Articles

The Appeal of the Project of Global Constitutionalism to Public International Lawyers

By Christine Schwöbel[*]

A. Introduction

Global constitutionalism, an idea neither necessarily rooted in nor emerging specifically from international law, has captured the imagination of public international lawyers. Rather than adding to the plethora of suggestions of what a global constitution would and should look like, this article is about *why* international lawyers are interested in this idea. The literature so far has largely omitted a stocktaking of what it is that is so appealing about constitutionalism and who is particularly partial to it.[1] When discussing global constitutionalism, international lawyers commonly assume one of two orientations: either a normative orientation (this is the type of constitutionalism we should have) or a descriptive orientation (this is the type of constitutionalism we already have). The former mostly concerns visions for "a global constitution" while the latter often concerns ideas of the process that will at some point culminate in "a global constitution;" this process is commonly referred to as "constitutionalization." The recent co-authored book by Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, sets out to go further. It aims to see "what a constitutional international legal order could look like."[2] In a sense, they have therefore adopted a third orientation: one that takes the descriptive case of constitutionalism as a given and theorizes about further normative aspects in regard to the international legal order.

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[1] Interestingly, the – to my mind – best analyses of the appeal of global constitutionalism have been in the context of the constitutionalization of specific areas of public international law, rather than of the field as a whole. *See* Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 647-675 (2006); Daniel Bodansky, *Is there an International Environmental Constitution?*, (2009) 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 574-584; DEBORAH CASS, THE CONSTITUTIONALIZATION FO THE WORLD TRADE ORGANIZATION (2005).

[2] JAN KLABBERS, ANNE PETERS, GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 4 (2009).

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I would like to take a step back from the idea of "a constitution" as a product, or of "constitutionalization" as a process, and shift the view towards the international lawyer her (or him) self. What is the agenda of international lawyers when they speak of constitutionalization? Why is it that constitutionalism is such an appealing prospect for them? And how compulsive is the pull to constitutionalism? In the following, I begin with a brief overview of the contemporary debate on global constitutionalism. I then consider three motivations of international lawyers to engage with the debate and finally I take a closer look at the apparent "appeal." In this context I examine whether the debate on global constitutionalism is merely appealing or whether there is something more compulsive to it.

No specific vision for "a global constitution" will be suggested here. Indeed, it is the inherent limitation of devising or recognizing "a global constitution" which drive my theorizing about the appeal of global constitutionalism in the first place. While the inherent limitations and biases are not the focus of this article, it is worth noting where I stand in terms of the debate on global constitutionalism. What I am ultimately interested in is whether the contemporary and prevailing visions of global constitutionalism either act as a screen for the exclusion of the more vulnerable in the international legal sphere or whether such visions may even encourage the exclusion of the more vulnerable. When speaking of the vulnerable in the international legal sphere, I refer to any entity, from whole states to individuals, that may be disadvantaged through the economic, political and cultural domination of the few, hegemonic, powers in the international sphere.

The concern about hegemony in international law is one that is familiar. The argument goes that some powerful states, particularly the United States (US), either disregard international law or use the international legal rhetoric for their own political convenience.[3] Yet, in my opinion this is not the end of the road for international law; at the same time as being marked by hegemonic power struggles, international law also possesses an emancipatory power. International law offers a space – a platform – for considering justice, equal participation, and inclusion of the weaker members of society.[4] International law incorporates the potential for solutions as well as problems. It is thus considered possible to reverse, if not escape, the bias inherent in concepts of international law. My view on global constitutionalism is very much in accordance with this line of argument. It appears that the current debate on global constitutionalism is tainted with biases and limitations, which, I believe, derive from investment in liberal-democratic political practice as the seemingly only available political practice with universal appeal. Yet, these limitations can be addressed within the international legal debate. The language of constitutionalism enshrines a hegemonic potential but also an alternative aspect of

[3] *See* for example, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003).

[4] *See* Martti Koskenniemi, *What is International Law For? in* INTERNATIONAL LAW 52 (Malcolm D. Evans ed., 2010).

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making visible and giving voice to those who would not be heard if it were exclusively for power politics. In his book *Strange Multiplicity*, James Tully argues that the constitutional language also accommodates anti-imperial undertakings through its flexibility.[5] The problem is that it is not this flexible aspect of the constitutional language that is adopted; it is rather the inflexible aspect that can cause stasis and manifestations of inequalities.

A reconceptualization of constitutionalism towards a more flexible understanding is only possible if the contemporary debate is revealed as only being one option of many, and as the specific option that is associated with liberal-democratic constitutionalism as is prevalent in the domestic legal systems of the international lawyers shaping the debate. In order to recognize global constitutionalism as having repressive as well as emancipatory properties, it must be recognized as a form of argument that is part and parcel of political considerations.[6] It is not a body of independent abstract and objective rules that are in a tug-of-war with politics. If, then, global constitutionalism is a form of argument, it is necessary to place the spotlight on the arguer. Only by directing our view to the arguer and his or her motivations can we find out what their argument really means.

But, one might ask why take issue with these international legal theories and the theorists promoting them? Why not let the academics while in their ivory towers and deliberate about a universal framework for the world? Indeed, declaring the existence of "a global constitution" may strike one as being nothing but a harmless fantasy. Yet, contributors to the debate on global constitutionalism never believe that the idea itself is sufficient. For them, the idea is inherently linked to a practicable project.[7] Ideas on global constitutionalism therefore always also consider the implementation of the idea of global constitutionalism. It is this determination of international lawyers that makes it necessary to question their motivation.

B. A Brief Overview over the Debate of Global Constitutionalism

"Global constitutionalism" is by no means a term exclusive to public international law. Scholars of various subjects and various times have thought about it, including those of anthropology, history, international relations, philosophy, political theory, sociology, and theology. Indeed, much of the terminology employed by international lawyers is borrowed from other disciplines and extrapolated to international law. Global constitutionalism has

[5] JAMES TULLY, STRANGE MULITIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 31 (1995).

[6] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (2005).

[7] Anne Peters states global constitutionalism is "an agenda" in *The Merits of Global Constitutionalism*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 397 (2009). In terms of international lawyers and their projects, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW (LJIL) 9, 18 (1999).

