reason, global constitutionalism is an umbrella concept uniting many different authors who either describe the current legal order in constitutional terms – as cosmopolitan,⁶ multi-level,⁷ heterarchical⁸ – or plead for a constitutional development of the “post-national constellation”.⁹ In contrast to the assumption of “societal constitutionalism”¹⁰ of the end of (state) politics in a world society, global constitutionalism emphasizes the capability to actively shape global governance in legal-political terms. Societal constitutionalism argues that the formation of global law is mainly due to the professional

⁵ R. Prandini, ‘The Morphogenesis of Constitutionalism’, in Dobner & Loughlin, *supra* note 1, 309, 318.

⁶ M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 907 [Kumm, Legitimacy of International Law]; *id.*, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009), 258 [Kumm, Cosmopolitan Turn]; M. Kumm, ‘The Best of Times and Worst of Times: Between Constitutional Triumphalism and Nostalgia’, in Dobner & Loughlin, *supra* note 1, 201.

⁷ I. Pernice, ‘The Global Dimension of Multilevel Constitutionalism’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006), 973.

⁸ D. Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in Dunoff & Trachtman, *supra* note 6, 326; D. Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’, in G. de Burca & J. Weiler (eds), *The Worlds of European Constitutionalism* (2010), 63.

⁹ J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (1998); *id.*, *Der gesplittene Westen* (2004); *id.*, ‘Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft’, in W. Brugger, U. Neumann & S. Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008), 360 *et seq.*

¹⁰ G. Teubner, ‘“Global Bukowina”: Legal Pluralism in the World Society’, in *id.* (ed.), *Global Law without a State* (1997), 3; *id.*, ‘Hybrid Law: Constitutionalizing Private Governance Networks’, in R. Kagan & K. Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (2002), 311; *id.*, ‘Globale Zivilverfassung: Alternativen zur Staatszentrierten Verfassungstheorie’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 1; *id.*, *Societal Constitutionalism*, *supra* note 2.

interaction of private actors who do not deliberately pursue a political project but follow the logic of their respective subsystem of world society. While societal constitutionalism derives mainly from a private law approach, global constitutionalism has its origins in the public law tradition and affirms the creative power of public law, of courts and judges for the organization of a global order. In other words, global constitutionalism is a legal-political project.

In this sense, Matthias Kumm portrays global constitutionalism as “a jurisprudential account claiming to describe the deep structure of public law as it is. It tries to make sense of a series of basic structural features of international and domestic constitutional law practices.”¹¹ It is the global constitutionalist aspiration to provide a “unifying framework” for the analysis of phenomena, such as an “increasingly complex structure of doctrines”, to regulate the linkage between domestic legal and international legal orders, the “proliferation of internally complex governance structures within international law”,¹² the new face of the concept of sovereignty, the global spread of human rights regimes and their interaction with human rights adjudication on the domestic level. Kumm is convinced that the “constitutional language is helpful for this purpose, because there are structural features of international law that bear some resemblance to [formal] features [of hierarchy, to functional features, and to substantive features which are usually] associated with domestic constitutional law”.¹³

However, global constitutionalism needs to be distinguished not only from societal constitutionalism but also from the traditional perspective to international law.¹⁴ The constitutionalist reading of international law claims that the legal and political physiognomy of global governance is “more characteristic of modern constitutional systems than of the traditional paradigm of international law as the law among states.”¹⁵ Nevertheless, among the purveyors of the constitutionalist vocabulary we recognize diverse standpoints regarding the state of constitutionalization in global governance: Authors like Kumm or Fassbender claim that global constitutionalism, either as cosmopolitan constitutionalism or in a more

¹¹ Kumm, *Cosmopolitan Turn*, *supra* note 6, 262.

¹² *Id.*, 262.

¹³ *Id.*, 259.

¹⁴ See S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) 2, 331.

¹⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 259.

formalistic approach in Fassbender's outline,¹⁶ is already in place. From their perspective, global constitutionalism is not so much an ideal but a paradigm that best fits legal practice.

On the other hand, authors like Andreas L. Paulus or Martti Koskenniemi are more skeptical. Paulus criticizes Kumm's or Fassbender's assumption that only a constitutionalist reading is an adequate account of international law today as a disproportional idealization¹⁷ and, as Somek puts it, as a "re-description of social realities".¹⁸ Nevertheless, Paulus ascribes himself to the normative project and pleads for a "constitutional development of [...] international law" with more "substantive principles".¹⁹

The same is true for Koskenniemi. Building on Kant's legal thought, Martti Koskenniemi argues that instead of "an institutional architecture or a set of legal rules, constitutionalism is best seen as a mindset – a tradition and a sensibility about how to act in a political world."²⁰ Although he criticizes parts of the constitutionalist writings for their "nostalgic attachment to traditional diplomatic institutions"²¹ and, therefore, as a hegemonic project, he commits himself to the constitutionalist tradition by embracing the "moral rectitude"²² of this tradition and, by highlighting the importance of the "virtue of constitutionalism",²³ for the world we live in.