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recently emerged as one of the most discussed areas in the field. According to Klabbers, constitutionalization forms, alongside fragmentation and verticalization, "the holy trinity of international legal debate in the early 21st century."[8]

So how do international lawyers relate to global constitutionalism? The contemporary debate is predominantly formed through two perspectives: suggestions as to which set of norms and principles such a constitution could and should be composed of and which process supposedly amounts to constitutionalization. As it is not the main purpose of this paper to contribute to this particular debate, the mapping of the various contributions will remain brief. It should also be said that it seems appropriate not to define global constitutionalism. In defining global constitutionalism, the opportunity would be lost to attempt to view the debate from the outside, from an observer's viewpoint. The following contributions and contributors have therefore been selected because they invoke global constitutionalism, not because their proposals fit into a predefined set of requirements for "global constitutionalism."

Since it is comprised of a large number of multi-faceted visions, global constitutionalism is a diverse and complex area. The contributions to the debate nonetheless share certain features, which allows for broad (and perhaps sweeping) categorizations. One way of ordering the debate is to understand current visions of global constitutionalism as falling into one of four dimensions. I call these dimensions: Social Constitutionalism, Institutional Constitutionalism, Normative Constitutionalism, and Analogical Constitutionalism.[9] Although it is not possible to capture the entire debate by way of this categorization, the four suggested dimensions are in my view representative of the predominant visions of global constitutionalism today. Proponents of *Social Constitutionalism* centre concerns for coexistence in international society. An example of this vision is that of a global constitutionalism of civil society. Gunter Teubner, for example, disassociates constitutionalism entirely from the nation state: In his view, the constitution of world society "emerges incrementally" through a process of the constitutionalization of autonomous sub-systems of this society.[10] The emphasis of this vision is on participation of individuals in society.[11]

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[8] KLABBERS, PETERS, ULFSTEIN (*supra* note 2).

[9] Christine E. J. Schwöbel, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (2011).

[10] Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory? in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 8 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004). Other proponents of a form of Social Constitutionalism include Christian 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 DE L'ACADÉMIE DE DROIT INTERNATIONAL 237(1999); Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung* (*The Emergence of the Global Constitution*), 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 717, 759 (2003); PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990).

[11] Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie* (*Global Civil Constitutions: Alternatives to a State-Centred Constitutional Theory*), 63 ZAÖRV 3, 6 (2003).

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Institutional Constitutionalism looks to where power is situated in the international sphere and seeks to legitimize this power through its institutionalization. The most common vision of this dimension is that which describes the United Nations Charter as the global constitution. Bardo Fassbender is among the most assertive proponents of this view, as evidenced by the title of his article from 1998 "The United Nations Charter As Constitution of the International Community."[12]

The next group of authors of international law specify individual norms as global constitutional norms, which they believe provide the framework for a global constitutional order. Such visions are described here as *Normative Constitutionalism*. What makes these specific norms 'constitutional' is supposedly their inherent moral value. Authors group these norms by referring to "world law," "fundamental norms" or "*jus cogens* norms."[13]

Finally, visions suggesting analogies between domestic or regional constitutionalism and the international sphere can be described as visions of *Analogical Constitutionalism*. Matthias Kumm, for example, examined to what extent international law can be awarded legitimacy from a constitutional perspective by making analogies between international law and European Union (EU) law. He suggests a constitutionalist framework for international law that draws on ideas of EU law.[14]

It is worth mentioning here that the above categorizations cannot be separated neatly but necessarily overlap, as pertinently demonstrated with Analogical Constitutionalism. In a way, all contributors to the debate compare certain established constitutional ideas to occurrences in the international sphere and thus project concepts familiar to them from national law to international law. One can devise certain territorial "clusters" of this type of research. German international lawyers, for varied historical, educational, and

[12] *See* Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529, 546 (1998). Other authors of Institutional Constitutionalism include Anne Peters, *Global Constitutionalism in a Nutshell in* Liber amicorum Jost Delbrück, 548 WELTINNENRECHT (2005); Ronald St. John Macdonald, *The International Community as a Legal Community in* TOWARDS WORLD CONSTITUTIONALISM – ISSUES IN THE LEGAL ORDERING THE WORLD COMMUNITY 879 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 19, 20 (2000).

[13] *See* for example Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LJIL 611-632 (2006). Other authors that could be categorized here include ANGELIKA EMMERICH-FRITSCHE, VOM VÖLKERRECHT ZUM WELTRECHT (FROM INTERNATIONAL LAW TO WORLD LAW) (2007); Michael Byers, '*Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC JOURNAL OF INTERNATIONAL LAW 220 (2007).

[14] Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis* 15 EJIL 907 (2004). Robert Uerpmann opts for the analogical approach by comparisons between international law and the German constitutional order in *Internationales Verfassungsrecht* (*International Constitutional Law*) 56 JURISTEN ZEITUNG 565-572 (2001).

institutional reasons, are particularly taken with the idea of a global constitution. But not only German, or for that matter European, scholars are interested in taking part in the debate – international lawyers from across the globe (though predominantly from the "Western" world) have contributed to the field. Evidently there is something about global constitutionalism that makes it attractive to international law scholars.

C. The Appeal of the Project of Global Constitutionalism

In the following, three motivations have been selected as representing what it is about global constitutionalism that carries such a strong appeal to international lawyers. The three motivations are closely related and interdependent: the first motivation – the allocation of political power – carries within it a central attribute of regulation (the second motivation), which itself can only be enforceable if the legitimacy of international law (the third motivation) is ensured. The distinctions highlight facets of constitutionalism, which deserve to be mentioned separately.

I. The Allocation of Power in the International Sphere

The first motivation that may elucidate the appeal of global constitutionalism for international lawyers concerns the appeal of the restriction of political power in the international sphere. The allocation of power, which includes the aspect of "constituting" as well as the aspect of "restricting," is an ongoing concern of international lawyers. One could say it is a lawyer's "bread and butter" to allocate political power: we believe that we require lawyers to ensure, for example, that there is an objective standard under which decision-makers exercise discretion. Lawyers test the discretion and then invoke the need for accountability for any actions that are an abuse of that discretion. The restriction of political power in the global sphere has become more urgent since the exercise of power (to be understood here as the political process of decision-making) has become more difficult to trace and therewith more difficult to grasp. This elusive exercise of power has occurred through the ubiquitous processes of globalization. Globalization processes are understood as, *inter alia*, the increasing number of networks that transcend state borders, whether economic, political, social, or legal;[15] the increasing number of norms, institutions, and procedures in the international sphere;[16] the changing relations in the world post World War II which have reshaped from systems of coexistence to systems of

[15] *See e.g.* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE 267 (1995); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[16] Bernhard Zangl & Michael Zürn, *Make Law Not War: Internationale und Transnationale Verrechtlichung als Baustein für Global Governance, in* VERRECHTLICHUNG – BAUSTEIN FÜR GLOBAL GOVERNANCE? 12 (Bernhard Zangl & Michael Zürn eds., 2004).