Other scholars argue that a constitutionalist paradigm for international law provides us with a sound and convincing normative standpoint, helpful to evaluate legal and political developments. In this respect, Neil Walker argues that the language of constitutionalism should be considered as a

¹⁶ B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529; *id.*, 'We the People of the United Nations': Constituent Power and Constitutional Form in International Law', in M. Loughlin & N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 269; B. Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', in Dunoff & Trachtman, *supra* note 6, 133.

¹⁷ A. L. Paulus, 'The International Legal System as a Constitution', in Dunoff & Trachtman, *supra* note 6, 69, 71 [Paulus, International Legal System].

¹⁸ A. Somek, *supra* note 1, 286.

¹⁹ Paulus, *International Legal System*, *supra* note 17, 86.

²⁰ M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 9 [Koskenniemi, Mindset].

²¹ *Id.*, 36.

²² *Id.*, 11.

²³ *Id.*, 35.

“normative technology”, which deals as an “insistent reminder of what and how much is at stake”²⁴ in a post-Westphalian world.

C. What is the Promise of Global Constitutionalism?

The “promises of constitutionalism”²⁵ are manifold. First of all, each and every theoretical approach which puts the idea of a constitution center-stage and dwells on the normative heritage of this concept, seeks to establish – no matter how explicitly or implicitly – a “system of collective action based on principles of equal participation, accountability, and the rule of law”.²⁶ For global constitutionalism, the international community, defined as an “ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values”,²⁷ embodies the subject of such a collective action in the post-national constellation. However, besides the fact of shaping the system of collective action, which Preuss declares to be the “essential promise of constitutions”,²⁸ global constitutionalism makes a couple of other promises.

Nico Krisch, though a critic of global constitutionalism,²⁹ argues that the global constitutionalist approach “seek[s] to give the current, largely unstructured, historically accidental, and power-driven order of global governance a rational, justifiable shape in which the powers of institutions and their relationships with one another are clearly delimited.”³⁰ But the promises of global constitutionalism are not just about limiting power but

²⁴ N. Walker, ‘Beyond the Holistic Constitution?’, in Dobner & Loughlin, *supra* note 1, 291, 308.

²⁵ S. Besson, ‘Whose Constitution(s)? International Law, Constitutionalism, and Democracy’, in Dunoff & Trachtman, *supra* note 6, 381, 384 [Besson, Whose Constitution].

²⁶ U. Preuss, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’, in Dobner & Loughlin, *supra* note 1, 23, 43 [Preuss, Disconnecting Constitutions].

²⁷ C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Recueil des Cours de l’Académie de Droit International* (1999), 9, 88.

²⁸ Preuss, *Disconnecting Constitutions*, *supra* note 26, 43.

²⁹ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011).

³⁰ N. Krisch, ‘Global Administrative Law and the Constitutional Ambition’, in Dobner & Loughlin, *supra* note 1, 245, 253.

also about efficient and effective ruling and cooperation. In this regard, Thomas Franck states that constitutionalization helps to separate the respective areas of jurisdiction among the organs of the institution and between the institution and its member States. In the end, this will lead to enhanced institutional efficacy³¹ and cooperation.

Additionally, Andreas L. Paulus stresses the fact that constitutionalization of international law becomes necessary also in terms of legitimacy. A constitutionalized international legal order would not have to rely on a mere assertion of its bindingness anymore but could “add a different, better quality to international law”.³² For Paulus, the better quality of international law, however, is not an end in itself. Rather, we need a constitutionalization of international law because otherwise, the “resistance to international regulation will likely – and justifiably – grow, and the accommodation needed for international order will not be forthcoming.”³³ To tame resistance, becomes another promise of constitutionalization.

In general, global constitutionalism is said to minimize arbitrary rule, enhance transparency, increase institutional efficiency, strengthen accountability, and secure a more inclusive representation or even, as Anne Peters argues, provide possibilities for Civil Society Organizations (CSO) to participate more actively substantively in global governance and law-making processes.³⁴ For Peters, therefore, global constitutionalism is the adequate response to the de-constitutionalizing impact of global governance on domestic legal-political orders.³⁵

³¹ T. Franck, ‘International Institutions: Why Constitutionalize?’, in Dunoff & Trachtman, *supra* note 6, xi, xiv.

³² Paulus, *International Legal System*, *supra* note 17, 75.

³³ *Id.*, 71.

³⁴ A. Peters, ‘Membership in the Global Constitutional Community’, in J. Klabbbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 153, 238-240 [Peters, Membership].

³⁵ A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2009) 3, 579.

D. How Does Global Constitutionalism Seek to Fulfill These Promises?

There are some important differences between Kumm, Peters, Fassbender or Paulus.³⁶ Paulus differs from Kumm's cosmopolitan perspective not only with respect to the current status of constitutionalization beyond the State, but also with regard to the driving forces of such a legal project. While Kumm emphasizes the "divorce of international law from State consent",³⁷ initiated by the proliferation of cosmopolitan values and norms, for Paulus states remain "the only legitimate legislator" and they constitute "the main bearer of responsibility for breaches of international law". Therefore, a "new global law over or above State consent will have to wait for another day."³⁸

Despite these important differences, the key instrument to fulfill the promises of constitutionalization is to strengthen the role of international courts and tribunals – the "progress of constitutionalization [...] [is] tied to a rise of adjudication"³⁹ – and to convince national and international elites to adopt a "constitutional mindest". In the eyes of the purveyors of the constitutionalist language, global constitutionalism is – first and foremost – legal and judicial constitutionalism. The aim must be to "strive for a more comprehensive balancing of rights and interests beyond the narrow confines of a specific subsystem. It should use the potential for checks and balances to hold all holders of public power accountable, whether State representatives or international civil servants."⁴⁰

In order to fulfill the promises of global constitutionalism, even thinkers like Juergen Habermas feel compelled to transform questions of global democracy into questions of global justice and the moral-legal quality of the outcome of legal (International Criminal Court) or executive (United Nations Security Council) decision-making on the global level.⁴¹ This gives rise to the assumption that global constitutionalist scholars are

³⁶ See S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235.

³⁷ Kumm, *Cosmopolitan Turn*, *supra* note 6, 272.

³⁸ Paulus, *International Legal System*, *supra* note 17, 83.

³⁹ *Id.*, 99.

⁴⁰ *Id.*, 109.

⁴¹ J. Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik' in: P. Niessen & B. Herboth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007), 406.

not so much concerned with the problem of democratic participation on the global level.⁴² From their perspective, the more serious problem is that States' executive branches do capture the international juris-generative processes.⁴³ To overcome these problems, Kumm suggests a "complex standard of public reason"⁴⁴ which is inspired by a "common set of principles"⁴⁵ underlying both national and international law as a coherent framework for addressing conflicting claims of authority in specific contexts. The keyword to make these international public authorities fit for global challenges is "procedural legitimacy",⁴⁶ and this proceduralism shall ensure that appropriate forms of transparency, participation, representativeness, and accountability become an integral part of governance practices. The reasonable deliberation of a legal elite supersedes the democratic-political struggle.

E. What is the Problem of This Liberal Framing of Global Constitutionalism?

Steps 1-3 illustrate that global constitutionalism is deeply embedded in a liberal paradigm of law and politics. From a political-theoretical perspective, global constitutionalism is liberal constitutionalism, mainly designed as a mechanism to secure rights – of States and/or individuals – and to guarantee a political process that brings about sustainable and fair compromises between diverging interests. Although the global constitutionalist approach abandons itself from the statism of traditional international law, it does so for the price of rushing into an apolitical, morally based individualism which is characteristic for a liberal approach. Samantha Besson, for example, pleads for the conception of the international community not simply as a combination of a "community of states", but also as a "community of individuals".⁴⁷ For such a "community of individuals", procedures have to be put in place which ensure that the arbitrariness of those who govern is effectively restricted, while at the same

⁴² See next step (E.).

⁴³ Kumm, *Cosmopolitan Turn*, *supra* note 6, 272.

⁴⁴ *Id.*, 268.

⁴⁵ *Id.*, 279.

⁴⁶ *Id.*, 303.

⁴⁷ Besson, *Whose Constitution*, *supra* note 25, 395.

time those who are governed are prevented from messing up the rational and reasonable decision- and law-making processes conducted by well-informed, coolheaded and responsible political leaders, judges, and administrative elites.

Taken together, they form the “new transnational ruling class”, and reinforce the impression that the cosmopolitanism of the global constitutionalist approach is only the “cosmopolitanism of the few”.⁴⁸ Since both constitutionalism and empire can go together quite well, as Koskenniemi pointed out for the 19th century, who can say for certain that global constitutionalism is not the constitution of a new empire and establishes a new “hegemony in international law”?⁴⁹ This question inevitably arises because another question, of equal importance, remains unanswered: “what kind of (or whose) law, and what type of (and whose) preference?” Additionally, “what is included in the constitution and what is left out (as “private”, for example, or as “scientific”), and whom does the present constitution lift to decision-making positions”?⁵⁰ Without doubt, Kumms’ cosmopolitan answer to questions about the bearer of decision-making power in global constitutionalism – an abstract rationality exercised by a cosmopolitan minded juridical elite and in favor of the needs and interests of an abstract individual – differs from Paulus’ version of global constitutionalism where States still play an important role, interact with international organizations within a network of checks and balances and, in “binding the exercise of international power to legal rules, it might get us nearer to the rule of law in international affairs.”⁵¹ However, both versions of global constitutionalism seek to strike a balance between rationality and juridification and declare rational stability to be the one important keyword, whereas politics has become a bad word.

Despite his critical intent, we can detect these depoliticizing strands of global constitutionalism even in the political-normative fabric of Koskenniemi’s thoughts. He is convinced that the “virtue of constitutionalism” is based on its “universalizing focus”, providing us with “a constitutionalist vocabulary”. Such a vocabulary “is needed to articulate

⁴⁸ H. Brunkhorst, ‘Constitutionalism and Democracy in the World Society’, in Dobner & Loughlin, *supra* note 1, 179, 193.