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cooperation;[17] and the shift of public decision-making away from the nation State towards international actors.[18] International lawyers translate the factual evolution of globalization into legal terminology: it is often claimed that a shift has occurred from a sovereignty-centered system towards a value-oriented or individual-oriented system.[19] A further narrative is that a shift has occurred from international law as a quasi-contractual system, in which sovereignty (in its external dimension) was the paradigm, to "a true legal order of a supra-State kind."[20]

Concurrent with the debate on the coherence of the international legal order (allegedly occurring through globalization processes), a debate is ongoing within the profession regarding the fragmentation of this very order (allegedly also occurring through globalization processes). It is widely argued that the field of international law has become fragmented into a collection of specialized and independent areas of law.[21] Due to the diverging principles of law, definitions of norms, and institutional procedures, it is maintained that there is no longer a coherent and overarching international law.[22] In 2002, the International Law Commission found that fragmentation has resulted in conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[23] In the early days of the debate, much of the engagement with fragmentation came particularly from institutions such as the International Court of Justice – institutions that may have been concerned about the weakening of their influence.[24]

It appears that global constitutional parlance appeals to those international lawyers who wish to emphasize that a common framework (in the form of overarching, universal concepts) is required and that they have ownership over this framework in its entirety. Such ownership – whether it be over the specialized terminology used, at the exclusion of non-experts, or the expertise for setting up institutional frameworks in general – would

[17] PETERS, *supra* note 12, at 536.

[18] DE WET, *supra* note 13, at 612.

[19] TOMUSCHAT, *supra* note 10.

[20] Luigi Ferrajoli, *Beyond Sovereignty and Citizenship: A Global Constitutionalism*, *in* CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 154 (Richard Bellamy ed.,1997).

[21] SLAUGHTER, *supra* note 15.

[22] David Kennedy refers to a "porous boundary" in *The Forgotten Politics of International Governance*, 6 EUROPEAN HUMAN RIGHTS LAW REVIEW 117, 120 (2001).

[23] Report of the Study Group of the ILC, 58th session (2006) A/CN.4/L.682 [8].

[24] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties,* 15 LJIL 553-579 (2002).

relay onto international lawyers an exclusive control. It seems then that the need for controlling fragmentation is prompted by a fear that such dispersing and elusive processes will make it more difficult or even impossible for lawyers to limit and control political power. Anne-Charlotte Martineau contextualized and historicized the fear regarding fragmentation, highlighting that such specialized mechanisms will at certain times be seen as healthy pluralism and at other times as perilous division.[25] Fear of fragmentation dominates the field in times of anxiety while the view of healthy pluralism dominates it in times of confidence.[26] General public international lawyers are the lawyers who are anxious – it is they who lose influence to specialists in a fragmented world. In particular those international lawyers who have committed themselves to a liberal or neo-liberal outlook on the field and have thus limited themselves to discussing universality from a Euro- or US-centric perspective have reason to be anxious.

The multiple sources of power, some national, some international, some transnational, have inspired discussions, predominantly by scholars of international relations, on global governance and the "disaggregated State."[27] International lawyers in turn are somewhat skeptical of global governance and decentralized power. They prefer to see power centralized, although of course predominantly not in the form of an international federal system. If international lawyers consider global governance, then it is usually in terms of framing it within well-known centralized structures of accountability and more generally public law.[28] With variations as to the extent of their efforts, international lawyers in international institutions have attempted to centralize their areas of expertise within their respective institutions. It appears that this is undertaken not only to channel expertise but also to argue for the ascendancy of their institution as the (single) institution with universal appeal. Their efforts are competing with the efforts of other international lawyers and so, somewhat paradoxically, they are adding to the decentralization.

Constitutionalism does not only serve the function of constraining power, it also "constitutes" power according to the will of those who craft the constitution in the first place.[29] This is stating the obvious, but it is a point that is sometimes swept under the carpet: when establishing an international organization, for example, power of the member states is not only restricted, it is also constituted within the organization. Examples of localization as a reaction to globalization can be found in various institutions:

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[25] Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LJIL 2 (2009).

[26] *Id*. at 3.

[27] SLAUGHTER, *supra* note 15, first introduced the term of the "disaggregated state."

[28] For an analysis of the public nature of global governance, *see* Armin von Bogdandy, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2009).

[29] BODANSKY, *supra* note 1.

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the United Nations has, in its Charter, attempted to centralize legal matters regarding the use of force; the World Trade Organization has attempted to centralize issues regarding international trade; the International Criminal Court's project is to centralize international criminal law matters;[30] and the International Labour Organization is, albeit with a commitment to localization, attempting to centralize labor standards. These international-norm-hubs are also power hubs. The restriction of political power through law is not merely a responsive tool. International institution will also be granted with law-*making* powers that extend to its member States and sometimes beyond. Once the power has been allocated through law, the exercise of that power is largely within the discretion of that specific institution. A prime example is the UN Security Council; this UN organ has declared itself as having legislative powers (see the resolutions regarding the funding of terrorism), executive powers (take for example the power to impose and oversee the implementation of sanctions), and institution-building powers (see the criminal tribunals of Rwanda and the former Yugoslavia). It is in fact unclear where the powers of the Security Council end, prompting concerns of parochialism. Klabbers observes, with the caveat that it is a heuristic device, that this is part of a chain of action and reaction, move and counter-move: "globalization calls forth localization, which then at the same time, by looking like parochialism, may inspire yet other manifestations of the global through de-localization." Again, the UN Security Council is an excellent example; it has centralized so much power that it is unclear what would happen if it were to act *ultra vires*, indeed, whether there is a space for an *ultra vires* at all.[31] This has itself prompted demands for Security Council reform in order to globalize what has been localized. The limitation of power that constitutionalism promises does of course not end with international organizations. Constitutionalism promises a framework that would encircle all actors of international law.