⁴⁹ C. E. J. Schwöbel, ‘Organic Global Constitutionalism’, 23 *Leiden Journal of International Law* (2010) 3, 529, 529.

⁵⁰ M. Koskenniemi, ‘The Politics of International Law: 20 Years Later’, 20 *European Journal of International Law* (2009) 1, 7, 17.

⁵¹ Paulus, *International Legal System*, *supra* note 17, 108.

it (extreme inequality; C.V.) as a scandal insofar as it violates the equal dignity and autonomy of human beings” and to transform “individual suffering into an objective wrong that concerns not just the victim but everyone”.⁵² Without doubt, Koskenniemi addresses a crucial and pressing issue of global politics. However, by referring to the Kantian tradition of constitutionalism, he introduces visions of unity (“universalizing focus”, one “vocabulary”) and of moral consensus (“everyone”) as a normative model for dealing with political conflicts. Even if these visions are not meant to compile pre-political values but rather function as an ideal against which we should evaluate a political process, they establish the end of political dissent over essential questions as a normative ideal.

While some kind of liberal understanding of constitutionalism might be the norm in Western societies, it is still much contested – and with good reason. The model of liberal or judicial constitutionalism assumes that citizens are only instrumentally interested in politics. They do have diverse, but precast interests and are looking for a way to realize these interests. Liberal theorists are aware that some kind of politics – and this implies restrictions – is needed in order to fulfill these interests. But the liberal idea says that politics, i.e. political conflict and dissent, should be reduced to a minimum. However, this liberal notion of politics and the political becomes problematic once conflictual political decisions and debates are required. Liberal constitutionalism is fairly well equipped to deal with conflicts that are about interests and aimed at finding compromises or include justifiable position. But it has no deeper understanding of emotional dynamics, irresolvable tensions, the public formation of opinions, or collective dynamics of decision formation. The overly pronounced desire for conflict resolution forbids taking conflicts seriously and tends to harshly exclude those who are not seen as willing to agree to the basic institutional and normative structure. This lack of understanding of the role of conflict in deeply diverse and pluralistic settings cannot be cured by enhancing accountability, transparency, and inclusiveness through a coherent legal framework for an alleged and imagined international community.⁵³ Global constitutionalism and its purveyors are too strongly biased in favor of the status quo. This becomes obvious when we examine how global

⁵² Koskenniemi, *Mindset*, *supra* note 20, 35.

⁵³ B. Simma & A. L. Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *European Journal of International Law* (1998) 2, 266.

constitutionalist thinkers perceive the role and function of democracy and participation.

Democratizing global governance and international law-making plays a minor role in global constitutionalism. If at all, democratization needs to happen at the State level.⁵⁴ For Kumm, questions regarding the democratic legitimacy of transnational governance practices are “widely overstated”.⁵⁵ While reading through the passages Kumm writes about democracy, it becomes obvious that he identifies democracy with electoral accountability and declares it impractical. Although Klabbers, Peters, and Ulfstein’s theory of “dual democracy”⁵⁶ in their version of constitutionalization marks an exception, they are also bound by the liberal framework, reducing democratic politics to cooperation and problem-solving – even in those passages where they write about the importance of “contestatory democracy”.⁵⁷ Even if we ignore the fact that Peters *et al.* fail to convincingly prove how to combine the many but incompatible normative claims of different democratic theories in their democratic-theoretical outline,⁵⁸ their reading of contestation and political conflict is still biased in liberal terms. Explicating their application of contestatory democratic theory to global governance, Peters argues that “the role of global civil society is mostly one of opposition and contestation. Civil society organizations have elicited greater accountability of global governance by increasing its transparency, by monitoring and reviewing global policies, and by seeking redress for mistakes and harms attributable to global regulatory bodies. Besides being a watchdog, civil society organizations are also agenda setters in global politics.”⁵⁹ For Peters *et al.*, NGOs’ participation should increase the public transparency of intergovernmental organizations’ operations, monitor and review these operations, and seek to redress mistakes and

⁵⁴ Paulus, *International Legal System*, *supra* note 17, 94.

⁵⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 273.

⁵⁶ A. Peters, ‘Dual Democracy’, in Klabbers, Peters & Ulfstein, *supra* note 34, 263.

⁵⁷ *Id.*, 270.

⁵⁸ In order to corroborate their normative beliefs and to support their programmatic direction, Peters *et al.* seek to combine the deliberative, the participatory, and the contestatory traditions of democratic thinking in their approach. In their endeavour, however, they fail to combine the different normative claims underlying these theories. To provide an example, while the vanishing point of theories of contestatory democracies is to guarantee permanent opposition – due to a lack of belief in consensus – deliberative democracies seek to achieve a rational consensus, i.e. through dissent and opposition.

⁵⁹ *Id.*, 314.

harms. Thereby, they become a necessary part of the formal accountability mechanisms of global governance institutions. Civil society groups should deliver knowledge, insights, and information. Against this background, contestation is not seen as an autonomous quality of a political-democratic setting but as a means to improve the process of global governance – and, moreover, as something which should disappear at the end of the day, when a sound and rational solution will be found.

But, as was previously stated here, when Peters *et al.* point out the necessity of introducing democratic-theoretical consideration into a version of global constitutionalism, they mark a welcome, though deficient, exception. In general, we have to follow Dobner, who detects that there is “a growing drift between law and democracy” within the global constitutionalist language which has so far “stirred little commotion among legal scholars”.⁶⁰ Dobner continues that democratic legitimation of any form of rule – global governance included – marks an “inalienable right and therefore must be transferred to the global arena”.⁶¹ If this does not happen, it is argued, the “globalization of law must be criticized” for its “submission of politics to law”.⁶²

Although Dobner is right to criticize legal scholars’ oblivion of democracy when it comes to questions of global governance, we cannot simply take the nation State constellation as our normative standpoint, and state – critically but fatalistically – that the “submission of internationally exercised public power to law will always lag behind the achievement of constitutionalism on the national level”.⁶³ In other words, we face the problem that our entire repertoire of concepts for a political-normative discussion (freedom, democracy, self-determination, etc.) has been designed in an analytical framework marked by an order of nation States and which gains its expectations on the quality and shape of a political process from there. However, it is neither plausible nor adequate to apply theories of democracy, legitimation, and self-legislation which were designed against the backdrop of the nation State constellation par for par to structures, institutions, and processes of global governance. Such an approach is either reduction or utopian or idealizes the status quo ante. We are still in need of

⁶⁰ P. Dobner, ‘More Law, Less Democracy? Democracy and Transnational Constitutionalism’, in *id.* & M. Loughlin, *supra* note 1, 141, 142.

⁶¹ *Id.*, 152.

⁶² D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, in Dobner & Loughlin, *supra* note 1, 3, 5 [Grimm, Achievement].

⁶³ *Id.*, 22.

new political-theoretical concepts in order to face the fragmented, unstable, temporally and spatially diverse, sectorally differentiated transnational order and inform our normative criteria. To do so, a normative political-theoretical approach not only has to criticize but also to engage with the complexity and dynamics of the transnational constellations – including the comprehension of the institutional subtleties of global governance regimes. Although a non-reflected apology of international and supranational governance regimes can be detrimental for a democratic culture – as it seems to apply to some legal scholars – a complete de-legitimation of global governance based on questionable premises is equally unhelpful. Rather, our view must be sharpened to recognize both new potentials and new dangers for political-democratic self-determination in the transnational constellation.

In the theory of global constitutionalism, however, democracy and participation – in fact one constitutional principle since the American and French Revolutions – are narrowed down to a desirable kind of input into the processes of global governance. Civil society groups are not meant to play the part of critical contesters, but rather should function in their role as “epistemic communities”.⁶⁴ They should bring helpful information and insights into policy processes and thereby improve the output.⁶⁵ If at all welcomed, transnational civil society mobilization is seen as a way to improve upon the process of global governance; its actors are considered as a significant element in the process of public education to help counter the widespread ignorance about the necessity and usefulness of global institutions and international adjudication. Civil society mobilization is meant to collaborate with global governance regimes, increase their public transparency, monitor, review, and seek to redress mistakes and harms. Thereby, transnational civil society becomes a necessary piece in the formal accountability mechanisms of global governance institutions. In short, participation is not about institutionalizing protest. It is about more effective policy shaping. Participation is designed against the backdrop of a

⁶⁴ P. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, 46 *International Organization* (1992) 1, 1, 1.

⁶⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 317. Kumm argues that the system of global constitutionalism “is further stabilized by the NGOs and various actors of civil society and interest groups that attach themselves to various international institutions and their policies, helping to shape public debates and perceptions that help anchor more deeply a cosmopolitan understanding of politics and of national identity.”

“liberalism of fear”⁶⁶ which pronounces a depoliticized notion of democracy.

F. Why Might This Depoliticized Notion of Democracy be Problematic?

What is the problem of such a de-politicized notion of democracy and legitimacy? What is problematic about rejecting democracy as a suitable criterion to evaluate the normative quality of global governance? Why might it be problematic if international politics takes place in a global constitutionalist framework? Could global constitutionalism not at least serve as a desirable normative ideal?

The first problem is cooptation. If CSOs engage in such depoliticized procedures of decision-making, they gamble with their credibility. Furthermore, the professionalization of interest group representation destroys the reason why they have been elevated, namely their representativeness. Civil society actors who need to reform their structures and strive for unity in order to be heard do lose what they once have been known for: their internal differentiation and their more open and creative exchange. They are perceived as tame and dependent, while in the long run other more radical groups will pop up, claiming to truly represent the interests of a particular societal group.