The notion of global constitutionalism, particularly of the liberal legalist type, thus provides international lawyers with a tool for allocating power and tracing accountability hierarchies within a framework that may otherwise seem chaotic at best or the fruits of hegemonic power struggles at worst. The use of globalization terminology – notably within their specialized language of "accountability" and "legitimacy" – therefore appears to be an attempt by international lawyers to reclaim some of the debate that they may have lost hold of in the globalizing and yet localizing world. In other words, discussions of global constitutionalism by public international lawyers could therefore be understood as attempts at denial or regulation of fragmentation and as a part of a bid to regain relevance. Global constitutionalism, no matter how loose, would necessarily acknowledge a certain set of universal ideas, whether rights, principles, or an international legal language in general. The recognition (or rather introduction) of such universal law would indeed settle the debate on the fragmentation of international law – at the very least in

[30] It appears that this is *by means of*, not despite, complementarity.

[31] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 168 (2009).

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regard to a loss of an overall perspective on the law. This in turn would allow international lawyers to believe that they exercise control over political processes.

However, such concern for the allocation of political power, in particular for the restriction of power through a constitution, appears one-dimensional. Lawyers with this concern assume a strict division of politics and law – an assumption prevalent in the liberal-democratic model of constitutionalism. Constitutional law according to this model is believed to pre-date politics and is therefore largely left unquestioned. What is omitted in this view are the complex power structures that enable law making and *constitution*-making in the first place. The idea of law as the objective frame that can keep the subjective political process in check will be explored further in the following motivation.

II. The Regulation of International Society through Law

Closely related to the lawyers' desire for the limitation of political power is the desire for the regulation of society through law. If the preceding motivation was about the reason for invoking global constitutionalism in the first place (the restriction of political power), this motivation is about the appropriate means to achieve it (law as a tool). Lawyers like to think of law having objective standard-setting properties, which stand in contrast to the political claim that "might is right." Indeed, as referred to above, this is in a sense the primary function of a lawyer: it is their "bread and butter." Participants in the debate on global constitutionalism believe that a global constitution would provide an appropriate framework that regulates social life in the international (as well as the national) sphere. This perception of constitutionalism reflects a perception of a wide-ranging, if not all-encompassing, potency of the law.

International lawyers tend to respond to international events with a demand for the greater or better application of law. Any changes in global social reality are believed to call for new or enhanced regulation. In that sense, many international lawyers tend to display an anxiety about the lack of law.[32] One often encounters the argument that there is a dichotomy between law on the one hand and politics on the other, with politics obstructing the way to a true legal system. Issues making the headlines such as the plight of the detainees in the detention camps at Guantanamo Bay have given rise to demands predicated on the strong belief that more law would be transformative of current (political) standards. For example, Lord Steyn of the UK House of Lords demanded more law by famously referring to Guantanamo Bay as a "legal black hole."[33] Lord Steyn argued that injustices had been perpetrated on individuals in the name of politics and security who then have no effective recourse to law.

[32] MARKS, *supra* note 32.

[33] Johan Steyn, *Guantanamo Bay: The legal black hole*, 27th F. A. Mann Lecture (25 November 2003).

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Such communicative and emancipatory power of law holds true, but what is left out of the picture is the exclusionary and exclusive power of law. The potential of law to both empower as well as disempower has been greatly discussed in human rights law. Human rights law, or rather the lack of human rights law and the lack of its enforcement, has, predominantly since the 1990s, been at the centre of much of the debate on the potency of law to regulate social reality. Human rights law in its traditional sense – as a negative obligation on the State power to refrain from doing something to the detriment of individuals' rights – is believed to be the chief tool with which arbitrary power can be made accountable.

In this context, Ralph Wilde has argued that law, particularly human rights law, is associated with a general redemptivist idea.[34] The need to redeem the exercise of supposedly arbitrary power prompts demand for more law. Not only is law seen as the appropriate medium with which to constrain arbitrary power and to thereby promote democracy, it is also seen as the appropriate medium for promoting peace throughout the world.[35] International lawyers speaking of global constitutionalism have also adopted this empowering facet of the law. In other words, the use of global constitutional language provides international lawyers with a legal tool that they regard as a tool for regulating *a better* global social reality. However, such overemphasis on the empowering properties of law can then of course veil the disempowering properties of law.

It appears that all contemporary crises are met with a call for more law, as the mechanism by which to overcome the respective crisis. The worldwide financial crisis also reignited the "law as redemption" debate, if using a less explosive terminology than that employed for human rights. The most commonly employed description of what happened in the global financial meltdown is that market forces spiraled out of control due to a lack of regulation. Howard Davies, Director of the London School of Economics and Political Science, writes, "One widely accepted conclusion emerging from analyses of the financial crisis that began in 2007 is that international networks of regulators have not kept pace with the increasing globalization of financial markets."[36]

Davies' response to this in the "Practitioners Special Section" of Global Policy is that "the problem" is the absence of a hierarchy between the various regulatory bodies and the absence of a "central body with the authority to require any of the other organisms to act,

[34] Ralph Wilde, *Casting Light on the "legal black hole": Some Political Issues at Stake*, 5 EUROPEAN HUMAN RIGHTS LAW REVIEW 552, 554 (2006).

[35] Jürgen Habermas & Ciaran Cronin (tr.), *Does the Constitutionalization of International Law Still Have a Chance? in* JÜRGEN HABERMAS, THE DIVIDED WEST 116 (2006); *see also Special Issue: The Kantian Project of International Law*, 10 GERMAN LAW JOURNAL 1-116 (2009).

[36] Howard Davies, *Global Financial Regulation after the Credit Crisis*, 1 GLOBAL POLICY 195 (2010).

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on any particular time frame."[37] Lawyers join the economists in the rhetoric of disapproval that – in Davies' words – "no one is in charge of anyone else" by explaining (self-importantly?) that increased regulation would restrict this powerful yet elusive "market force" from causing more havoc in the future. Law can fix any blips in society's usually ordered progress towards perfection. One could of course retort that lawyers after all possess the necessary expertise for employing law as a tool for social change, and that therefore, there is nothing wrong with lawyers (as experts) employing this tool. Reflecting on the politics of expertise that may be implicated if international lawyers invoke authority (as they did when pronouncing the Iraq war illegal,) the authors of the article "We are Teachers of International Law" consider two aspects: On the one hand, the expertise lies in the legal training, experience and label of "lawyer;" on the other hand, law can be such a powerful means of impacting social reality that it cannot be left exclusively to certain individuals (even if they bear the label "lawyer") to claim knowledge of what "justice," or other similarly influential terms, is and means.[38] Lawyers have an undeniably strong interest in maintaining the associations of expertise that the label "lawyer" invokes. In many legal systems around the world – particularly those legal systems that are home to scholars of global constitutionalism – a constitution is the mechanism that encapsulates the entire legal system, it is, as Teubner states "the law of laws."[39]

However, as discussed above, other forces also appear to have the capacity to regulate society on the international sphere; for example, market forces.[40] David Kennedy observes that international lawyers are aware of the danger of losing control over impacting on social reality when he states: "A great deal of the urgency in the progressive case for building international institutions has always come from the fear that the international regulatory project would fall behind the natural advances of the international market."[41]

Along with market forces, there is an increase in private law issues on the field that we know as public international law. One need only think of private military companies that derive their obligations from their contracts, or the provisions for the reparations of victims in the Rome Statute, or investment arrangements in bilateral investment treaties. For international lawyers, the dividing line between the public and the private is extremely

[37] *Id*.

[38] Matthew Craven, Susan Marks, Gerry Simpson & Ralph Wilde, *We are Teachers of International Law*, 17 LJIL 363, 370 (2004).

[39] Gunter Teubner, *A Constitutional Moment? The Logics of 'Hitting the Bottom,' in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 32 (Poul Kjaer, Gunther Teubner & Alberto Febbrajo eds., 2011).

[40] This should of course not tempt us into viewing market forces as entirely distinct from law. The enabling power of law applies here too.

[41] KENNEDY, *supra* note 7, at 53.

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significant: public law enables lawyers to predict outcomes; it means the universalization of certain standards, and it means *control*. Private law on the other hand, provides legal subjects (note nevertheless, the terminology of *subject*) a largely impenetrable legal bubble in which they are accorded with contractual freedom. Certainly, this freedom is restricted by public law, for example as regards the legal age of the legal subjects. But, the plethora of contracts means that there is a large body of law that is intangible and obscured or even invisible. A constitutionalized international law would reintroduce the "publicness" of public international law in a way that it would act as a framework for this currently obscured or invisible sphere of legal relationships. The framework would provide a mechanism of making these legal relationships more controllable. It is after all control and order that provide the comforting duvet (or is it a security blanket?) for lawyers. Constitutionalism, the quintessence of the "public," would thus undoubtedly confirm the power of law to regulate international society.

III. The Legitimation of International Law

Legitimacy, particularly in regard to the discipline at large, is an issue frequently addressed by international lawyers. It is, according to this analysis, the third main motivation for international lawyers to speak of their field as "constitutionalizing." Wouter Werner states that the debate on a global constitutional order implicates a normative project in that advocates of a global constitutional order are at the same time trying to bring such an order about.[42] What is happening is a self-allocation of power to international lawyers which at the same time rather usefully settles the debate about the legitimacy of international law itself: the very term "constitution" carries with it a promise of legitimacy.[43] The legitimacy of international law is often questioned in the context of a familiar debate on whether "international law is really law?" For the most part, this discussion is couched within the context of the lack of enforcement mechanisms on the international sphere. A lack of enforcement means a lack of legitimacy in that there may be no need to comply with international law.[44] Some authors state that an effective enforcement mechanism is thus central to any legal system and that the absence of such an enforcement mechanism on the international sphere at the same time means the absence of law. Other authors believe that all actions by States are determined by (military and economic) self-interest of States. Thus, there is no effective international law where the self-interest of States does not accord with it.[45] Taken to the extreme, the exclusion of

[42] Wouter Werner, *The never-ending closure: constitutionalism and international law*, *in* TRANSNATIONAL CONSTITUTIONALISM 348 (Nicholas Tsagourias ed., 2007).

[43] Jan Klabbers, *Constitutionalism Lite*, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 31, 47 (2004).

[44] In terms of the moral duty of citizens to obey international law, *see* KUMM, *supra* note 14, at 908.

[45] *See e.g.* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

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an *international* interest means that international affairs are but an assemblage of self-interests (an international anarchy), barring the possibility of a separate international legal order. Many advocates of a global constitutional order promote the other extreme by asserting that a loose international order of coordination has given way to a comprehensive international order of cooperation. They therefore not only submit that an international legal order exists, but go a (normative) step further by claiming that the international legal order is a *constitutional* order.

The question of whether international law is really law is one that has dogged the field since the first treaties were signed, and has indeed long been claimed to be defeated.[46] It therefore merits asking: why the recent interest in constitutionalism as a mechanism to settle the debate on legitimacy once and for all? It appears that the new legitimacy crisis of international law is, again, connected to globalization processes: globalization has to a certain extent displaced state consent as the source of legitimacy since it has brought with it a large number of non-consensual norms thus precipitating a vacancy for legitimacy.[47] It is an assumption underlying all ideas of constitutionalism that, just as there is no society without law so too there is no law without society (*ubi societas, ibi jus*). Constitutionalism is the legal framework that pertains to the coexistence of humans on a given territory; in other words, it is the legal framework of a society, a legal community. Correspondingly, *global* constitutionalism is the legal framework of *international* society. With this in mind, the first point to be made is that global constitutionalism puts an end to questions about *whether* an international legal order exists. For it is impossible to contemplate the topic of global constitutionalism without recognizing its basis in an international *legal* society. This seems all the more apparent when one calls attention to the root of the word constitutionalism as being "constitute." A constitution "constitutes" a legal society. The constitutionalist language evokes ideas of a normative framework that is ordered and *good*: it is a framework that has the potential to largely remain unquestioned, not simply by international lawyers, but by entire societies.

Werner states that the rise of global constitutional debates can "partly be understood as an attempt to make sense of some (recent) developments in international law."[48] I believe the project of these international lawyers is directed towards something more than a desire to rationalize and order. As stated above, it seems that the goal is to regain some of the influence that international lawyers may have lost in the thickets of globalization processes – or may never have had due to the supposedly unresolved question of the legitimacy of the field itself. The above three motivations all share the common theme that

[46] Thomas Franck claimed in 1995 that "international law has entered its post-ontological era" in THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

[47] BODANSKY, *supra* note 1, at 583.

[48] WERNER, *supra* note 42, at 331.