The second problem is a twofold form of exclusion: the discourse arenas are modeled not to engage with critics but to inform about needs and interests which then can be balanced and formed into consent. To include a few presumably moderate CSOs in the process of deliberation and decision-making has only intensified the feeling of powerlessness of the rest. The reason for this is that the inclusion of moderate groups leads to a twofold exclusion of those groups who are not willing to ascribe themselves to the rules of the game of big politics and/or are considered too radical. These politically inopportune CSOs are excluded from the process of deliberation and decision-making, while others are not. The inclusion of moderate groups, due to their alleged reasonability, political significance, and cooperativeness, also marginalizes politically inopportune groups with

⁶⁶ J. N. Shklar, ‘The Liberalism of Fear’, in N. L. Rosenblum, *Liberalism and the Moral Life* (1989), 21.

regard to publicity, media attention and – also very important – their normative valuation and appreciation by the general public. In short, the dark side of cherry-picking and moderating CSOs resulted in an even stronger exclusion of those not judged to suit the structured dialogue.⁶⁷ Furthermore, many CSOs do perceive all this interaction as a mere window dressing and complain that all of these instruments are not designed to produce decisions, but simply attempt to prove the willingness of political and administrative elites to engage in dialogue, while many of the compromises and proposals are later overridden by executive agreements. This is the form of non-politics to which global constitutionalism ascribes itself.

If these processes of global governance, named global constitutionalism, worked without anyone mentioning them, they would be perceived as sound and legitimate. But, unfortunately, this is not the case. The Battle of Seattle, the protests in Genoa, Davos, and Heiligendamm, the riots in Athens, and the mass demonstrations in Madrid, New York, and Frankfurt, are warning signs of how easily criticism can end up in outrage, radicalization, and violence when disagreement is not institutionally recognized and the few opportunities to participate are experienced as marginal or useless.

If we really seek to dwell on the concept of constitutionalism – either as a normative ideal or simply as a source of normativity in order to judge, evaluate, and obtain some orientation in troubled times of supra- and transnationalization – we need a version of constitutionalism which gives place to dissent and political struggle. In other words, we need a version of constitutionalism which puts contestation and conflict center-stage and, in so doing, reveals the contingency of policy processes and uncovers the political character of international law and decision-making in global governance.

⁶⁷ J. A. Scholte, 'Civil Society and Democratically Accountable Global Governance', 39 *Government and Opposition* (2004) 2, 211. Additionally, exclusion is even furthered by the fact that taking part in these organized debates does cost lots of resources. Intensive transnational activism is usually only available to well-endowed organizations. Therefore, IOs tend to reach mainly Northern urban elites and fail to engage with wider constituencies, especially from the Global South.

G. Constitutionalism of Dissent?

In a recent article, Paulus argues that we should not debate so much about the meaning and concept of constitution but rather discuss and elaborate on important substantive principles necessary to bolster the international legal system.⁶⁸ Insofar as this is directed against Fassbender's formalistic reading of the UN Charter as the constitution of the international community, against a cosmopolitan idealization of the status quo or against Grimm's and Wahl's idealization of the nation State's constitution,⁶⁹ I agree with Paulus. Neither a mere formalistic approach, nor an apolitical cosmopolitanism, nor a conservative communitarian reflex provides us with substantive ideas how to design the global legal and political order. However, in contrast to Paulus, I am convinced that a careful examination of the concept of constitution can be helpful for two reasons.

First, the debate about the meaning and concept of constitution is a debate about where to get our normative criteria from in order to judge developments on the global scale. Such a debate makes us sensitive for our own normative criteria, which we tacitly and often unaware introduce through the backdoor. Second, the debate about the meaning and concept of constitution and constitutionalism can provide us with a deeper understanding of a) how to structure our law-making process, b) how to organize judicial review, c) how to establish the interrelationship between law and politics, and d) what kind of institutional setting is needed to give realm to pluralistic, conflictual, and irreconcilable political positions and integrate them into one system without silencing them on the one hand and without triggering radicalization on the other.

As a consequence, referring to the domestic roots of the concept of constitutionalism is not meant to illustrate that any transposition of the concept from state- to the global-level "suffers from a narrow, politically emptied, under-complex, and diluted version."⁷⁰ Such an assessment is unnecessarily bound to the nation State constellation and its specific version of constitutionalism. Rather, we should follow Preuss, who argues that, first and foremost, constitutions establish "schemes of cooperation across physical, social, and cultural boundaries because they do not presuppose

⁶⁸ Paulus, *International Legal System*, *supra* note 17, 71.

⁶⁹ R. Wahl, 'In Defence of the "Constitution"', in Dobner & Loughlin, *supra* note 1, 220, 233-234.