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international lawyers are seeking a means of expressing their concerns of their own (possibly dwindling or alternatively never existing) influence. International lawyers hope to express and rationalize and perhaps *control* globalization processes on their field.

The proliferation of international and transnational forces (globalization processes) has partly displaced and at any rate decentered international law discourses. International lawyers are observing the factual changes on the international sphere such as the increase in interconnectedness and the international market and wish to address these with legal structures that uphold their own relevance. Global constitutionalism offers the perfect solution: it is flexible enough to take politics and economics into account, and at the same time provides ground for a strong normative framework. The appeal of a strong regulating framework that at the same time is realistic enough to take other (non-normative) forces into account is overwhelming.

D. Appeal, Survival or Addiction?

So what of this "appeal?" Is it merely a matter of wishful thinking or is it something more compulsive? As stated above, at the centre of the debate on the tenacity of global constitutionalism are its possible regulating and legitimizing properties, which at the same time secure the relevance of international lawyers. It is no secret that international lawyers – indeed lawyers at large – like to think of legal systems as unified and coherent.[49] Mimicking the sovereign power that international lawyers are familiar with from their respective domestic legal settings (see Analogical Constitutionalism), the UN as an organization is rationalized to encompass a hierarchical structure with a centralized power system. As David Kennedy observes, this is a paradoxical enterprise, since what is happening is a struggle to somehow "reinvent at an international level the sovereign authority it was determined to transcend" in the first place.[50] Interestingly, Kennedy describes this enterprise as an "obsession."[51] Maybe, what we are in fact dealing with is not only an "appeal," but something more irresistible.

Conditioned by their legal training, lawyers are compelled to attempt to find a "principle" in the chaos, a "structure" in the confusion and a "definition" in the varied interpretations and determinations. Legal training, albeit to a larger extent in the civil law system, revolves

[49] This appears to be evidenced in the recent rediscovery of systems theory, even as a form of articulating pluralism, particularly pronounced by Gunther Teubner; *see* TEUBNER, *supra* note 39; Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 17-38 (2011); Gunther Teubner, *Constitutionalizing Polycontexturality*, 19 SOCIAL AND LEGAL STUDIES 17-38 (2009).

[50] David Kennedy, *The International Style in Postwar Law and Policy*, 7 UTAH LAW REVIEW 7, 14 (1994).

[51] *Id*.

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around learning a structure and definitions in abstract and then applying these abstract legal rules to cases. In the domestic legal setting, these structures and definitions are extremely useful for reasons of legal certainty and social stability. It is seen as a necessary evil that there will be exceptional individual cases (so-called "hard cases") in which the application of the structure and definition will lead to injustices;[52] and indeed the system normally provides enough flexibility for adapting the structure if the individual cases become the norm. Overall, coherence is the order of the day.

In international law, a greater extent of caution is required when it comes to such abstractions. It is certainly true that the international sphere does not have the same level of coherence as a domestic legal system. Coherence here can be viewed in a formal or a substantive way. Ulrich Haltern, a critic of global constitutionalism, rejects analogies between the international and the domestic on the basis that he believes that international law lacks the "symbolic-esthetical dimension" inherent in national constitutional law.[53] The great diversity of environments, ethnicities, customs, and value systems in the world does not allow for the extrapolation of the symbolism of constitutionalism from the domestic sphere. While constitutions do not necessarily incorporate a great extent of power or detail in themselves, indeed are at times fairly brief documents (the German Constitution) or are comprised of no particular document (English constitutionalism), their *idea* nevertheless portrays ordered power structures. The emphasis on the symbolism of the constitution, represented here through Haltern's work, can be referred to as formal coherence. Jason Beckett, in contrast, applies the invocation of coherence to a possible politics of domination; he warns: "Because coherence is an unattainable goal, the search for "coherence" becomes the willful disregard of a reality of conflict, the hegemonic imposition of a particular project which has, always already, subsumed and regulated its "others."[54]

Beckett's concern about coherence is thus substantive: How might it be invoked? As a proxy for domination? Notably, the invocation of pluralism as opposed to coherence may not be the answer to breaking such patterns of domination. It appears that when international lawyers do invoke "pluralism" in contrast to coherence, then it is a pluralism that is restricted to the familiar liberal-democratic trajectories. A pluralism of liberalism, so to speak. International lawyers are uncomfortable with embracing "true" legal pluralism. For them, international law with its plurality and diversity is a challenge, in the form of an uncut diamond that requires some legal attention until it will shine in all its clarity. Certainly, the sparkling diamond of international law is something of which many

[52] KOSKENNIEMI, *supra* note 6, at 595.

[53] Ulrich Haltern, *Internationales Verfassungsrecht?*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511-556 (2003).

[54] Jason Beckett, *Fragmentation, openness, and hegemony: adjudication and the WTO*, *in* INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 44 (Meredith Kolsky Lewis, Susy Frankel ed., 2010).

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international lawyers will already have a mental image or a fantasy. Constitutionalism enables international lawyers to bring about that image.

Taking the above considerations about non-regulatory forces on the international sphere into account, one could however consider whether the debate on global constitutionalism is more than a desire or a fantasy; whether it is in fact a survival mechanism. In the face of the fragmentation of international law into specialized legal systems, could international lawyers be fighting for the survival of their profession? If this is the case, and if international law is indeed in the midst of a legitimacy crisis, should one regard the model of a global constitution, which provides a normative framework for all of international society, as the saving grace for the profession? In that event, international lawyers could hardly be blamed for the urgency with which global constitutionalism is presented, indeed with the infatuation which is becoming more and more evident.

This survival argument in regard to the international legal discipline is however only persuasive if one assumes that every legal system requires a determinate set of rules – or perhaps values – in order to be observed. The survival argument presupposes that individuals can voice preferences in terms of who can make legal decisions, and that once this preference has been ascertained the political body can act upon them and other issues arising from them. But, as Martti Koskenniemi explained in *From Apology to Utopia*, this view is a premise of liberalism.[55] Thus, international law would only be in a legitimacy crisis if it were exclusively predicated on the political model or tradition of liberal-democracy. It would certainly go beyond the scope of this article to state what the premises of international law are and whether they lie in a particular political tradition, suffice it to say that international law could also derive its legitimacy (assuming it requires this) from other sources, other democratic models for example. Even if the liberal legalist tradition is the predominant tradition, it cannot be assumed to be universal. The discourse on global constitutionalism is therefore not one of survival for the discipline. But what about the survival of those international lawyers partaking in the discourse? Could it be that they are in desperate need of mechanisms to ensure their survival?