⁷⁰ *Id.*

shared values or shared understandings of social practices. They may produce a common cognitive and normative horizon in that they create institutional facts which generate new possibilities of action among aliens who otherwise would be relegated to largely ineffective forms of purely voluntary cooperation.”⁷¹

However, to free the concept of constitutionalism from its narrow boundaries set by the nation State constellation is an important step, but only a first step. A further, equally important step is to unbound the concept of constitutionalism from a mere legalistic usage, which in the end identifies constitutionalism with limitation – constitutionalism as a “theory of limited government”⁷² and public power. Quite the opposite is the case. From a democratic-emancipatory perspective, the spirit of constitutionalism is not about limits but about enablement. Since constitutions seek to establish and preserve a political arena, constitutionalism is first and foremost a doctrine for enabling political action. Although Grimm draws misleading conclusions from his elaborations – misleading in the sense that he takes the nation State constellation as the only democracy-enabling constellation⁷³ – he is right to claim that there are two elements of constitutionalism, a democratic-political element and a rule of law element, which “cannot be separated from each other without diminishing the achievement of constitutionalism.”⁷⁴ But, nevertheless, the all-important question is, how do we understand the democratic-political element? What kind of concept of democracy do we think of?

It is no coincidence that, from a political-historical perspective, the success of constitutionalism is closely tied to parliamentarianism. To argue for the parliamentarization of international politics, however, does not make much sense for many good and well-known reasons. Nevertheless, I would argue that the normative core of parliamentarianism is not so much about institutionalizing majoritarian rule and electoral accountability. The political-normative quality of parliamentarianism is rooted in the constant possibility to confront the political system with different opinions. Seen from this perspective, parliamentarianism is about opening up the constant possibility to keep the plurality of opinions and viewpoints always visible;

⁷¹ Preuss, *Disconnecting Constitutions*, *supra* note 26, 46.

⁷² M. Loughlin, ‘What Is Constitutionalisation?’, in Dobner & Loughlin, *supra* note 1, 47, 55.

⁷³ D. Grimm, ‘The Constitution in the Process of Denationalization’, 12 *Constellations* (2005) 4, 447.

⁷⁴ Grimm, *Achievement*, *supra* note 62, 10.

in short, to present political conflict. This is what is needed to derive from the historical correlation between constitutionalism and parliamentarianism when we try to make constitutionalism fit for the transnational constellation.

If we do so, our focus is not so much on using the political process as a filter for selecting the best available solution but rather to take more positions into account, so that the interested public has a chance to form its opinions, but also to constantly develop compromises or creatively re-think the available options.⁷⁵ The political process is set center-stage, its contingency has to be highlighted and its conditions – as far as possible – must be revealed. In doing so, politics is not considered as something instrumental or distant, but as something which can be shaped and which fascinates through its multi-dimensionality. No longer is the single “democratic moment”⁷⁶ of voting at the heart of politics, but instead the ongoing struggles – and its representation – as well as space for political expressivity,⁷⁷ which truly characterizes democratic decision-making.

In order to prevent the radicalization and escalation of political conflict, we must restructure the institutional setting of global governance regimes in such a way that politicization becomes possible. The theoretical account, from which the structure of such a post-dominant order of international politics might derive, refers to the tradition of republican thinking, dwells on the importance of conflict and dissent, and puts the manifestation of difference and the representation of alternatives within the political process center-stage. We suggest labeling such an understanding of republicanism, a *republicanism of dissent*.⁷⁸

⁷⁵ R. Bellamy, ‘Dealing with Difference: Four Models of Pluralist Politics’, 53 *Parliamentary Affairs* (2000) 1, 198.

⁷⁶ S. S. Wolin, ‘Fugitive Democracy’, 1 *Constellations* (1994) 1, 11, 21; C. Mouffe, *The Democratic Paradox* (2000).

⁷⁷ C. Möllers, ‘Expressive versus Repräsentative Demokratie’, in R. Kreide & A. Niederberger (eds), *Transnationale Verrechtlichung: Nationale Demokratien im Kontext globaler Politik* (2008), 160.

⁷⁸ The idea of a reconstruction of international politics in terms republicanism has been developed during discussions with Thorsten Thiel. We use the label of republicanism to point to a tradition of political thought which emphasizes the relationship between institutions and citizens, highly values political participation, and is at the same time sensitive to the complex relations between law and politics. Since we are aware that the term republicanism is used in many different ways and with many different intentions, we want to stress that we neither understand republicanism in a Rousseauian sense of small, engaged and virtuous activity of those belonging together, nor in the currently fashionable Neo-Roman sense, which Philip Pettit (see P. Pettit, *Republicanism: A Theory of Freedom and Government* (1999); *id.*,

In order to achieve such a republican kind of political process, structural and performative elements have to be considered at the same time. Statist elements, like institutional balances, the separation of powers, and legal guarantees are as important as elements which enhance the visibility of political conflicts and make them comprehensible and intelligible. A *republicanism of dissent*, as the political-theoretical account of post-national constellation, is accompanied, enabled and fostered by a *constitutionalism of dissent*, as its legal-theoretical equivalent. Politicization is not meant as the capturing of the decision-making process by self-interested elites, nor as the eruption of protest outside the high walls of formal politics, but it refers to publicly aired and controversially discussed opinions. Politicization seeks to actualize difference and highlight the contingency of the political process. In this way, political action and the articulation of opinions can be experienced as making a difference. And, to experience that political action and contestation makes a difference, is something that matters, and something that is central to the understanding of democracy in a republican sense.