Beckett fittingly writes about international lawyers "craving" constitutionalization.[56] A craving is stronger than a mere appeal since it carries with it a sense of compulsion, but it also acknowledges that whatever one is craving is dispensable, and could ultimately even lead to self-destruction. Lawyers are accustomed to structures and definitions from their domestic legal systems and therefore long for them when dealing with international law (withdrawal). It is difficult to defy the pull of order, which offers itself as a relief to the chaos. The compulsive side of a craving is often due to an addiction. An international

[55] KOSKENNIEMI, *supra* note 6, at 75.

[56] Jason Beckett, *The Politics of International Law – Twenty Years Later: A Reply*, *EJIL: Debate,* available at: http://www.ejiltalk.org/author/jason-beckett/ (last accessed 23 December 2011).

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lawyer's addiction for a constitutionalism which promises order, as any other addiction, comes with a health warning: the more the craving is fed, the stronger the desire and the greater the dependency. The stronger the desire, the more arduous it becomes to question one's behavior and any possible significant problems inherent in that which gives relief. Liberal constitutionalism is a very potent drug with highly addictive properties. It can offer a momentary relief on the contradictions and diversity evident in the global arena by promising hierarchies, order and control.

Teubner recently wrote about collective addiction; but not to constitutionalism, rather to growth, particularly as regards the economy.[57] Interestingly, constitutionalism is for him the antidote, not the addiction. Teubner approaches the phenomenon of collective addiction by employing methodologies borrowed from systems theory. In his view, '[i]t is possible that social processes as such might exhibit the properties of addictive behaviour quite independently of the dependence syndromes of individual human beings'."[58] Since the present article focuses in particular on individuals (specific international lawyers) as part of a collective (professionals belonging to the discipline of international law), I would disagree with collective addiction being a phenomenon independent of the individuals making up this collective. However, there is much to be said about collective addiction as a social phenomenon. And the compulsions for growth appear to be a very real instance of addictive behavior, whether engaged in by a collective actor (as Teubner would say) or by individuals. However, rather than constitutionalism being a "'new orientation"' that will lead away from the compulsions for growth, what might rather be at hand is the danger real threat of trading one addiction for another. Addiction transfer is a real threat. Teubner envisages that the collective addiction for growth would come to a moment of "'hitting the bottom'," a moment of near-catastrophe, which would at the same time be the constitutional moment – the moment of the transformation of the "'inner constitution'."[59] What he does not take into account is that the collective addiction for growth can only be overcome by addiction to another drug; indeed, that he is to a certain extent promoting addiction transfer.

Who then are the international lawyers who fall prey to its addictive properties? Are they "users" or "abusers" of the drug? As noted above, the debate on global constitutionalism has gained wider appeal in the past years, but has its epicenter in Germany or at least with German-speaking scholars. While international lawyers around the world have been inspired by constitutionalism on a global scale, the debate in Germany has become particularly extensive and detailed. With the ontological questions and doubts largely defeated, scholars such as Andreas Fischer-Lescano, Anne Peters, Angelika Emmerich-

[57] TEUBNER, *supra* note 39, 9-51.

[58] *Id.* at 9.

[59] *Id.* at 15, 16.

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Fritsche, Armin von Bogdandy, Bardo Fassbender, Gunter Teubner, Mattias Kumm, Nico Krisch and many more[60] discuss which principles and rights have gained constitutional status in great detail. Although Stefan Kadelbach and Thomas Kleinlein are of course correct in stating that with only a lawyer's tools it is difficult to determine whether the debate on global constitutionalism is a predominantly German debate,[61] it also rings true that there are certain favorable historical, educational and institutional conditions for the appeal to German international lawyers in particular.

It can be argued that Germany's recent history of the Third Reich, combined with a possible collective feeling of guilt, has proved to be fertile ground for viewing its own post-1945 constitution as an instrument with healing properties.[62] Further, it has been stated that this has left Germans with conflicting feelings in regard to their national heritage.[63] Such could be the reason why German lawyers and politicians arguably prefer to invoke the interests of the global legal community, as the advocate of universal legal principles, rather than their own national interests.[64] Aside from the historical reasons, there are also reasons entrenched in the German legal educational system, which further a link between international and constitutional law. Traditionally, professors of international law in Germany will also hold a chair for constitutional law and will be expected to teach and publish in both areas of law. A cross-fertilization of the two disciplines is therefore very likely. These professors will introduce ideas grounded in such cross-fertilization into their teachings and supervisions, which continues the cycle for the next generation of scholars. Such cross-fertilization has been institutionalized through the establishment of research centers and the election of international law scholars to judges, particularly at the Federal Constitutional Court (*Bundesverfassungsgerich*).[65]

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[60] A brief look at the Council of the German Society of International Law (Deutsche Gesellschaft für Internationales Recht) shows a large number of names taking part in the debate on global constitutionalism, available at: http://www.dgfir.de/society/structure/ (last accessed 23 December 2011).

[61] Stefan Kadelbach & Thomas Kleinlein, *International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles*, 50 GERMAN YEARBOOK OF INTERNATIONAL LAW 304 (2007);

[62] The issue of collective guilt and *Vergangenheitsbewältigung* is much debated in German literature; *see*, most recently, BERNHARD SCHLINK, GUILT ABOUT THE PAST (2010).

[63] Juliane Kokott, *Report on Germany in* THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77, 126 (Anne-Marie Slaughter *et al*. (eds.), 1998).

[64] Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARVARD INTERNATIONAL LAW JOURNAL 223-242 (2006).

[65] Andreas L. Paulus, for example, was elected as Judge in the *Bundesverfassungsgericht* in 2010. His work on constitutionalism includes ANDREAS L. PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT (THE INTERNATIONAL COMMUNITY IN INTERNATIONAL LAW) (2001); Andreas L. Paulus, *The International Legal System as a Constitution*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 69-109 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

These scholars have shaped the debate to date in a way that mimics the constitutional precepts, at the very least the constitutional culture, predominant in Germany. Although the ideas of these eminent scholars are diverse, multifarious, and at some times contradictory, the contemporary understanding of global constitutionalism is largely focused on five key themes of constitutionalism: the limitation of power, the institutionalization of power, social idealism, standardization, and the protection of individual rights.[66] The compulsion to mimic German constitutionalism has led to an exclusion of other, perhaps more flexible, ideas of constitutionalism. To date, there are very few contributions to the debate by scholars from the global south or the group of scholars now associated with the acronym TWAIL. There are a few engagements with constitutionalism by scholars from critical legal studies, but it is fair to say that those scholars who have a commitment to a liberal tradition have primarily led the debate. And within that tradition there has been a constant dosage of constitutionalism understood as a coherent international legal system, which requires common principles, rights and morals.

Rather than being "abusers" of the drug, these scholars maintain a constant, careful dosage. They are users, not abusers. For an overdose, say an institutionalized federal constitutional system, is very much frowned upon. The problem with this constant high is that it causes reality to be distorted. The hegemonic potential of the liberal constitutionalism rhetoric is out of sight for the sedated.

What is the antidote then to this addiction? I suggest it lies in the embrace of indeterminacy on the one hand and the taking seriously of private law conceptions and methodologies on the other. Applied to this issue, embracing indeterminacy means embracing global constitutionalism as an ongoing process. Although this may seem less comforting than a set of rules enshrined in a given hierarchy, there may nevertheless be the possibility of taking comfort in ones own discomfort. Importantly, the discomfort does not point towards a structural deficiency of international law, it is merely an indicator of the appeal for order. In the Epilogue to the reissue of *From Apology to Utopia*, Martti Koskenniemi aims to save indeterminacy from disrepute by stating that indeterminacy is neither a scandal nor about deficiency, it is indeed "an absolutely central aspect of international law's acceptability."[67] He explains that it is necessary to recognize indeterminacy as a mechanism for accommodating not only for the different, and often conflicting, purposes of legal rules but also to accommodate for change. Rules must stand the test of time and for this, they must be indeterminate – at least to a certain extent. Thus, although it may be possible to order the international legal sphere in hierarchies and to design a global constitution, this is only one possible interpretation. As soon as one attempts to define the indeterminate, one inevitably excludes all other potential

[66] For a closer analysis of these five key themes, *see* SCHWÖBEL, *supra* note 9, particularly Chapter 2.

[67] KOSKENNIEMI, *supra* note 6, at 591.

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interpretations. I believe that, from this point of view, it should be possible to take comfort in the discomfort of indeterminacy of global constitutionalism. While there are of course moments of stasis, global constitutionalism should be regarded as a shifting debate. There will therefore not be room for "a global constitution;" instead the "ism" of global constitutionalism should be embraced. Global constitutionalism should thus be understood as an on-going process, one with the potential to continually self-correct.[68] It appears that this can only take place if the contributors to the debate attempt to "unlearn" that which they have learned from their domestic constitutional systems about constitutionalism. They need to break the habit.

The final point relates to the increasing significance of private law in public international law and the reluctance of international lawyers to take this seriously. Whether in the form of private military companies as mentioned above, human rights and business, or of bilateral investment treaties, private law is a growing part of international law. In contemporary international law scholarship, private law has however been demonized or has been equated with extra-legal processes. It is therefore regarded as a serious and urgent matter to make private military companies and private corporations accountable in a public law framework. Such subsuming under public law causes a blind faith in the public that goes hand in hand with a fear of the private. Taking private law conceptions seriously, such as the varied possibilities for remedies, the (legal) equality of the parties and contractual freedom could therefore provide part of an antidote to the addiction of systemizing that has taken place within the global constitutional debate.

E. Conclusion

The above argument takes a step back from the contemporary debate on global constitutionalism that revolves around suggestions for what is or should be the global constitution, to identify what it is that draws advocates of global constitutionalism to the field. Understanding the appeal and the motivation behind suggestions for global constitutionalism assists in analyzing the concerns of international lawyers as regards their field at large. The idea of global constitutionalism embodies important – though not existential – concerns of public international lawyers. It is not only the concern about international law that is of interest however; importantly, by looking at global constitutionalism as a field of enquiry conceived by individual authors, we can also get a grip on the weight to be attributed to the notion of global constitutionalism itself. Iain Scobbie states that the identification of "authorial predispositions is simply crucial to evaluating the weight to be given to an argument", and that it can indeed be "decisive in

[68] Elsewhere I term this "organic global constitutionalism," SCHWÖBEL, *supra* note 9, particularly Chapter 4; Christine E. J. Schwöbel, *Organic Global Constitutionalism*, 23 LJIL 529-553 (2010).

law."[69] In order to understand and assess visions of global constitutionalism, it is therefore a useful path of enquiry to examine the country that the author comes from, the author's legal education, the author's sex, age, ethnic background, religion, and other cultural characteristics. Naturally, there is also the issue of the partial *reader*. Yet, it is illuminating in terms of the global constitutional debate that the majority of the authors (with significant exceptions) are German, or have at least had a German legal education, regard themselves as general international lawyers, are male, white, and have most likely had a Christian (protestant) upbringing. This not only helps interpret their abstractions in a more concrete and contextual manner, it also assists in making a legal assessment. Most importantly for international law: can these individuals really speak authoritatively about a supposedly *global* and *neutral* phenomenon?

Within the framework of this paper it has only been possible to touch on the critique of contemporary visions of global constitutionalism. However, global constitutionalism should be viewed as one of a number of competing ideas pertaining to a framework for an international legal order, others being global administrative law, an international *ordre public*, or global governance.[70] Some of the arguments therefore also apply to these competing concepts insofar as they too foreground liberal democratic political models. It has hopefully become clear that the prevalent concerns regarding a loss of control of international lawyers only stand fast if one assumes that international law is predicated on an exclusively liberal-democratic political model. The recognition that global constitutionalism could be influenced by other political models, some that do not (or would not) necessarily mimic the domestic constitutional orders of the developed world, allows for a creativity that could occasion progressive social change. Global constitutionalism, once detached from these concerns about fragmentation and the influence of law on society, might be an effective tool for social change in that it could provide the space for discussing global concerns with actors that may have been previously excluded and whose interests may have previously not been heard.

[69] Iain Scobbie, *Wicked Heresies or Legitimate Perspectives? Theory and International Law* in INTERNATIONAL LAW 59 (Malcolm D. Evans 3rd ed., 2010).

[70] *See* Neil Walker, who writes about the disorder of orders in *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 373-396 (2008).

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