Such a conception of politics and democracy leads to an analytical perspective which is distinct from what is commonly discussed in liberal theories. Neither do we need to identify the “cohesive glue”,⁷⁹ nor do we need to search for the “number of basic values that are shared by mankind as a whole”.⁸⁰ Rather, a constitutionalization of international politics has to be concerned with the question how to enable and ensure political conflict

‘Legitimate International Institutions: A Neo-Republican Perspective’, in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 139) advanced, and which is mainly focused on institutions and close to what we have presented as the liberal argument. Instead, we use the term ‘republicanism of dissent’ and would locate our understanding closer to the works of Hannah Arendt (see H. Arendt, *On Revolution* (1963)) and thinkers in the tradition of civil-society republicanism (see C. Lefort, *Democracy and Political Theory* (1988); *id.*, ‘Die Frage der Demokratie’, in U. Rödel (ed.), *Autonome Gesellschaft und Libertäre Demokratie* (1990), 281; P. Rosanvallon, *Democracy Past and Future* (2006)). For detailed explanations see C. Volk, ‘Zwischen Entpolitisierung und Radikalisierung: Zur Theorie von Demokratie und Politik in Zeiten des Widerstands’, 53 *Politische Vierteljahresschrift* (2013), (forthcoming); *id.*, ‘Die Ordnung der Freiheit: Recht und Politik im Denken Hannah Arendt’ (2010) [Volk, *Ordnung der Freiheit*]; *id.*, ‘Eine Globalisierung des Republikanismus?’, 58 *Deutsche Zeitschrift für Philosophie* (2010) [Volk, *Republikanismus*]; T. Thiel, *Republikanismus und die Europäische Union* (2012).

⁷⁹ C. Tomuschat, ‘International Law as the Constitution of Mankind’, in United Nations (ed.), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), 37, 37.

⁸⁰ *Id.*, 43.

by and through the structural legal setting – and not with question to overcome political conflict or make it invisible. It is not just that regimes of global governance are not accountable enough or follow their own interests. From a republican perspective, it is of equal importance that elitist closure veils differences and attempts to restrict conflict in order to prevent criticism. Bureaucratization, informalization, legalization, or juridification are, therefore, seen as dangers (and not as ways to rationalize policymaking and thereby ensure approval). Due to the deep pluralism of all human societies, there are always conflicting opinions and to silence them means to neglect alternatives. Rather, to ignore or silence opposing voices leads to mistrust and frustration, to apathy or radicalization.

To apply the republican perspective to global politics allows one to see that the emerging institutional framework might become an important new arena to allow and encourage contestation. After restructuring the order of international politics, regimes of global governance may really “serve as a kind of ‘coral reef’”⁸¹ where plurality and the necessity to gather and connect are even more obvious than on the national level. The likelihood of politicization is high, since States, international and supranational organizations, NGOs and transnational corporations are forced to come together and consider the consequences of their actions for third parties or collective public goods. But, in order to allow for politicization and renew an interest in politics as the art of finding compromise and publicly debating political options, the asymmetry of today’s order must be overcome and the closure of elitist decision-making has to be avoided. Wherever and whenever we can identify something as a more or less successful, stable and durable answer to a problem within a specific field of global policy, we can notice that NGOs, transnational corporations, international organizations, courts and government networks refer to each other, relate to each other and interact with each other. The increasing number of political actors and interrelatedness allows for politicization, but only if these agents do not seal themselves off from the broader public. De-politicization occurs if alternativity is neglected. The opposite of politicization is the rejection of plurality and difference; the opposite of democracy is ignorance and exclusion.

From the perspective of a republicanism of dissent, reform efforts in international politics should aim at enabling and motivating political

⁸¹ S. Tarrow, ‘Transnational Politics: Contention and Institutions in International Politics’, 4 *Annual Review of Political Science* (2001), 1, 15.

conflicts to develop and to be discussed. One institutional way to do so would be to find a way to translate the concept of oppositional politics into the international realm.⁸² So far, constant effort has been made to keep political opposition to a minimum, since all forms of conflict have been seen as potentially disruptive of the decision-making capabilities of international bodies. Contrary to this approach, an open and free-floating critique and the politicization within and outside of the core political systems are the strongest characteristics of a constitutionalist order in a republican sense. Not just guaranteeing the right to criticize, but actively granting space for opposing voices to form and articulate is what marks the political-democratic experience per se and which is one core feature of constitutionalism. Politicization as a possibility has been one core feature of constitutionalism “at home”⁸³ and it needs to become one component of the constitutionalization of international politics as well. From the perspective of a republicanism of dissent, however, the supra- and transnational level is no longer interpreted as a competitive political order but rather as an additional institutional framework, which enables, allows, and encourages dissent and contestation.

⁸² See Thorsten Thiel application of the republican ideas to the functioning and political structure of the European Union. Thiel, *supra* note 78.

⁸³ Bohman, James, ‘Living without Freedom: Cosmopolitanism at Home and the Rule of Law’, 37 *Political Theory* (2009) 4, 539.